COMPLEXITY, CONFUSION AND THE MULTIFACETED LEGAL ROLES OF THE INTERNATIONAL FREIGHT FORWARDER

PETER CAIN*

The freight forwarder is a critical service provider in world trade and transport. As the 'architect of transport', the freight forwarder offers transport and logistics solutions characterised by efficiency, value and flexibility. The freight forwarder performs a variety of service roles, depending on the specific needs of the client shipper. As almost a corollary to the flexibility of these service roles, the legal roles that may be occupied by the freight forwarder are varied. This article provides an overview of the various legal roles of the freight forwarder with respect to its client shipper. The two primary classifications of legal roles identified are that of agent (for the shipper) and principal. The sub-classification of those two primary roles reveals further complexity, particularly in the role of principal (for example, performing carrier, contractual carrier or pure principal). Beyond the base of contractual roles and responsibilities, the law of bailment provides additional legal obligations. Case law and legal commentators provide examples illustrating the confusion and complexity in defining the true legal role of the freight forwarder. A taxonomy of legal roles is identified. As a conclusion, it is recommended that care be taken in drafting freight forwarders' terms of engagement and associated contracts of carriage to clearly specify the role, responsibilities and obligations of the freight forwarder in an entire freight movement.

I INTRODUCTION

This article is centred on the international freight forwarder,[1] a specialist transport intermediary who operates in the space between those with cargo interests ('shippers'),[2] performing carriers[3] and non-carrying intermediaries.[4] The international freight forwarder specialises in efficient

* Peter Cain, LLB (QUT), is a lecturer with the National Centre for Ports and Shipping of the Australian Maritime College, a specialised institute of the University of Tasmania. The author wishes to thank Professor Gino Dal Pont and Dr Jiangang Fei, both of the University of Tasmania, for their considered and helpful suggestions for changes to the article.

1 A 'freight forwarder' is a specialist transport intermediary (that is, an intermediary as between shippers and carriers) which provides a wide range of services in relation to the carriage of goods. The previous common name of the intermediary was that of a 'forwarding agent'. The common contemporary change in name to 'freight forwarder' reflects the broader and deeper involvement in the freight movement, which forms the base of much of the content in this article.

2 A 'shipper' has an interest in cargo required to be transported to meet the obligations of an overarching sale of goods contract. For the purpose of this article, it is assumed that some international transport is required to meet the obligations under a sale of goods contract.

3 A 'performing carrier' is a carrier who physically acts to carry goods, no matter the mode of transport.

4 A 'non-carrying intermediary' is a transportation intermediary who, while not carrying goods, performs a physical function during the course of an entire freight movement. Examples may be a warehouse or a stevedore. The collective term 'performing parties' is used in this article to encompass any or all of the

door-to-door multimodal cargo transportation by providing a broad portfolio of services to shippers. This article identifies, describes and classifies the varying legal roles of the international freight forwarder as a crucial intermediary in contemporary world trade and transport.

Courts and commentators have identified uncertainties and a lack of clarity in the legal roles of freight forwarders. The lack of clarity is most evident upon loss or damage to cargo of the shipper, and the diverse range of parties that may be pursued to meet that loss or damage. A shipper may commence a legal action against a freight forwarder and one or more performing carriers or non-carrying intermediaries.[5] This may lead to cross-claims being initiated between defendants. The claims pleaded by a shipper can be as diverse as in contract, tort (negligence or a property-based tort), bailment and/or breach of statute.[6] While it can be appreciated that plaintiffs are cautious and wish to incorporate all possible claims,[7] were the legal role of the freight forwarder relatively clear, such actions would be streamlined. The key in any case is to ascertain the legal role of the freight forwarder. Uncertainty of the legal role has a cost for all participants in international transport, including the direct cargo and carrying interests, but also rippling outwards to encompass insurers, financiers and law/policy makers.

II INTRODUCTION TO THE LEGAL ROLE OF THE FREIGHT FORWARDER

The most obvious role of the freight forwarder — the *service* role(s),[8] being the actual specific functions carried out by a freight forwarder for the shipper — has a historic background

---

performing carriers and non-carrying intermediaries who perform functions within an entire freight movement.

5 For examples of claims, see *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd* [2001] NSWCA 281 (In this case, the shipper took action against the freight forwarder under a 'contract of bailment', and against a road carrier in negligence. The road carrier counterclaimed for indemnity or contribution against the freight forwarder. As to the question of characterisation, the court found that the freight forwarder had contracted as principal with the shipper); *The Assets Venture* (2002) 192 ALR 277 (In this case, the shipper took action against the freight forwarder under contract, bailment and in negligence, and against the sea carrier in bailment and in negligence. The freight forwarder gave notice to the sea carrier of its intention to seek an order for contribution or indemnity if it was found liable to the shipper. The sea carrier counterclaimed against the freight forwarder for damages, indemnity or contribution if found liable to the shipper. Ultimately, the court held that the freight forwarder had contracted as principal with the shipper); *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd; The Cape Comorin* (1991) 24 NSWLR 745 ('*Carrington Slipways*') (In this case, the shipper took action against four parties/defendants. The freight forwarder was sued in contract under its house bill of lading. The time charterer of the carrying ship, the Cape Comorin, was sued in contract under the ocean bill of lading. The owner of the Cape Comorin was sued in bailment. The stevedore was sued in negligence. On the question of characterisation of the freight forwarder, the court found the freight forwarder had acted as the agent of the shipper).

6 See, eg, *East West Corporation v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83. In that case, the shippers took action against carriers under a combined transport bill of lading in tort (negligence and conversion) and in contract.

7 Indeed, a failure to plead all material facts underlying all potential causes of action (either directly or in the alternative) may ultimately prove fatal to an overall claim.

8 Jan Ramberg acknowledges the broad spectrum of freight forwarder functions by characterising the freight forwarder neutrally as a 'service provider': See Jan Ramberg, 'Freight Forwarder Law' (Paper presented at Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007) 1 <www.uncitral.org/pdf/english/congress/Ramberg.pdf>.

extending back at least to the 13th century.[9] An exhaustive characterisation of the modern service roles of the freight forwarder is not an easy task,[10] but a useful broad descriptor is that of an 'architect of transport'.[11]

The introduction of the container,[12] and its fundamental part in modern combined transport (that is, a door-to-door delivery service), has broadened the scope of the service role of freight forwarders.[13] Before the container, the most critical mode of transport was the maritime leg. The maritime transport mode was commonly international, often the longest in duration and the riskiest in terms of possible catastrophic loss. The commercial imperative has since moved away from the seaports and from the loading of break bulk cargo dockside. Prepacked and secured containers enclosing valuable goods are nowadays the vital tool that allows for multimodal transport. The modern shipper's justified expectation is for efficient, timely and regular door-to-door transportation.[14]

The chain of carriage in a contemporary door-to-door cargo movement can be complex.[15] The individual freight forwarder, depending on the terms of its engagement, can be involved in many disparate and critical activities. Dr Hans-Joachim Schramm usefully categorises twelve broad potential service functions of a freight forwarder: 'consultancy, packaging, clearance, documentary, affreightment, consolidation, insurance, logistics, fiduciary, supervision, quasi-banking and transport'.[16]

---

9 The practice in the 13th century of the '*frachter*' acting as a combination of guide, forwarding agent and provider of an armed guard is discussed well in Donald James Hill, *Freight Forwarders* (Stevens, 1972) 4.

10 See discussion in H Edwin Anderson, 'The Status and Associated Liability of Ocean Freight Forwarders' (2009) 36(2) *Transportation Law Journal* 121, 121–4.

11 This description is attributed to the International Federation of Freight Forwarders Associations (FIATA), the peak international industry association representing freight forwarders: FIATA, *About FIATA: Who is FIATA* (2014) International Federation of Freight Forwarders Associations <http://fiata.com/about-fiata.html>.

