Articles

The Status and Associated Liability of Ocean Freight Forwarders

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I. INTRODUCTION

It is beyond argument that ocean freight forwarders assist in the furtherance of global commerce. The U.S. Senate has recognized that "many [export shippers] could hardly continue in foreign commerce without the operations of the independent ocean freight forwarder."[1] However, as status of a forwarder has been the source of much confusion within the jurisprudence with one court recognizing that "[t]he precise status of a forwarder is a matter not free from doubt."[2]

The confusion is partly due to the many functions which a freight forwarder may perform and the fact that the role of the freight forwarder in ocean transportation can be described in many different ways depending on the particular duties or responsibilities that the forwarder as undertaken. The courts have attempted to generally categorize freight forwarder status and the holdings of the relevant cases do not always comport either with the language of the applicable statutes or with the specific, actual duties or legal obligations of the freight forwarder at issue.[3] Also, the cases discussing forwarder status are hesitant to apply traditional agency law to forwarder activities, and commonly attempt to find a compromise between a traditional agency role and something else, for which there is not either a sound precedential or conceptual basis, and which may conflict with the applicable federal regulations. The determination of forwarder status is of particular importance in ascertaining whether or not the forwarder was acting in the capacity of an agent of the merchant in matters concerning contractual negotiation and accordingly, had the authority and ability to contractually bind the merchant. Further, in certain circumstances, the forwarder may incur additional liability as a carrier.

This article will review the functions and duties of ocean freight forwarders along with reference to the applicable federal regulations as well as consider the differences between the activities of an ocean freight forwarder and domestic forwarders. This article also will discuss the relevant jurisprudence with respect to determination of forwarder status and spe-

1. Strachan Shipping Co. v. Dressler Indus., Inc., 701 F.2d 483, 487 (5th Cir. 1983) (quoting S. REP. No 691, at 6 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2699, 2704)).

2. Koninklijke Nedlloyd BV v. Uniroyal, Inc., 433 F.Supp. 121 (S.D.N.Y. 1977).

3. *See* Black & Geddes, Inc. Dampskibsselskabet AF 1912 Aktieseiskab v. Black & Geddes, Inc., 35 B.R. 830, 834 (Bankr. S.D.N.Y. 1984) ("There are numerous cases addressing various aspects of the carrier-freight forwarder-shipper triad. Many of these cases reach inconsistent conclusions . . . The court has concluded that the confusion initially created by the case law is more apparent than real. Fundamentally the relationship is one of contract. . . ."). Respectfully, the court did not recognize that such relationships are also determined by reference to federal regulation as well as equitable principles. Many of these cases are determined by U.S. district courts sitting in admiralty and it has long been recognized that courts of admiralty are also courts of equity.

cifically the U.S. courts' discussions of the application of agency concepts to a freight forwarder's role in ocean transport. The article then will provide a brief comparison with English law. Lastly, this article will examine under what circumstances an ocean freight forwarder may have undertaken additional obligations so that the forwarder would be considered to be a carrier.

II. Freight Forwarders' Role in Ocean Transport

Freight forwarders arrange for transportation of goods from one place to another for someone else. As succinctly stated by the English Court in *Jones v. General Express*,[4] freight forwarders are:
"willing to forward goods for you. . ..to the utmost ends of the earth. They do not undertake to carry you and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work. . ."[5]

Concerning the carriage of goods by sea, forwarder functions have been described and defined by customary practice, case law and federal regulation. Depending on the factual situation, freight forwarders have been determined to be intermediaries, independent contractors, agents, and possibly principals or carriers in a contract for carriage of goods by sea or a carriage of goods which includes ocean transport.

A. Freight Forwarders as Intermediaries

With respect to U.S. Federal regulation, freight forwarders are designated as ocean transportation intermediaries, and are required to be bonded, licensed, and otherwise regulated by the Federal Maritime Commission (FMC) pursuant to the Shipping Act of 1984,[6] specifically incorporated into the provisions 46 C.F.R. Part 515, *et seq.* These regulations provide that the definition of an ocean freight forwarder is as follows:

> (1) Ocean *freight forwarder* means a person that-
> (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
> (ii) processes the documentation or performs related activities incident to those shipments.[7]

4. (1920) 4 Ll.L. Rep 127.

5. *Id.*

6. *See* 46 app. § 1701-1702 (2006). Formerly, ocean freight forwarders were regulated by The Shipping Act 1916, Section 1 (46 U.S.C. app. § 801 as "other person subject to this Act." The Shipping Act 1916 further defined forwarding as "carrying on the business of forwarding means the dispatching of shipments by any person on behalf of others by ocean going common carriers. . ..").

7. 46 C.F.R. § 515.2(o) (2009).

In the aspect of federal regulation, freight forwarders are different from other ocean transport intermediaries in shipping such as shipbrokers, which are not regulated by statute in the United States and accordingly do not have to pose a bond or have any reporting requirements.[8] While shipbrokers may also perform many of the functions of freight forwarders, the legal treatment of freight forwarders and shipbrokers under U.S. law is significantly different in that shipbroker activities are largely governed by agency law,[9] and shipbroker activities are not considered to fall within a U.S. court's admiralty jurisdiction,[10] as shipbroker activities have been held to be not "sufficiently maritime in nature to come within the maritime jurisdiction."[11] In contrast, U.S. courts are oftentimes hesitant to apply the principals of agency law to freight forwarders[12] and forwarder activities almost always fall with the admiralty jurisdiction of U.S. courts.[13]

8. Shipbroker services are defined in 46 C.F.R. § 515.2(n) (2009), which states that an "Ocean freight broker is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions, and other terms of transportation." 46 C.F.R. § 515.4 (2009) further specifies that a license is not required for ocean freight brokers. This situation is different from brokers involved in trucking and motor carriage in that such brokers must obtain a license from the Federal Motor Carriers Safety Administration. *See* 14 U.S.C.S. § 13904 (1995) (amended by Pub. L. No. 104-88, Title IV, Subtitle A, § 4142(c) (2005)). *See generally* James C. Hardman, *Legal Practical and Economic Aspects of Third Party Motor Carrier Services: An Overview*, 34 TRANP. L.J. 237, 238 (2007).

9. *See e.g.*, W. India Indus., Inc. v. Vance & Sons AMC-JEEP, 671 F.2d 1384, 1386 (5th Cir. 1982) and MTO Mar. Transp. Overseas, Inc. v. McLendon Forwarding Co., 837 F.2d 215, 218 (5th Cir. 1988). Additionally, the Association of Shipbrokers and Agents (USA), Inc. has stated that "[l]egally speaking, a shipbroker is an agent and subject to the laws of agency." BASIC PRINCIPALS OF CHARTERING 60 (Peter D. Scott, ed., 1990). With respect to the application of agency law, the position under English law is similar to U.S. law. *See e.g.*, Harper & Co. v. Vigers Brothers, (1909) 2 K.B. 549, 562 (explaining that ". . .a shipbroker is only an agent to make a charter.").

10. *See* 28 U.S.C.S. § 1333 (1) (2009) (granting admiralty jurisdiction to U.S. Courts over "[a]ny civil case of admiralty or maritime jurisdiction.").

11. Shipping Fin. Serv. v. Drakos, 140 F.3d 129, 133 (2d Cir. 1998). *Drakos* involved the Second Circuit's review of shipbroker activities after Exxon v. Cent. Gulf Lines, Inc. 500 U.S. 603 (1991). In *Exxon*, the Supreme Court held that the *per se* rule, in which certain activities would *per se* fall outside the U.S. Court's admiralty jurisdiction, would no longer be applicable. Instead, a "subject matter" test should be applied to the activities in question in order to determine if they would qualify for admiralty jurisdiction. *Id.* at 611-13.

