QT TRADING, L.P. V. M/V SAGA MORUS,
The United States Fifth Circuit Court of Appeals Tells Cargo Interests: Control Your Documents or Lose Your Claim.

An Analysis

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The decision issued by U.S. Fifth Circuit Court of Appeals on May 11, 2011, *QT Trading, L.P. v. M/V Saga Morus*,[1] should alert cargo interests to the importance of ensuring that the party issuing the bills of lading does so in accordance with the authority granted by the Master, Owner and/or charterers involved. In this case, the omission of a required statement of authority in the signature block voided the shipper's cargo claims against the vessel owner and head charterer.

The case is significant because the Fifth Circuit held that when a sub-charterer issues bills of lading to a shipper, and exceeds its authority by failing to sign the bills in accordance with the shipmaster's instructions, or otherwise fails to sign them "by authority of the master," a shipper cannot bring an *in personam*[2] claim against the vessel's owner and head-charterer under the Carriage of Goods by Sea Act (hereinafter

[1] 2011 U.S. App. LEXIS 9619 (5th Cir. 2011).
[2] Under U.S. law, *in personam* and *in rem* actions may arise from the same claim, and may be brought separately or in the same suit. *See* Supplemental Admiralty Rule C(1)(b). The *in personam* action is filed against the owner or charterer personally. *See Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984). "An *in rem* action, on the other hand, is filed against the *res*, the vessel; and a maritime lien on the vessel is a prerequisite to an action *in rem*." *Id.*

"COGSA")[3] despite substantial cargo damage.[4] As a result of the sub-charterer's agent's failure to abide by the instructions and prior authority granted by the vessel owner and head charterer, in respect to properly clausing the bills of lading to indicate any pre-shipment damage, the Fifth Circuit dismissed the *in personam* claims against the vessel owner and head charterer and permitted the shipper to assert its claims only against the sub-charterer who issued the bills.[5] In this case, however, the sub-charterer filed separately for bankruptcy protection, and the refuge of those proceedings effectively left the shipper altogether without a remedy for its cargo damage.[6]

While shippers will surely view the *QT Trading* decision with a measure of horror, they should realize that the Fifth Circuit's decision is not a new rule. Instead, as examined below, the Fifth Circuit merely restated the basic principles that vessel owners, charterers, and cargo interests must, at all times exercise prudent document control, and each must know the extent of a party's authority to issue a bill of lading.[7]

A. Summary of Relevant Facts in *QT Trading*.

The vessel in question was the M/V SAGA MORUS, a 200-meter general cargo ship flagged in Hong Kong (the "vessel").[8] The Defendant Attic Forest AS ("Attic")

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[3] *See* 46 U.S.C. § 30701 note. In 2006, Congress re-codified the entire text of COGSA into a single "note" that follows the text of 46 U.S.C. § 30701. Hence COGSA is cited as "46 U.S.C. § 30701 note." Citations to COGSA are hereinafter made to the individual sections of COGSA within the note, *e.g.* "COGSA § 1."
[4] *QT Trading*, [4] 2011 U.S. App. LEXIS 9619 at *15.
[5] *See id*. at *15.
[6] *See id*. at *5-6; *see also infra* FN 31, discussing ramifications of sub-charterer's bankruptcy proceedings.
[7] The precedent, discussed *infra*, dates to at least 1921 and has served to exonerate vessel owners and head charterers for liability for cargo damage in cases where sub-charterers have improperly signed or otherwise wrongly issued the bills of lading. *See, e.g., Thyssen Steel Co. v. M/V KAVO YERAKAS*, 50 F.3d 1349, 1351 (5th Cir. 1995); *Pac. Employers Ins. Co. v. M/V GLORIA*, 767 F.2d 229, 236-7 (5th Cir. 1985); *Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE*, 1997 U.S. Dist. LEXIS 13102, at *10 (E.D. La. 1997); *Mahroos v. S/S TATIANA L*, No.86-CV-6706, 1988 A.M.C. 757, 760 (S.D.N.Y. 1988); *Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1015 (2nd Cir. 1972); *Tuscaloosa Steel Corp. v. M/V NAIMO*, 1993 A.M.C. 622 (S.D.N.Y. 1992); *The Poznan*, 276 F. 418, 432 (S.D.N.Y. 1921).
[8] *See QT Trading, L.P.,* 2011 U.S. App. LEXIS 9619, at *2.