12 The containerisation revolution began in 1956 when, as Marc Levinson describes, 'the Ideal-X, a war-surplus oil tanker with a steel frame welded above its deck, loaded 58 aluminium containers at a dock in Newark, New Jersey. Five days later, the ship steamed into Houston, Texas, where trucks took on the metal boxes and carried them to their destinations': Marc Levinson, 'How a box transformed the world', *Financial Times* (online), 24 April 2006 <http://www.ft.com/intl/cms/s/1/4bdb14b2-d3b7-11da-b2f3-0000779e2340.html#axzz3HtR0OnCe>.

13 Jan Ramberg, 'Unification of the Law of International Freight Forwarding' (1998) 3(1) *Uniform Law Review* 5, 6 <http://www.unidroit.org/english/publications/review/articles/1998-1-ramberg-e.pdf>.

14 See discussion in Ian C Holloway, 'Troubled Waters: The Liability of a Freight Forwarder as a Principal under Anglo-Canadian Law' (1986) 17(2) *Journal of Maritime Law and Commerce* 243, 243–4.

15 Even a relatively straightforward container movement might involve the following steps: container loaded at factory in export country, container collected and moved to 'dry port' (an inland intermodal terminal), container loaded and moved by rail to export port, container loaded onto ship, international sea carriage, container unloaded at port in import country, container carriage by road to importer's distribution centre and container unloaded. Beyond the actual cargo carriage, there are manifold other dealings with the cargo — dealings with transport/security documentation, obtaining insurances, export/import licence compliance, customs declarations and clearances, quarantine clearances, payment of ports fees and charges, payment of government taxes and charges, etc. See discussion in Brian Harris, *Ridley's Law of the Carriage of Goods by Land, Sea and Air* (Thompson Reuters, 8th ed, 2010) 388.

16 Hans-Joachim Schramm, *Freight Forwarder's Intermediary Role in Multimodal Transport Chains: A Social Network Approach* (Physica-Verlag, 2012) 25–9.

Beyond the *service* role, it is necessary to inquire into the *legal* role of the freight forwarder. Though there is clearly a close relationship between the two, they are nonetheless distinct.[17] The primary determinant of the legal role of the freight forwarder is the entire course of dealings between the freight forwarder and shipper, including the contractual terms of the engagement.[18] This means that in any specific claim against a freight forwarder following cargo damage or loss, a court will very likely consider a general or overarching agreement(s) between the shipper and freight forwarder and specific contract(s) of carriage involved in the subject freight movement.[19] A freight forwarder may be acting under contract as principal, agent, carrier or some other legal amalgam or hybrid.[20]

In addition to the contractual role, a freight forwarder may assume responsibility in tort (negligence)[21] or as a bailee[22] of the shipper's goods. There may be liability for the freight forwarder acting as a carrier under an international cargo carriage regime. There may, moreover, be liability for the freight forwarder under domestic legislation.[23] The nature and extent of the legal role is evidently one of some complexity and is heavily reliant on individual cases.

An examination of the specific *legal* roles identified by case law, conventions and commentators ensues, with the aim of creating a taxonomy of legal roles.

II FREIGHT FORWARDER AS AGENT FOR SHIPPER

A *Agent for Shipper as the Traditional Legal Role*

The 'traditional' or 'historic' role of the freight forwarder is as an agent for the shipper. In this role, freight forwarders are engaged as experts in cargo transport to determine and execute the most efficient transport strategy.[24] As an agent, the prime work of the freight forwarder is to enter its principal (the shipper) into contracts with performing parties. The entire freight movement is then carried out by the performing parties who have privity of contract with the

---

17 It may be that, from a shipper's perspective, the question of the legal role of the freight forwarder is only likely to receive any real consideration if there is loss or damage to the goods being transported, and a claim then needs to be made.

18 *A Gagniere & Co v Eastern Company of Warehouses* (1921) 7 Ll L Rep 188; *C A Pisani and Co Ltd v Brown, Jenkinson and Co Ltd* (1939) 64 Ll L Rep 340; *Hair & Skin Trading Co Ltd v Norman Air Freight Carriers and World Transport Agencies Ltd* [1974] 1 Lloyd's Rep 443; *EMI (New Zealand) Ltd v William Holyman & Sons Pty Ltd; The Maheno* [1977] 1 Lloyd's Rep 81 ('*The Maheno*').

19 *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418 [1]–[16], [27]–[36] (McHugh ACJ).

20 *The Maheno* [1977] 1 Lloyd's Rep 81.

21 See *Jones v European and General Express Co Ltd* (1920) 4 Ll L Rep 127; *Hair & Skin Trading Co Ltd v Norman Air Freight Carriers and World Transport Agencies Ltd* [1974] 1 Lloyd's Rep 443; *Geofizika DD v MMB International Ltd; The Green Island* [2010] 2 Lloyd's Rep 1; [2010] EWCA Civ 459.

22 See *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *The Assets Venture* (2002) 192 ALR 277; [2002] FCA 440; *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83.

23 See, eg, *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* (1993) 113 ALR 677 ('*Comalco Aluminium*') (liability of freight forwarder under the (then) *Trade Practices Act 1974* (Cth)).

24 The transport strategy may involve a consideration of different possible modes of carriage, different carriers within a single mode, time and cost of different carriage alternatives, recommendations as to level of insurance, advice as to risk minimisation, trade financing alternatives, etc.

shipper. An examination of the legal roles of freight forwarders typically commences with the oft-quoted words of Goddard LJ in the 1939 English case *C A Pisani and Co Ltd v Brown, Jenkinson and Co Ltd*.[25] His Lordship characterised a 'forwarding agent' as

> willing to forward goods for you … to the uttermost ends of the world. 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, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract. [26]

The common terminology of the time ('forwarding agent') gives more than a hint as to the status of the freight forwarder.[27] Prior to the 1950s container revolution, the legal role of the freight forwarder as a forwarding agent was the industry norm and quite clear. The imperative was for the forwarding agent to find space on a ship and to enter its principal into a contract of carriage. The loading and unloading of unconsolidated break bulk cargo was a long and laborious process. The shipper had much greater control over this critical process as direct principal with the sea carrier.

Though the legal role of the freight forwarder as forwarding agent persists, it has been significantly overtaken by the other roles discussed below.

B *Freight Forwarder Acting as a Dual Agent*

Professor Jan Ramberg observes that freight forwarders can position themselves so they have 'dual' agency functions — for the shipper, but also for the carrier.[28] The immediate impression, from someone operating outside of the maritime industry, may be one of surprise at an agent positioning themselves on both sides of an onerous and possibly contentious transaction. It is well accepted that the agent–principal relationship ordinarily exhibits indicia that attract fiduciary duties superimposed on the contract engaging the agent. Fiduciary duties, which are almost invariably more onerous than those imposed by agreement, are directed to fostering 'undivided loyalty', in this context reflected in the proscription that an agent must avoid conflicts

---

25 (1939) 64 Ll L Rep 340.

26 *C A Pisani and Co Ltd v Brown, Jenkinson and Co Ltd* (1939) 64 Ll L Rep 340, 342. See also *Jones v European and General Express Co Ltd* (1920) 4 Ll L Rep 127; *A Gagniere & Co v Eastern Company of Warehouses* (1921) 7 Ll L Rep 188; *Hair & Skin Trading Co Ltd v Norman Air Freight Carriers and World Transport Agencies Ltd* [1974] 1 Lloyd's Rep 443; *Carrington Slipways* (1991) 24 NSWLR 745; *Geofizika DD v MMB International Ltd; The Green Island* [2010] 2 Lloyd's Rep 1; [2010] EWCA Civ 459.

27 See *Jones v European and General Express Co Ltd* (1920) 4 Ll L Rep 127, 127 (Rowlatt J): 'It must be clearly understood that a forwarding agent is not a carrier… All he does is to act as agent and make the necessary arrangements, as far as is necessary, between the ship and the railway or anywhere else'.

28 This is explained in the following:

> Traditionally, freight forwarders offer their services in connection with international transport by contracting with carriers as agents for the customer. They could also be retained by carriers in soliciting cargo for their benefit and as their agents. In ports served by liner shipping companies, freight forwarders are often appointed as liner agents. Consequently, they would have a dual function representing both parties in the contractual relationship that they have arranged as agents.

