

THE IDENTITY OF THE CARRIER CLAUSE UNDER MALTESE LAW

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In Malta the legal validity or otherwise of the "Identity of the Carrier Clause" is an open question. The position at law is unregulated and, consequently, an uncertain one. Maltese lawyers have no option but to tread carefully when giving advice on this point. In point of fact, there is not much to go by except for one particular Judgment delivered by the Maltese Commercial Court in 1988. This Judgment will be examined in some detail, hereunder.

The Karthago

The Maltese Commercial Court had the opportunity to examine the "Identity of the Carrier" clause in the landmark case *The Karthago*. It will be seen how the attitude of the Maltese Courts towards such clauses side-tracks from that of a number of European courts, where such clauses were dismissed as out of hand.

The latter case dealt with the carriage of goods on board the vessel *the Karthago* to a Maltese port of discharge, under a container bill of lading issued by the Near East Container Lines (hereinafter "NECOL"). The cargo underwriters, which were subrogated in the rights of the consignee, claimed that the cargo was short landed and sued the local company Bianchi & Sons Co. Limited as agents, for and on behalf of Near East Container Lines, for the consequential damages suffered. In their statement of defence, defendants Bianchi and Sons Co. Limited pleaded, among other things, that they were not the proper defendants because, among other things, they were not the owners of the said vessel *the Karthago* on which the cargo was carried, and consequently, that the Court declares them non-suited.

The Court moved to examine the legal relationship between the parties to the suit in order to be able to decide on defendant's plea. The Court based its Judgment on the following findings. It noted that the logo "NECOL" appeared prominently in the said bill of lading whilst Deutsche Orient-Linie GMBH, Hamburg were indicated as the "carriers" and the Mercantile, Shipping & Coaling Co. Bianchi & Sons Co. (1916) Ltd, as agents of the latter. In the box on the face of the bill of lading marked "carrier" the words "subject to clause 31" were inserted. Clause 31 read as follows:-



"The contract evidenced by the Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that the same ship owner alone shall be liable for any damage or loss due to any breach or non performance of any obligation arising out of the contract of carriage..."

The Court noted Plaintiff's submissions that NECOL were the actual carriers of the transported cargo and were, therefore, the proper defendants to the action and that, furthermore, such a clause was internationally, generally ignored.

The Court then undertook to examine whether NECOL were, in fact, the carriers of the cargo *de quo*. The Court did not agree with Plaintiff's submissions and held that "identity of the carrier" clauses, as the one above-quoted, were invalid solely in those cases where the relationship between the ship-owner and the charterer (or his agent) was not brought to the cognisance of the "shipper". The Court held that, in the case under examination, the bill of lading expressly indicated that responsibility for damages for breach of the contract of carriage fell solely on the "carrier". It went on to hold that NECOL, the charterers, cannot be considered the carrier because the company Deutsche Orient-Linie GMBH was, in fact, clearly indicated in the said bill of lading as the "carrier". The Court added that it was expressly agreed that the latter company, and not NECOL, was going to assume responsibility arising out of the contract of carriage.

The Court did not enter into the merits as to whether the clause circumvented the word or the spirit of the Hague Rules, but went on to point out, *obiter*, that the said clause did not violate the said Hague Rules and, hence, was binding on the parties.

The Court went on to declare defendants NECOL non-suited and threw out plaintiff's action, thus giving full effect to the "Identity of the Carrier" Clause.

Comparative Views

This is the only judicial statement Maltese lawyers have on this issue and, even when one considers that this decision was passed by a Court of first instance, the position remains ambivalent. In situations where issues appear unregulated, local Courts do not shy away from referring to the law obtaining in foreign jurisdictions and, as Maltese law has its roots in Roman Law, it is only natural that the position in civil law countries be examined. If one had to examine, for example, the approach taken by the French Courts, it will be seen that, in a number of cases, their approach is diametrically opposed to the stance taken by the Maltese Court. In a number of cases, the French courts ignored the identity of the carrier clause holding that the ship owner was not a party to the contract



of carriage. On the other hand, under Italian law, there is no hard and fast rule regulating identity of the carrier clauses: such clauses are examined on a case by case basis and their legal validity decided upon accordingly. Neither does there seem to be a definite position established under the Common Law, with different Common Law jurisdictions taking different views in regard to such clauses.

Interpretation of the Clause on the Local Front

Conflict with the Hague Rules

On the local scene, it may be said that the Maltese Commercial Court reached its decision in *the Karthago* somewhat hastily, unaware of the more subtle implications of its decision on ship-owners (and, presumably, demise charterers) and, on the other hand, consignees. In particular, the Court's statement that the said clause did not violate the said Hague Rules and, hence, was binding on the parties, does not share support. In Tetley's words, the clause contravenes art.3(8) since it is an attempt by the charterer, who has duties under the Hague Rules to limit or completely escape responsibility.