owned the vessel.[9] The Defendant Saga Forest Carriers International AS ("Saga") chartered the vessel from Attic.[10] Daewoo Logistics Corp. ("Daewoo") subchartered the vessel for two years from Saga (pursuant to the "Saga-Daewoo Charter Party").[11] Defendant Patt Manfield & Co., Ltd. ("Patt") was the vessel's technical manager, employing the officers and crew and operating the ship according to the charterer's instructions.[12]

The Saga-Daewoo Charter Party contained three relevant provisions. The first required Daewoo to "load, stow, trim, secure and discharge the cargo at their expense under the supervision of the Captain…."[13] The second provided that the master would, if requested by Daewoo, "sign Bills of Lading for cargo as presented, **in conformity with Mate's and Tally Clerk's receipts**."[14] Lastly, the Saga-Daewoo Charter Party authorized Daewoo, or its agents, to sign bills of lading on behalf of the master, or Saga, so long as the bills of lading were consistent "with the Mate's or Tally Clerk's receipts…."[15] In the event that Daewoo failed to incorporate the Mate's Receipts in any bills of lading it issued, Daewoo was "to accept all consequences that might result from…**signing Bills of Lading not adhering to the remarks in Mate's or Tally Clerk's receipts**."[16]

In March 2008, the Plaintiff, QT Trading L.P. ("QT"), purchased 800 bundles of steel pipe from a Chinese company.[17] The pipe seller contracted with Daewoo to ship the

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[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.* at *3.
[13] *See id.* at *2.
[14] *See id.* (Emphasis added).
[15] *See id.* at *2-3.
[16] *See id.* (Emphasis added).
[17] *See id.* at *5.

pipe from Dalian, China to Houston, Texas.[18] The master authorized Daewoo and its agents to sign bills of lading on his behalf, with the condition that Daewoo was to ensure "that the original Bills of Lading are **issued in strict conformity with the Mate's Receipts, i.e., all remarks of quantity and condition which are contained in the Mate's Receipts must be entered on the Bills of Lading prior to signing**."[19]

At the load port, the vessel owners' P&I Club engaged an independent cargo surveyor to inspect the pipe and issue a "Preshipment Cargo Condition Report" (the "Preshipment Report") to the ship's master.[20] The surveyor noted extensive pre-load damage to the pipe bundles in the Preshipment Report. At the same time, the shipper issued certain documents called a "Shipping Order," which all parties agreed were, in fact, the Mate's Receipts.[21] Notations on the Mate's Receipts described the cargo as having been loaded "clean on board" the vessel, but also incorporated the findings of the Preshipment Report by noting "as per P&I surveyor report."[22]

Daewoo's agent signed the bills of lading in China, but, contrary to the requirements of Saga-Daewoo Charter Party, <u>failed to make any note on the bills of lading to incorporate the Mate's Receipts</u>.[23] The agent wrote only that the cargo was loaded "clean on board", thereby certifying in effect that the cargo was free of damage.[24] The bills were signed "As Agent For The Carrier Daewoo Logistics Corp."[25] There was no reference to the vessel's master, Attic, Saga, or Patt.[26] When the vessel arrived at

[18] *See id.*
[19] *See id.* at *3. (Emphasis added).
[20] *See id.* at *3-4.
[21] *See id.* at *4.
[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] *See id.*
[26] *See id.*

Houston, QT's attending surveyor reported the cargo being "discharged in a damaged and non-conforming condition," including surface rust on some bundles and other damage due to "rough, careless, and/or improper handling" and "faulty stowage."[27]

QT filed suit in the United States District Court for the Southern District of Texas, asserting claims for cargo damage *in personam*, against Attic as vessel owners, Saga as head charterers, Daewoo as sub-charterers, and Patt as technical managers, and *in rem* against the vessel.[28] QT sought relief under COGSA,[29] as the controlling law for the shipment from China to the United States, and for negligent bailment, under the general maritime law of the United States.[30] Early on in the litigation, the District Court dismissed Daewoo from the case when Daewoo filed separately for bankruptcy protection.[31]

The District Court also dismissed the claims against Attic and Patt, on the basis that QT could not prove privity of contract with either. The District Court dismissed the claims against Saga on grounds that Daewoo exceeded its authority under the Saga-