12. *See e.g.*, Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 34 (2004) (holding that reliance on agency law was misplaced with respect to the relationship between the forwarder and the shipper who retained the forwarder.)

13. *See e.g.*, Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 301 (2d Cir. 1987) (noting with approval the district court's holding that "[f]ederal courts have traditionally exercised admiralty jurisdiction over shipper's claims against forwarders." (quoting Ingersoll Milling Mach. Co. v. M/V Bodena, 619 F. Supp. 492, 503 (S.D.N.Y. 1985)).

The applicable federal regulations define and delineate freight forwarder functions as follows:

> (i) Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:
> (1) ordering cargo to port;
> (2) preparing and/or processing export declarations;
> (3) booking, arranging for or confirming cargo space;
> (4) preparing or processing delivery orders or dock receipts;
> (5) preparing and/or processing ocean bills of lading;
> (6) preparing and/or processing consular documents or arranging for their certification;
> (7) arranging for warehouse storage;
> (8) arranging for cargo insurance;
> (9) clearing shipments in accordance with United States Government export regulations;
> (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees as required;
> (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
> (12) coordinating the movement of shipments from origin to vessel; and
> (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.[14]

When discussing the role of a freight forwarder, case law emphasizes the intermediary aspects of a forwarder's functions. For example, in *Scholastic Inc. v. M/V Kitano*,[15] a case in which a party's status was in dispute, the Court noted that "[a] freight forwarder 'simply facilitates the movement of cargo to the ocean vessel.'"[16] Likewise, the U.S. Supreme Court in *Norfolk Southern Railway Company, v. Kirby*[17] noted that "[a] freight forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo."[18]

Defining a freight forwarder as an intermediary or a facilitator may be generally descriptive with respect to a freight forwarder's role as a logistics service provider. However, these descriptions do not convey the exact relationship a forwarder may have to the other parties involved in the shipment and may be in conflict with the actual duties a forwarder has

14. 46 C.F.R. § 515.2 (i) (2002).

15. Scholastic Inc. v. M/V Kitano, 362 F. Supp. 2d 449 (S.D.N.Y. 2005).

16. *Id.* at 455 (quoting Prima U.S. Inc. v. Panalpina, Inc. 233 F. 3d 126, 129 (2d Cir. 2000) (quoting N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n, 337 F.2d 289, 299 (2d Cir. 1964))).

17. *Norfolk S. Ry. Co.*, 543 U.S. at 14.

18. *Id.* at 19.

undertaken for a particular shipment. Furthermore, such definitions may also create uncertainty regarding when a forwarder may act as an agent to one of the parties, or even when a forwarder may assume the role of principal or carrier in a contract for ocean carriage.

For the sake of clarity, it must be mentioned that ocean freight forwarders are governed by different federal regulations than freight forwarders involved with trucking or motor carriage and accordingly, the term 'freight forwarder' used for motor carriage encompasses different functions from an ocean freight forwarder. Specifically, 49 U.S.C §13102 (8) provides that a forwarder in the context of motor carriage is defined as:

> "a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business -
>
> (A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;
>
> (B) assumes responsibility for the transportation from the place of receipt to the place of destination; and
>
> (C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle. "The term does not include a person using transportation of an air carrier subject to part A of subtitle VII."[19]

Freight forwarders for motor carriage are regulated by the Surface Transportation Board of the U.S. Department of Transportation, while ocean freight forwarders are regulated by the Federal Maritime Commission. It is important to note that the critical distinction is that a freight forwarder for motor carriage "assumes responsibility for the transportation,"[20] while an ocean freight forwarder dispatches shipments "on behalf of others."[21] Accordingly, a freight forwarder for motor transportation according to the Department of Transportation definition engages in similar activities, undertakes similar responsibilities, and is generally analogous to a Non-Vessel Operating Common Carrier with respect to Federal Maritime Commission regulations and the international carriage of goods by sea.[22]

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19. 49 U.S.C.S. § 13102 (8) (2008). Freight forwarder activities were originally regulated by the Interstate Commerce Commission under 49 U.S.C. § 1001. However, the ICC was terminated pursuant to the ICC Termination Act of 1995. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). Regulation of motor carriage freight forwarders, including registration and the demonstration of financial security, was then transferred to the Surface Transportation Board of the United States Department of Transportation.

20. 49 U.S.C.S. § 13102(B) (2008).

21. 46 C.F.R. § 515.2(i) (2009).

22. *See* 46 C.F.R. § 515.2(o)(2) (2009).

B. Freight Forwarders and Agency Law

U.S. Courts are extremely hesitant to apply the principles of agency law to freight forwarders in order to determine whether or not the forwarder may be considered to be an agent of either the Carrier or the Merchant. One of the seminal cases concerning forwarder status is *Farrell Lines, Inc. v. Titan Industrial Group.*[23] The facts in *Farrell Lines* are representative of the Merchant-Carrier-Forwarder triad which forms the basis of many of the disputes involving forwarders. In *Farrell Lines*, Titan Industrial Group (Titan) would book cargo with various carriers through the forwarder, Baltimore Dispatch Corporation (Baltimore Dispatch). In this particular instance, Titan booked three shipments of steel from Baltimore to Africa on two vessels in Farrell Lines' fleet through Baltimore Dispatch. Titan paid the freight to Baltimore Dispatch which went bankrupt before and without paying the freight to Farrell Lines. Farrell Lines then sued Titan, claiming that Titan statutorily[24] and contractually[25] owed the freight to Farrell Lines even though Titan had paid the freight to Baltimore Dispatch. Titan defended, in part, alleging that Baltimore Dispatch had actually been Farrell Lines' agent. The Court held in favor of Titan based on the actions of the parties indicating that the Farrell Lines was looking to Baltimore Dispatch as "the principal and obligor on the freight contract."[26] Although it was not dispositive to the holding, with respect to the agency issue, the Court noted that

> "[t]he forwarder was paid for these services [selecting the carrier, booking the carriage of the cargo, arranging delivery of the cargo to the vessels, preparing bills of lading] based on a percentage of freight charges. Neither the shipper nor the carrier however, had any control over the manner in which the forwarder performed these services. Moreover, the forwarder would deal with many other carriers and shippers besides the parties. Absent the critical

23. Farrell Lines, Inc. v. Titan Indus. Group, 306 F. Supp. 1348 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970).

24. *See id.* at 1349. In accordance with the Shipping Act of 1916, 46 U.S.C. §§ 812, 814-817, the Transportation Act, 49 U.S.C. §§ 6(7), 906 (c), mandates that the carrier receive full freight. The provisions are designed to prevent common carriers from giving preferable or favored treatment to particular shippers such that all shippers may book carrier with the carrier pursuant to the rates and terms of the carrier's public tariff. The Court held that "as long as someone is liable for the full amount of the freight, so there is no overcharge or undercharge, the public interest is protected and the statutes are satisfied." *Id.* (citing Louisville & Nashville R.R. Co. v. Cent. Iron & Coal Co., 265 U.S. 59, 66 (1924)).

