The ambiguous incorporation of charterparties into bills of lading under English law: a case of too many cooks?

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The present article looks at the question of which charterparty among several has been incorporated into a charterparty bill of lading that contains an equivocal incorporation clause. First it examines whether a binding rule can be identified from those authorities which dealt with the issue, such as *The San Nicholas*, *The Sevonia Team*, *The Nai Matteini*, *Lignell v Samulson* and *The Heidberg*. Secondly, an attempt will be made to find a methodical solution by applying the modern law on interpretation of contracts and finally to determine whether it is possible to extract an answer to the question from the several authorities.

I. Introduction

Over many years the English courts have had occasion to grapple with the issue of which charterparty has been incorporated into a charterparty bill of lading if it has not been clearly identified in the incorporation clause in the bill of lading itself. The purpose of the present article is to find out whether a rule of law derives from these authorities and, if not, whether the application of certain rules of interpretation could be a solution under English law.

A good example of how this issue could arise is the Congenbill, which provides in clause (1) that 'all terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated'. On the reverse side it is stated that 'Freight payable as per Charterparty dated _____'. If this blank in the Congenbill is not filled in, the question arises as to which charterparty was incorporated. And as will be shown in the authorities examined below, several charterparties could relate to one single voyage.

Various problems could then occur. For example, if a shipper wants to sue the carrier for damages caused by improper stowage he will need to know where, until when and under which regime he can sue the carrier and it is possible that different charterparties contain different arbitration and/or governing law clauses. A judge or arbitrators would have first to establish which charterparty was incorporated into the bill of lading, and then decide whether any specifically relevant clause of this charterparty is also included in the bill of lading.[1]

[1] For example, for the description and the consistency issue, see *Astro Valiente Compania Naviera SA v The Government of Pakistan Ministry of Food and Agriculture (The Emmanuel Colocotronis (No. 2))* [1982] 1 WLR 1096; [1982] 1 Lloyd's Rep 286.

This article is divided into two main parts. In the first part, the relevant cases will be summarised and distinguished from each other in order to discover whether any general rules can be identified. In the second part, an attempt will be made to find a systematic solution, showing that, in particular, the *contra proferentem* rule and the criterion of appositeness play the main roles.

II. Authorities

II.I Voyage or similar types of charterparties

II.1.1 Smidt v Tiden and *The San Nicholas*

The first case which had to deal with several voyage charterparties was *Smidt v Tiden*,[2] where the claimant as master and shipowner of the vessel *Gothenburg* entered into a voyage charterparty with Lyth, a shipbroker. The following day, Lyth chartered the vessel to the defendant at a higher freight. The master signed a bill of lading which stated that freight was to be paid as per charterparty but did not identify which charterparty was referred to. The defendant paid freight to Lyth who did not pay the due freight to the claimant. The claimant sued the defendant for that amount. It was held by the Court of Queen's Bench that the defendant did not have to pay the freight to the claimant (ie twice). The reasoning for this judgment was that each of the parties acted under a misapprehension. The claimant supposed that the bill of lading he had signed referred to his charterparty with Lyth, whereas the defendant supposed that it referred to the one to which the defendant was party.[3] Since both acted in good faith and neither of them misled the other and the bill of lading was ambiguous and equally capable of being applied to the one charterparty as to the other, it was held there was no contract between the parties.[4]

About 100 years later, in *The San Nicholas*,[5] the defendants as shipowners of the vessel *San Nicholas* let their vessel to Athelqueen under a voyage charterparty. This charterparty provided that English law was to apply. On the same day, Athelqueen sub-chartered the vessel to the second claimants on the same terms as the head charterparty. Also on the same day, the second claimants sub-chartered the vessel to the first claimants for the same voyage. This third charterparty stated that it was to be governed by the law of the flag of the vessel (ie Liberia). The goods were shipped on board under a bill of lading stating that 'the terms of the Charter shall apply' but having left date and the names of the parties unfilled. This bill of lading had been signed by the master. The vessel sank and the goods carried on board were lost. Both claimants sought leave to serve a claim form out of the jurisdiction on the defendants on the ground that the contract was governed by English law (ie that the first charterparty and its governing law clause incorporated into the bill of lading were valid). The defendants tried to persuade the court that the bill of lading did not incorporate the terms of the head charterparty.

Had the terms of the head charterparty (or the first sub-charterparty) not been incorporated, English law would not have been applied to the bill of lading. The question whether the head charterparty had been incorporated was therefore decisive. Both Donaldson J and the Court of Appeal held that the terms of the head charterparty were incorporated. The reasoning was that the blanks were left because the master in Recife did not know the date and the name of the parties to the particular charterparty so as to be able to fill them in. The head charterparty was the only one to which the defendants were party.[6] Additionally, it became apparent that

[2] *Smidt v Tiden* (1874) LR 9 QB 446.
[3] ibid 449 *per* Lush J.
[4] ibid 450.
[5] *Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd's Rep 8.
[6] ibid 11 *per* Lord Denning MR.

the intention of the parties to the bill of lading was to incorporate a charterparty known to exist but not sufficiently known to them either by date or otherwise to be properly identified and thus expressly incorporated. Moreover, there would have been very remarkable gaps in the bill of lading if the parties had not incorporated a charterparty.[7]

At first sight, the facts of both cases look similar and the results seem to be contradictory. It is also surprising that the Court of Appeal in *The San Nicholas* did not consider Lush J's decision in *Smidt v Tiden*. Did *The San Nicholas* overrule *Smidt v Tiden*?