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[27] *See id.*
[28] *See id.* at *5 (dismissing the *in rem* action filed against the vessel, as the controlling forum selection clause required such action be filed in Hong Kong).
[29] 46 U.S.C. § 30701 note.
[30] *See QT Trading, L.P.,* 2011 U.S. App. LEXIS 9619, at *5.
[31] *See id.* at *5-6. Of course, had Daewoo not filed for bankruptcy protection, QT's claims against it would have continued for two reasons. First, unlike Attic, Saga and Patt, Daewoo's agent issued the bills of lading for Daewoo, which established privity of contract between QT and Daewoo, and which defined Daewoo as the liable "carrier" under COGSA, discussed *infra* at Section B. Secondly, unlike Attic, Saga, and Patt, Daewoo could not raise the defense of "exceeding authority" when its own agent issued the bills of lading on Daewoo's behalf. Accordingly, but for the bankruptcy, Daewoo would have remained a viable defendant in QT's case. *Id.* at *6-15. Theoretically, to maintain its claims against Daewoo after dismissal, QT could have intervened in Daewoo's bankruptcy action to assert its claims against Daewoo and, if it prevailed, to collect its damages from the proceeds of the bankruptcy estate. However, QT's intervention would have been impractical because, even if it proved its claims in that very different forum, the claims would be unsecured. As an unsecured creditor, QT would be limited to collecting whatever proceeds remained, if any, after all of Daewoo's secured creditors were paid in full, and then those remaining proceeds would themselves be divided, *pro rata*, among the unsecured creditors, including QT. As a practical matter, there are rarely any proceeds remaining to be so divided by unsecured creditors in any bankruptcy proceeding. Thus, the Daewoo bankruptcy, as a practical matter, effectively precluded QT's assertion of claims against Daewoo.

Daewoo Charter Party by issuing the bills of lading without incorporating the Mate's Receipts. QT appealed the dismissal of all defendants to the U.S. Fifth Circuit Court of Appeals, and for the reasons set forth below, the Fifth Circuit affirmed.[32]

B. Application of COGSA in *QT Trading*.

COGSA is the statutory regime governing the common carriage[33] of goods to or from the United States by sea.[34] COGSA imposes on ocean carriers a duty to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried,"[35] and "forbids a [carrier] from contracting out of liability for improper stowage of cargo."[36]

Under COGSA, the cargo owner claiming damage may recover, *in personam*, only from the statutory "carrier"[37] of the goods.[38] The Fifth Circuit Court of Appeals has expressly held that, "to recover under COGSA, the cargo owner must establish that the

[32] *See id.*
[33] Private carriage, where a party hires an entire ship, is another matter, and such an arrangement is not governed by statute unless the parties so incorporate it by contract. As a result, parties to a private charter are free to allocate the risks and responsibilities associated with the private carriage of goods. Thus, in private charter parties, "the responsibility for cargo loss falls on the [party] who agreed to perform the duty involved." *Nissho-Iwai Co. v. M/T Stolt Lion*, 617 F.2d 907, 914 (2nd Cir. 1980). "Congress declined to enact a statute regulating the terms of charter parties because it has generally considered the bargaining power of charterers and vessel owners to be merely equal, unlike the edge in bargaining power held by vessel owners and charterers over cargo owners." *Nissho-Iwai Co.*, 617 F.2d at 914.
[34] COGSA is the United States' incorporation of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (commonly referred to as "the Hague Rules"). *See Man Ferrostaal, Inc. v. M/V Akili*, 2011 U.S. Dist. LEXIS 6336, *5 (S.D.N.Y. 2011). The Hague Rules are nearly identical to COGSA, except for newer amendments that allow a higher recovery per package in cargo claims. *See Kreta Shipping, S.A. v. Preussag Intern. Steel Corp.*, 192 F.3d 41, 46 (2nd Cir. 1999).
[35] COGSA § 3(2).
[36] *See Assoc. Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47, 50 (2nd Cir. 1992) ("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 the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect." COGSA § 3(8)).
[37] COGSA defines a "carrier" as "the owner or the charterer who enters into a contract of carriage with a shipper," and provides that a "contract of carriage" applies only to those contracts "covered by a bill of lading or any similar document of title." COGSA § 1.
[38] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *8 (citing *Thyssen Steel Co. v. M/V KAVO YERAKAS*, 50 F.3d 1349, 1351 (5th Cir. 1995)).

vessel owner or charterer executed a contract of carriage with the cargo owner" and was thereby the COGSA "carrier."[39] The vessel itself may be liable *in rem*.[40]

The shipper may establish its privity of contract with a vessel owner, and therefore its entitlement to assert a claim under COGSA, by showing "the charterer's authority to bind the vessel owner by signing the bill of lading 'for the master.'"[41] Thus if a charterer's bill of lading is to bind the vessel owner, and thereby confer the status of "carrier" on the owner under COGSA, the charterer must have authority to sign the bill of lading "for the master," and the master must have authority to sign bills of lading for the owner.[42] As set forth in the *QT Trading* decision, the scope and extent of this authority is critical, and, when a charterer exceeds its authority granted by a charter party, cargo interests may be precluded from asserting *in personam* claims against the vessel's owner.

