

# The Liability for Freight

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## 1 Introductory Remarks

Freight is the term generally used for the remuneration payable to a carrier/shipowner,<sup>1</sup> whether payable by the shipper, consignee, sender or charterer.<sup>2</sup> In time charter or bareboat charter the remuneration is normally referred to as charter hire. Thus legal problems related to freight is part of the interrelation between sale's law and the law of carriage, a field to which Jan Ramberg has devoted much of his interest and knowledge.<sup>3</sup> Freight issues have been treated in

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<sup>1</sup> See i.a. Cook, Young, Taylor, Kimball, Martowski & Lambert, *Voyage charters*, London 1993 p. 215 (cit. Voyage charter), Gram, *Fraktaftaler og deres tolkning*, 4th ed. Oslo 1977 i.a. p. 75, Bull & Falkanger, *Innføring i Sjøret*, 5. ed. Oslo 1999, p. 3 ff. and Grönfors, *Sjölagens bestämmelser om godsbefordran*, Stockholm 1982 p. 190 f.

<sup>2</sup> In the new Swedish Maritime Code (1994:1009) - below referred to as SMC - art. 13:1 makes a distinction between *sender* and *shipper*, where the sender enters into a contract for carriage of general cargo, whereas the shipper actually delivers the goods for carriage. They are the counterparts of the *carrier*. 14:1 states i.a. that the "carrier" charters a vessel through a contract for the carriage of goods to another party, the *charterer*. (The terminology has been taken from a translation of the SMC 1994 made in 1995 and published by the Maritime Law Institute at the Stockholm University. It is not an official translation, but I have relied on it for convenience, although it contains certain peculiarities which could be questioned.) I tend to believe that the better concept in chartering is "owner" rather than "carrier", and below I use this term.

The Scandinavian terminology does not quite correspond to the terminology used in English law where the basic terms used in this perspective are "shipper" and "carrier" and "charterer" and "owner" respectively. In bills of lading the term "merchant" is frequently applied to signify "shipper", "sender" or "consignee" as the case may be.

The Nordic maritime codes date back to the late 19th century and were more or less drafted as common Nordic legislation. Also the new codes mirror common Nordic legislation efforts. The new SMC replaces the previous one from 1891, which has, however, been amended on a number of occasions during the 100 year period passed.

<sup>3</sup> See i.a. Ramberg, *Köpvaktal samt transportavtal och andra anslutande avtal*, Stockholm 1993, id., *Konossement och köpvaktal. Festskrift till Kurt Grönfors*, Stockholm 1991 s. 357 ff, och id., *Samordning av köp-, transport-, försäkrings- och finansieringsavtal i internationell handel*, SvJT 1988 s 281 ff.

great depth by Professor Erling Selvig in his "The freight risk" published in *Arkiv for sjørett* vol.7, Oslo 1965-78.

A number of legal issues may be connected with the payment/earning of freight/hire. Two types of legal problems then seem to have particular importance. One concerns those aspects which are related to competition regulation, which may, particularly in liner traffic, have important implications. The other is rather related to contract law aspects generally and the interrelation between sale's law and the law of carriage.

The main problem focused in this article relates to the latter type of problems and in particular to the question who is liable to pay the freight, and my point of departure is Scandinavian law with comparisons with English law which has particular practical importance in respect of charter parties in an ocean transportation.

## **2 General Background**

The particular situation, which forms the basis for this article, is to-day history, but it still contains elements which are of importance in the discussion of liability for the payment of freight.

During the autumn of 1991 and the spring of 1992 a number of disputes arose where the then Soviet organization *Exportkhleb* was involved as buyer/charterer/consignee in transactions related to the purchase of grain. Many of the transactions then leading to disputes involved the purchase of grain from the United States.

Traditionally, Soviet enterprises tried to apply CIF-terms as sellers and FOB-terms as buyers in international sales, i.e. in order to gear transportation and insurance to Soviet "sister" organizations.

*Exportkhleb* made the different purchases of US grain from various grain houses in roughly the same manner and on the same terms and conditions as on earlier occasions. It appeared, however, that during the particular period *Exportkhleb* did not have enough funds, and payments were delayed considerably or did not come through. Furthermore there were for various reasons delays in the loading and in the discharge of the goods under the different shipments. Thus one of the problems involved was related to the buyers' failure to pay the cargo, i.e. a problem under the sale's agreement between the seller and the buyer. The other one concerned failure to pay the freight, i.e. a problem under the charter party between the charterer and the shipowner, and/or under the bill of lading between the shipper and the carrier. Apart from the lack of funds as a basic problem there were also delays due to congestion at the ports, leading to demurrage and such related costs.

Problems thus arose for sellers, carriers and financiers due to the delay in payment of the purchase price, the freight, and various steps were taken to protect the different interests involved. The problems that arose had many different angles. One concerned the general question what steps could be taken against *Exportkhleb* or other Soviet related organizations, if the ultimate buyer was in fact an enterprise in one of the Baltic States or other parts of the previous Soviet Union (previously under the same head), where much of the grain was

actually discharged. The question could then be posed who was really the contracting party in the situation? Depending on the answer to that question decisions had then to be taken concerning the legal steps that could be taken and against which body. Could Exportkhleb invoke immunity? Could the property of other Soviet organizations be attached, i.e. could there be a case of “piercing the corporate veil”? From the carriers’/shipowner’s point of view corresponding questions had to be taken into consideration. Thus a practical question was then what steps could be taken by the shipowner to protect its interests and against whom he could have a claim. The bill of lading stated the consignee to be “order of the shipper”, freight was “payable as per charter party---“ and the terms and conditions of the bill of lading did not contain any lien/cesser clause. The main questions were:

1) who was the contracting party?

2) if Exportkhleb could not, or would not, pay freight, demurrage and ancillary costs, would there then be another liable party? In other words could the shipper still be liable? Would it make any difference if the bill of lading as consignee stated “to the order of the shipper”?