It is arguable whether *Smidt v Tiden* was not only a dispute about the question as to which charterparty was to apply, but also, apart from the defendants, which was the contracting party to the bill of lading. The defendants were of the opinion it was Lyth, their contracting party to the charterparty. What would have been the difference if one or the other charterparty had been incorporated? In terms of the contracting party, there would have been no difference because the contracting party would still have been the party on whose behalf the master had signed the bill of lading. Basically, the only difference in this case would have been the freight rate. Moreover, according to *The Ardennes*,[8] where it was held that between a shipowner and a charterer the terms of their contractual relationship lie in the charterparty and not in the bill of lading,[9] this question would now not arise. It can be said, therefore, that the decision in the *Smidt v Tiden* took into consideration additional issues compared with those in *The San Nicholas* and, because of the decision in *The Ardennes*, could no longer be deemed good law.

It should be noted, however, that the main issue in *The San Nicholas* was whether a charterparty had been incorporated at all. The question as to which charterparty had been incorporated was answered by the court simply by referring to Scrutton,[10] without any detailed reasoning why the head charterparty should be preferred. The only argument Scrutton provides is that the head charterparty is the one to which the carrier is party. It should also be added that all the charterparties were dated the same day. Even if the master had known the date this would not have been enough to avoid any ambiguities. Furthermore, the court's argument is not persuasive. If the master really had considered filling in the blanks without knowing the details he could have stated that: 'All terms and conditions of the charterparty which the carrier is party to are hereby incorporated into this Bill of Lading'. It is also worth pointing out that the court decided this question only as a preliminary issue to serve a claim form out of the jurisdiction on the defendants.

Two subsequent cases with similar issues referred to *The San Nicholas*, viz *The Sevonia Team*[11] and *The Nai Matteini*.[12] In *The Sevonia Team*, Lloyd J, relying on *The San Nicholas*, regarded the voyage charterparty (the only charterparty) between shipowners (claimants) and charterers as incorporated, and left the transportation contract between charterers and

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[7] ibid 12 *per* Roskill LJ.

[8] *SS Ardennes (Cargo Owners) v SS Ardennes (Owners) (The Ardennes)* [1951] 1 KB 55.

[9] ibid 60 *per* Lord Goddard CJ.

[10] Note 5, 11 *per* Lord Denning MR, who referred to the 18th edn (1974) p 63. A A Mocatta and others *Scrutton on Charterparties and Bills of Lading* (18th edn Sweet and Maxwell London 1974).

[11] *K/S A/S Seateam & Co v Iraq National Oil Co and Others (The Sevonia Team)* [1983] 2 Lloyd's Rep 640.

[12] *Navigazione Alta Italia SpA v Svenska Petroleum AB (The Nai Matteini)* [1988] 1 Lloyd's Rep 452. In this case a string of voyage charterparties was at stake as well and the terms, conditions and exceptions of an unidentified charterparty were incorporated into the bill of lading. Gatehouse J held (obiter) that the head charterparty was incorporated into the bill of lading even though it was a consecutive voyage charterparty. Because it was for the case not decisive (the judge held that due to lack of proper description the arbitration clause in neither charterparty had been incorporated into the bill of lading) he justified his decision, by referring to *The San Nicholas* and *The Sevonia Team*, quite briefly and without giving any persuasive reasoning for his decision, that he was not persuaded that the normal rule (the presumed intention of the parties is to incorporate the head charterparty) should not be followed in this case ([1988] 1 Lloyd's Rep 459 *per* Gatehouse J).

Petrofina[13] aside. He also held that the terms of the voyage charterparty were wholly apposite, whereas it was the terms of the sub-charter, or transportation agreement, which might have been regarded as inapposite.[14]

II.1.2 Lignell v Samuelson

In an older case, *Lignell v Samuelson*,[15] the claimants were time charterers of the vessel *Sonja*. They chartered it to the Baltic and North Sea Traffic under a voyage charterparty which contained laytime and demurrage provisions. The Baltic and North Sea Traffic themselves concluded a contract for tonnage space in general cargo ships with A/S Sylvester who were shippers of a cargo of wood. The Baltic and North Sea Traffic issued a bill of lading which had a clause stating 'under conditions as per charterparty' and signed it on behalf of the claimants' master, ie Lignell as carriers. Consignees were the defendants. The claimants sought demurrage from the defendants by contending that the voyage charterparty was incorporated into the bill of lading. Rowlatt J held that the claimants were not entitled to demurrage. In his opinion, the bill of lading referred to the document under which the parties whose names appeared in the bill of lading were also parties, ie the contract for tonnage space which was also titled as 'charterparty'. The shipper had never heard of the charterparty under which it sent the ship. The Baltic and North Sea Traffic and the shippers must have been referring to the document which passed between them.[16]

Several points are to be made with regard to this case. First, it is the only case dealing with an improper incorporation clause in a charterer's bill of lading, ie a bill of lading issued on behalf of the charterers.[17] The charterparty concluded between shipowners and claimants as time charterers of the vessel was not considered as the charterparty incorporated into the bill of lading. If the rule according to *The San Nicholas* was generally applicable, ie that the head charterparty is normally incorporated, in *Lignell v Samuelson* it would be the charterparty between carrier (Lignell) and charterer (The Baltic and North Sea Traffic). However, the court in *Lignell v Samuelson*, (unlike *The San Nicholas*) had to deal with this issue as a material question, and held that neither the head voyage charterparty nor the head charterparty (the time charterparty) were incorporated. Rowlatt J was of the opinion that the particular charterparty was incorporated, which both parties (the shipper and its contracting party to the contract for tonnage space) were aware of. Unfortunately, the court in *The San Nicholas*, to which the whole doctrine is relevant,[18] did not consider *Lignell v Samuelson*, even though the facts of these two cases are very similar given the main issue in *The San Nicholas* was the incorporation of the particular charterparty to which the carrier is party.