C. The Fifth Circuit Upholds Dismissal of QT Claims.

The Fifth Circuit affirmed the dismissal of the claims against Attic and Patt with little discussion,[43] finding that, because Daewoo had no contract with either defendant, there was no evidence that either Attic or Patt was a party to the bills of lading, or that either had authorized Daewoo to sign bills of lading on their behalf.[44] While a shipper

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[39] *See Thyssen,* 50 F.3d at 1351 (citing *Pac. Employers Ins. Co. v. M/V GLORIA*, 767 F.2d 229, 236-7 (5th Cir. 1985)).

[40] When issued as part of a shipment of public carriage, the bill of lading makes a vessel carrying the referenced cargo liable *in rem* for any damage incurred. *See Romano v. W. India Fruit & S.S. Co.*, 151 F.2d 727, 730 (5th Cir. 1945). To hold the vessel liable *in rem*, the shipper need not have privity of contract with the ship's owners. *See Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2nd Cir. 1972). "Every claim for cargo damage creates a maritime lien against the ship which may be enforced … *in rem*." *Id.* However, the bill of lading in question must be issued by a charterer, and not by a mere Non-Vessel Operating Common Carrier (NVOCC) or similar unauthorized third person. *See Ins. Co. of N. Am. v. S/S Am. Argosy*, 732 F.2d 299, 303 (2nd Cir. 1984); *See also supra* FN 2, defining "*in personam*" and "*in rem*" claims.

[41] *QT Trading*, 2011 U.S. App. LEXIS 9619, *8 (quoting *Thyssen*, 50 F.3d at 1352; and citing *Pac. Employers*, 767 F.2d at 236).

[42] *See id.* (citing *Pac. Employers*, 767 F.2d at 237; and *EAC Timberlane*, 745 F.2d at 719).

[43] *See id.* at *9-10.

[44] *See id.*

may rely on a charter party to support a claim based on the authority of the charterer to sign on behalf of the master and the master's authority to bind the vessel owner, QT had no such claim against Attic or Patt because Daewoo's charter party was with Saga, alone.[45] Therefore, the *QT* Court held that Attic and Patt were not "carriers" subject to liability under COGSA.[46]

1. To Implicate Owners, One Must Sign for the Master.

While Daewoo had a charter party with Saga, the Fifth Circuit held that the decision to dismiss the claims against Saga was supported by the language of the contract, which expressly required that bills of lading issued on Saga's behalf incorporate the Mate's Receipts.[47] Relying on the Saga-Daewoo Charter Party, QT proved that Daewoo's agent had authority to sign on behalf of the master, and that the master was authorized to sign the bills of lading on behalf of Saga.[48] However, the court held that QT's argument that Saga was a COGSA "carrier" failed for two reasons, the first of which related to how the bills of lading were signed.[49] Daewoo's agent wrote on the bills of lading that he signed only for "Daewoo," not "by authority of the master," and not "for Saga."[50] Because they were not signed for the master, the bills of lading could not bind Saga as a "carrier" subject to liability under COGSA.[51] The court contrasted Saga's exoneration with its holding in *Pacific Employers*,[52] where it held a shipowner liable as a

[45] *See id.*
[46] *See id.*
[47] *See id.* at *10-11.
[48] *See id.* at *10.
[49] The second reason related to Daewoo's failure to incorporate the Mate's Receipts. *See id.* at *15, discussed *infra* at § 2.
[50] *See id*. at *11.
[51] *See id.* at *11.
[52] *See Pac.* Employers, 767 F.2d at 237.