I am not going into the at the time interesting questions of international law and public law but shall restrict myself to discuss some of the more narrow freight issues.<sup>4</sup>

### 3 The Sea Carrier’s Liability and the Bill of Lading

#### 3.1 In General

The freight issue could, of course, not be isolated from the general principles on the carrier’s liability and on the bill of lading. The character of the bill of lading as a “document of title” entitling the holder to demand delivery of the goods at the port of discharge plays an important role in the international sale of goods. The bill of lading is often referred to as a tripartite agreement between the sender (shipper), the carrier and the consignee.<sup>5</sup> Whereas the carrier’s main duties are to receive, load, care for, transport and deliver the cargo, the customer’s main duty is to pay the freight and other charges but also to ship the goods in accordance with the purchase agreement and the contract of carriage (the shipper), and to receive them at the port of discharge (the consignee). Some of the questions that may come up will then, of course, be which of the parties involved is liable to pay the freight, and how much freight has to be paid if the cargo has been lost/damaged.

Rules on seaway bills have been introduced into the new Swedish Maritime Code (art. 13:58 and 13:59) as well as into the UK 1992 Carriage of goods by sea act (cf art.2). I am, however, here not concerned with the particulars of the seaway bills.

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<sup>4</sup> It should be mentioned that in the end most outstanding amounts were paid, in many cases also including interest.

<sup>5</sup> See i.a. Grönfors, *Allmän transporträtt*, 5th ed. 1977, p. 46, Schmitthoff, *The export trade. The law and practice of international trade*, 9th ed. London 1990 p. 561 ff. and Scrutton, *On charterparties and bills of lading*, 19th ed. London 1984 p. 54 ff..

### 3.2 *Rules on Bills of Lading*

Ocean carriers' liability for damage to or loss of cargo in connection with ocean carriage is governed by different international conventions, namely the Hague Rules (1924), the Hague-Visby Rules (1968) and the Hamburg Rules (1978). They all set a mandatory minimum with respect to the ocean carrier's liability for damage to or loss of goods, although there are differences between them.<sup>6</sup> Even if they are considered to be important to protect the "economic value" of the bill of lading neither of these rules really concern the particular legal character of this document.<sup>7</sup>

Thus the mandatory minimum liability of the ocean carrier forms a basis for the practical functioning of the bill of lading, since the liability rules serve to protect the interests of the seller/buyer respectively under the sale's contract,<sup>8</sup> but the question concerning liability for cargo damage should also be related to the question of payment of freight.<sup>9</sup> The rules related to the carrier also set out the principles for the particulars of the bill of lading including the description of the cargo, dating and signing of the document, reference to freight payment etc, which are important for the seller and the buyer in order to enable them to judge whether the obligations under the sale's agreement have been performed.

On top of that the legal character of the bill of lading, i.e. its functions as a negotiable/quasi-negotiable document of title is governed by national legislation but based on international custom.<sup>10</sup> Such legislation may contain rules on the relation between the document and the actual cargo holder and may cover items, such as: Is the holder of the bill of lading also automatically the owner of the cargo? Who is entitled to demand delivery from the carrier? Who is entitled to sue in contract (or in tort for that matter) for damage to or loss of cargo? Who is entitled to receive the goods and liable to pay outstanding freight and other charges?<sup>11</sup>

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<sup>6</sup> See e.g. Grönfors, *Allmän transporträtt*, 5 th ed. Stockholm 1977, p. 28 ff and id. *Inledning till transporträtten*, 2nd ed. Stockholm 1989 p. 28 and 54.

<sup>7</sup> This is evident from e.g. *The Hamburg rules on the carriage of goods by sea*, ed. by S. Mankabady, Leyden/Boston 1978.

<sup>8</sup> Hellner, *Linked contracts*, Festschrift to Roy Goode, manuscript not yet published.

<sup>9</sup> See further below in 4.2. and 5.3.

<sup>10</sup> In common law the bill of lading has been referred to as quasi-negotiable, cf Schmitthoff, *The development of a CT document. Seminar on combined transport*. II *Diritto Marittimo*, April-September 1972 p. 140 ff.

<sup>11</sup> To some extent, at least, the rules related to these topics are found in national rules e.g. in the United States in the Pomerene Act, in England in the Carriage of goods by Sea Act 1924 (replacing i.a. the 1855 Bill of Lading Act) and in the Nordic countries in the respective Maritime Codes (see e.g. SMC 13:42-13:57).

### **3.3 Principles Related to Bills of Lading According to The 1992 Carriage of Goods by Sea Act**

Under the preamble of the 1855 Bill of Lading Act, reference is made to the bill of lading being transferable, i.e. transferability of the right to demand possession of the goods from the carrier currently having physical possession of them.<sup>12</sup>

Section 1 of the Bill of Lading Act 1855 provided that in circumstances where the property in the goods passes by reason of endorsement of the bill of lading the endorsee has all rights of suit transferred to him and is subject to the same liabilities as if the contract under the bill of lading had been made with him.

In 1992 a new Carriage of goods by sea act replaced i.a. the 1855 Bill of Lading Act and some of the particularities of the previous English law in this field have thereby been geared at more mainstream principles.

The general principles related to bills of lading and their use could be condensed from the 1992 Act in the following way, although there may be slight variations in other national rules :

a) According to section 2 (1) (a) the lawful holder of a bill of lading will be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered loss himself.

b) Following section 2(5) the shipper and any intermediate holder of a bill of lading should not be entitled to rights of suit after someone else has become the lawful holder of the bill of lading.

c) According to section 2(2)(a) a bill of lading should be capable of indorsement so as to pass contractual rights even after delivery of the goods has been made, provided that the indorsement is effected in pursuance of arrangements made before the delivery of the goods. 2(2)(b) also allows a person to sue if goods or documents have been rejected.

d) Section 3 prescribes that, where the holder of a bill of lading, or any other person entitled to sue under the act, takes or demands delivery of the goods, or otherwise makes a claim under the contract of carriage against the carrier, he should become subject to any contractual liabilities as if he had been a party to the contract of carriage, without prejudice to the liabilities under the contract of carriage with the original shipper,

e) According to section 2(1)(b) and 2(5) the consignee named in a seaway bill, or such other person to whom the carrier is duly instructed to deliver the goods under the terms of the seaway bill, is able to sue under the contract of carriage, without prejudice to the rights of the original shipper. This contrasts to the law applicable to bills of lading.

f) Section 2(4) lays down, that as any lawful holder of a bill of lading will now be entitled to assert contractual rights against the carrier. This will mean that on occasion recovery of those who have not suffered loss will occur, such as forwarding agent acting on behalf of the final holder of the bill of lading.