II.1.3 The Heidberg

In *The Heidberg*,[19] a contract of affreightment was concluded between UNCAC (the second defendants) and Peter Dohle, which provided arbitration in Paris. Peter Dohle, obliged by this contract to provide vessels to perform a certain number of voyages from several named ports in France at charterers' option, chartered the vessel *Heidberg* from Partenreederei M/S 'Heidberg' (the first claimants). The charterparty with a London arbitration clause was basically agreed over the telephone and confirmed by a recap telex which had some errors. A bill of

[13] In this contract the charterers agreed to make available to Petrofina a number of vessels which had previously been subject to individual time and consecutive voyage charters.
[14] Note 11, 644 *per* Lloyd J.
[15] *Lignell v Samuelson & Co Ltd* (1921) 9 Lloyd's Rep 361/362 and 415/416.
[16] ibid 415/416 *per* Rowlatt J.
[17] J F Wilson *Carriage of Goods by Sea* (5th edn Pearson & Longman London 2004) 236.
[18] Text at III.1.
[19] *Partenreederei M/S 'Heidberg' and Vega Reederei Friedrich Dauber v Grosvenor Grain and Feed Co Ltd and Union Nationale des Cooperatives Agricoles de Cereales and Assurances Mutuelles Agricoles (The Heidberg)* [1994] 2 Lloyd's Rep 287.

lading was issued by the shippers (UNCAC) and signed by the managers for UNCAC and the master. The blanks in the incorporation clause were not filled in. The ship collided with a Shell jetty, a fire broke out on board the vessel, and part of the cargo sustained water damage as a result of fire-fighting operations. Several proceedings started in France and in England.

Diamond QC had to decide which contract was incorporated into the bill of lading. Because he had held initially that he was bound to recognise a French judgment which decided that the London arbitration clause was not incorporated into the bill of lading[20] and that it did not incorporate the terms of an orally concluded charterparty,[21] he decided on this issue only as an obiter dictum. After examining the previous cases, he held that the bill of lading incorporated the terms of the contract of affreightment (ie not the head charterparty). The reasons he gave were as follows. The 'normal rule' that the head charterparty is incorporated applies only if it appears that the words of incorporation were designed to give the owners a lien on the cargo for freight or demurrage. A bill of lading, however, is a bilateral contract, and while weight should be given to the presumed intention of the master who signed and issued the bill, equal weight must be given to the intention of the shipper who normally draws up the bill and presents it to the master for signature.[22] He saw no reason why the contract of affreightment should not be considered a charterparty in the meaning of the bill of lading and there was no commercial need to incorporate the voyage charterparty.[23] Perhaps most important was the fact that the bill of lading expressly provided freight payable as per charterparty. Diamond QC concluded that the clause obliged UNCAC (the shippers) to pay freight in accordance with a charterparty. It was therefore necessary to ask the question: 'In accordance with which charterparty was UNCAC to pay freight?' In his opinion, it would have been surprising if a shipper had intended to pay freight in accordance with a charterparty whose terms were unknown to him and which might specify an entirely different rate of freight and different terms of payment from those which he had agreed under his contract. The answer to the above question had therefore to be the contract of affreightment.[24]

Although only an obiter dictum, this decision raised several interesting new points about the ambiguous incorporation clause and was the first to include comprehensive reasons for its conclusion. First, Diamond QC doubted that there is a good reason why the head charterparty should generally prevail. Secondly, he also emphasised the fact that it is normally the shipper who drafts the bill of lading.

II.1.4 Result

As far as voyage or similar types of charterparties are concerned, the judgments discussed above show that there is no clear rule that one charterparty should prevail over the other. While *The San Nicholas*, *The Nai Matteini* and *The Sevonia Team* preferred the head charterparty, *The Heidberg* and *Lignell v Samuelson* preferred the charterparty to which the shipper was party. The only cases which materially dealt with that question were *Lignell v Samuelson* and *The Sevonia Team*. *The Nai Matteini* and *The Heidberg* only dealt with this issue as an obiter dictum. In *The Sevonia Team*, on the other hand, it was important that the sub-agreement (the transportation agreement) was wholly inapposite so that the court applied the head charterparty. Moreover, the main, or rather sole argument for choosing the head charterparty in *The San Nicholas* was that the agreement to which the carrier was party should be preferred. This argument was irrelevant in the other cases and not considered at all. It has to be emphasised as well that this question was only decided as a preliminary issue in *The San Nicholas*.

[20] ibid 303 *per* Diamond QC.
[21] ibid 311.
[22] ibid 311.
[23] ibid 312.
[24] ibid 312/313.

Thus even if a decision is reached as to which charterparty the carrier was party this is not necessarily conclusive. In respect of a string of voyage charterparties the result is anything but clear. In the writer's opinion, it would not be possible to argue that a binding rule could be concluded from the authorities discussed here.

II.2 Conflict between time and voyage charterparties (The SLS Everest)

The result in *The San Nicholas*, that it is the head charterparty which is incorporated into the bill of lading, was also qualified in *The SLS Everest*.[25] In this case the claimants entered into a voyage charterparty with a company called Drumplace Ltd which time chartered the vessel *SLS Everest* from the second defendants as the shipowners. After having loaded the goods, the master signed a bill of lading on behalf of the shipowners with a clause stating 'Freight and other conditions as per _____ including the exoneration clause'. The vessel sank while anchored off Casablanca when water entered its engine room, and as a result the goods were lost. The claimants applied for a freezing order to stop the money, which was to be paid by the hull underwriters, being taken out of London.