Ramberg, 'Freight Forwarder Law', above n 8, 1–2.

between duties owed to two principals.[29]Yet this dual agency role occurs, and is accepted, as a daily feature of maritime transport and commerce.[30]

C *'Agency Plus'*

In his 2012 book on freight forwarding law, David Glass identifies an agency role that could be described as 'agency plus'. This is where the freight forwarder acts in the traditional role of shipper's agent, but voluntarily takes on additional legal responsibilities and obligations (such as warranting a maximum price for carriage).[31] There is nothing to preclude an agent from voluntarily accepting this additional legal obligation, in addition to its main role as agent. The drivers for this particular role appear to be the increasing complexity of transport and logistics, coupled with the willingness of freight forwarders to expand their role as specialist transport advisers and consultants. The broadening and deepening role of the freight forwarder is discussed under the following heading.

IV FREIGHT FORWARDER AS PRINCIPAL

A *The Many Permutations of the Freight Forwarder as Principal*

While the traditional role of the freight forwarder is that of agent, increasingly its contemporary role is as a principal. The core reason for this is the common business strategy for freight forwarders to seek a much broader and deeper involvement in freight transport, and in their shippers' logistics systems. There are many drivers for this business strategy, four of which will be discussed briefly. These are related in that the pace of change of modern transport has greatly strengthened the role of the freight forwarder as a specialist consultant and advisor in modern transport.

The *first* driver is the container revolution from the late 1950s, which enabled great efficiencies in loading and unloading vessels and allowed for the reality of efficient multimodal transport.[32] In particular, it allowed the freight forwarder to expand its services to the shipper, such as the packing and consolidation of cargo pre and/or post carriage.[33] The *second* driver is the

---

29 *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 46–7.

30 See judicial consideration of the dual agency practice, without controversy or criticism, in *C A Pisani and Co Ltd v Brown, Jenkinson and Co Ltd* (1939) 64 Ll L Rep 340; *Heskell v Continental Express Ltd* (1950) 83 Ll L Rep 438.

31 In this respect, Glass states:

> … it is perfectly possible on principles of agency for a forwarder to give a guarantee to his principal while additionally having authority to create privity of contract between his customer and the actual carrier. Conversely it is possible for a forwarder, as an agent, to create privity but additionally to accept a personal responsibility to the actual carrier.

David Glass, *Freight Forwarding and Multimodal Transport Contracts* (Informa Law, 2nd ed, 2012) 61.

32 Ibid 43–4.

33 Mandy Verena Rigtering, *Stuck in the Middle: Freight Forwarder — Forwarding Agent or Contracting Carrier?* (LLM Thesis, University of Capetown, 2009) 5–9. <http://www.indabook.org/preview/42clx9e8LWmDLecAF6B6V9O3vIdXpkcK4v3Pyh-tT0I,/Stuck-in-the-Middle-Freight-Forwarder-Forwarding.html?query=International-Freight-Forwarding-Agents>.

information technology revolution from the 1970s, which opened the door to efficiencies such as information transfer, electronic document processing, and real time tracking and tracing of shipments.[34] The ability to effectively use these critical systems afforded freight forwarders an opportunity to further promote themselves as specialist transport consultants and advisors.[35] The *third* driver is the rise of logistics as a fundamentally important part of the effective planning and operations for a modern business. Logistics is a discipline derived from military roots, where the flow of materials and information within the company–customer relationship are studied.[36] In a commercial sense, a logistics system comprises all of the activities that determine the flow of materials and information within a business involved in the supply of goods and/or services to a customer.[37] As almost a natural progression from offering door-to-door solutions, freight forwarders increasingly seek to be actively involved within the logistics systems of their client shippers.[38] The first three drivers are from the freight forwarder's perspective (the supply side). The *fourth* driver derives from the perspective of the shipper (the demand side). In a world of increasing competition and specialisation, the services of a freight forwarder are generally welcomed by shippers. The promise is to carve off the complexities of transport to an expert in that field.

Acting as principal usually allows the freight forwarder (depending on its contract with the shipper) considerable freedom in how it moves goods, and in its relationship with third parties involved in the overall freight movement.[39] The cases identify a range of possible subcategories of principals, depending on the terms of the relevant engagement.[40] A principal may be the performing carrier for all or part of the overall freight movement.[41] A principal may be the contractual carrier (that is, assume the responsibility as carrier to the shipper, and subcontract out all or parts of the carriage and associated dealings with the goods).[42] A principal may take on an amalgam role, as principal for one mode of the carriage, and as agent for another mode (or

---

34 Schramm, above n 16, 45.

35 Ibid 62.

36 Gianpaolo Ghiani, Gilbert Laporte and Roberto Musmanno, *Introduction to Logistics Systems Management* (Wiley, 2nd ed, 2013) 1.

37 Ibid 1–2.

38 Glass, above n 31, 1. Indeed, freight forwarders are increasingly seeking to position themselves as third party logistics providers (3PLs) and fourth party logistics providers (4PLs), providing services to meet the logistics needs of shippers (offering a broad range of services such as warehousing, product assembly and labelling, pick and pack, order fulfilment, inventory management, reverse logistics, etc). For definitions of 3PLs and 4PLs, see Council of Supply Chain Management Professionals, *Supply Chain Management Terms and Glossary* (August 2013) Council of Supply Chain Management Professionals 86, 195 <http://cscmp.org/sites/default/files/user_uploads/resources/downloads/glossary-2013.pdf>.

39 Typical bills of lading or contracts of carriage issued by freight forwarders allow significant liberty in favour of the freight forwarder, including liberty to subcontract all or part of the actual performance of the entire freight movement. A 'liberty to subcontract clause' within a bill of lading is one of a commonly claimed suite of liberties in favour of the carrier. The liberty to subcontract clause allows the carrier substantial freedom to engage third parties to perform part or whole of the contractual carriage.
See related discussion in Craig Neame, 'Who Contracts with Whom? An Analysis of Chinese Exports to the United Kingdom' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Uni-Modal and Multi-Modal Transport in the 21st Century* (Taylor and Francis, 2013) 113, 118–119.

40 See discussion of principals' roles in Holloway, above n 14.

41 *Singer Co (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

42 *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57.

modes) of the carriage.[43] Or a freight forwarder may be a 'true' or 'pure' principal, undertaking no part in the carriage of goods, whether as a performing carrier or as a contractual carrier.[44] A freight forwarder may be liable as a bailee of goods.[45] Each of these subcategories is examined below.

B *Freight Forwarder as Performing Carrier*

Professor Jan Ramberg usefully characterises an undertaking by a freight forwarder to carry goods as one that may be done as a *performing* carrier or as a *contracting* carrier, who then subsequently subcontracts out all or part of the actual cargo movement.[46] The real catalyst for the need to discern the true nature of the shipper–freight forwarder legal relationship, and the role of the freight forwarder, is often damage or loss of goods. Depending on all of the circumstances, it may be argued that the freight forwarder was acting as a shipper's agent, as principal, or as a carrier (or indeed as a 'hybrid').[47]

The difference between the possible conclusions is no dry academic argument. For example, faced with a claim for cargo loss or damage, a sea carrier can usually invoke the benefit of a long list of exemptions/defences available under the applicable cargo liability regime.[48] If the exemptions do not apply to the individual circumstances, a sea carrier may be able to claim very restrictive package limitations[49] to greatly reduce the quantum of its liability for loss or damage. In other words, being classified as a carrier invokes greater responsibility, but also makes available the (typically) beneficial provisions of cargo liability regimes.

The freight forwarder may actually perform part or whole of the overall freight movement.[50] This may be particularly apt for performing carriers whose core business is the performance of a particular mode of transport, but who wish to expand their scope of overall service to offer a door-to-door delivery service. It is not uncommon for the terms of engagement between a shipper and a freight forwarder to allow substantial liberty to the freight forwarder in performing

---

43 *The Maheno* [1977] 1 Lloyd's Rep 81.