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<sup>12</sup> In Swedish law related principles are found in art. 13:42, 13:52 and 13:54, cf Schmitthoff, *The development of a CT document*. On the questions generally see also i.a. Powers, *A practical guide to bills of lading*, New York 1966.

## 4 Freight/hire Provisions in the Swedish Maritime Code

### 4.1 In General

SMC contains a number of provisions concerning freight and hire and the protection of a claim for freight.<sup>13</sup>

As previously noted it is in this perspective important to be aware of the interrelation between the sale/purchase agreement and the contract of carriage, where the former is decisive for the allocation of freight payment. As a consequence the delivery terms agreed in the sale's contract should be synchronized with the provisions of the contract of carriage or the charter contract.<sup>14</sup> In the latter one the basic principle is, like in other contractual relations, that it falls upon the contracting party to pay the price, i.e. in this connection the freight. Apart from the booking note there is in liner transportation normally only a bill of lading issued as evidence of a contract of carriage, and the shipper is in one way or the other one of the parties involved.

Thus the freight clause in the contract of carriage should follow the delivery clause in the sale's contract, but the former mirrors a separate contract covering the particular relation between the carrier and the cargo owner. Under a charter agreement the charterer and the shipowner agree on the freight, but then the bill of lading could supplement or supersede the charter party. The bill of lading may supersede the charter party in relation to the consignee/endorsee under the bill of lading not being a party to the charter contract. This means that the provisions of the bill of lading may apply before the terms and conditions of the charter party.<sup>15</sup> On the other hand the charter party being the document first signed may prevail over the bill of lading in this relation between the shipowner and the charterer.<sup>16</sup>

If the person liable to pay freight according to the sale's contract and the charter agreement respectively does not pay, the question will arise if another person may become liable to pay the freight. It should also be underlined that there is often in the charter party and/or the bill of lading a lien/cesser clause whereby the ultimate liability to pay freight may be changed from the charterer to the receiver or to the "goods".<sup>17</sup> The freight problem therefore appears on

<sup>13</sup> Thus related provisions appear in 13:10, 13:19, 13:20, 13:23, 13:46, 13:57, 13:59 (with respect to general cargo often in connection with liner transportation), 14:6, 14:21, 14:24, 14:25, 14:50 (with respect to voyage charter) and 14:70-72 (with respect to time charter hire). I shall not delve into the questions related to time charter hire in this article.

<sup>14</sup> See i.a. Gorton, *Rättsliga ramar för internationella affärer*, Stockholm 1993, p. 175 ff, Grönfors, *Allmän transporträtt* p. 37 f, Hellner, *Sale, carriage, insurance - an integration of the contracts and harmonization of the law*. I Estudios en homenaje a Joaquin Garriguez, 1971 p. 48, Ramberg, *Samordning av köp-, transport-, försäkrings- och finansieringsavtal i internationell handel*. SVJT 1988 s. 281 ff. and Selvig, *Fra kjøpsrettens og transportrettens grenseland*, Oslo 1975 i.a. p. 10 ff.

<sup>15</sup> This particular problem is illustrated in *Oriental Maritime Pte. Ltd. v. Ministry of Food Government of the People's Republic of Bangladesh (The Silva Plana, Bahamastars and Magic Sky* [1989] 2 Lloyd's Rep. 371 (QB).

<sup>16</sup> See e.g. Grönfors, *Allmän transporträtt* p. 37 ff.

<sup>17</sup> The question of lien and cesser clauses will be further discussed below 4.5 and 5.3..

different levels depending on the contractual relation, but this article mainly deals with the contract of carriage/voyage charter aspect.

#### 4.2 *The Right to Claim Payment of Freight*

Payment of the freight is one of the fundamental provisions in a contract of carriage or a charter. The basic provision concerning freight in SMC with respect to general cargo has been laid down in 13:10 which sets out as the main principle that “Unless otherwise agreed, the freight payable is that which is current at the time of delivery of the goods for carriage. Freight shall be paid upon reception of the goods”. The rule means some change in comparison with the earlier rule. The reason for the change is an adaption to commercial practice where bills of lading often prescribe “freight prepaid” (often also earned in advance).<sup>18</sup>

SMC also clearly spells out that prepaid freight shall be returned if the cargo or part thereof is not delivered to the merchant. Thus SMC in 13:10 (cf. also 14:24) prescribes i.a.: “For goods which do not remain at the end of the carriage, freight shall be paid only if the goods have been lost due to their own propensity, insufficient packing or fault or negligence on the sender’s side.”

English law has as its basis that, unless otherwise agreed, freight is payable only upon delivery of the cargo to the merchant, provided that the cargo is not so damaged that “the nature of the thing has been altered”.<sup>19</sup> If, however, payment has been made in advance, it will depend on the contractual situation whether the prepaid freight shall be regarded as a loan (to be repaid) or as a final advance payment.<sup>20</sup> There are also cases where the earning occurs before the payment.<sup>21</sup>

In contrast to this provision SMC 14:6 does not contain any express rule on the payment of freight in a charter, but the travaux préparatoire (prop. 1993/94:195, p. 271 at 14:6) explain that failing such express rule the old rule shall apply, namely that unless otherwise agreed, freight shall be paid upon delivery of the cargo to the receiver, i.e. upon performance. This is the same main rule as is applied in English law, where there is no particular legislation in this field.<sup>22</sup> Unlike in other instances English law does not allow the set off of claims for damages against freight.<sup>23</sup>

<sup>18</sup> This means that in respect of general cargo contracts the time for “payment” and the time for “earning” have been separated, and it could be questioned if the solution chosen is a good rule taking into consideration the general legal perception that payment shall be made upon the other party’s performance of his contractual obligations. I think that the old rule should have remained but non-mandatory as a rule.