COGSA carrier because the charterer's agent had written on the bills of lading that he had signed them "by authority of the master," thereby implicating the vessel owners.[53]

The basis for the Fifth Circuit's decision is also well established in the federal maritime courts of New York. In a case of nearly identical facts and outcome, the United States District Court for the Southern District of New York held that "[i]n general, a shipowner is not personally liable for a bill of lading issued by a charterer which does not indicate the name of the owner and which is not signed by or for the master."[54]

2. Daewoo Exceeded Its Authority under the Relevant Charter Party with Saga.

The Fifth Circuit further held that even if Daewoo's agent had implicated Saga by signing for the master, the signature would have been without effect because the agent exceeded the authority granted by the Saga-Daewoo Charter Party, which required Daewoo and its agents to sign the bills in conformity with the Mate's Receipts.[55] The Saga-Daewoo Charter Party expressly required Daewoo to "accept all consequences that might result from [Daewoo] and/or their agents signing Bills of Lading not adhering to the remarks in Mate's or Tally Clerk's receipts."[56] Because Daewoo's agent signed the bills of lading only as "clean on board," it failed to incorporate or reference the Mate's Receipts, which themselves incorporated the Preshipment Report that noted substantial

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[53] *See id.* (citing *Pac. Employers*, 767 F.2d at 237-38; and *Thyssen*, 50 F.3d at 1352 n.3 (noting that bills of lading were signed "for the master")).

[54] *Mahroos v. S/S TATIANA L*, No.86-CV-6706, 1988 A.M.C. 757, 760 (S.D.N.Y. 1988) (exonerating owner where charterer exceeded authority by issuing bills of lading without incorporating Mate's Receipts that noted pre-load damage to rice cargo); *see also Demsey*, 461 F.2d at 1015 ("Because…[the owner] did not authorize [the charterer's] agent to issue the bills of lading, [the owner] is not liable *in personam*" for damage to cargo). In fact, Judge Learned Hand reached the same conclusion ninety years ago. In *The Poznan*, 276 F. 418, 432 (S.D.N.Y. 1921), Judge Hand wrote that a vessel's owner "was not liable under the bills of lading because these did not purport to bind it," instead the bills of lading were "issued in the name of the charterer." *Id.*

[55] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *15.

[56] *See id.* at *2-3.

pre-shipment damage to the cargo.[57] "The fact that Daewoo failed to sign the bills of lading in accordance with the Mate's Receipts is sufficient, standing alone, to establish [that] Daewoo exceeded its authority."[58]

In sum, when "the signing party exceeds its authority in signing bills of lading not in accordance with the master's instructions, the owner cannot be held liable as a COGSA carrier."[59] As a result the *QT* Court dismissed the COGSA claim against Saga, and QT's only remedy was against Daewoo, as the sole "carrier" as defined by COGSA.[60] Daewoo, of course, had already been dismissed upon filing for bankruptcy protection, and QT was left without a remedy under COGSA.

3. Lack of Exclusive Possession Vitiates Bailment Claim.

As a common law cause of action, a party alleging breach of bailment is not constrained by the statutory language of COGSA and its definition of "carrier." The *QT* Court nevertheless disposed of the bailment claim against Saga because it could not be shown that Saga ever had "exclusive possession" of the cargo.[61] Under the general maritime law of the United States, a claim of bailment arises when (1) "delivery to the bailee is complete" and (2) the bailee "has **exclusive** possession of the bailed property, even as against the property owner." [62]

QT argued that, because Daewoo acted as an agent for Saga during shipping, Saga retained exclusive possession of the cargo and the ensuing damage amounted to Saga's

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[57] *See id.* at *4.
[58] *See id.* at *15.
[59] *See id.* at *13. (citing *Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE*, 1997 U.S. Dist. LEXIS 13102, at *10 (E.D. La. 1997) (dismissing claims against shipowner where charterer exceeded authority by signing bills of lading not in accordance with Mate's Receipts, when required to do so by shipmaster's instructions)); *see also Tuscaloosa Steel Corp. v. M/V NAIMO*, 1993 A.M.C. 622 (S.D.N.Y. 1992) (same)).
[60] *See id.* at *14-15.
[61] *See id.* at *15-16.
[62] *See id.* at *16; *see also Thyssen*, 50 F.3d at 1354-55 (citing *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 (5th Cir. 1983)).