The important issue was whether the contract contained in the bill of lading was governed by English law. Both Lloyd J and the Court of Appeal answered this question in the affirmative. Even though the above-mentioned clause did not state 'charterparty', the Court of Appeal considered that the word 'freight' could only have referred to a charterparty.[26] With reference to Scrutton, the Court of Appeal came to the conclusion that even though the time charterparty was the head charterparty, it was the voyage charterparty which was incorporated into the bill of lading.[27] English law was applicable and the injunction was granted, or rather, the appeal was dismissed.

The result seems to be straightforward. An unidentified charterparty in an incorporation clause refers to the voyage and not the time charterparty. It has to be emphasised, however, that the word 'freight' could, in fact, only have referred to a voyage and not to a time charterparty because 'freight' is an expression normally not used in time charterparties.

The sole argument raised in *The San Nicholas*, that the carrier was party to the head charterparty, was also clearly not relevant for determining the applicable charterparty, because the carrier was not party to the voyage charterparty. This argument seems once more not to be decisive in ascertaining the incorporated charterparty where both a voyage and a time charterparty are involved.

II.3 Time or similar types of charterparties

In the recently decided case *The Vinson*,[28] (unreported), the judge had to deal with a string of time charterparties. In that case Quark entered a pool arrangement managed by Eco Shipping. Each vessel was then chartered by Quark to Eco on the terms of the Ecotime 99 charterparty. Both the pooling agreement and the Ecotime charterparty contained a New York arbitration clause. Eco chartered the vessel *Vinson* to Sunline on the terms of the Baltime form, which contained a London arbitration clause. Sunline concluded a contract of affreightment with the shippers Laysun. Quark as carrier issued Congenbill Bills of Lading. Again, under the clause 'Freight payable as per Charter-Party dated _____' the charterparty remained unidentified. The receivers alleged that on delivery the cargo was damaged and commenced

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[25] *Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd (The SLS Everest)* [1981] 2 Lloyd's Rep 389.
[26] ibid 393 *per* Dunn LJ.
[27] ibid 392 *per* Lord Denning MR, who, again, referred to exactly the same source (Scrutton, n 10) as in *The San Nicholas*.
[28] *Quark Ltd v Chiquita Unifrutti Japan Ltd and Others (The Vinson)* (QB (Comm) 26 April 2005), summarised in (2005) 11 JIML 309.

arbitration proceedings in London (ie accepting the London arbitration clause in the Baltime form).

The judge held that there was an inclination in English law to favour the incorporation of the terms of the head charterparty (which would have been the Ecotime 99 charterparty) but, by referring to *The SLS Everest*, this inclination did not amount to a rule that was invariably applied. Since the head time charterparty served to govern in part the operation of the pool arrangement, its specific provisions could not appropriately be incorporated into the bills of lading. The Baltime charterparty was the most appropriate to incorporate into Quark's bills of lading.[29]

Again, the argument in *The San Nicholas* that the head charterparty prevails was not followed in this case. Even though the detailed reasoning is not known, it seems that the criterion of appositeness was the most relevant one. It can also be assumed that Sunline drafted the bill of lading and only had the charterparty in mind to which Sunline was party (ie the Baltime charterparty) and not the Ecotime 99 charterparty. The result comes therefore in line with *Lignell v Samuelson*.

III. Considerations

III.I Is the issue still unresolved?

The views of commentators seem predominantly to favour two main interpretations: where there is ambiguity the head charterparty is preferred; and secondly, voyage or similar types of charterparties prevail over time charterparties.[30] The question here is whether this issue is still open to debate.

First of all, these conclusions have not been unanimously endorsed. Debattista is of the opinion that where no charterparty is specifically identified in the bill of lading, the clause must be taken to refer to the head charterparty.[31] He criticises the result achieved in *The SLS Everest* and argues that the reasoning, (that the time charterparty clauses were inapposite to the bill of lading), blurred the distinction between the 'description' and the 'consistency' issues and destroyed the certainty achieved by the simpler rule.[32] In contrast to Debattista, Carver criticises the proposition that the head voyage charterparty should prevail. With reference to *The Heidberg*, where it is stated that there is no obvious reason why the intention of the shipowner should, on the issue of incorporation, prevail over that of the shipper,[33] he comes to the conclusion that where the courts have to choose between several charterparties, they will be inclined to favour the incorporation of the terms of whichever charter which are the most appropriate to regulate the legal relations of the parties to the bill of lading contract. Where more than one of the charterparties is equally appropriate for this purpose, the courts might determine the issue by holding the relevant charterparty to be the one which governed the contractual relations between the original parties to the bill of lading and in pursuance of which the bill was issued.[34] And even Scrutton, who was referred to in *The San Nicholas*[35] and *The SLS Everest*,[36] is not sure about the results achieved from the