25. *See id.* Farrell Lines relied on a provision of its Bill of lading which stated that "the shipper and consignee shall be jointly and severally liable to the carrier for payment of all freight." *Id.* The Court held that Farrell Lines could not rely on this provision as it had issued Freight Prepaid Bills of lading and had otherwise dealt with Baltimore Dispatch as a shipper, stating that "allowing the carrier to recast the transaction in a different mold because of the forwarder's insolvency would be most unjust." *Id* at 1351.

26. *Id.*

> elements of control and exclusivity, we find that the forwarder was neither the carrier's agent for receipt of payment, nor the shipper's agent in the transactions with the carrier, but rather an independent contractor."[27]

Since *Farrell Lines*, freight forwarders have been frequently held to be independent contractors by U.S. Courts. In *Koninklijke Nedlloyd BV v. Uniroyal, Inc.*,[28] (Nedlloyd) the Court followed the rationale of Farrell Lines. In *Nedlloyd*, the Merchant, Uniroyal, Inc. (Uniroyal) booked space directly with the Carrier, Koninklijke Nedlloyd BV (Nedlloyd) on the Carrier's vessels. There was a credit agreement between Uniroyal and Nedlloyd which stipulated that freight would be payable within 15 days after the vessel had departed the port of loading. Eastern Cargo Forwarders (Eastern) would prepare the bills of lading with the information supplied by Uniroyal and for which Uniroyal would pay Eastern a fee.[29] Eastern would deliver the bill of lading drafts to Nedlloyd's general agent in New York who would check the bills of lading against the mates' receipts and then issue the Bills of Lading along with the freight invoice, or Due Bill. The Due Bill would be released to Eastern after Eastern's messenger initialed the Due Bill. Uniroyal would pay Eastern the freight who would then pay the freight to Uniroyal.

Eastern became late in payment of freight to Nedlloyd and subsequently defaulted on several freight payments. Nedlloyd then sued Uniroyal for the freight due, arguing *inter alia* that Eastern was Uniroyal's agent and that "Uniroyal is therefore bound by the contracts entered into by the forwarder on its behalf."[30] Further, Nedlloyd argued that "[s]ince Eastern was the defendant's [Uniroyal's] agent, [Nedlloyd] reasons that Uniroyal must be responsible for the failure of its agent to remit the funds."[31]

The Court held that:

> The precise status of a forwarder is a matter which is not free from doubt, and it would serve no useful purpose to attempt here to reconcile all of the conflicting cases. In the Court's opinion, the most persuasive reasoning is contained in Judge MacMahon's decision in Farrell Lines, supra. He held that a forwarder was an independent contractor, and was thus not an agent of either the shipper or the carrier. The evidence in this case certainly supports such a holding here.[32]

With respect to the merits of the case, Nedlloyd relied on the wording of the credit agreement with Uniroyal which stipulated that "[w]e[the

27. *Id.* at 1350.
28. Koninklijke Nedlloyd BV v. Uniroyal, Inc., 433 F. Supp. 121, 128 (S.D.N.Y. 1977).
29. *See id.* at 123. Eastern was not a party to the lawsuit.
30. *Id.* at 128.
31. *Id.*
32. *Id.*

Shippers] will be absolutely and unconditionally responsible to the Carrier for the payment of all freight . . ."[33] as well as clause 12 of the bill of lading which provided that "[i]n all circumstances the shipper remains responsible for the freight, primage and charges until same have been paid."[34] The bill of lading listed Uniroyal as the shipper and Eastern as the forwarder.

Similarly to the holding of *Farrell Lines*, the Court held that an examination of the course of dealing between the parties for the shipment indicated that Nedlloyd had treated the Eastern as a shipper in that Nedlloyd had attempted to collect freight from Eastern and issued the Due Bills over Eastern's signature. Therefore, "Eastern was thus the principal obligor on the freight invoice and was responsible to Nedlloyd for payment."[35] Accordingly, the Court essentially disregarded the contractual terms in favor of the Court's interpretation of the parties' actions.

A more equitable result from the Carrier's point of view was obtained in *Strachan Shipping Co., v. Dresser*,[36] in which the Fifth Circuit also followed *Farrell Lines* with respect to the rejection of agency principles for freight forwarder relationships with the Carrier and Merchant. The facts of *Strachan* are similar to *Nedlloyd*. In *Strachan* four shipping lines and their agent, Strachan Shipping Co (Strachan) sought to recover freight and stevedoring expenses from the shipper, Dresser Industries, Inc (Dresser) after the forwarder, Sierra went bankrupt. Dresser had paid Sierra, but Sierra had not remitted the funds to the carriers. The carriers initially attempted to collect the funds from Sierra but then when these collection efforts proved futile, the carriers proceeded to attempt collection from Dresser. As in *Nedlloyd*, Dresser as the shipper had signed a conference credit agreement stipulating that "[w]e will be absolutely and unconditionally responsible to see that all freights and charges due are paid . . ."[37] in consideration of receiving "Freight Prepaid" bills of lading.

The carriers argued that although Dresser had paid the forwarder, Dresser would still be liable to the carriers based on the language of the credit agreement as well as agency theory in that Sierra was Dresser's agent and that a failure of the agent to remit the funds to a third party does not relieve the principal of the obligation to pay.[38] The District Court had found that Sierra was in fact the carriers' agent and that payment had been satisfied as the payment to an agent fulfilled the obliga-

33. *Id.* at 126.

34. *Id.* at 127. (quoting The Bill of Ladings on file with the FMC).

35. *Id.* at 128.

36. Strachan Shipping Co. v. Dresser Indus., Inc., 701 F.2d 483, 488-89 (5th Cir. 1983).

37. *Id.* at 485.

38. *Id.*

tion to pay freight in accordance with the terms of the credit agreement.[39] The Fifth Circuit noted that the forwarders activities benefitted both parties[40] at various times during the shipment and that therefore, "[i]f Sierra is neither the shipper's nor the carrier's agent throughout, instead of making the left hand the agent of one and the right hand the agent of the other we view Sierra as an independent contractor."[41] In so holding the most important factor in the Court's determination appears to be the lack of control exhibited by both the carrier and the shipper over a forwarders' activities. The court reasoned that "[w]hile the forwarder performs a variety of functions benefitting both shipper and carrier, neither the shipper nor the carrier retains substantial control over the forwarder's performance."[42] Concerning the merits, the Court held that as the shipper "guaranteed to pay even if the forwarder failed to remit the funds, and we cannot alter this obligation."[43]

While there is a reluctance to analyze the forwarder principal relationship under agency, a Court may use agency law to determine the rights and obligations between the principals if there is another factor present that would lead to the application of agency law. For example, if there is an agency contract between the forwarder and the principal, then agency law may be applied to the entire relationship between the forwarder and its principal. In *MTO Maritime Transport Overseas, Inc. v. McLendon Forwarding Co., et al.*[44] the merchant and Principal, Umm Al Jawaby Petroleum Company ("Jawaby") instructed McClendon, its forwarder, to arrange for the carriage of two rigs from Houston to ports in the Arabian Gulf. The rigs were to be shipped at different times and accordingly, on different vessels. The first rig was booked by McLendon

39. *See id.* at 487. In Strachan Shipping Co. v. Dresser Indus., Inc., 534 F. Supp. 205, 208, the district court succinctly stated "I find that in this case the facts established that Sierra was plaintiff's agent for receiving payment." The Fifth Circuit noted the faulty reasoning in the district court's analysis stating that "after finding that Sierra was the carriers' agent, the district court construed the transaction in question as an extension of credit by the carriers to Sierra. However, if Sierra were the carriers' agent, then the credit nature of the transaction never arises because Dresser has paid the carriers themselves." *Strachan Shipping Co.*, 701 F.2d at 487 n3.