44 *M Bardiger Ltd v Halberg Spedition Aps* (Unreported, Queens Bench Division, Evans J, 26 October 1990) ('*Bardiger v Halberg*').

45 *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd* [2001] NSWCA 281.

46 Ramberg, 'Unification of the Law of International Freight Forwarding', above n 13, 6.

47 *The Maheno* [1977] 1 Lloyd's Rep 81, 86 (Beattie J).

48 Such regimes include the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931) ('*Hague Rules*').

49 A package limitation being a limitation of liability provision within a contract of carriage, whether contractually-based or incorporated through the operation of a cargo liability regime.

50 See *Singer Co (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 (in this case the freight forwarder crated and delivered the goods to a port by road, and then acted as a principal with a port authority for stevedoring activities). Compare and contrast *The Maheno* [1977] 1 Lloyd's Rep 81 (a similar situation, but in this case, the freight forwarder, after performing the land segment of a movement, was held to act as an *agent* for the shipper for the balance of the freight movement).

the carriage itself, or subcontracting all or part of the carriage and associated activities to third parties.[51]

C *Freight Forwarder as Contracting Carrier*

A freight forwarder may have accepted responsibility as contractual carrier for the entire freight movement when, in fact, the freight forwarder may perform none of the actual carriage or associated activities. In *Salsi v Jetspeed Air Services Ltd*,[52] Donaldson J, in construing an air freight contract, found the freight forwarder to be a contracting carrier. The contractual role as principal was not to carry the goods, but to 'personally procure that the goods were carried'.[53] In *Assets Venture*,[54] Lee J examined the case of a freight forwarder who delivered goods between mainland Western Australia and the Cocos (Keeling) Islands. His Honour found that in the circumstances, the freight forwarder 'contracted personally to effect delivery of the machine; not to use its skills as an agent to obtain a carrier or carriers for the plaintiff'.[55]

D *Freight Forwarder as Contracting Carrier and Cargo Liability Regime Carrier*

The next possible step, beyond the freight forwarder accepting responsibility as a contracting carrier, is for domestic legislation to compulsorily apply a cargo liability regime to the contract of carriage.[56] Under this sub-category the freight forwarder has responsibilities under contract as a 'carrier', but also holds additional responsibilities as 'carrier' under one or more cargo liability regimes.[57]

In *Aqualon (UK) Ltd v Vallana Shipping Corp*,[58] the issue was whether a freight forwarder was a road carrier in terms of United Kingdom (UK) legislation (which applied the *Convention on the Contract for the International Carriage of Goods by Road*,[59] the 'CMR', to certain road carriage contracts). After examining the dealings between the parties, the Queen's Bench Division found that a Dutch freight forwarder (Nilsson) was the CMR carrier. Nilsson was thereby both the contractual carrier and the CMR (cargo liability regime) carrier.

---

51 In theory and in practice, this subcategory of principal may not be that different from the following subcategory of principal (as being the contractual carrier). The only difference may in fact be that the principal actually undertakes some part of the carriage themselves.

52 [1977] 2 Lloyd's Rep 57, 60.

53 Ibid.

54 *Westrac Equipment Pty Ltd v 'Assets Venture'* (2002) 192 ALR 277.

55 Ibid [36].

56 See generally Martin Davies, 'The Elusive Carrier: Whom do I Sue and How?' (1991) 19(4) *Australian Business Law Review* 230, 232; Gillian Bristow, 'Freight Forwarder: Principal or Agent? What Difference Does it Make?' (1999) 27 *Australian Business Law Review* 196, 203.

57 This reality is reflected in the drafting of standard bills of lading and contracts of carriage. Standard contractual drafting practices recognise and allow for the application and operation of international cargo conventions. As an example, standard forms of bills of lading provide for paramount clauses that clearly acknowledge the potential compulsory application and operation of maritime cargo conventions to the bill/contract.

58 [1994] 1 Lloyd's Rep 669.

59 *Convention on the Contract for the International Carriage of Goods by Road*, opened for signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961).

In *Siemens Ltd v Schenker International (Australia) Pty Ltd*,[60] the High Court of Australia considered an air freight case involving Siemens as shipper, Schenker as freight forwarder and Singapore Airlines as actual carrier from Berlin to Melbourne. Both Singapore Airlines and Schenker issued air waybills.[61] Valuable equipment belonging to Siemens was lost when it fell from a truck located outside the boundary of Melbourne Airport. The Court accepted that Schenker was a carrier for the purposes of the Australian air cargo liability regime.[62] Schenker, as freight forwarder, was thereby both the contracting carrier and the cargo liability regime carrier.

E *The Pure (Non-Carrying) Principal*

There is yet another legal role that the principal freight forwarder may occupy. This is an intermediate role, probably best described as that of a pure principal or 'pure forwarder'.[63] The leading case is the unreported decision of *Bardiger v Halberg*.[64] It considered the unfortunate loss of raw mink skins by theft from a truck. The skins had been transported from Copenhagen and were lost a short distance from their ultimate intended delivery point in East London. There were five plaintiffs and 11 defendants. The first plaintiff (Bardiger) purchased the skins and appointed the '*speditorer*' (forwarder) Halberg to arrange their transport to two street addresses in East London. The skins were packed in 18 cartons, 12 of which were stolen. A major issue was to determine which of the 11 defendants were CMR carriers.[65] Evans J saw nothing in principle to compel a finding that Halberg was either an agent or carrier.[66] Evans J discerned a third possibility, that is, that the freight forwarder acts as a true intermediary between the shipper and the carrier(s), and in this role is obliged 'to make suitable arrangements for the carriage, at his own expense'.[67] His Lordship found Halberg to occupy this role.[68] The distinction between this role, and that of the contracting carrier considered above, is that the freight forwarder as contracting carrier takes responsibility for the whole freight movement.

---

60 (2004) 216 CLR 418.

61 Ibid [7] (McHugh ACJ), [87] (Gummow, Callinan and Heydon JJ).

62 Ibid [18]–[21], [36] (McHugh ACJ), [87] (Gummow, Callinan and Heydon JJ). The applicable Australian air cargo liability regime was the *International Convention for the Unification of Certain Rules Relating to International Carriage by Air [Warsaw Convention]*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933), as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955, 478 UNTS 371 (entered into force 1 August 1963) , applicable by force of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) s 11(1).

63 This is the description used by Mance J in *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669, 673.

64 (Unreported, Queens Bench Division, Evans J, 26 October 1990).

65 *Convention on the Contract for the International Carriage of Goods by Road (CMR)*, opened for signature 19 May 1956, 399 UNTS 189 (entered into force 2 July 1961), as applied by the *Carriage of Goods by Road Act 1965* (UK).

66 *Bardiger v Halberg* (Unreported, Queens Bench Division, Evans J, 26 October 1990) 16.

67 Ibid.

68 The court determined that Halberg 'was limited to that of procuring carriage by another person': Ibid, 19.

In *Aqualon (UK) Ltd v Vallana Shipping Corp*,[69] discussed above, the Dutch freight forwarder (Nilsson) argued, on the basis of *Bardiger v Halberg*,[70] that its true role was as pure principal. Mance J nonetheless found Nilsson to be a carrier, reasoning as follows:

> I would accept that it must be possible for a contractor to undertake an intermediate role such as that described by Mr Justice Evans in *Bardiger*. This does not mean that such a role is either likely or lightly to be inferred. It represents an intermediate position between the responsibilities of a carrier and an agent.[71]

These cautionary words seem apt and appropriate, and the likelihood of a court finding a freight forwarder as a pure principal will likely be low. It appears that no English court has followed *Bardiger v Halberg*[72] and found a freight forwarder to be a pure principal. It may, accordingly, be that it is a decision largely confined to its own particular factual and legal matrix.[73]

F *Amalgam of Roles — Principal and Agent*

A freight forwarder may occupy a 'hybrid' legal role, being both an agent and a principal within an overall freight movement. In *The Maheno*,[74] the New Zealand Supreme Court held that the freight forwarder acted as principal/carrier for one mode of the overall freight movement, and as an agent for the balance of the movement.[75] There seems to be no principle of law precluding parties from organising themselves with the freight forwarder in an amalgam role.[76] This may occur if the freight forwarder is the performing carrier for one mode of carriage, and does not wish to take any further responsibility in the overall freight movement. This could be described as a 'modal' or 'spacial' amalgam of roles.