[29] (2005) 11 JIML 310.
[30] Gaskell in N Gaskell R Asariotis and Y Baatz *Bills of Lading: Law and Contracts* (LLP London 2000) 21.25; S C Boyd A S Burrows and D Foxton *Charter Parties and Bills of Lading* (20th edn Sweet & Maxwell London 1996) (hereinafter 'Scrutton') art 38; Wilson (n 17) 242; J Cooke et al *Voyage Charters* (2nd edn Lloyd's of London 2001) (hereinafter 'Cooke') 18.61.
[31] C Debattista *The Sale of Goods Carried by Sea* (2nd edn Butterworths London 1998) 169.
[32] ibid 169 n 10.
[33] G H Treitel and F M B Reynolds *Carver on Bills of Lading* (Sweet & Maxwell London 2001) (hereinafter 'Carver') 3-023 p 82.
[34] ibid p 83.
[35] Note 5, 11 *per* Lord Denning MR.
[36] Note 25, 392 *per* Lord Denning MR.

authorities and states that: 'the court may conclude, on examining the facts, that the intention was to incorporate the sub-charter [and not the head charterparty]; or even, in extreme cases, that the bill of lading is so ambiguous as to be void'.[37]

These different conclusions do not make it easy to propose a definitive solution. Moreover, in the leading authority, *The San Nicholas*, the argument that the head charterparty which should be preferred is that to which the carrier is party, was not accompanied by any detailed reasoning.[38]

Certainty and predictability are two important arguments in commercial matters. In *The Varenna*,[39] for example, it was held that documents so commonly in use and containing familiar expressions which have a well-established meaning among commercial lawyers should be consistently construed and that a well-established meaning – particularly as regards something like an arbitration clause where clarity and certainty are important to both parties – should not be departed from in the absence of compulsive surrounding circumstances or a context which is strongly suggestive of some other meaning. The most certain rule would be to state that an unidentified charterparty is regarded as ineffective, as decided in *Smidt v Tiden*.[40] English authorities took a different and less predictable approach.[41]

Hence, the issue is still open to dispute. The most relevant rules of interpretation will now be scrutinised and an attempt made to show to what extent they could be applied to the main issue. Finally we will examine whether there is a hierarchy among these rules.

III.2 Construction and interpretation of a bill of lading

Generally, the rules of construction and interpretation developed for contracts are equally applicable to charterparties and bills of lading,[42] and in the interpretation of an incorporation clause of whole contracts into a bill of lading, the following principles in particular are considered: the surrounding circumstances, the appositeness of the incorporated charterparty and the *contra proferentem* rule.

III.2.1 Surrounding circumstances

The bill of lading is to be construed in the light of the nature and details of the adventure contemplated by the parties to it.[43] 'What the court must do is place itself in thought in the same factual matrix as that in which the parties were.'[44] 'No contracts are made in a vacuum:

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[37] Scrutton (n 30) art 38 para 1.

[38] Compare J Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 433: 'The modern view is that the reason for a rule is important. The rule ought to apply where reason requires it, and no further. However, often the real purpose of a rule is debatable. The question can then only be solved by rational argument, and a judgment by an impartial judge. Once the purpose of a rule has been identified by effective and proper adjudication, it is an important and legitimate matter to enquire whether the rule as formulated fulfils that purpose. If it appears not to fulfil the purpose, it is potentially defective.'

[39] *Skips A/S Nordheim v Syrian Petroleum Co Ltd and Petrofina SA (The Varenna)* [1984] QB 599; [1983] 2 Lloyd's Rep 592, at 597 *per* Oliver LJ.

[40] For example, see under US law, *USA v Cia Naviera Continental SA* [1962] AMC 2403 and *Southwestern Sugar & Molasses Co v Eliza Jane Nicholson* [1955] AMC 746. Here it was held that a bill of lading which referred to a charterparty but which left blank the names of the parties and the date of the charterparty was ineffective to incorporate the terms of the charter by reference into the bill of lading.

[41] Besides, since the decision of the court on the meaning of a contract decides a question of law, the doctrine of *stare decisis* theoretically means that any inferior court is bound by the point of law decided. However, any contract is a consensual arrangement between particular parties made against the background of particular circumstances. In those it has proved a relatively simple task for the court to distinguish a decision made in relation to a different contract when it so desires (K Lewison *The Interpretation of Contract* (3rd edn Sweet & Maxwell London 2004) 102).

[42] Scrutton (n 30) art 9 p 10; Gaskell (n 30) 2.26; W Tetley *Marine Cargo Claims* (3rd edn Blais Montreal 1988) 83.

[43] Scrutton (n 30) art 9 p 10.

[44] *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989; [1976] 2 Lloyd's Rep 621, at 625 *per* Lord Wilberforce.

there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the 'surrounding circumstances' ….'[45]

'Where the words of the contract are ambiguous, the acts, conduct, and course of dealing of the parties before, and at the time, they entered into it may be looked at to ascertain what was in their contemplation, the sense in which they used the language they employ, and the intention which their words in that sense reveal.'[46] Thus, if the words are fairly capable of two meanings, evidence of a course of conduct before or at the time of entering into the contract may determine the choice.[47]

However, it is a fundamental rule of English law that evidence by either party of what was intended is inadmissible.[48] Another kind of evidence which is excluded under English law is evidence of what happened after the contract was made.[49]

Nothing is relevant to interpretation of what the parties agreed, unless it was known or ought reasonably to be expected to be known to both of them at the time when the contract was made.[50] This exclusion is especially of relevance as far as bills of lading are concerned. Where a string of charterparties exists and an owner's bill of lading is issued the shipper is in a less close relationship with the carrier so that there would be only few surrounding circumstances which could be considered. The only relevant moment will most likely be the time when the bill of lading shifts from the shipper to the master and vice versa. In *The San Nicholas*, Roskill LJ considered the surrounding circumstances and came to the conclusion that the cargo owners had been interested in one, if not two, charterparties relating to the voyage.[51] It is worth pointing out, however, that he examined the surrounding circumstances only in relation to the question whether a charterparty was incorporated at all, and it has to be emphasised that he did not mention what the surrounding circumstances in this specific case were.