<sup>19</sup> See i.a. *Dakin v. Oxley* (1864) 15 C.B.(N.S.) 646 and *Montedison S.p.A.v. Icrova S.p.A. (The Caspian Sea)* [1980] 1 Lloyd’s Rep. 91. Cf in Scandinavian law Bull & Falkanger, with references on p. 332 and 337.

<sup>20</sup> See Voyage charter p. 233 ff., cf also the corresponding situation in connection with time charter, *Pan Ocean Shipping Co. Ltd v. Creditcorp. Ltd. (The Trident Beauty)* [1994] 1 Lloyd’s Rep. 365 (H.L.) with ref.

<sup>21</sup> *Vagres Compania Maritima v. Nissho-Iwai American Corp. (The Karin Vatrís)* [1988] 2 Lloyd’s Rep. 330.

<sup>22</sup> See Voyage charter, p. 230 ff. The English rule dates back to the case *Dakin v. Oxley* (1864) 15 C.B. N.S. 646 where Willes J. at p. 664 stated: “--- the true test of the right to freight is the

Earning of the freight is distinguished from the payment thereof, and SMC in 13:10 contains an indirect provision to the effect that, unless otherwise agreed, the carrier is entitled to freight only upon his performance of his duty to carry and deliver the goods. In some legal systems (so e.g. the Scandinavian) the carrier is, however, entitled to a certain remuneration although the goods do not reach the port of discharge, through so called distance freight, which shall be determined *pro rata parte* calculated on the carriage actually performed in relation to the agreed carriage.<sup>24</sup>

The earning principle, where earning of the freight occurs upon performance of the agreed obligation, could be seen as a general principle in transport law. It also corresponds to the payment principle in the Swedish sale's act art 45 and could probably be seen as a general principle in the law of obligations.

### 4.3 *The Determination of Freight*

In liner traffic freight is normally predetermined through tariffs set out by the liner conferences, but the individual customer may negotiate a certain discount.<sup>25</sup> In chartering the freight is almost invariably set individually after negotiations between the parties, and the freight level reflects the market level at the time of the deal.<sup>26</sup>

There is generally a dividing line between liner traffic on the one hand and chartering on the other hand, although the nuances may be many.

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question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they may be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carries part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried unless the charter party makes the carriage of the whole a condition precedent to the earning of any freight ---".

<sup>23</sup> See Voyage charter p. 227 ff. with references. The same principle applies in carriage by road, see *United Carrier Ltd. v. Heritage Food Comp. UK Ltd.* [1995] 2 Lloyd's Rep. 269.

<sup>24</sup> In Swedish law art. 13:15 referring to art 14:21 prescribes: "If a part of the carriage has been performed when the contract is cancelled or avoided or when for any reason the goods are unloaded in a port other than the agreed port of discharge, the carrier shall be entitled to distance freight according to the provisions of chapter 14 section 21." The question of freight risk is also illustrated in ND 1990 p. 123 (SøHa). English law, among others, does not recognize the principle of distance freight, which partly follows from the *Dakin v. Oxley*-case, but also follows the basic principle that payment is due upon the debtor's fulfilment of his contractual obligations only. There may, however, be certain exceptions to the basic rule, cf Voyage charter p. 222 and 230 ff with references. See particularly *Appleby v. Myers* (1867) L.R.2 C.P. 651 where Blackburn J. at p. 661 stated: "The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract."

<sup>25</sup> As mentioned above I have here left out all questions related to competition law.

<sup>26</sup> In tanker shipping the New World scale system is used to give the freight rate relations between different cargo voyages, cf.



The rate may be determined in different ways: by weight or other unit (kilogram, ton, bag, container etc), on lumpsum basis or another basis. It may be based on bill of lading weight, actually measured weight or similar.

Freight may be payable based on “intaken quantity”,<sup>27</sup> on “outturn quantity” or on “bill of lading quantity”. Various legal problems may come up in this connection and to a large extent the problems coming up in these cases are evidential.<sup>28</sup>

Time charter hire is payable on period basis in advance: per calendar month, per week, per day etc.<sup>29</sup>

#### 4.4 *Agreed Earning/payment of the Freight*

Above has been pointed out that the generally accepted principle is that freight is earned upon the carrier’s performance of his contractual obligations (i.e. upon delivery to the consignee<sup>30</sup>), and in many instances this is also when the freight shall be paid. In principle, however, a distinction should be made between the earning of the freight and the payment thereof. As to payment of freight the parties could agree in different ways: payment in advance, in arrears, on signing bills of lading (upon delivery of the cargo to the carrier), upon release of the bill of lading, X days after signing bills of lading, BBB (before breaking bulk) etc. or similar. The payment clause could even state that freight shall be paid upon delivery, although in fact no delivery will take place. In such case it is really an earned freight.

The individual provision chosen in the contract of carriage/charter is similarly a consequence of the terms in the sale’s agreement. It is not uncommon that the parties have agreed that freight shall be paid in different parts.<sup>31</sup> The earning of the freight, which principally occurs on the performance, i.e. when the cargo is ready for delivery to the merchant, is frequently amended and may e.g. be agreed to take place upon “shipment of the cargo” and “non-returnable whether the cargo is lost or not lost”.

A practical situation is that, where the bill of lading has been marked “freight prepaid”, although the freight has not been paid. This may be due to the situation upon loading. The shipper requests a “freight prepaid” bill of lading, since he needs such document in order e.g. to obtain payment under a documentary credit. This payment is necessary for him to be able to pay the freight. Thus the

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<sup>27</sup> See e.g. in English law *Shell International Petroleum Co. v. Seabridge Shipping (The Metula)* [1978] 2 Lloyd’s Rep. 5.

<sup>28</sup> There may thus be problems concerning the establishing of figure to be inserted into the bill of lading, problems related to where measuring shall take place etc.

<sup>29</sup> In Swedish law SMC 14:70.

<sup>30</sup> It merits to be pointed out that “delivery” under the sale’s contract may differ from delivery under the contract of carriage.

<sup>31</sup> In the *Silva Plana*-case mentioned above in note 13 the following clause was used, which may serve as an illustration:

”Freight Payment.