Section 99 of the Civil Code

Secondly, one particular provision of the Maltese Civil Code, is perfectly applicable to the clause under scrutiny but seems to have been completely disregarded by the Commercial Court. This particular provision provides that:

- (1) A person cannot by a contract entered into in his own name bind or stipulate for any one but himself.
- (2) Nevertheless, a person can bind himself in favour of another person, to the performance of an obligation by a third party; but in any such case if the third party refuses to perform the obligation, the person who bound himself or promised the ratification shall only be liable to the payment of an indemnity.

Maltese Courts had opportunity to explain that it not prohibited, but in fact allowed, that one binds himself towards another by promising something that would be carried out by another. Such a "promise" (obligation) is binding between the parties to that agreement ("inter contrahentes"). If such a promise is not actually carried out (or is not carried out according to the agreement), the



beneficiary would have an action against the promiser for an indemnity on the basis of this agreement.

It is submitted that, in cases where the charterer (or his agent) releases or issues a bill of lading which he signs, or which is signed on his behalf by, for example, his agent, which, however, contains an "identity of the carrier clause", the charterer (the promiser) is, nevertheless, contractually responsible towards the shipper/consignee/endorsee (the beneficiary) for the performance of the carriage (the promise) by the ship-owner (third party), according to the provision of the Civil Code. Hence, in opposition to what was decided in *the Karthago*, it could be argued that, under Maltese law, an action by the consignee/endorsee against the charterer should be allowed on the basis of the said provision. Furthermore, it is also submitted that the provision is one of a regulatory nature meant to draw the confines of the otherwise unlimited right of freedom of contract. Hence, from such a provision of the law the parties to a contract cannot derogate.

Agency

On the other hand, it could be argued that the provision of the Civil Code quoted above does not apply to identity of the carrier clauses, wherein a "promiser (*i.e.*, charterer)-beneficiary (shipper/consignee/endorsee) - third party (ship-owner)" relationship is not contemplated, but rather, a "principal (shipowner) - agent (Charterer)-beneficiary (shipper/ consignee/ endorsee)" relationship exists, and the rules of agency should apply thereto. Strictly speaking, the latter is perhaps more true to the wording of a typical identity of the carrier clause. This emerges if one had to examine further the last sentence of a standard clause which normally continues to read as follows:

"... It is further understood and agreed that as the Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Company or Agents shall not be under any liability arising out of the contract of carriage..."

This part of the clause suggests a relationship, between the ship owner and the charterer, based on agency. Naturally, a cargo claimant would have to choose whether to base his action on section 999 of the Civil Code or whether to trigger the rules of agency and mould his arguments, accordingly. For example, in cases where a bill of lading is issued in the name of some phantom line, these clauses could be found useful to help argue in favour of a situation of agency in order to land an action against ship owner (or substitute) and dismantle a scheme



purposely constructed by the line in order to disintegrate potential cargo claims. The provision of the Maltese Civil Code quoted above would only allow for an action against the promiser(charterer) but not against the ship owner, there being no privity of contract with the latter.

At this juncture, it is best to proceed with a certain amount of caution because, under Maltese law, an action based on section 999 cannot not co-exist with an acknowledgement of a situation of agency between the ship owner and the charterer. Section 999 applies in cases where no agency between the third party ship owner and the charterer (promiser) exists. Any attempt to apply the provisions of section 999 of the Civil Code could be understood by a Court of Law to imply that plaintiff (consignee/ endorsee) are acknowledging a principal-agency relationship between the promiser (charterer) and the third party (ship owner) does not exist, thus destroying their opportunity to build an argument based on the agency theory. An action based squarely on section 999 could leave a cargo claimant saddled with a suit against a defunct, alas phantom, line.

Maltese law of agency could be attractive to a cargo claimant in that it would allow an action (writ of summons) to be validly served locally, against the ship owner who would be represented by the charterer who, in turn, would be represented by a local agent.

On the other side of the coin, in acknowledging the existence of a principal-agency relationship between the ship owner (principal) and the charterer (agent), could imply giving up a *direct* action against the charterer under section 999.

Hence, any action by the consignee/ endorsee in Malta against the ship owner and/or charterer should entertain the three above mentioned views; however, it should be made clear that each argument is being made without prejudice to any of the others.

Conclusion

The position under Maltese law follows the trend in that it does not present a straight forward solution to the interpretation and the acceptance, or otherwise, of the identity of the carrier clause. The specific circumstances surrounding the particular bill of lading would have to be examined and conclusions arrived at according to those circumstances. In certain situations, for example, the use of identity of the carrier clauses could give suspect to fraud. In others, a ship owner might never have actually appointed the charterer as his agent, or the charterer might have no actual authority from the shipowner to use such a clause. As has been so aptly said, this clause cannot be standardised and labelled.