Another form of amalgam of roles has been identified in United States (US) jurisprudence. This is where a freight forwarder, in clearly adopting a role as principal/contracting carrier, *also* acts as an agent for its shipper for a limited purpose. The leading exposition is found in the Supreme Court's reasons in *Norfolk Southern Railway Co v James N Kirby Pty Ltd*.[77] Kirby, an Australian company, sold machinery loaded in ten containers to be delivered from Sydney to the purchaser in Huntsville, Alabama.[78] An Australian freight forwarding company ('ICC') was engaged to

---

69 [1994] 1 Lloyd's Rep 669.

70 (Unreported, Queens Bench Division, Evans J, 26 October 1990).

71 [1994] 1 Lloyd's Rep 673.

72 (Unreported, Queens Bench Division, Evans J, 26 October 1990).

73 This includes the complex facts with many parties, the operation of Danish civil law, the status of the '*speditor*' under Danish law, and the combined operation of the CMR Convention and UK statute.

74 [1977] 1 Lloyd's Rep 81.

75 Beattie J of the New Zealand Supreme Court stated:

> … the liability of the defendant is restricted to its position, first, as a carrier and bailee for reward for the land segments of the journey, and secondly, that its liability for the sea leg is simply that of a ship forwarder or shipper's agent. It follows that in my opinion, the consignment note should not be regarded as a 'through' bill of lading, covering the whole transit.

Ibid 86.

76 Although, to protect themselves and to avoid uncertainty, the parties should reflect that arrangement clearly in the contract of carriage(s) and associated materials.

77 543 US 14 (2004) ('*Norfolk v Kirby*').

78 Ibid 19.

arrange the through transport.[79] ICC issued its own bill of lading ('ICC bill') encompassing the whole through transport.[80] The ICC bill provided for package limitation provisions from the US *Carriage of Goods by Sea Act* 46 USC App (1936) ('*COGSA*')[81] regime for the sea leg of the transport.[82] The ICC bill provided for a different (and more generous to the shipper) package limitation regime for the land transport mode within the US.[83] It also contained a form of a Himalaya clause[84] seeking to extend the benefits of the bill of lading to independent contractors performing under the bill.[85] ICC was not a performing carrier and engaged carriers to perform the freight movement.[86] ICC contracted Hamburg Sud to transport the containers for the entire movement.[87] Hamburg Sud issued a bill of lading to ICC ('Hamburg Sud bill').[88] The latter acknowledged the statutory application of the *COGSA* package limitation for the sea leg of transport.[89] It also incorporated a Himalaya clause and a paramount clause[90] contractually extending the *COGSA* package limitation regime to encompass the land leg of the freight movement.[91]

Through a subsidiary, Hamburg Sud contracted with the petitioner, Norfolk Southern Railway Company ('Norfolk'), to carry the containers from the Port of Savannah to Huntsville.[92] Kirby

---

79 Ibid.

80 Ibid. The ICC through bill encompassed the whole intermodal freight movement. On terminology, the better strict legal view is probably that a 'through bill of lading' refers to transport by two or more separate sea legs, whereas a 'combined bill of lading' has an expanded scope, being a bill of lading designed to encompass an entire freight multimodal movement of goods, no matter the modes involved, and typically being for door-to-door carriage. However, elements of industry conflate the two terms to describe a bill covering the entire multimodal transport of goods. See D Rhidian Thomas, 'Multimodalism and Through Transport — Language, Concepts, and Categories' (2011–2012) 36(2) *Tulane Maritime Law Journal* 761, 769–70.

81 That is, the US mandated marine cargo liability regime: *Carriage of Goods by Sea Act*, 46 USC App §§1301–1315 (1936).

82 *Norfolk v Kirby*, 543 US 14 (2004), 19.

83 Ibid 20.

84 A 'Himalaya clause' is a specific provision in a bill of lading, or other contract of carriage, which is designed to extend benefits, under that contract with the carrier, on to performing subcontractors involved in an entire freight movement. The contractual benefits can include defences, limitations upon claim and time bar provisions. A Himalaya clause avoids the problem of third parties enjoying the benefits of a contract to which they are not privy, by providing that the carrier acts as agent and trustee of the performing subcontractors when contracting with the shipper. See discussion in William Tetley, *Marine Cargo Claims* (Thomson Carswell, 4th ed, 2008) 1853–55.

85 *Norfolk v Kirby*, 543 US 14 (2004), 19.

86 Ibid.

87 Ibid 21.

88 Ibid.

89 Ibid.

90 A 'paramount clause' is a clause very commonly (if not universally) used in bills of lading or in other contracts of carriage. A paramount clause may also be known as a 'period of responsibility clause'. A paramount clause is a contractual mechanism by which a cargo liability regime is selected by the parties to apply to the whole or part of the international carriage of goods. A paramount clause, being a contractual mechanism, must give way to the application of a cargo liability regime applied by force of domestic statute. See discussions in Brian Harris, *Ridley's Law of the Carriage of Goods by Land, Sea and Air* (Thompson Reuters, 8th ed, 2010) 258–9; John Wilson, *Carriage of Goods by Sea* (Pearson Longman, 6th ed, 2008) 226–7.

91 *Norfolk v Kirby*, 543 US 14 (2004), 19.

92 Ibid 21.

insured the cargo with an insurance company for its true value.[93] During the US land carriage, the carrying train derailed causing damage at an alleged US$1.5 million.[94] Kirby's insurance company paid Kirby under its policy.[95] This led to the claim, and ultimately to the appeal to the United States Supreme Court. The dispute was essentially about the applicability of package limitations. In addressing this issue, the Supreme Court considered the true characterisation of the two bills and of the legal relationships between the parties.

The Hamburg Sud bill package limitations were much stricter (that is, much more beneficial to Norfolk) than the ICC bill package limitations. Could Norfolk rely on the terms of the Hamburg Sud bill as against Kirby? The Supreme Court found in the affirmative. This required the court to take a bold step with the recognition of a *limited and special form of agency*. While the ICC–Kirby relationship did not have 'traditional indicia of agency, a fiduciary relationship and effective control by the principal', the court found ICC to be Kirby's agent 'for a *single, limited* purpose'.[96] In this respect, it held:

> In holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles. We merely ensure the reliability of downstream contracts for liability agency principles.[97]

The Court dredged back to its 1918 decision in *Great Northern Railway Co v O'Connor*[98] as the prime support for this statement, and in any case maintained that the result 'tracks industry practices' and also 'produces an equitable result'.[99] Applying the principle, in entering into the contract with Hamburg Sud, ICC did so on its own behalf as principal, save for acting as a special limited agent of Kirby for the purposes of binding Kirby to a limitation regime for on-land transport. Norfolk could thus legally assert the very restrictive package limitations contained in the Hamburg Sud bill as against Kirby.[100] *Norfolk v Kirby*[101] has stirred vigorous debate among commentators.[102] The *Norfolk v Kirby*[103] amalgam role does, however, seem to be confined to the US at the moment.

---

93 Ibid.

94 Ibid. Note that Kirby had also sued ICC in an Australian court: see *Norfolk v Kirby*, 543 US 14 (2004), 35.

95 Ibid.

96 Ibid 34.

97 Ibid.

98 232 US 508 (1918).

99 *Norfolk v Kirby*, 543 US 14 (2004), 35.

100 Ibid.

101 543 US 14 (2004).