90 % freight payable within 10 clear working days of signing and release Bills of Lading and 10 % freight to be paid on completion of discharge on right and true delivery of cargo. --- Freight payment to be made by confirmed and irrevocable L/C. ---”

carrier issues a “freight prepaid” bill of lading as requested. The shipper does not pay freight and the question will come up at the port of discharge whether the carrier could use the cargo as security for the freight in spite of the bill of lading being marked “freight prepaid”. The wording in SMC 13:19 limits the consignee’s duty to pay freight to those situations where the unpaid freight follows from the bill of lading. This is, of course, not the case if the bill of lading states “freight prepaid”.

As already indicated freight payment clauses may be drafted in many ways and some circumstances should be observed in that connection. So for example it is not uncommon that there is in the charter party an “issuance of bill of lading” clause that may provide:

“Upon loading the captain shall sign clean bills of lading as presented marked freight prepaid.” Sometimes it is also stated “without prejudice to this charter.” At the same time the freight payment clause may prescribe: “Freight to be paid within seven days of signing of bills of lading.”<sup>32</sup>

Such wording serves to give payor of freight a possibility to use a freight prepaid bill of lading to obtain payment under a documentary credit. The situation may be practically the same in respect of shippers and bills of lading. As a consequence of such “freight prepaid” clauses there may be difficulties for the carrier/shipowner, naturally in the relation to a bill of lading holder, but also in relation to the charterer/shipper he may face problems of evidentiary nature. Principally, however, the charterer/shipper may not rely on such clauses, if neither of them have paid the freight.

The following American case illustrates the question here concerned.<sup>33</sup> Here the payment liability of the buyer was considered but the facts were somewhat particular.

The buyers in November 1985 agreed to purchase goods on a C.I.F. basis from the sellers. Payment was to be made under a letter of credit upon presentation of documents marked “freight prepaid” and indicating the buyers as shippers.

Although the sellers booked the shipments with the carrier in the seller’s name, the buyers insisted upon appearing as shippers on the bills of lading because they did not wish to reveal the name of the supplier to the ultimate buyer of the goods. The sellers prepared the bill of lading marked “freight prepaid” which were then forwarded directly to and issued by the carrier without payment of the freight charges. The decision to release the prepaid bills of lading without any credit arrangement having been effected with the buyers was made unilaterally by the carrier’s personnel.

The buyers paid the sellers all freight charge due on the bills of lading in reliance upon their being marked “freight prepaid” by the carrier.

The sellers ceased trading before paying over freight to the carrier, and the question arose whether the carrier was entitled to receive freight from the buyer.

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<sup>32</sup> The charterer is then entitled to present and the captain obliged to sign, a bill of lading which varies the terms of the charter both as to rate and payment of freight, see *The Nanfri* [1978] Q.B. 927, [1979] A.C. 757. The captain is, however, not obliged to sign bills lading which are incorrect, see Voyage charter p. 405 with references or “contain extraordinary terms or terms manifestly inconsistent with the charter party”, i.a. *The Vikfrost* [1980] 1 Lloyd’s Rep. 560 (CA).

<sup>33</sup> *Mediterranean Shipping Co. v. Elof Hansson Inc.(The Tumilco and the Tuxpan)* USDC (SDNY) August 29, 1988.

The carriers argued, firstly, that the sellers had acted as agents of the buyers, and secondly that despite the fact that the bills were marked “freight prepaid” they did not in fact receive payment, but rather extended credit to the buyers.

The buyers argued that since they had paid the freight in reliance of the “freight prepaid” clause in the bills of lading, they were protected on the grounds of equitable estoppel and should not have to pay the freight once more.

The court found that the carrier’s contention that the seller had acted as agent for the buyers was without merit. The court stated that even if there seemed to be no case laying down a principle of *equitable estoppel* on behalf of shippers this was a case where such *equitable estoppel* should be applied to protect the buyers from having to pay twice.

#### 4.5 *Security for Payment of Freight*

In connection with the charter negotiations a shipowner may demand security for the freight unless it is paid in advance.<sup>34</sup> An irrevocable letter of credit or a guarantee may provide the shipowner with good financial security.<sup>35</sup> Security is also provided in many legal systems through the carrier’s/shipowner’s right of lien.<sup>36</sup> Most charter parties and bills of lading for that matter contain particular lien clauses. Somewhat carelessly one could then say that the goods are, to some extent at least, the financial security for the freight payment; i.e. if payment is not made as agreed the carrier could in accordance with the particular rules applicable cover himself for the freight through the value of the cargo.

SMC in 13:20-22 and 14:25 (with a reference to 3:43) prescribe rules on lien, whereby the carrier’s demand for freight is secured by his right to release the cargo, and is entitled to retain the cargo and eventually sell it to make himself paid out of the proceeds.

## 5 **Relation Between the Charter Party and the Bill of Lading**

### 5.1 *In General*

As mentioned briefly it is in certain trades common that carriage of goods involves a couple of relations and documents, namely a charter party related to the use of the vessel (for a voyage or for a period of time) as well as a bill of lading related to the cargo.

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<sup>34</sup> See e.g. Bull & Falkanger, p. 335 f. Cf. Gram, *Inndrivelse av fraktkrav*, Marfus No. 41 (1979).

<sup>35</sup> A letter of credit is normally issued by a bank, cf. Gorton, *Rembursrätt*, Stockholm 1980 p. A 9. In my experience such freight credits are not very common but more often a parent guarantee or equivalent is requested for the charterer’s performance.

Frequently such parent guarantees are made directly in the charter party in a rather simple form, e.g. “the undersigned company hereby guarantees the performance of the charterer”. It may then turn out that the wording of such guarantee for various reasons do not amount to such strict drafting as to provide sufficient security.

<sup>36</sup> General legal principles extend similar security in certain equivalent situations, e.g. a lien for an artisan in goods having been handed to him for work/repairs.

Looking at the contractual relations the seller under a C.I.F.-contract will probably appear as the *charterer* of a vessel under a subsequent voyage charter party, and he will in many cases also be the *shipper* under the bill of lading involved. He has to pay freight as well as certain ancillary costs as seller under the C.I.F. sale's contract and he will then also be liable to pay the freight under the charter party/contract of carriage, since the buyer as the possible consignee will request a bill of lading marked "freight prepaid" following the terms of the sale's contract.