40. The Fifth Circuit reviewed the legislative history of 46 U.S.C. § 841b, which was enacted to enable carriers to compensate forwarders through the payment of commission without contravening the provisions of the Shipping Act 1916, § 44, which in turn prohibited the payment of rebates. *See Strachan Shipping Co.*, 701 F.2d at 487.

41. *Strachan Shipping Co.*, 701 F.2d at 488.

42. *Id.* at 488-89.

43. *Id.* at 489. Concerning the contractual construction of the credit agreement and the shippers guarantee of the payment of freight therein, the Court held that "both the lower court and the *Uniroyal* [Nedlloyd] court gave this agreement an unduly narrow interpretation." *Id.* at 486.

44. MTO Maritime Transp. Overseas, Inc. v. McLendon Forwarding Co., 837 F.2d 215, 217 (5th Cir. 1988).

with a carrier, World Navigation in Sepetmber, 1983 and was carried without incident.

In December, 1983, McLendon confirmed the booking for the second rig with World Navigation and the rig was delivered to the carrier's terminal. At some time, it became apparent that World Navigation could not perform and McLendon then booked the rig with another carrier, MLS. World Navigation refused to release the rig to MLS and the rig was eventually carried by a third carrier.

MLS sued Jawaby and McLendon jointly and severally in the U.S. District Court for the Southern District of Texas for breach of contract. MLS was successfully and Jawaby appealed to the U.S. Fifth Circuit, arguing, *inter alia* that McLendon had not had the requisite authority to contract for the carriage of the second rig with MLS.

First, the Fifth Circuit found that an agency contract existed between McLendon and Jawaby.[45] Then, the Court noted that Jawaby's two-prong analysis concerning agency law was inconsistent with respect to the facts of the case. First Jawaby asserted that McLendon did not have authority to enter into a contract with MLS as "the preexisting written booking agreement with World Navigation in some sense obviated McLendon's authority to enter into another agreement with a separate [carrier]."[46] The second prong of Jawaby's argument was that the contract with MLS could not be valid unless and until MLS released the cargo. Thus, the court noted that the assertion that the contract with MLS was based on a condition precedent was inconsistent with the assertion that the contract was invalid due to the lack of McLendon's authority. With respect to the issue of agency and authority, the Court stated when it became apparent that a second vessel was needed, "Mclendon was acting within the scope of its authority in arranging alternate carriage."[47]

Mclendon potentially illustrates the difference in treatment between brokers and forwarders with respect to the application of agency law and actual authority. With respect to shipbrokers, in the 1984, four years prior to McLendon the Fifth Circuit noted that "[b]y custom among New York shipbrokers, each broker must have a separate and express grant of authority from the principal each time a firm offer is made or confirmed on behalf of the principal."[48] Thus, if Mclendon had simply been a shipbroker, then the Court could have held that there was no actual authority to contract with MLS. Furthermore, McLendon demonstrates the "lack of control" the principals exercise over a forwarders' functions. If there had been no agency agreement, considering the precedent, a different result

45. *Id.* at 218.
46. *Id.* at 219.
47. *Id.* at 219 n8.
48. Golden Chase S.S. v. Valmar Navegacion, S.A., 724 F.2d 129, 129 (5th Cir. 1984).

could have been obtained in McLendon if the court had determined that McLendon was acting in the capacity of independent contractor.

Absent an agency contract or other indicia of the agency relationship, courts continue to be hesitant if not hostile to the application of agency law to freight forwarder activities. This hesitancy is further evident in the most recent U.S. Supreme Court decision to discuss freight forwarders and agency law. In *Norfolk Southern Railway v. Kirby*,[49] the United States Supreme Court considered the agency relationship of forwarders and their ability to bind parties. In *Kirby* an Australian cargo owner, James N. Kirby, Pty, Ltd., (Kirby) hired an Australian freight forwarder, International Cargo Control (ICC) to ship 10 containers of machinery parts from Sydney, Australia to Huntsville, Alabama. ICC issued Kirby a through bill of lading designating Sydney as the load port, Savannah as the discharge port and Huntsville as the ultimate destination. The ICC bill of lading provided Kirby with a "fair opportunity" to declare the value of the cargo,[50] but Kirby accepted the contractual limitation of liability and insured the cargo for its full value with Allianz Australia Insurance Ltd. (Allianz).[51] Further, the ICC bill contained a Himalaya clause[52] which read as follows:

> "[t]hese conditions [for limitation on liability] apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract."[53]

ICC then contracted with Hamburg Sudamerikaniche Dampfschiffahrts Gesellschaft Eggert & Amsinck (Hamburg Sud) to carry the cargo from the port of loading to the destination. Hamburg Sud then issued its own bill of lading to ICC.[54] The bill of lading contained a clause para-

49. *Norfolk S. Ry. Co.*, 543 U.S. at 16-17.

50. The Supreme Court did not address the controversy surrounding the fair opportunity doctrine. The fair opportunity doctrine is a judicial rather than a statutory requirement. *See generally*, David W. Robertson, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 31 TUL. MAR. L.J. 463, 514-15 (2007). There is no provision in the United States Carriage of Goods by Sea Act which requires a "fair opportunity" for the shipper. *See* 46 U.S.C.A. § 30701 (2009).

51. *Norfolk S. Ry. Co.*, 543 U.S. at 21.

52. The clause is named after the English case, Adler v. Dickson, *The Himalaya* [1955] 1 Q.B. 158 (C.A. 1954), in which the Court of Appeals held that a crewmember could not rely on an exceptions clause in the contract between the shipowner and a passenger due to the lack of privity of contract. After this decision, exception and limitation clauses were drafted to include a shipowner's or carrier's agents and servants.

53. *Norfolk S. Ry. Co.*, 543 U.S. at 30.

54. If ICC had been a US freight forwarder under 46 C.F.R. § 515.3, then the bill of lading issued to ICC as the shipper rather than Kirby as the shipper and ICC as the freight forwarder, would contravene 46 C.F.R. § 515.42(a), which mandates that "[t]he identity of the shipper must

mount, adopting the US COGSA limitations and extending the limitations after discharge and until delivery of the cargo.[55] The Hamburg Sud bill of lading also contained the standard Himalaya clause which provided that all limitations would extend to "all agents. . .(including inland) carriers. . .and all independent contractors whatsoever."[56]

Hamburg Sud contracted with Norfolk Southern Railway Company (Norfolk) to deliver the carry the cargo from Savannah to Huntsville.[57] The Norfolk train carrying the cargo derailed causing damage to the cargo in an alleged amount US $1.5 million.[58] Allianz paid Kirby and then Kirby and Allianz sued Norfolk in the United States District Court for the Northern District of Georgia. Norfolk defended alleging, *inter alia*, that it was protected by the limitation and the Himalaya clause both in the ICC and the Hamburg Sud bills of lading.[59]

The Eleventh Circuit found that Norfolk could not rely on the terms of the ICC bill of lading for two reasons. First of all, the language of the Himalaya was "too vague to include Norfolk"[60] and other parties that were not in privity with ICC when the bill of lading was issued by ICC.[61] Secondly, the Court held that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier."[62] With respect to the Himalaya clause in the Hamburg Süd bill of lading, the Eleventh Circuit held that this would apply "only if ICC was acting as Kirby's agent when it received the Hamburg Süd bill."[63]

In reversing the Eleventh Circuit and noting that admiralty jurisdiction would apply to the controversy[64], the Supreme Court first held that utilizing the principles of contract interpretation, the ICC bill's Himalaya clause would include an inland carrier because "the parties must have anticipated that a land carrier's services would be necessary for the contract's performance."[65] The Court did not have to consider agency law in arriving at this conclusion. However, with respect to the Hamburg Süd

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always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent."