breach of bailment.[63] As in *Thyssen*,[64] however, the Fifth Circuit rejected the claim because the bills of lading and the Saga-Daewoo charter party provided that the vessel owners and charterers both had possession of the cargo.[65] The Saga-Daewoo Charter Party expressly required Daewoo, not Saga, to load, stow, secure, and discharge the cargo.[66] With Daewoo in charge of loading and stowage, it could not be said that Saga ever had exclusive possession of the cargo.[67] The court also found that Daewoo's agent signed the bills of lading on behalf of "Daewoo," not Saga, further undermining any claim that Saga had exclusive possession.[68]

Therefore, the U.S. Fifth Circuit Court of Appeals affirmed the district court decision in its entirety, dismissing the COGSA and bailment claims against the vessel owners, the head charterer, and the technical manager. The court held that QT's remedy was against Daewoo, alone, and Daewoo had already been dismissed from the action upon filing for bankruptcy. The result left QT without a remedy, short of pursuing its *in rem* claim against the vessel in Hong Kong.

D. Advice to Charterers and Owners.

Vessel owners, head charterers and sub-charterers (the "carrier chain") should take several lessons from this case. Shippers sustaining cargo damage will sue as many parties as they can identify in the carrier chain, if only to avoid the fate of QT Trading, in which only one defendant remained, and it was bankrupt. The first lesson is that for

[63] *See id.* at *15-16.
[64] *See Thyssen*, 50 F.3d 1349.
[65] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *16-17.
[66] *See id.* at *17.
[67] *See id.*
[68] *See id.* This ruling is in accord with decisions of other U.S. courts. *See Man Ferrostaal, Inc.*, 2011 U.S. Dist. LEXIS 6336 at *27 (S.D.N.Y. 2011) (exonerating vessel owners as COGSA carriers where charterers issued bills of lading in their own name only, and dismissing bailment claim, as well, on grounds that where "a charterer has taken responsibility for stowage of cargo onboard a ship, the ship owner does not have exclusive possession of the property and so cannot be held liable as a bailee").

some in the carrier chain, there could be an easy out. If faced with a claim, the parties in the carrier chain should review the bills of lading to verify that the bills were signed by the issuer "by authority of the master," and not merely as "agents for [sub-charterer]." The signature for the master would establish the shipper's privity of contract with the employer of the ship's captain, which may be an upstream charterer (if a bareboat charter) or the vessel's owner (if a time charter). Without this language, cargo interests may, under similar circumstances to the *QT Trading* case, lose their *in personam* claims against those parties hierarchically above the party issuing the bills of lading.[69] Thus, if the bills are not signed for the master, the vessel owners and head charterers should reject the claim and refer the shipper to the issuer of the bills of lading, as the sole statutory "carrier" under COGSA.

The second lesson is that, even if the bills are signed for the master, the owners and head charterers should verify that the issuer stayed within the scope and extent of its authority. Most charter parties require that, if the owner and charterers upstream of the issuer are to be bound as statutory "carriers" of the goods, the bills of lading must incorporate the Mate's Receipts. Accordingly, if the bills of lading of lading fail to incorporate the Mate's Receipts, the shipper has likely lost its right of action against the vessel owners and upstream charterers, and should be referred to the issuer of the bills, as the sole statutory "carrier" under COGSA.

Third, as an evidentiary matter, the carrier should undertake a pre-load and discharge survey of any cargo sufficiently valuable to merit the expense. In the event the goods are damaged before transit, the carrier's survey can be documented on the Mate's Receipts to show the nature and extent of pre-load cargo damage, and thereby defend

[69] *See id.*

against the shipper's efforts to hold the carrier liable for damage that the carrier did not cause. Thus in *QT Trading*, had the case continued, the owner's pre-load survey would likely have greatly reduced the carrier's liability to QT because there was independent proof that much of the damage occurred in Dalian, China, before liability attached to the carrier.

Furthermore, it should be noted that if the shipper contests the nature and extent of the pre-load cargo damage noted on the Mate's Receipts, the shipper will often negotiate with the carrier on the exact language with which the bills of lading are claused to note the damage. In that case, the parties in the carrier chain must note the pre-load damage as extensively as possible to preclude a future claim that the damage occurred in transit, and therefore they should negotiate this language with strict attention to detail.