On the other hand in a traditional F.O.B.-transaction the buyer will normally appear as charterer of the vessel whereas the seller will frequently appear as the shipper under the bill of lading and the buyer may appear as the consignee.<sup>37</sup> Then as contracting party the charterer under the charter party will be liable to pay the freight, but depending on the circumstances there may be situations where the freight is not paid and where there will be need of a more plentiful pocket. As mentioned the bill of lading will be an additional, and at least to some extent, superseding document. The relations will, of course, differ depending on who is actually performing, but the important thing in the perspective here, is the relation and coordination between the two contracts. Below, I shall in some more detail focus on the different parties involved and the financial security in the cargo.

In English law *Scrutton*<sup>38</sup> explains that there are two alternative, complimentary situations. Firstly freight is prima facie payable by the party who makes the contract of carriage with the owner. "But, a new contract may be presumed as a fact from demand of the goods, and their delivery by the master without insisting on his lien."<sup>39</sup> The apparent implication is, of course subject to the shipper in fact being the contracting party. Even if the charterer has entered into the charter the shipper will then come into a contractual relation with the carrier by delivering the cargo for carriage and receiving the bill of lading. Apart from the charterer there are thus three possible payors of the freight, namely the shipper, the consignee and the holder of the bill of lading.<sup>40</sup>

I shall here somewhat further discuss those principles which have been laid down and developed in English law and illustrate this development through some cases. The duties of the seller under a C.I.F. contract has already been discussed to some degree. It has, however, to be added that there are occasions where the sale's contract provides that the bill of lading will name the buyer as the shipper even where the seller has to make the shipping arrangements.

Also when it comes to F.O.B.-sales there are many variations, but again in the "classic" form of the F.O.B. contract the fob seller enters into a contract with the shipowner.<sup>41</sup> In one of the leading cases on the fundamentals of F.O.B. contracts,

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<sup>37</sup> This is the basic assumption of the Incoterms, but cf. the many variations which exist and some of which have been described in the *Pyrene v. Scindia* case below at footnote 41.

<sup>38</sup> On charter parties, 19 ed. London 1984, p. 356 ff.

<sup>39</sup> P. 357

<sup>40</sup> Cf. Selvig, *The freight risk*.

<sup>41</sup> It should, however, be noted that the Incoterms 1990 contain certain amendments to traditional clauses and certain new clauses to mirror modern cargo handling and transportation methods, cf. i.a. Lando et al., *Incoterms* 1990, 2nd ed. 1992, p. 15 ff.

*Pyrene Co. Limited v. Scindia Navigation Limited*<sup>42</sup> Devlin J set out three common types of F.O.B. contracts as follows:

“In what counsel called the classic type...the buyer’s duty is to nominate the ship, and the seller’s to put the goods on board for account of the buyer and to procure a bill of lading in terms usual in the trade. In such a case the seller is directly a party to the contract of carriage at least until he takes out the bill of lading in the buyer’s name. Probably the classic type is based on the assumption that the ship nominated will be willing to load any goods brought down to the berth or at least those of which she is notified. Under present conditions, when space often has to be booked well in advance, the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make necessary arrangements; and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a C.I.F. contract. Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance, this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate’s receipt and handing it to the forwarding agent to enable him to obtain the bill of lading. The present case belongs to this third type; and it is only in this type, I think, that any doubt can arise about the seller being a party to the contract.”

Probably the usual situation nowadays is for the F.O.B.-sellers to take out the bill of lading in the buyer’s name. However, F.O.B.- sellers are at liberty to take out the bill of lading in their own name and they frequently do.

The contract of carriage basically springs up when the shipowner agrees to carry goods by sea in return for freight. The bill of lading does not per se replace that contract, but is only evidence (very good evidence) for it, at least until the bill of lading is transferred to a third party. Therefore it is quite possible that the buyer identified in the bill of lading may not be the true contracting party. However, in the *Pyrene v. Scindia*-case that analysis was slightly turned on its head, since the court seemed to think that where a seller takes out a bill of lading in the buyer’s name at that stage the buyer is probably substituted for the seller as the party to the contract. The reason for this is probably that the fact that the bill of lading is taken out in such way expresses the intention that the seller’s duty goes no further than to placing the goods on board and that the buyer in such case is responsible for the carriage itself. Equally when an F.O.B.-seller takes out the bill of lading in his own name he is “a fortiori” a party to the contract of carriage.

It follows that when the F.O.B.- or the C.I.F.- seller takes out the bill of lading in his own name without qualification it is safe to say that he is a party to the contract of carriage as the shipper and makes himself liable in accordance with its terms, no doubt as set out in the bill of lading.

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<sup>42</sup> (1954) 2 QB 402.

## 5.2 *The Parties Liable to Pay the Freight*

### 5.2.1 In General

At this point disregarding liens and lien clauses one may then ask who is liable for the payment of freight: the charterer, the shipper or someone else? Are the parties involved liable jointly and severally? Who is ultimately liable?

From the transport law perspective the basis is as stated above, that the charterer will have to pay the freight. If there is only a bill of lading involved the sender/shipper (cf above at footnote 2) will be primarily liable. In case the bill of lading is issued subsequent to a charter party the charterer is undoubtedly (unless the parties have agreed otherwise explicitly) liable to pay to the shipowner the agreed freight under the charter party, but failing such payment is there a second (or for that matter a third) payor?<sup>43</sup> When analyzing the position of the different parties involved, it has to be underlined that the problems that may turn up in the various relations are often similar or cross each other.

### 5.2.2 The Shipper and the Charterer

Although the shipper under the bill of lading and the charterer under the charter party are often different persons they could be liable for the freight payment as alternate contracting parties.

Apart from 14:25 making the charterer liable to pay the freight under the charter party SMC does not explicitly state that the sender (the contracting party) or the shipper are those having an obligation to pay the freight. 13:10, however, states that freight shall be paid upon delivery of the cargo to the carrier, and from that it follows that there may be a duty on the shipper to pay the freight. Also, 13:23 explicitly states that the sender shall remain liable for the payment of freight.