55. *See Ingersoll*, 829 F.2d at 293. US COGSA as well as the Hague/Visby Rules apply from the time the cargo is loaded until the cargo has been discharged.

56. *Norfolk S. Ry. Co.*, 543 U.S. at 14.

57. The court characterized Norfolk's commercial relationship with ICC as that of a subcontractor. *See Norfolk S. Ry. Co.*, 543 U.S. at 30.

58. *Norfolk S. Ry. Co.*, 543 at 30.

59. *Id.*

60. *Id.* at 31.

61. Norfolk S. Ry. Co. v. Kirby, 300 F.3d 1300, 1308-09 (11th Cir. 2002).

62. *Id.* at 1310.

63. *Id.* at 1305.

64. *See Norfolk S. Ry. Co.*, 543 U.S. at 27.

65. *Id.* at 32.

bill[66] the Court had to consider to what extent agency law would apply to the actions of the freight forwarder, ICC. As the Court noted "[t]he question arising from the Hamburg Süd bill of lading is more difficult. It requires us to set an efficient default rule for certain shipping contracts, a task that has been a challenge for courts for centuries."[67] First, the court held that there was no agency relationship between Kirby and ICC. The Court noted that "reliance on agency law is misplaced here. It is undeniable that the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC."[68] Then, the Court held that precedent did not require the consideration of agency between ICC and Kirby, "in the classic sense. It only requires treating ICC as Kirby's agent for a *single, limited* purpose: when ICC contracts with subsequent carriers for limitation on liability. . .here we hold that intermediaries entrusted with goods are "agents" only in their ability to contract for liability limitations with carriers downstream."[69] The Court further held only that "[w]hen an intermediary contracts with a carrier to transport goods. . .[t]he intermediary is certainly not automatically the cargo owner's agent in every sense. That would be unsustainable."[70] The Court did not explain how such agency can be readily applied to one type of intermediary, shipbrokers, and not freight forwarders.

Aside from the failure to provide a rationale for the different application of agency law with respect to other intermediaries, there are three other major problems with the Court's ruling. First and foremost, the Court's decision that a forwarder is only an agent for a "single limited

66. The limitation of liability in the Hamburg Süd bill of lading was lower than the limitation in the ICC bill, and, thus, Norfolk wanted the protection of the limitation clause in the Hamburg Süd bill of lading. *See Norfolk S. Ry. Co.*, 543 U.S. at 32.

67. *Id.*

68. *Id.* at 14. With respect to the fiduciary relationship, although not articulated by the Court, it is important to note that a forwarder does not hold funds in trust. As noted by the bankruptcy court in *Black & Geddes, Inc.*, 35 B.R. at 832, while FMC regulations require the forwarder to pay the monies received from the shipper to the carrier, "the freight forwarder is under no obligation to, and does not, turn over to the carrier the actual check received from the shipper, or exact funds represented by the check." Accordingly, the Court would not let a steamship company recover freight owed by a shipper from the forwarder's bankruptcy estate. It could be argued that if a fiduciary relationship existed, the exact funds would have to be submitted to the carrier and a trust would be created between the forwarder and the shipper. *See Id.* at 34.

69. *Id.* at 14. The Court further discussed two reasons why the application of the limited agency rule is pragmatic and beneficial. The Court noted that "First, we believe that a limited agency rule tracks industry practices. In intercontinental shipping, carriers may not know if they are dealing with an intermediary . . . The task of information gathering might be very costly or even impossible . . . Second, if liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates." *Id.* at 34-35.

70. *Id.* at 33.

purpose" when a limitation of liability is negotiated with downstream carriers specifically contradicts the FMC policy and the language of the federal statutes and code provisions which stipulate that the freight forwarder is acting "on behalf of shippers."[71] Secondly, this holding contradicts U.S. Supreme Court precedent. In *Chicago, Milwaukee, St. Paul & Pac. R. Co. et al v. Acme Fast Freight, Inc.*,[72] the Supreme Court considered a the issue of when a freight forwarder would be liable for cargo damaged during truck transport that was initially carried by train. At issue was the applicability of the provisions Freight Forwarders Act,[73] an act regulating domestic forwarders consolidating shipments by truck and not applicable to ocean freight forwarders. If, after having issued a bill of lading to the shipper as required by the Act, the forwarder were to be considered a carrier, then the 9 month time limit in the railroad bill of lading would not apply as the forwarder would have an indemnity action against the rail carrier. However, if the forwarder were to be considered as a shipper under the rail bill of lading, then the 9 month limit would apply. In holding that the 9 month time bar was applicable against forwarders, the court examined the relationship between the forwarders and the shippers. The court noted:

"The term [forwarder] was originally applied to persons who. . .as agents of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment. . ..Later, a different type of forwarding service was offered. . .[the forwarder] held itself out not merely to arrange with common carriers for transportation of the goods, but to deliver them safely to the consignee. . .When goods handled by an agent-forwarder were lost or damaged, it was liable to the shipper only for its own negligence, including negligence in selecting a carrier. If, on the other hand, the shipment had been entrusted to a forwarder of the second type. . .the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault."[74]

Thus, the Court examined a forwarder's possible status with the idea that the forwarder would either be an agent for the shipper, or a carrier. While this case was considered under the Interstate Commerce Act, the Court's discussion with respect to the different activities of freight forwarders is still germane to ocean freight forwarders in respect of the Court's discussion of the evolution of forwarding. In short, the Court determined that only when forwarders took responsibility for the shipment

71. 46 U.S.C. § 1702 (2006). *See also* 46 C.F.R. § 515.2(o)(1)(i).

72. Chicago, Milwaukee, St. Paul & Pac. R. Co. et al v. Acme Fast Freight, Inc., 336 U.S. 465 (1949).

73. 49 U.S.C. § 1001 et seq. was referred to as the Interstate Commerce Act, and Part IV of the Act was commonly referred to as the Freight Forwarders Act.

74. *Acme Fast Freight*, 336 U.S. at 484-85.

of the goods, would the forwarders fall under the provisions of the Act. The Court thereby recognized the dichotomy of forwarder functions as either forwarder-carrier or forwarder-agent. The reasoning of the Court in *Acme Fast Freight* was not considered by the *Kirby* Court.

Thirdly, concept of a forwarder as an independent contractor in U.S. jurisprudence does not provide for international uniformity with respect to forwarder law. The U.S. courts' hesitancy to use agency can be contrasted with the consideration of the freight forwarders role under English law and well as the law of other jurisdictions. Under English law, a forwarder is generally considered to act as an agent when the forwarder negotiates a contract of carriage between the principles, and as a carrier when the forwarder has undertaken to carry the goods to their destination.[75] As noted by David Glass, a recognized scholar on the English law of freight forwarders and multimodal contracts, "when considered to act as an agency, the forwarder will commonly be taken to create privity of contract between his principal and a third party, as well as assuming the duties normally associated with an agency role."[76] While English Courts have noted that a forwarder may have a role that is between that of agent and principal, this is neither usual not customary.[77] With respect to *Kirby*, the U.S. Supreme Court does not explain how ICC would be acting as an agent and create contractual privity for only one contractual term (and not create such privity for the remainder of the contract) and then act essentially as carrier in all other circumstances. While providing a practical remedy, the theoretical basis for *Kirby* is thereby strained and inconclusive.