102 See detailed discussions of the US Supreme Court's decision in William H Theis, 'Third-Party Beneficiaries in Multimodal Contracts of Carriage. *Norfolk Southern Railway Co v James N Kirby, Pty Ltd*, 125 S Ct 385, 2004 AMC 2705 (2004)' (2005) 36(2) *Journal of Maritime Law and Commerce* 201, 215; Attilio M Costabel, 'The "Himalaya" Clause Crosses Privity's Far Frontier. *Norfolk Southern Railway Co v James N Kirby, Pty Ltd*, 125 S Ct 385, 2004 AMC 2705 (2004)' (2005) 36(2) *Journal of Maritime Law and Commerce* 217; Marva Jo Wyatt, '*COGSA* Comes Ashore... and More: The Supreme Court Makes Inroads Promoting Uniformity and Maritime Commerce in *Norfolk Southern Railway v Kirby*' (2006) 30 *Tulane Maritime Law Journal* 101; William T J de la Mare, 'Jurisprudential Problems of Attribution of Liability in the Area of Admiralty Contracts for Carriage following *Norfolk Southern Railway v Kirby*' (2006-2007) 22(1) *Connecticut Journal of International Law* 203.

103 543 US 14 (2004).

G *Freight Forwarder (and Others) Liability under Bailment*

The primary cause of action for a shipper's claim against a freight forwarder is typically for breach of contract. No matter the legal role of the freight forwarder, there is a contract between the freight forwarder and shipper. However, the freight forwarder may also be liable to the shipper in tort (negligence) and/or bailment. A shipper/plaintiff can, of course, plead as many causes of action against the freight forwarder that are potentially sustainable on the facts.

When the freight forwarder acts as principal, the shipper will likely lack a contractual relationship with the performing parties. The shipper's contract is with the freight forwarder. The performing parties are subcontractors to the freight forwarder. There is therefore no privity of contract between the shipper and the performing parties. In those circumstances, if the shipper wishes to take action against the carriers and/or intermediaries, the options are a claim in tort (negligence, and perhaps, conversion, trespass, and/or other exotic property torts) and/or bailment. The freight forwarder may then itself be liable under an indemnity given to its subcontractor. This was the result in *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd.*[104] In that case, after major damage was caused to a motor cruiser being transported, the road transporter was found liable in bailment to the shipper. In its contract with the freight forwarder, the road transporter had an indemnity which the New South Wales Court of Appeal upheld as against the freight forwarder (who would have otherwise escaped liability).[105]

The great variety of potential dealings between the shipper, freight forwarder, and the carrying and non-carrying intermediaries involved in an entire freight movement brings with it an extensive range of potential responsibilities/liabilities in bailment. The law relating to claims in bailment, in carrying cases, is considered below briefly, from the perspectives of relevant parties.

Consider, from the perspective of the law of bailment, a multimodal freight movement involving a freight forwarder and multiple performing parties, being carrying and non-carrying intermediaries. Under bailment law, the *shipper* is the *head bailor*. The goods of the shipper are entrusted to others as bailees. A bailee may be liable to the head bailor if the goods are lost or damaged in transit. A claim in bailment is not based on contract, but on the bailor's possession (or right to immediate possession) of the goods.[106] From the perspective of the shipper, possession, or a right to immediate possession, can found an action in bailment.[107] For the shipper/bailor who lacks actual possession, but has a right to immediate possession (described as a 'reversionary proprietary right'),[108] a claim under bailment is an 'ancillary or parasitical' right[109] to the primary tort that is claimed as a cause of action (whether in negligence, conversion or trespass).[110]

---

104 [2001] NSWCA 281.

105 *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd* [2001] NSWCA 281, [86]–[103]; See discussion in Hamish Austin, 'The Essentiality of Possession in Bailment: Sub-Bailment on Terms, Quasi-Bailment and Freight Forwarders' (2004) 20(2) *Journal of Contract Law* 145.

106 *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716, 736–737 (Diplock LJ), 738, 740 (Salmon LJ).

107 *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83, [27].

108 Ibid.

109 Ibid [32].

110 Ibid.

The freight forwarder is the *head bailee*. The freight forwarder is liable in bailment for loss or damage to the shipper's goods while they are in its possession, unless it can establish that such loss or damage occurred without its fault.[111] However, the shipper's goods will often be in the possession of the performing parties engaged by the freight forwarder to carry out the freight movement. The pivotal question is therefore: what is the freight forwarders' liability under bailment once the goods have left its possession (or, alternatively, if the goods were never in its possession)? The answer depends on the nature of the overall dealings between the shipper and the freight forwarder and, in particular, the legal role of the freight forwarder. If the freight forwarder is acting as an agent for the shipper, its responsibility is discharged once possession is given to a carefully selected performing party.[112] If, however, the freight forwarder has assumed the role of contracting carrier, it is liable as bailee to the shipper/head bailor throughout the entire freight movement.[113] The fact that the performing parties are also personally liable to the shipper/head bailor does not release the freight forwarder from its own obligations.[114]

The perspective of a *performing party* under bailment law is very much reliant on the entire dealings between the parties. A performing party may hold the shipper's goods on a sub-bailment (including a sub-bailment on terms), as a bailee under a bailment by attornment, as a bailee under a 'springing' or substitutional bailment, or as a bailee under a quasi-bailment. These four possible bailments are all species of *constructive* bailment, where there is no direct contractual relationship between the shipper and a performing party.[115] A bailment by attornment is the substitution of a current bailee directly by a second bailee, with the immediate release of the first bailee at that point.[116] In terms of freight forwarding practice, a quasi-bailment occurs when a freight forwarder, without possession of the goods, procures a subcontractor who receives the goods.[117]

Of particular relevance in decided cases is the doctrine of sub-bailment on terms. If a claim in bailment is the 'sword' by which a shipper may take action directly against a freight forwarder's subcontractor, the doctrine of sub-bailment on terms can be seen as a 'shield' that can commonly

---

111 Ibid [28].

112 Norman Palmer, *Palmer on Bailment* (Thomson Reuters, 3rd edn, 2009) [23-058]; See also *The Maheno* [1977] 1 Lloyd's Rep 81, 87.

113 *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83, [37].

114 Ibid. David Glass discusses this in his 2012 book where he states:

> The forwarder who has undertaken to perform throughout the transit retains his responsibility (whether as a bailee or quasi bailee). The forwarder who acts as bailee for part of the transit and then hands the goods to another under arrangements made by the forwarder or otherwise may well be considered to have relinquished his liability for the remainder of the transit… Even if a continuous liability is relinquished the disposition to a secondary must nevertheless be authorised and the secondary bailee must be chosen with reasonable care.

Glass, above n 31, 61.

115 Palmer, above n 112, [23-001].

116 Ibid.

117 Within a freight forwarding context, see *The Assets Venture* (2002) 192 ALR 277; See also *Metaalhandel JA Magnus BV v Ardfields Transport Ltd & Eastfell Ltd* [1988] 1 Lloyd's Rep 197; *Lukoil-Kaliningradmorneft Plc v Tata Ltd* [1999] 1 Lloyd's Rep 129.

be deployed by the subcontractor in answer to the claim.[118] A performing party who receives the shipper's goods, from either the freight forwarder or another performing subcontractor, holds the goods as a sub-bailee.[119] The performing party is thereby liable to the shipper, but this exposure may be conditioned or mitigated by the terms under which the shipper contracted with the freight forwarder. In *The Pioneer Container*,[120] the Privy Council advised that a sub-bailment on terms required the consent of the bailor.[121] On the facts in that case, the consent of the bailor was found in the bill of lading where the freight forwarder was given substantial liberty to engage subcontractors.

The English Court of Appeal in *East West Corp v DKBS 1912*,[122] held that a series of sub-bailments of cargo between successive possessors does not relieve the original bailee's responsibilities to the head bailor.[123] The significance of the terms of bailment are that those terms can include exemption clauses, exclusive jurisdiction clauses and other advantageous clauses that can then be claimed by a performing party in answer to claims against it by the shipper.[124] The Court also envisaged scenarios involving bailment obligations outside a direct bailment or sub-bailment, for instance, a springing (or substitutional) bailment.[125] This is where a freight forwarder relinquishes possession to a subcontractor, and is thereby released from liability under bailment, and will occur if the freight forwarder is acting purely as an agent.