Under the voyage charter the charterer has a duty to pay the agreed freight according to 14:25, which states: “The owner may under all circumstances demand payment by the voyage charterer according to the provisions of 13:23.”

If looking at English law section 2 of the 1855 Bill of Lading Act provided that “nothing herein shall prejudice or affect... any right to claim freight against the original shipper or owner...”

This did not immediately give a right to claim freight against the shipper, but left open the possibility of doing so even where the bill of lading was endorsed over to a third party. The act expressed the state of the law of the 19<sup>th</sup> century, and there were few cases in the area thereafter. Case law at the time held that the shipper could not be relieved of the duty to pay freight, even where the bill of lading provided for delivery of the goods to the consignee or his assigns on payment of the freight by the consignee.<sup>44</sup>

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<sup>43</sup> It should be observed that the charterer in his turn may subcharter the vessel, but he will remain liable to pay his agreed freight to the shipowner. From a practical point of view the shipowner may through procedural measures create particular security in the subfreight (injunction, garnishment etc.) to protect his claim for freight. Cf. Gram, *Inndrivelse av fraktkrav*, MarIus No. 41 (1979).

<sup>44</sup> See i.a. Scrutton, p. 357 f.

The reasoning of the courts was that the clause in the bill of lading was inserted for the benefit of the shipowner to enable him to insist on payment before delivery and not to put a duty on him to obtain freight from consignees before delivering the goods.

Now section 3(3) of the 1992 Act replaces section 2 of the 1855 Act. It provides that so far as the act as a whole imposes liabilities, those liabilities are without prejudice to the liabilities under the contract of any person as an original party to the contract. It therefore seems to maintain the status quo, at least as regards freight.

The law will therefore probably remain such that as a matter of contract, where, as is usual, the shipper has entered into the contract with the owner, the shipper beside the charterer under the carter party is liable to pay freight unless there is some term in the bill of lading or the governing charter party which releases him from that obligation.

### 5.2.3 The Consignee

In respect of carriage of general cargo (often in connection with liner service) art. 13:19 - 13:22 in SMC lay down some principles with respect to the consignee's liability to pay freight. 13:19 sets out that, unless freight has been paid already, the consignee has a duty to put up funds for the freight and other claims that the carrier may have in accordance with the bill of lading. The second para of the article adds that in case the goods are released otherwise than against the presentation of a bill of lading the consignee's duty to pay the freight is limited to situations where he has been notified of the claims or otherwise knew or should have known that the carrier had not been paid.

13:20-22 lay down the principles that in case the consignee does not pay, the carrier may refuse to release the cargo until payment has been made or acceptable security has been provided. The next step is that the carrier may lay up the goods and ultimately have them sold.

In respect of voyage charter corresponding principles shall apply according to SMC 14:25. Thus the general principles are rather clear, namely that the carrier may rely on the consignee and ultimately the cargo as security for the freight payment.

The situation in English law is similar, although the basic legal considerations may be somewhat more complex,<sup>45</sup> and in *the Aramis* Bingham L.J. stated at p. 224:<sup>46</sup>

"But the cases certainly show that there is evidence from which a Contract may be inferred where a shipowner who has a lien on cargo for unpaid freight or demurrage or other charges makes or agrees to make delivery of the cargo to the holder of a Bill of Lading who presents it and seeks or obtains delivery and pays outstanding dues or agrees to pay them or is to be taken to agree to pay them."

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<sup>45</sup> Scrutton, p. 358.

<sup>46</sup> [1989] 1 Lloyd's Rep. 213.

### 5.2.4 Intermediate Bill of Lading Holders

There may, however, also be other parties involved, for example banks holding bills of lading as security or intermediate sellers and buyers trading with the goods during the transit by transferring the bills of lading to new holders. The question may then be raised, if any of these parties could be held liable for the freight. Neither Swedish nor English law is explicit on this point.

According to art. 1 of the 1855 Bill of Lading Act every endorsee seems to have been subject to the same liabilities as if the bill of lading contract had been made with him. Reading the section literally gave some foundation to say that every intermediate purchaser would be liable although he had also parted with all interest in the goods. In *Sewell v. Burdick*<sup>47</sup> House of Lords held that a bank, being an endorsee, who is a mere pledgee does not obtain the full or general property in the goods so as to be liable in an action by the shipowner for freight. In *the Future Express*<sup>48</sup> the bank involved failed in its claim and the Commercial Court expressed the view that there was need for new legislation. In *Brandt v. Liverpool, Brazil and Riverplate Steam Navigation Co. Ltd*<sup>49</sup> the pledgee who had taken delivery of the goods sued the carrier in respect of damage caused to the goods in transit. Court of Appeal found for the pledgee by inferring a contract where he presented the bill of lading, *paid freight* and took delivery of the goods. The 1924 Carriage of Goods by Sea Act is not explicitly clear in this respect, but as touched upon above the Act imposes contractual liability on a bill of lading holder where he seeks to enforce rights under a contract of carriage or takes or demands delivery of the goods. That means that the carrier is rather well protected in respect of his claims for freight or compensation for certain other costs. As far as it can be reasonably judged there will not under the new act be a right to sue the intermediate bill of lading holder.

### 5.3 *Circumstances Whereby the Shipper/charterer Could Avoid Liability*

In a voyage charter the shipowner normally has certain protection for the due payment of freight through a so-called “lien clause”, whereby the value of the cargo provides security. The practical economic use of the cargo, however, depends upon the possibility to store the goods and arrange for their sale at the port of discharge. Such liens are often provided for in law but normally charter parties (and for that matter bills of lading) contain particular lien clauses.

Lien clauses are often connected with a cesser clause, stating e.g. that the charterer’s responsibility for the freight, ceases if he has not exercised a lien on the cargo before the vessel leaves the loading port.<sup>50</sup> A “cesser clause” may have the following wording:

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<sup>47</sup> (1884) 10 App. Cas. 74.

<sup>48</sup> [1992] 2 Lloyd’s Rep. 79.

<sup>49</sup> [1924] 1 K.B. 575.