The legal rationale for the hesitancy to use agency law with respect to forwarder activities is not well-articulated within the jurisprudence, but there are some factual scenarios which give rise to concern and are frequently discussed. As mentioned by the courts in *Farrell Lines*, *Nedlloyd* and *Strachan,* a major concern for the application of agency law to forwarder activities originates from the fact that a freight forwarders may undertake tasks for both parties. This is not problematic under the general principles of agency law. Specifically with respect to agency and English law, David Glass noted that "[i]n relation to a movement of goods, therefore, the forwarder may act as agent for the customer in respect of one segment and agent for a carrier in respect of another segment or for

75. *See* DIANA FABER, MULTIMODAL TRANSPORT: AVOIDING LEGAL PROBLEMS (1997) at 19. ("Traditionally the freight forwarder did not assume liability for his function as a carrier. He merely acted for the purpose of connecting the shipper with the carrier as n agent for the shipper, or, alternatively, as an agent for the carrier.")

76. DAVID A. GLASS, FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS 49-50 (2004).

77. *See* Aqualon (UK) Ltd. v. Vallana Shipping Corp., (1994) 1 Lloyd's Rep. 669 (Q.B.D.).

different parts of the process of preparation for shipment."[78] Such dual agency has been recognized in shipbroker cases by English courts. In *Maracan Shipping (London), Ltd. v. Polish Steamship Co. (The "Manifest Lipkowy")*,[79] the English High Court held that "if [the broker] becomes involved as a sole intermediary with the knowledge and consent of both parties then [the broker's] role will involve negotiating with both principals on behalf of the other, in turn, and doubtless he will owe duties to both."[80] Likewise, under U.S. law, such a position of dual agency is supported in the Restatement (Second) of Agency in § 14L(1) which provides that "a person who conducts a transaction between two others may be an agent of both of them in the transaction, or the agent of one of them only. . ."[81] There has been a lack of an analysis by the U.S. Courts as to why agency law is not applicable to freight forwarder activities. It is submitted that agency law could provide a sound theoretical base for most contracts negotiated by or with freight forwarders, although the Court ethereally achieves the practical solution for one of the most critical terms of contracts of affreightment, limitations of liability, through its adoption of the limited agency default rule.

C. Freight Forwarders as Carriers

1. Carrier Liability

Because a freight forwarder's default status is that of an independent contractor, the issue which arises with respect to carrier status is what additional actions has the freight forwarder committed or what further obligations has the freight forwarder undertaken which would elevate the freight forwarders' obligations to that of a carrier. In other words, the principal issue is whether the freight forwarder has maintained its traditional and customary role by only arranging to transport the goods and undertaking to conclude associated matters, or weather the freight forwarder has actually undertaken to transport the goods and deliver them to consignee. The distinction is important because absent carrier status, a freight forwarder is only liable for its own negligence, and the burden of proof is on the party asserting forwarder negligence,[82] while a carrier would be liable for damage to the goods in accordance with any applica-

78. Glass, *supra* note 76, at 55.

79. Marcan Shipping (London) Ltd. v. Polish Steamship Co., (1988) 2 Lloyd's Rep 171 (Q.B.D.).

80. *Id.* at 180. *See also* Armagas Ltd. v. Mundogas S.A., (1985) Lloyd's Rep. 1, 17 (noting that with respect to a single broker acting between two principals, "[i]n such circumstances he is what I would describe as a true broker, authorized by each party in turn to do on its behalf what that party requires him to do.").

81. Restatement (Second) of Agency § 14L(1).

82. *See e.g.*, Prima U.S. Inc., v. Panalpina, Inc., 223 F.3d. 126, 129 (2d Cir. 2000).

ble International Convention which has been incorporated into the applicable law. As the Court in *Zima Corp. v. M.V. Roman Pazinski*[83] noted,

> "[discussion of precedent]. . .a freight forwarder is liable for lost or damaged goods only for its own negligence, including negligence in choosing a carrier; but a forwarder who contracts to deliver the goods to their destination, as well as or instead of arranging for their transportation, becomes liable as a common carrier for loss or damage to the goods, whether the fault or other basis of liability for damage lies with that forwarder or with the underlying carrier actually transporting the goods."[84]

While it is doubted that an ocean freight forwarder's ability to limit in accordance with U.S. COGSA or otherwise would be affected by decisions subsequent to *Kirby*, the recent Second Circuit jurisprudence should be addressed. Since the U.S. Supreme Court's decision in *Kirby*, the Second Circuit has attempted to establish rules to determine which liability scheme would apply between the Carmack amendment,[85] which applies to domestic road and rail shipments, and U.S. COGSA when a through bill of lading is issued.[86] In the latest decision, *Rexroth Hydraudyne B.V. v. Ocean World Lines*,[87] Rexroth Hydraudyne B.V. (Rexroth) contracted with Ocean World Lines (OWL), a non-vessel operating common carrier (NVOCC) to ship 27 packages from Rotterdam to Englewood, Colorado through Houston. OWL in turn contracted with COSCO Container Lines (COSCO), a vessel-owning common carrier for the execution of the carriage. Contrary to the Rexroth's instructions, the cargo was released in Denver before Rexroth had confirmed payment had been received for the cargo. The receiver subsequently took delivery of the goods and became insolvent. OWL and COSCO filed a declaratory action in the U.S. District Court for the Southern District of New York but this action was dismissed without prejudice. Subsequently, Rexroth partially recovered from the receivers' bankrupt estate and sued the defendants for the remaining amount of US $297,630.81.[88] Rexroth argued,

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83. Zima Corp. v. M.V. Roman Pazinski, 493 F. Supp. 268 (S.D.N.Y. 1980).

84. *Id.* at 274. Carrier status is determined similarly under English law. *See* GLASS, *supra* note 76, at 53 ("Where the forwarder is considered to have undertaken to effect carriage he is likely thereby to be classified as a carrier. Classification as a carrier will often subject the forwarder to compulsory regimes of liability applicable to carriers. . ..").

85. *See* 49 U.S.C. § 14706(a) (2006).

86. Of particular interest is Sompo Japan Ins. Co. v. Union Pac. R.R. Co., 456 F.3d 54, 74 (2d Cir. 2006) (noting that "[i]n *Kirby,* the cargo owner failed to raise the issue of Carmack's applicability . . . Therefore, the only issue before the Court was the interaction between *state* law and contractual provisions extending COGSA's terms to a rail carrier. Consequently, *Kirby* only established the principle that maritime contracts should be interpreted in light of federal maritime law.").

87. Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351 (2d Cir. 2008).

88. Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., No. 06 Civ. 5549 (S.D.N.Y. Feb. 14, 2007).

inter alia, that the Carmack amendment should apply because the incident at issue occurred during the inland portion of the voyage.[89]

The Second Circuit disagreed, holding that the determination of the Carmack's amendment applicability requires a two part analysis:

(1) Is the shipment covered by the Amendment?
(2) Is the carrier covered by the Amendment?[90]

The determination is significant because of Carmack's liability regime which provides that the carrier is liable for the actual damage, unless "alternative terms" have been negotiated.[91]

Accordingly, under the *Rexroth* analysis, even if the damage to cargo occurs on an inland portion of the voyage, the Carmack amendment would never apply to an ocean freight forwarder acting as an ocean freight forwarder and subject to the FMC regulation. Furthermore, even if the ocean freight forwarder acting as a carrier were to issue a through bill of lading and be held to be a COGSA carrier, *Rexroth* provides support for the proposition that only physical carriers, that is a carrier which is "actively involved in the transporting or "carrying" of the shipper's cargo"[92] would be considered a rail carrier to which the Carmack amendment would apply.