With regard to the relationship between a carrier and a consignee the situation is even more obscure. The consignee, who becomes contracting party to the carrier only when he is the lawful holder of the bill of lading[52] (and in such a case the bill of lading becomes conclusive evidence of the terms of the contract of carriage),[53] is normally not in touch with the carrier at the time the bill of lading is issued. Surrounding circumstances are, as far as the consignee is concerned, most unlikely to be considered.

III.2.2 Appositeness of the incorporated charterparty

In *The Sevonia Team*[54] the criterion of appositeness was considered in order to find out which charterparty was incorporated. In *The SLS Everest*, which dealt with a conflict between a voyage and a time charterparty, the court also considered this criterion and held that the voyage charterparty was more apposite than the time charterparty.[55] Since these two authorities only dealt with disputes between the carrier and the shipper, it is not clear whether this criterion would also be applicable to the dispute between a carrier and a consignee. In the writer's opinion, there is no apparent reason why it should be handled differently. It should be noted that where it is clearly stated in the bill of lading that the

[45] ibid, at 624 *per* Lord Wilberforce.
[46] *Houlder Brothers & Co Ltd v Commissioner of Public Works* [1908] AC 276, at 285 *per* Lord Atkinson.
[47] Scrutton (n 30) art 9 p 11; *Charrington & Co Ltd v Wooder* [1914] AC 71, at 82 *per* Lord Dunedin.
[48] L J Staughton 'Interpretation of Maritime Contracts' (1995) 26 J Maritime Law & Commerce 259, 263.
[49] ibid 264; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, at 267 *per* Lord Simon de Glaisdale.
[50] Staughton (n 48) 267; *Prenn v Simmonds* [1971] 1 WLR 1381, at 1385 *per* Lord Wilberforce.
[51] Note 5, 12 *per* Roskill LJ.
[52] The Carriage of Goods by Sea Act 1992 s 2 (1).
[53] *Leduc v Ward* (1888) QBD 475. This proposition also applies to charterparty bills of lading (see Wilson (n 17) 132).
[54] Note 11 *per* Lloyd J.
[55] Note 25, 392 *per* Lord Denning MR.

consignee should look at the charterparty the consignee is obliged to do so.[56] Upon receipt of a charterparty bill of lading with an ambiguous incorporation clause the consignee has to assume that the parties will have incorporated an appropriate charterparty into the bill of lading.

Thus the criterion of appositeness would seem from the authorities to be a useful one in the interpretation of a bill of lading, and Carver regards it as the most relevant.[57] As already mentioned, Debattista criticised this and argued that it blurred the distinction between the 'description' and the 'consistency' issues, and that it destroyed the certainty achieved by the simpler rule.[58] However, as explained above the 'description' and the 'consistency' issues relate to the question of whether a specific clause of one charterparty is also incorporated into the bill of lading. The criterion of which charterparty is more apposite to the bill of lading than another, on the other hand, relates to the very first issue, ie which charterparty among several was incorporated. Therefore, the criterion of appositeness does not deal directly with a specific clause of a charterparty, but in the circumstances where it is necessary to discover which charterparty the parties intended to incorporate, it is one reason to argue that the parties were unlikely to incorporate an inapposite charterparty into the bill of lading.

III.2.3 Contra proferentem rule

a) Basic principles

Where there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward. However, this phrase might mean: (1) the person who prepared the document as a whole; (2) the person who prepared the particular clause; or (3) the person for whose benefit the clause operates.[59] The authorities are not clear on this point. While older cases in particular mainly preferred the third interpretation,[60] recent authorities have opted for the first or the second option, the argument being that *proferens* is the person who drafted the proposed agreement because it may be assumed that he looked after his own interest.[61] However, this presumption can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question, and if the presumption is not a factor which may be taken into account in reaching that conclusion.[62] Where the *proferens* cannot be identified, or both parties may with equal force be described as the *proferens*, the maxim cannot be applied either.[63]

A specific problem with bills of lading is that, apart from the shipper, the holder has no bargaining power when receiving the bill of lading from the previous holder. The original holder must be taken to have had access to the terms of the charterparty when entering into the bill of lading contract.[64] A point of policy would therefore be to prevent the carrier or the shipper from issuing ambiguous bills of lading. It is the shipper who normally prepares the document for signature and the carrier, or master on behalf of the carrier who signs the bill of lading.[65] The person who prepares the bill of lading should not be in a position to take advantage of any failures in its drafting.

Cooke is of a similar opinion and states that the head voyage charterparty is the one which is

[56] *The Emmanuel Colocotronis (No. 2)* (n 1) 290 *per* Staughton J.
[57] Carver (n 33) 3-023 p 83.
[58] Debattista (n 31) 169 n 10.
[59] Lewison (n 41) 208.
[60] For example, *Burton & Co v English & Co* (1883) 12 QBD 218, at 220 *per* Brett MR.
[61] For example, *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, at 77 *per* Lord Mustill.
[62] Lewison (n 41) 213; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No. 2)* [1975] 1 WLR 468 at 477 *per* Sir John Pennycuick.
[63] Lewison (n 41) 209; *Tersons Ltd v Stevenage Development Corp* [1965] 1 QB 37; [1963] 2 Lloyd's Rep 333 at 368 *per* Pearson LJ.
[64] *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160 at 163 *per* Colman J.
[65] *The Heidberg* (n 19) 311 *per* Diamond QC.