Lastly, as a commercial matter, a shipper might demand "clean" bills of lading, regardless of pre-shipment cargo damage, so that it may receive payment on the receiver's letter of credit ("LOC"), the terms of which will likely require the presentation of "clean" bills for payment. In that instance, the shipper might propose tendering a letter of indemnity ("LOI") to the carrier, to cover claims asserted by the receiver for damage, in exchange for receiving a clean bill of lading from the carrier with which to be paid by the receiver's LOC. However, carriers should view any such invitation with great caution and must check with their club correspondent and club rules before accepting an LOI from a shipper in exchange for issuing a clean bill of lading. It is generally a violation of P&I club rules to knowingly issuing a bill of lading that does not accurately describe the condition and amount of the laden cargo. The practice may actually be a crime in some jurisdictions because it is thought to work a fraud on an innocent third-

party, *i.e.*, the receiver, which is counting on receiving sound cargo based on the "clean" bill of lading, and against which it tendered payment to the shipper. The LOI's general disfavor has been known to raise problems of enforcement. Specifically, in the event the shipper or its bank dishonors the LOI upon presentment for payment, courts may find the carrier as equally at fault as the defaulting shipper, for the act of having issued a bill of lading which inaccurately described the condition of the cargo, and therefore may decline to enforce payment against the LOI. As a result, P&I Clubs generally hold that it is a violation of Club rules, and a forfeiture of cover, if the carrier accepts an LOI in exchange for knowingly issuing a clean bill of lading for damaged cargo.

III. Conclusion

While shippers might view the *QT Trading* decision with shock and consternation, the holding of the Fifth Circuit Court of Appeals is clearly not a new rule.[70] Had the shipper exercised better document control and the manner and style by

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[70] *See supra* FN 7. It should also be noted that the outcome of this case would likely have been the same under the proposed "Rotterdam Rules." Subject to certain defenses, the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), holds only the "carrier" and the "performing parties" who accomplish a shipment under the carrier's "supervision or control," liable to the shipper for cargo damage. *See*: Rotterdam Rules at Article 17 ¶ 1 (liability of "carrier"), Article 18 (liability of carrier's servants), and Article 1 ¶ 6(a) (defining "performing party"). The Rotterdam Rules define the "carrier" as "a person that enters into a contract of carriage with a shipper." *See id.* at Article 1, ¶ 5. To be liable to a shipper for cargo damage, the "carrier" must be identified by name and address on the bill of lading or similar "transport document." *See id.* at Article 36 ¶ (2)(b).
The only instances in which the vessel <u>owner</u> would be liable are those cases in which (a) the owner itself is named as the "carrier" on the bill of lading (whether by issuing the bill of lading itself or by authorizing the charterer to issue the bill of lading in the owner's name), *See id.* at Article 17 ¶ 1; or (b) regardless of the identity of the "carrier," the cause of the cargo damage was an unseaworthy vessel, s*ee id.* at Article 17 ¶ 5(a); or (c) the bill of lading failed to identify <u>any</u> carrier by name and address, in which case liability would revert to the vessel owner, *See id.* at Article 37 ¶ 2. In the latter case, where the bill of lading is blank, the vessel owner will be exonerated if it could (a) show that the vessel was under bareboat charter, and (b) supply the name and address of the bareboat charterer to the shipper, in which case the bareboat charterer would be the default "carrier". *See id.*
Thus, the outcome of the *QT Trading* case would likely be the same under the Rotterdam Rules because sub-charterer Daewoo, alone, was the statutory "carrier" named on the bills of lading, and Attic, Saga and Patt were not carriers. Neither were they "performing parties," subject to liability under the Rotterdam Rules, because it could not be said that Attic, Saga and Patt were servants working under Daewoo's "supervision or control" to accomplish the shipment. *See id.* at Article 1, ¶ 6(a). (It should be noted that

which the bills of lading were signed, it is likely that the District Court would have denied the defendants' motions for summary judgment. In that case, QT Trading could have proceeded against three defendants instead of zero, given the untimely bankruptcy filing by Daewoo and the documentation omissions which absolved the other parties in the "carrier" chain.[71]

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the Rotterdam Rules do not yet apply. The United Nations adopted the Rotterdam Rules in 2008, with 23 nations joining, of which one, Spain, has ratified the Rules to date. The Rotterdam Rules will become effective among the ratifying nations once 20 nations have ratified them. As of June 2011, the United States has signed but not ratified the Rotterdam Rules. Accordingly, the Rotterdam Rules are not yet effective anywhere, including the United States, wherein COGSA remains the controlling statute).

[71] The facts of this case were unique in that all defendants were dismissed. Ordinarily, the sub-charterer who issued the bill of lading would have remained in the litigation. Daewoo, however, was dismissed upon filing for bankruptcy protection. *See supra* FN 31.