2. *Determining Carrier Status*

There is no bright line test to determine carrier status either under US or English law. U.S. Courts considering the issue generally have utilized four factors in order to determine carrier status:[93]

89. The Merchants relied heavily on *Sompo Japan Ins, Co.*, 456 F.3d at 75 (holding that the Carmack amendment would apply instead of U.S. COGSA to a claim asserted against a railroad). The court further "determined that Carmack applies to the domestic rail portion of an international shipment originating in a foreign country and traveling under a through bill of lading, even where the parties have extended COGSA's liability provisions to domestic rail carriers."). *Id.*

90. *Rexroth Hydraudyne B.V.*, 547 F.3d at 360.

91. *See* 49 U.S.C § 11706 (2006) (liability regime).

92. *See Rexroth Hydraudyne*, 547 F.3d at 363. The Second Circuit took issue with a Southern District of New York case, Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Corp., 578 F.Supp. 584, 590 (S.D.N.Y. 2008) (holding that an intermediary was a "rail carrier" under the applicable provision of Carmack, i.e., 49 U.S.C. § 10102(5)). The Second Circuit further held that "it is difficult to see how, for example, a freight forwarder could use a rail or motor carrier for transportation (thus qualifying *itself* as a rail or motor carrier under Sompo II's definition) while also "holding itself out to the general public" as something "other than" a rail or motor carrier. "We believe the better view is that "providing" transportation as a rail carrier under §§ 10102(5) and 11706(a) entails being actively involved in transporting, or "carrying," the cargo." *Id.* at 362-63. Thus, even if an ocean freight forwarder holds itself out as a carrier, it cannot be a Carmack carrier unless it is the actual, physical carrier.

93. *See, e.g., Zima Corp.*, 493 F. Supp. at 273 and Hoffman-LaRoche, Inc. v. M/TFL Jefferson, 731 F. Supp. 109, 111 (S.D.N.Y. 1990).

(a) the way in which the obligations are described in the relevant documents. However, a party's self-description is not controlling;
(b) the history of dealing between the parties;
(c) the issuance of a bill of lading, although a document described as a "bill of lading" is not determinative;
(d) the method of charging for the services, especially if the forwarder charged a commission.

An examination of each of these factors is in order.

a) Description of the Parties in the Documents

When discussing the way in which the parties are described in the relevant documentation, courts are quick to emphasize that parties' "self-description is not always controlling."[94] Such documents may include the forwarder's standard trading terms,[95] booking notes and bills of lading. Some forwarder bills of lading may include such provisions describing the forwarder as an agent or stating that the forwarder will act as a carrier. A court will examine exactly what a party's undertakings were in order to determine if the party acted as carrier. As the Second Circuit noted in *Prima U.S., Inc. v. Panalpina*,[96] "Of course a party calling itself a freight forwarder might in fact be performing functions of the carrier, in which case function would govern over form."[97] Such was a situation which occurred in the U.S. Fifth Circuit decision of *Sabah v. M/V Harabel Tapper*.[98] In that case, a gas turbine was shipped from Houston to the receiver Sabah's facilities in Labuan, Malaysia via Singapore. The bill of lading, issued by Industrial Maritime Carriers (Bahamas), Inc. (Industrial) specified that the port of loading was Houston, the port of discharge was Singapore and that Labuan was "the place of delivery by on-carrier."[99] When the M/V HABEL TAPPER arrived in Singapore, the turbine was discharged onto a barge, the Asia Mariner 5, which took on water, damaging the turbine. Clause 6 of the Industrial bill of lading pro-

94. *Hoffman-LaRoche, Inc.*, 731 F. Supp at 111; *see also Zima Corp.*, 493 F. Supp. at 273.

95. *See e.g.*, The International Federation of Freight Forwarders' Association, Standard Trading Terms, http://www.fiata.com/uploads/media/A_Guide_to_Logistics_Agreements.pdf (last visited April 14, 2009). The acronym of the Association is FIATA (Fédération Internationale des Transitaires et Assimilés) and there is a national affiliated organization in the United States.

96. Prima U.S. Inc., v. Panalpina, Inc. 223 F.3d. 126 (2d Cir. 2000).

97. *Id.* at 129.

98. Sabah Shipyard SBN. BHD. v. M/V Harbel Tapper, 178 F.3d 400 (5th Cir. 1999). A full disclosure is warranted. The author was an in-house counsel for the commercial managers, Intermarine Inc., and for the time charterers, Industrial Maritime Carriers (Bahamas), Inc., at the time of the incident and also when the decision was rendered. The author was responsible for negotiating several of the terms in the time charter party between Industrial and the owners of the M/V Harbel Tapper. The author also drafted many of the terms of the bill of lading at issue.

99. *Id.* at 403.

vided for forwarder status for on carriage, stating "When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as a Forwarding Agent only."[100] The plaintiff, Sabah Shipyard, argued *inter alia* that COGSA's limitation of liability would not apply to this incident as Industrial was acting merely as a forwarder. Further, as a forwarder, Industrial would be liable for its own negligence in selecting an unseaworthy barge. The U.S. District Court found that Industrial had been negligent in selecting the barge in question and that as a freight forwarder, Industrial was not entitled to the U.S. COGSA package limitation of US $500 per package.[101] Thus, the U.S. District Court awarded a judgment in favor of Sabah and against Industrial and the owner of the M/V Harbel Tapper in the amount of US $9,125,565.78. Industrial appealed asserting status as a COGSA carrier.

The Fifth Circuit reversed the district court's ruling and held that despite the language in clause 6 of the bill of lading, according to U.S. COGSA, a carrier "includes the owner or the charterer who enters into a contract of carriage with a shipper"[102] and that a contract of carriage is "covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea."[103] The Fifth Circuit found that the bill of lading issued by Industrial was such a contract of carriage and in accordance with precedent and the plain language of COGSA and therefore, Industrial was a carrier and entitled to the COGSA package limitation.[104] Accordingly, statutory reference and precedent took priority with regard to contractual interpretation over the self-description contained in the documents.

b) History of Dealing Between the Parties

Naturally, the court will examine the past relationship between the parties and whether there was an expectation that, due to the past dealings between the parties, the forwarder would assume the role of the carrier.[105] English courts also will consider the course of dealings between the parties as relevant in the determination of carrier status.[106]

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100. *Id.* at 405.

101. Sabah Shipyard SDN. BHD. v. M/V Harbel Tapper, 984 F. Supp. 569, 574 (S.D. TX 1997).

102. *Sabah Shipyard*, 178 F.3d at 405 (quoting 46 U.S.C. app. § 1301(a) (2006)).

103. *Id.* (quoting 46 U.S.C. app § 1301(b) (2006)).

104. *Id* at 405.

105. *See generally*, *Hoffman-LaRoche, Inc.*, 731 F. Supp. at 110.