H *Indicia Used by Courts to Determine the Legal Role of the Freight Forwarder*

As is apparent from the above, a fundamental issue for any court lies in ascertaining the true legal role carried out by a freight forwarder. This requires enquiry into the circumstances of each individual case, including the dealings between the parties.[126] H Edwin Anderson III, in the US context, describes the tests used by courts to determine the true legal role of the freight forwarder, in particular, as to whether it is a carrier:

> 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:
> (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;

---

118 The doctrine of sub-bailment on terms was founded in the English Court of Appeal decision of *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716.

119 *The Pioneer Container* [1994] 2 AC 324; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1998] 2 Lloyd's Rep 164. See discussion of *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1998] 2 Lloyd's Rep 164 in Clive M Schmitthoff, 'Sub-Bailee's Standard Conditions Operate Against Exporter' [1998] *Journal of Business Law* 254.

120 [1994] 2 AC 324.

121 Ibid 341. See also *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83, [30].

122 [2003] QB 1509; [2003] EWCA Civ 83.

123 Ibid [37].

124 The facts of *East West Corp v DKBS 1912* [2003] QB 1509; [2003] EWCA Civ 83 involved an exclusive jurisdiction clause.

125 Ibid [26]. Although Mance LJ did not provide an example, a likely example would presumably be if the freight forwarder exhausted its role under the contract with the shipper, and is passing over possession to a well-chosen subcontractor without any further obligation.

126 *Salsi v Jetspeed Air Services* [1977] 2 Lloyd's Rep 57; *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669; *The Assets Venture* (2002) 192 ALR 277.

> (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. [127]

Each of those factors is now briefly discussed. As Anderson notes with regards to the first factor, the parties' self-description, although it is hardly irrelevant, is not determinative of status.

The second factor assumes greater importance to the ultimate question as to the role of the freight forwarder. The cases reveal the need, in this context, for a court to examine (often in great detail) the dealings between the parties involved in the entire freight movement.[128] The very flexibility of the freight forwarder in its service roles carries with it a variety of potential dealings between the parties.

The third factor is the issuance by a freight forwarder of a bill of lading. The issuance of a bill of lading is very significant *per se*, albeit to be assessed in full light of the dealings.[129] Two contrasting Australian cases are particularly apt as illustrations. In *Carrington Slipways*,[130] two bills were issued with respect to the carriage of diesel engines. One bill was a house bill of lading, the other an ocean bill of lading.[131] The first defendant was a freight forwarder who issued its own (house) bill. On the same day, a subsidiary of the time charterer of the carrying ship issued its own (ocean) bill of lading. One of the engines was badly damaged in unloading operations. The plaintiff was the shipper. The plaintiff pursued various claims, including in contract under each bill of lading. The New South Wales Court of Appeal, having considered in detail the dealings between the plaintiff and the first defendant,[132] concluded that the house bill issued by the freight forwarder was not a bill of lading,[133] 'was not a document of title and was not within the *Bills of Lading Act* 1855 or its New South Wales equivalents'.[134] The freight forwarder was therefore *not* the carrier.

In *Comalco Aluminium*,[135] the plaintiffs were a number of related Comalco companies (collectively 'Comalco'). The first defendant ('Mogal') was a freight forwarder.[136] The cargo

---

127 Anderson, above n 10, 139–40.

128 *Salsi v Jetspeed Air Services* [1977] 2 Lloyd's Rep 57; *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669; *The Assets Venture* (2002) 192 ALR 277, [36].

129 Of particular significance are four issues: (i) Has the freight forwarder issued a document described as a bill of lading? (ii) Is the bill of lading issued by the freight forwarder described as a 'combined' bill of lading? (iii) What is the true identity and legal effect of the freight forwarder's bill of lading? (iv) Is the freight forwarder the 'carrier' in terms of one or more cargo liability regimes? See discussion of the legal status and nature of bills of lading in Shane Nossal, 'The Legal Status of Freight Forwarders' Bills of Lading' (1995) 25(1) *Hong Kong Law Journal* 78. For additional discussion and contrast with Nossal's article, see John S Mo, 'Forwarder's Bill and Bill of Lading' (1997) 5(2) *Asia Pacific Law Review* 96.

130 (1991) 24 NSWLR 745.

131 A 'house bill of lading' is a legal document issued by a freight forwarder. It invariably covers an entire freight transport movement. More than one bill may be issued for a freight movement — there may be a house bill issued (for the entire freight movement) and an 'ocean' bill (issued by the ocean carrier for the sea carriage part of the overall freight movement).

132 *Carrington Slipways* (1991) 24 NSWLR 745, 750–3.

133 Ibid 745, 752.

134 Ibid.

135 (1993) 113 ALR 677.

136 Ibid 678. See also discussions in Martin Davies, 'The Exocet Finds a New Target, or Fear and Loathing for Freight Forwarders and Other Carriers by Sea' (1993) 21(5) *Australian Business Law Review* 377; Stuart

consisted of 46 aluminium coils which were packed in containers by Mogal as part of their overall service for Comalco.[137] The entire freight movement incorporated sea carriage from Sydney to Auckland. The coils arrived in New Zealand after the sea carriage in a badly damaged state.[138] The principal content of the contract between Comalco and Mogal was a document called a 'consignment note' issued under the Mogal name and insignia.[139] Within the consignment note, Mogal was described as the 'carrier'.[140] There was also a bill of lading issued by the ship's agent for the sea carriage from Sydney to Auckland.[141]

Two separate categories of claim were pursued by Comalco against Mogal. The first, described by the Court as 'contractual claims', included claims for breach of contract, breach of a bailee's obligations and negligence.[142] The second category of claims was brought under the (then) *Trade Practices Act 1974* (Cth).[143] The cause of damage was established to be insufficient packing by Mogal.[144] Essentially the contractual claims failed as the consignment note exempted Mogal from liability for faulty packing.[145] The Federal Court of Australia found Mogal liable for breaching the proscription against misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth).[146]

The court nonetheless considered the identity and nature of the Mogal consignment note,[147] albeit in obiter,[148] because much time at trial had been devoted to pursuing the contractual claims.[149] It found that Mogal had acted as principal in engaging a sea carrier.[150] It then considered the character of house bills of lading issued by freight forwarders.[151] The judge presiding, Sheppard J, decided that the Mogal consignment note was a bill of lading as it was a receipt, a document of title and evidence of a contract of affreightment.[152]

Hetherington, 'Freight Forwarders' liability' [1993] (3) *Lloyd's Maritime and Commercial Law Quarterly* 313; Martin Davies, 'Australian Maritime Law Decisions 1993' [1994] (3) *Lloyd's Maritime and Commercial Law Quarterly* 409.

137 *Comalco Aluminium* (1993) 113 ALR 677, 679.

138 Ibid.

139 Ibid.

140 Ibid.

141 Ibid 677, 678.

142 Ibid 677, 679.

143 Ibid 677, 683.

144 Ibid 677, 686.

145 Ibid 680–1.

146 Ibid 694.

147 Ibid 695.

148 Sheppard J determined that Mogal could rely on its consignment note (conditions three and four) as an exemption to the claim against it. Conditions three and four exempted liability for its packaging of the goods: Ibid 680–1. His Honour went on to find that the cause of damage was improper or inadequate packaging: Ibid 688. So the consignment note conditions/exemptions applied. This was a result of contractual construction. It was then found that even if the *Hague Rules* applied with compulsory effect to the consignment note, the result would not change, as the parties were free under art VII of those rules to contract as to carrier's liability prior to the loading of the goods: Ibid 695. His Honour 'felt obliged' to consider the nature of the consignment note due to the extensive submissions of counsel on the issue: Ibid 700.