incorporated into a bill of lading even if the shipowner is not party to it.[66] The reason for this is the fact that the time charterer will usually have the lawful authority of the shipowner, as well as the commercial incentive, to sign and issue the bill of lading or to direct the master to sign and issue bills of lading. If the shipper omits to identify the charterparty, he has only himself to blame.[67] This reasoning comes close to the *contra proferentem* rule and, as it will be shown, the *contra proferentem* rule is at first sight not easily applicable to bills of lading. Two additional aspects have to be considered with regard to Cooke's statement. First, in the cases *The Nai Matteini* and *Lignell v Samuelson* it was the consignee and not the shipper who sued the carrier, and it cannot be said that in such circumstances it was the consignee who was to blame. Secondly, construing the incorporation clause to refer to the head charterparty to which the shipowner is party does not inevitably mean that this charterparty is in favour of the shipowner. It might also be the case that a sub-charterparty is more favourable to the shipowner's claim than the head charterparty.

b) Ambiguous incorporation clause

The first crucial question in this context is whether the *contra proferentem* rule applies in any way to an ambiguous incorporation clause. In none of the authorities discussed here did the court consider the *contra proferentem* rule in reaching a decision. Likewise, in *The Heidberg* it was held that there is no reason why the shipowner should take priority over the shipper,[68] which leads to the assumption that Diamond QC did not want to prefer one party to the other. On the other hand, it was not stated that the *contra proferentem* rule did not apply.

Where parties expressly incorporate terms into a contract, the incorporated terms must be construed as if they had been written out in full in the contract.[69] In addition, it can also be argued that the reason for the incorporation clause is to apply terms of a charterparty where, most likely, rights to or exception of the carrier are stipulated (eg right to freight or exclusion of liability for goods after discharge). Without an incorporation clause, the carrier cannot rely on any of the exceptions and rights provided in a charterparty which would not have formed part of the contract contained in the bill of lading if the reference had not been made. Thus, it can be said that there is no difference between an ambiguous term in the bill of lading itself and an ambiguous reference. The starting point in both cases is ambiguity.

Therefore, there is, in the writer's opinion, no reason not to apply the *contra proferentem* rule to an ambiguous incorporation clause as one of the interpretation principles. The next question then is to find out who the *proferens* is.

c) Who is the proferens?

Dispute between consignee and carrier

Since the consignee is not party to a charterparty and is normally not involved in the preparation and completion of the bill of lading, he should not be regarded as the *proferens* when a dispute arises between a consignee and a carrier. When a master signs the bill of lading on behalf of the carrier without filling in the blanks the carrier is then regarded as the *proferens*. The situation is not so clear in a dispute between shipper and carrier.

Dispute between shipper and carrier

Where one party drafts the bill of lading and signs it on behalf of the carrier there seems to be no problem. Under such circumstances this party (shipper or carrier) has to be regarded as the *proferens* of the bill of lading.[70]

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[66] Cooke (n 30) 18.61.
[67] ibid.
[68] Note 19, 311 *per* Diamond QC.
[69] Lewison (n 41) 63; *Indian Oil Corp v Vanol Inc* [1991] 2 Lloyd's Rep 635 at 636 *per* Webster J.
[70] This result arises from the proposition that the rules of interpretation developed for contracts are equally applicable to charterparties and bills of lading (Scrutton (n 30) art 9 p 10; Gaskell (n 30) 2.26; Tetley (n 42) 83); and (as an example)

More problematic is the situation where the shipper or his agent fills out a pre-printed bill of lading issued by the carrier and the master signs it. It is the writer's view that the extent of charterer's right to give orders to the master is the most relevant criterion because, as long as the master is not entitled to refuse a bill of lading which is not in compliance with the provisions of a charterparty, the carrier cannot be deemed the *proferens*. Cooke regards this criterion as important as well.[71] It will therefore be examined under which types of charterparty the master, on behalf of the carrier, can refuse a bill of lading with unfilled blanks.

In time charterparties the charterer normally has a wide power to determine the form and contents of the bills of lading they may call on the master to sign.[72] In clause 9 of the Baltime 1939 charterparty, for example, it is provided that the master shall be under the orders of the charterers as regards employment, agency or other arrangements, combined with an indemnity clause. The nature and purpose of time charterparties is to enable the charterers to use the vessels during the period of the charters for trading in whatever manner they think fit. The issue of bills of lading in a particular form may be vital for the charterers' trade. The indemnity clause underlines the power of the charterers, in the course of exploiting the vessel, to decide what bills of lading are appropriate for their trade and to instruct the masters to issue such bills, the owners being protected by the indemnity clause.[73] Since time charterers can ask the master to sign bills of lading as they like, the result can only be that the charterers have to be regarded as the persons who drafted the bill of lading.

In voyage charterparties the right to give orders to the master is not as wide as in time charterparties. For example, in clause 10 of the Gencon 1994 charterparty it is stated that the master shall sign presented bills of lading as per the Congenbill bill of lading. The charterer is therefore obliged to use a certain form, otherwise the master is not under a duty to sign the bill of lading. This category is the most restrictive of the charterer's rights because the terms of the bill of lading which the charterer is entitled to present and to require the captain to sign are fixed by reference.[74] Where the charterparty clause is of this kind it is incumbent on the charterer properly to complete the prescribed form of bill of lading by filling in the blank spaces as appropriate.[75] Even if correct types of bills of lading are presented which are not in the stipulated form, then the master is not bound to sign them because the blanks in the form are indications that the relevant details should be entered in the blanks which are left for that purpose.[76] The consequences then, with regard to the question who prepares the bill of lading, are as follows: since the master is entitled to refuse to sign a bill of lading not properly completed by the shipper/charterer, it is he, or the carrier who is to blame if uncertainties arise. Under such a voyage charterparty the carrier has to be regarded as the *proferens* of the bill of lading because he could have refused to sign an ambiguous bill of lading.