<sup>50</sup> See i.a. Bull & Falkanger, p. 334 ff. As an illustration see also ND 1987 p. 158 (IH Hvalvik). Cf. also Voyage charter 340 ff. and Gram, Fraktavtaler p. 86 f.



“Charterers’ liability to cease when cargo is shipped and Bills of Lading signed, except as regards payment of freight, deadfreight and demurrage (if any) at loading port.”

The Gencon 1976 charter party used to contain the following *lien clause*, which was, however, also at the same time a hidden cesser clause:

“Owners shall have a lien on the cargo for freight, deadfreight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention) incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.”

The revised Gencon 1994 charter party has introduced a limitation with respect to the cesser part of the clause. The charterer shall pay the freight (cl 4) and the lien clause (cl 8) does not put an obligation only to use the cargo, but the charterer remains liable.

A shipowner may be entitled to exercise a lien on the cargo even before the vessel arrives at the discharge port.<sup>51</sup> According to the court a lien could be exercised before the vessel reaches the point of delivery and actual demand for delivery of the cargo was made. It was sufficient if the vessel had been ordered to a named port of discharge.

In a fairly recent London Arbitration<sup>52</sup> the question of the construction of a lien clause was being judged, including whether the owner was entitled to recover damages for detention.

The vessel was chartered on the Tanker Voyage Charterparty form (Vegoilvoy 1/27/50) for a voyage from South America to Iran. By clause 2 of the additional printed clauses, freight was to be paid, less 4 % address commission and estimated discharge port disbursements within 10 working days after completion of loading and signing/releasing bills of lading. Clause 25 read;

“25. LIEN. The owners shall have an absolute lien on the cargo for all freight...which lien shall continue after delivery of the cargo into the possession of the charterer or of the holders of any bills of lading covering the same or of any storageman,”

Freight should have been paid on April 27, but was not paid until May 12. The owners stopped the vessel from proceeding to the port of destination in order, as they told the charterers, to exercise their possessory lien in the cargo, but as soon as the freight was paid, the vessel was ordered to continue. The owners claim for damages for detention while the vessel was lying idle before freight was paid, was dismissed by the arbitrators, primarily because owners could not show any loss.

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<sup>51</sup> See the *Chrysovalandou Dyo* [1981]1 Lloyd’s Rep. 1959.

<sup>52</sup> 12/91.

#### 5.4 *Remarks on Demurrage*

Apart from the freight issue there are a number of other costs, which are important in this connection. One of those costs is demurrage.<sup>53</sup> Due to its particularity it serves a purpose as an illustration of the interrelation between seller/buyer and charterer/shipper/carrier and receiver.

The freight covers the sea voyage, but also in various ways and to different degrees the time for loading and discharging of the vessel. Thus there are a number of different ways in the individual charter parties to determine the borderline between the items covered by the freight and those covered by demurrage.<sup>54</sup>

Demurrage accruing at the port of discharge is allocated to the seller following the delivery term C.I.F. Incoterms 1990.<sup>55</sup> Sometimes the sale's contract prescribes C.I.F. F.O. (meaning free out) or C.I.F. landed respectively signifying in the former case that the buyer shall pay for the costs in connection with the discharging, and in the latter case that the seller will cover those costs.<sup>56</sup>

It should be noted that F.O. or landed are not terms directly covered by or described in the Incoterms but rather trade terms which have developed in trade practice without their meaning having been "officially" established.

If related to the charter party/bill of lading it becomes evident that if the sale's contract prescribes C.I.F. F.O. the charter party in order to be synchronized with the sale's agreement needs to state that demurrage at the port of discharge shall be borne by the receiver. From the shipowner's point of view this means that the charterer would not be liable for demurrage at the port of discharge. Therefore there may be a practical reason for the charterer to demand the insertion of a cesser clause in the charter party, which from the shipowner's point of view is impractical and really not advisable.<sup>57</sup>

It is thus evident that the interrelation between all the contracts and parties involved may work down into great detail, where the different parties involved in the different relations do not really know of (and may be should not know of) all the facts that may have importance. In practice it is therefore more or less impossible to synchronize all the interrelated terms and conditions that may be concerned.

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<sup>53</sup> Demurrage is a compensation payable by a charterer to a shipowner for time used for loading and/or discharge of a vessel in excess of that basic compensation which has been agreed between the parties. Demurrage could be characterized as a type of liquidated damages.

<sup>54</sup> See Tiberg, *The law of demurrage*, 4th ed. 1995 and also Gorton, Ihre & Sandevärn, *Shipbroking and chartering practice*, 4th ed. 1994. *Gill & Duffus S.A. v. Rionda Futures Ltd.* [1994] 2 Lloyd's Rep. 67 (Q.B.) is an example of a situation where the contract prescribes that "despatch/demurrage as per charter party rate to be settled directly between buyer and seller".

<sup>55</sup> See Lando et al. *Incoterms 1990*, 2nd ed. 199 p. 240 ff.

<sup>56</sup> Debattista, *Incoterms in practice*, 1993 p. 133: "C.I.F. F.O. (Free Out). This means that the buyer authorises the seller to conclude the contract of carriage on the most favourable terms and the buyer pays for the discharging costs."

<sup>57</sup> E.g. Gram, *The cesser clause should go*, in AFS 2:509 ff. As mentioned above the last revised Gencon form charter party no longer contains a cesser clause.

## **6 Some Concluding Remarks**

As we have seen, there have been a number of amendments in the SMC in respect of freight payment in comparison with corresponding rules in the 1891 legislation.

The English 1992 Carriage of Goods by Sea Act also means a number of changes in relation to the 1855 Bill of Lading Act, and largely the new English rules mean some harmonization with corresponding rules in other countries.

The introduction of the Scandinavian principle that freight is payable on loading in connection with general cargo could be regarded as somewhat questionable from a law structure point of view, and my impression is that the legislator has chosen to disregard from the interrelation between the contract of carriage and the sale's agreement.

Largely SMC does not otherwise mean a great break with previous rules in this area, and it will fall upon the parties to make those solutions which are required in the individual case.

There may also be a trend where far reaching cesser clauses are gradually narrowed down in charter practice.