149 Ibid 700.

150 Ibid 694.

151 Ibid 698–9.

152 Ibid 699–700.

Professor Martin Davies is of the view that *Carrington Slipways*[153] can be distinguished on its facts from *Comalco Aluminium*[154] on the basis that the freight forwarder's bill of lading in *Comalco Aluminium*[155] was for the door-to-door carriage, while the ocean carrier's bill was for only the sea carriage.[156] In other words, the freight forwarder's bill was the only bill covering the whole carriage, supporting the view that it was a true bill. In contrast, the two bills in *Carrington Slipways*[157] were for the same sea carriage and supported the view that the true bill in that case was the ocean bill.[158] Delving deeper, Davies maintains that the conclusion in *Comalco Aluminium*[159] (that the house bill was a true bill) best reflected commercial practice, noting, in particular, that a house bill is typically the only bill seen by the shipper.[160] Ultimately, consideration by a court of a similar matter would provide welcome guidance.

The fourth element identified by Anderson is the freight forwarder's method of charging the shipper. Is it an 'all-in' price, or a commission? The former is a factor indicative of a freight forwarder acting as principal; the latter is a factor indicative of a freight forwarder acting as agent.[161] These four factors are certainly not exhaustive in the quest to determine the status and legal role of the freight forwarder.[162]

V FREIGHT FORWARDER UNDER CIVIL LAW SYSTEMS

Adding to the already complex and expansive possible legal roles of a freight forwarder discussed above is the reality of the civil law position on agency. David Glass teases apart fundamental differences between common law systems and civil law systems in this context.[163] Glass explains that, in so far as freight forwarding is concerned, civil law systems adopt a different (and more nuanced) acceptance of indirect representation.[164] As an indirect representative, a freight forwarder under a civil law system will act as an agent towards its client, the shipper, but can be the principal in its dealings arranging carriage with performing parties.[165]

---

153 (1991) 24 NSWLR 745.

154 (1993) 113 ALR 677.

155 Ibid.

156 Davies, above n 136, 379–80.

157 (1991) 24 NSWLR 745.

158 Davies, above n 136, 379–80.

159 (1993) 113 ALR 677.

160 Davies, above n 136, 380.

161 *Zima Corp v MV Roman Pazinski*, 493 F Supp 268 (SDNY, 1980); *Carrington Slipways* (1991) 24 NSWLR 745, 752.

162 For instance, the significance of the issue of a *combined* bill of lading by the freight forwarder (in particular, the standard form of FIATA's FBL) may be a strong indication that the freight forwarder is acting as a carrier: *James N Kirby Pty Ltd v Norfolk Southern Railway Co*, 300 F 3d 1300 (11th Cir, 2002), 1306.

163 Glass, above n 31, 49.

164 Ibid:

> A separate, though connected issue, arises from the ambiguity inherent in the concept of agency. An agent in the strict sense at common law is a person empowered to affect his principal's legal relations. In civil law countries the concept of indirect representation is more commonly accepted. While the internal relationship remains posited on agency principles, in the external relationship the agent acts as principal.

165 Peter G Watts and Francis M B Reynolds (eds), *Bowstead and Reynolds on Agency* (Thomson Reuters, 19th ed, 2010) [1-020].

As an example, French law accepts freight forwarders acting as an indirect representative (*commissionaire de transport*) or as a true agent (*transitaire*).[166] The acceptance of indirect representation is said to contrast with common law systems of law which constrain the role of agent to be true agent, thereby affecting their principal's legal relations.[167]

A question for further exploration is whether the developing freight forwarder law, discussed earlier in this article, provides examples of common law systems accepting indirect representation. The editors of *Bowstead and Reynolds on Agency* pose the general question of the possible acceptance, by the common law, of indirect representation, by analysing the role of agencies recognised by the common law, including factors, commission agents and commission merchants.[168] Each of those analysed roles exhibit indirect representation. The editors drill down further to consider the specific position of freight forwarders, and explain the 'agency plus' role identified and described above (at C *'Agency Plus*') by analogy to the role of a freight forwarder as agent under French civil law.[169] They also consider the 'pure (non-carrying) principal' role identified and described above (at E *The Pure (Non-Carrying) Principal*) to be an example of the acceptance of indirect representation.[170] This begs the question as to whether common law systems might adapt to accept indirect representation.[171]

VI CONCLUSION

It is submitted that the weight of cases and the sheer complexity of the legal roles of the freight forwarder, as discussed above, are sufficient in and of themselves to highlight legal uncertainty surrounding the legal role of the freight forwarder. Beyond that, the uncertainty of the role of the freight forwarder has not been lost on practitioners and prominent legal commentators. Based on the case law and the commentary, there seems to be little doubt that there is confusion about the legal roles of freight forwarders — and extending from there — to their attendant legal obligations and responsibilities. In the particular context of US law, H Edwin Anderson III states:[172]

> 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.'
>
> 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

166 Tetley, above n 84, 1734–43.

167 Glass, above n 31, 49. Note that Jan Ramberg explains that common law systems tend to recognise the intermediate stage between principal and agent (typically termed 'commission agency') indirectly by applying the doctrine of the undisclosed principal: see Ramberg, 'Unification of the Law of International Freight Forwarding', above n 13, 7.

168 Watts and Reynolds, above n 165, [1-021].

169 'Alternatively, the freight forwarder may act as agent of the consignor but also warrant due performance of the contract of carriage or the safe arrival of the goods, as with French *commissionaire de transport*': Ibid [9-024].

170 Ibid.

171 Against this, the status quo of the common law view of an agent is difficult to change. See the case of *Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd* [2006] 2 Lloyd's Rep 110, as discussed in Harris, above n 15, 390.

172 Anderson, above n 10, 122.

> depending on the particular duties or responsibilities that the forwarder has 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.

Professor William Tetley paints a picture of freight forwarders seeming to want to have their cake and eat it too: in the good times, to be paid well as a carrier; in the bad times, or upon loss or damage to cargo, to claim to be a mere shipper's agent. In this context, Tetley states:[173]

> Freight forwarders, despite or perhaps because of their newfound fortune, are faced with a dilemma — will they present themselves as 'principal contractors' or as 'agents'? At times they even flirt with the term 'carrier'. Their solution to the problem has been new standard trading conditions which admit equivocally that they may be principal contractors, but the terms are so evasively wrapped in conditions, limitations and exclusions that there is little clarity as to their responsibility at law. Much of this uncertainty is the fault of freight forwarders, who contest any legislation or court decision which would find them as responsible parties to the contract of carriage. On the other hand, they do not want to be paid a percentage as agents.

Yet the true measure of actual uncertainty is arguably camouflaged by likely industry attitudes and practice. *First*, even if there is a lingering uncertainty as to the true legal position of the freight forwarder, if the shipper is happy with the price paid and service of the freight forwarder, and the goods are received on time and undamaged, there is no effective problem. *Second*, even if there is delay, loss or damage to the goods, there is often insurance for the shipper to turn to. In that case, the shipper is paid out and it effectively becomes the insurer's problem. *Third*, in an intensely commercial industry, claims by the subrogated shipper's insurer may often be settled with the insurer for the freight forwarder and/or performing parties. The settlements may be negotiated and finalised without the need to initiate (or at least prosecute to a great extent) litigation in the courts.

A lesson for legal practice is the need for care and clear language in drafting the terms of engagement of freight forwarders and of associated contracts of carriage. The need is to clearly specify the role, responsibilities and obligations of the freight forwarder.

***

---

173 Tetley, above n 84, 1745. Relatedly, see also the comments of Professor Jan Ramberg, who light-heartedly has described the freight forwarder as a 'Pimpernel':

> As has been seen, the development from the freight forwarder's traditional role as agent towards his voluntary or compulsory role as operator with carrier liability rather adds to than diminishes the difficulties encountered in applying the law of international freight forwarding. I have stated in the foreword to my presentation of "The Law of Freight Forwarding" that this difficulty to distinguish between the freight forwarder as agent and the freight forwarder as carrier makes it tempting to regard him as a "legal Pimpernel Smith" when — at times — he attempts to avoid the status of carrier, requiring his customer to seek the carrier elsewhere.

Ramberg, 'Unification of the Law of International Freight Forwarding', above n 13, 7.