If there is a string of charterparties and the head charterparty authorises sub-letting the charterer is entitled to put the sub-charterer in the same position with regard to signature of bills of lading as the charterer was under the head charter, ie to authorise the sub-charterer to require the master to sign bills of lading, or to sign them itself.[77] This means that the power of

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the Scottish case *Davidson v Guardian Royal Exchange Assurance* [1979] 1 Lloyd's Rep 406, where it was held that an insurance policy was framed and printed by the insurance company and, if there was any ambiguity, the construction had to be *contra proferentem*, *ie* the insurance company).

[71] Cooke (n 30)18.61.

[72] M Wilford T Coughlin and JD Kimball *Time Charters* (4th edn Lloyd's of London 1995) 325.

[73] *Federal Commerce and Navigation Ltd v Molena Alpha Inc (The Nanfri, Benfri and Lorfri)* [1978] 1 QB 927; [1979] 1 Lloyd's Rep 201 at 206 *per* Lord Wilberforce.

[74] Cooke (n 30) 18.177.

[75] ibid 18.178.

[76] *Garbis Maritime Corp v Philippine National Oil Co (The Garbis)* [1982] 2 Lloyd's Rep 283 *per* Goff J at p 288.

[77] *W & R Fletcher (New Zealand) Ltd v Sigurd Haavik Aksjeselskap (The Vikfrost)* [1980] 1 Lloyd's Rep 560 at 567 *per* Browne LJ.

sub-charterer to give orders to the master is similar to that of the charterer to the head charterparty. As a result, it is therefore relevant whether the head charterparty (ie the charterparty by which the carrier lets its vessel to a charterer) is a usual time charterparty permitting charterers to use bills of lading as they like (shipper is the *proferens)* or a voyage charterparty (carrier is the *proferens)* which authorises sub-letting.

Result

In a case where the carrier time charters the vessel to a third party he cannot normally refuse to sign the bill of lading. In such a situation the charterer (or the shipper at the end of a possible string of charterparties, respectively) has to be regarded as the *proferens*. If the carrier voyage charters the vessel to a third party and he charters it to the shipper, according to *The Garbis* the carrier could have refused to sign a bill of lading if the blanks were not filled in. If the master nevertheless signs the bill of lading, the carrier has to be deemed the *proferens*. Needless to say, it always depends on the specific wording in the head charterparty and, in particular, upon the right to give orders to the master. It is possible that the wording of the time charterparty concerning the right to give orders to the master is similar to the purport in typical voyage charterparties or *vice versa*.

d) Which charterparty is more or less favourable?

The result achieved above does not mean that if the carrier voyage charters its vessel to a charterer (the carrier is therefore deemed the *proferens)*, the head voyage charterparty is less favourable. In *The San Nicholas* it was obvious that the shippers as claimants preferred the head voyage charterparty because it had a more convenient governing law clause (English law).[78] Another example relates to freight. If freight is in dispute, it is likely that the head charterparty has lower freight rates than a sub-charterparty. However, it would be very difficult for a judge to determine which charterparty is less advantageous to the *proferens* because some clauses will be in favour, whilst some will not. In the writer's opinion, if the shipper as claimant sues the carrier as the *proferens* then the shipper can choose which charterparty he regards as the most favourable. If the carrier (as *proferens* and claimant) sues the shipper he has to expect that the shipper might regard a different charterparty as more advantageous and therefore incorporated into the bill of lading in any dispute. Under such circumstances the carrier might consider starting proceedings in different locations where the various charterparties provide for different jurisdiction or arbitration clauses. If the shipper is the *proferens* the situation is the other way round. Where a dispute between a carrier and a consignee arises the carrier should be always deemed the *proferens*. Thus, the consignee can choose which charterparty prevails.

III.3 Hierarchy of the interpretation rules

As far as charterparty bills of lading are concerned, the *contra proferentem* rule and the criterion of appositeness are most relevant for all parties. Surrounding circumstances and proof of these circumstances are only relevant with regard to a dispute between a carrier and a shipper. The final question is which of these criteria prevail.

Neither the *contra proferentem* rule nor the surrounding circumstances were considered in the authorities discussed above. In *The Sevonia Team* and *The SLS Everest* the criterion of appositeness was expressly considered.[79] Carver is of the opinion that where the courts have to choose between several charterparties, they will be inclined to favour (at the first stage) the incorporation of terms of that charter which are the most appropriate to regulate the legal relations of the parties to the bill of lading contract.[80]

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[78] Note 5, 11 *per* Lord Denning MR.
[79] It seems from the summary of the *The Vinson* case (n 28) that the judge took this criterion into account as well.
[80] Carver (n 33) 3-023 p 83.

Different interpretation rules might lead to different results. It is also the writer's view that the criterion of appositeness is the most relevant. This might sometimes lead to the head charterparty but not necessarily, and a rule that the head charterparty should prevail is not in existence. If there are several options, ie several charterparties which are apposite, the *contra proferentem* rule and, where applicable, the surrounding circumstances should then be considered. Since surrounding circumstances may hardly exist the *contra proferentem* rule will be of more importance. If the criterion of appositeness is taken to be more relevant the other party will be prevented from having too wide a choice of options and from having the opportunity of incorporating a completely inapposite charterparty.