106. Glass, *supra* note 76, at 62.

c) The Issuance of a Bill of Lading

In considering this factor, the courts emphasize that issuing a document called a bill of lading is not determinative. Presumably, though if the document was actually a bill of lading, performing all functions of a bill of lading including a document of title, presumably this would be indicative of forwarder status. The Second Circuit in *Prima*[107] emphasized that the major difference between a carrier and a freight forwarder was that "[u]nlike a carrier, a freight forwarder does *not* issue a bill of lading and is therefore not liable to the shipper for anything that occurs to the goods being shipped."[108] However, a bill of lading labeled "house bill of lading" used "to facilitate arrangements between related freight forwarders on either ends of the voyage" will not constitute a contract for carriage equivalent to a bill of lading,[109] although if the house bill lists the forwarder as is executed by the forwarder as a carrier, the document may be considered as a bill of lading in some jurisdictions.[110] Likewise, if the purported bill of lading contains language establishing that the forwarder is acting in a different capacity from a carrier, then the document will not be considered to be a bill of lading even if described as such.[111] Moreover and in any event, a court will examine extrinsic evidence if the document is considered to be ambiguous.[112]

There has been no definitive case on the issue of what constitutes a bill of lading that would elevate a forwarder's status to that of carrier. Presumably though, a court would find that the document is bill of lading and the forwarder is the actual carrier if (1) the forwarder is listed on the bill of lading as the carrier, (2) there is no other language on the document indicating that the forwarder should not be considered to be carrier, and, critically (3) the document issued is a document of title as stipulated by U.S. COGSA.[113] The court in *Kirby*[114] appears to treat the bill of

107. Prima U.S. Inc., 223 F.3d at 126.

108. *Id.* at 129.

109. *See Zima Corp.*, 493 F. Supp. at 275.

110. *See* Glass, *supra* note 76, at 29 with respect to English law. "The House BL will be acceptable under Article 30 of the Uniform Customs and Practice for Documentary Credits 1993, however, where it indicates on its face the name of the forwarder as a carrier and is signed by him as a carrier or multimodal transport operator." *Id.*

111. *See* J.C. Penny v. The Am. Exp. Co., 102 F. Supp. 742, 474 (S.D.N.Y. 1951) (holding that a document titled "bill of lading" was not, in fact, a bill of lading attaching liability to the forwarder because the document contained a term stating that the forwarder was undertaking shipping "to act as shipping agent for the Shipper.").

112. *See, e.g., Zima Corp.*, 493 F. Supp. at 274 ("Even if it is assumed that the document's heading and form as a bill of lading creates a sufficient ambiguity to warrant examination of extrinsic evidence, the extrinsic evidence is consistent with defendant's assumption of liability as a freight forwarder only.").

113. *See* 46 U.S.C. § 1300 (2006) ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports in the United States, in

lading issued by the forwarder ICC as a carrier's bill of lading, but the Court's position is somewhat ambiguous.[115] Further and more problematic is the fact that issuing a bill of lading under COGSA is only upon the shipper's request.[116] Accordingly, the forwarder may be a carrier under a contract of carriage where no bill of lading has been issued as the bill of lading is only evidence of the contract of carriage.[117]

d) The Method of Charging for Services.

Freight forwarders have two methods of charging for their services. First, a forwarder may charge a commission on the freight charged by the underlying carriers. This is the traditional method of compensation. The forwarder may also charge a lumpsum amount for the entire carriage and, accordingly, the merchants will not know what the underlying carriers are charging.

The fact that a lumpsum, or all inclusive amount is charged may indicate that the forwarder is acting as a carrier, although U.S. courts usually do not consider this to be a strong factor and will consider the totality of the circumstances. In *Hoffman-LaRoche v. M/V Tel Jefferson*,[118] the court noted that "regarding the manner in which [the forwarder] made its profit on this shipment, plaintiff is correct that the evidence points more strongly to carrier status. . ..resolution of the other three criteria [documents issued, course of dealing, and description of the parties in the documents], however militates toward forwarder status."[119]

The position is similar under English law[120] and as Glass notes, "this [the fact that a lumpsum freight amount has been charged] has not always been taken as a particularly strong factor."[121] In contrast, in many juris-

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foreign trade, shall have effect subject to the provisions of this chapter."). *See also*, Matsushita Elec. Corp of Am. v. S.S. Aegis Spirit, 414 F. Supp. 894, 901, 1976 A.M.C. 779 (W.D. Wash 1976) (holding that "COGSA is an act of limited scope intended only to govern important aspects of the relationship between the issuer and holder of a bill of lading (or similar document of title.").

114. *See Norfolk S. Ry. Co.*, 300 F.3d at 19.

115. The *Kirby* court first notes that ICC issued a bill of lading and states that "a bill of lading records that a carrier has received goods from the party that wishes to ship them." *Id.* at 19. The court further states that ICC, as a forwarder, "arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." *Id.*

116. 46. U.S.C.§ 1303(3) (2006) ("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.. . .").

117. 46 U.S.C. § 1300 (2006).

118. *Hoffman-LaRoche*, 731 F. Supp. At 111.

119. *Id. See also Zima Corp.*, 493 F. Supp at 275.

120. *See* Texas Instruments Ltd. V. Nasan (Europe) Ltd. [1991] 1 Lloyd's Rep. 146; M. Bardiger Ltd. V.Halberg Spedition Aps., [1991] 1 Lloyd's Rep 146. cf. Colley v. Brewer's Wharf & Transport, (1921) 9 Ll.L.Rep. 5.

121. Glass, *supra* note 76, at 61.

dictions, such a method of charging is indicative of carrier status. For example, the German Commercial Code (Deutsches Handelsgesetzbuch or "HGB") provides that if a forwarder charges a single, definite rate as opposed to a commission to be added to carrier freight charges, then the forwarder has taken on the rights and responsibilities of a carrier.[122]

III. Conclusion

A forwarder's status will be of relevance especially in two cases, (1) where the carrier has not been paid freight and (2) when there is cargo damage. In the case of unpaid freight, a determination of the forwarder's status may also be determinative of the merchant's obligation with respect to the carrier. In the event of cargo damage, a forwarder will not be liable except for the forwarder's own negligence unless the forwarder has acted as a carrier. The ascertainment of carrier status will require a four-part inquiry into the transaction including most importantly, whether the forwarder has issued a bill of lading which is also a document of title and the method of compensation. The inquiry into the issuance of a bill of lading is further complicate by the fact under U.S. COGSA, a bill of lading is only evidence of the contract[123] of carriage and is issued only upon request of the shipper.[124]

Freight forwarder status under U.S. law requires reference to both federal statute as well as case law. These sources may conflict due to the jurisprudential precedent that a forwarder is an independent contractor while the FMC considers the forwarder to be an agent of the shipper.[125] The courts should consider the application of agency law in order to provide international uniformity in this area of legal inquiry.

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122. The applicable HGB provision reads as follows:

1 HGB §459 Spedition zu festen Kosten Soweit als Vergütung ein bestimmter Betrag vereinbart ist, der Kosten für die Beförderung einscliessen, hat der Spediteur hinsichtlich der Beförderung die Rechte und Pflichten eines Fractführers oder Verfrachters. In diesem Fall hat er Anspruch auf Ersatz seiner Aufwendungen nur, soweit dies übich ist.

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Freight forwarder charging a fixed rate- As far as a definite sum has been agreed upon as the compensation for the carriage, the Forwarder has taken on the rights and responsibilities of a carrier toward the carriage. In this case has the forwarder has a claim for expenses only as far as customary.

(above free translation by the author)

123. 46 U.S.C. § 1300 (2006).

124. 46 U.S.C § 1303(3) (2006).

125. 46 C.F.R. § 515.2(o)(1)(i) (2009).