

11-0486-cv(L)
MAN Ferrostaal, Inc. v. M/V Akili,

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: January 9, 2012 Decided: December 6, 2012)

5 Docket No. 11-0486-cv(L), 11-0567-cv(XAP)

6 - - - - -
7 MAN FERROSTAAL, INC.,
8 Plaintiff-Appellee-Cross-Appellant,
9
10 v.
11
12 M/V AKILI, her engines, boilers, tackle, etc.,
13 Defendant-Cross-Claimant-Appellant-Cross-Appellee
14
15 AKELA NAVIGATION CO., LTD., ALMI MARINE MANAGEMENT SA,
16 Defendants-Third-Party Plaintiffs-Cross-
17 Claimants-Appellees,
18
19 SM CHINA CO., LTD.,
20 Defendant-Third-Party Defendant-Cross-Defendant.
21
22 - - - - -
23

24 B e f o r e: WINTER, KATZMANN, and LYNCH, Circuit Judges.

25 Appeal from a judgment of the United States District Court
26 for the Southern District of New York (Denise Cote, Judge), after
27 a bench trial, holding the M/V Akili liable in rem for damage to
28 cargo shipped aboard the vessel. Appellants argue that the
29 district court erred in holding that the vessel was liable in
30 rem, and in holding that the Carriage of Goods by Sea Act applied

1 to the vessel as a "carrier" under that act. Man Ferrostaal
2 cross-appeals the judgment for failing to hold Almi Marine
3 Management and Akela Navigation Co. liable in personam for the
4 damage under a bailment theory. We affirm.

5 VINCENT M. DEORCHIS,
6 Deorchis & Partners, LLP, New York,
7 NY, for Defendant-Cross-Claimant-
8 Appellant-Cross-Appellee.
9

10 STEVEN P. CALKINS, Kingsley
11 Kingsley & Calkins, Hicksville, NY,
12 for Plaintiff-Appellee-Cross-
13 Appellant.
14

15
16 WINTER, Circuit Judge:

17 The M/V Akili, its owner, Akela Navigation Co., and manager,
18 Almi Marine Management, appeal from Judge Cote's decision, after
19 a bench trial, holding the M/V Akili liable in rem for damage to
20 cargo shipped aboard the vessel. Appellants claim that the
21 district court erred in holding the vessel liable in rem. Man
22 Ferrostaal ("Ferrostaal") cross-appeals from the holding that
23 Almi Marine Management ("Almi") and Akela Navigation Co.
24 ("Akela") are not liable in personam under a bailment theory. We
25 write at length to clarify both the issues and our analysis,
26 which differs somewhat from that of the district court. However,
27 we affirm.
28

1 BACKGROUND

2 Ferrostaal's business is accepting orders of steel from
3 customers in the United States, procuring steel from
4 international suppliers, and then arranging for the steel's
5 transportation to the customer. The cargo at issue here was
6 9,960 "thin-walled" steel pipes, manufactured in China and sold
7 to Ferrostaal pursuant to a purchase order dated March 23, 2006
8 ("Purchase Order"). Ferrostaal in turn sold the pipe to McJunkin
9 Appalachian Oilfield of West Virginia and arranged for it to be
10 shipped to New Orleans.

11 A series of charters and sub-charters of the Akili were
12 executed before the cargo was loaded aboard. On June 19, 2006,
13 Akela time-chartered the Akili to Seyang Shipping, Ltd., which in
14 turn was permitted to sublet the vessel for all or any part of
15 the time covered by the charter (the "Time Charter Party"). The
16 Time Charter Party specified that all bills of lading issued
17 under the charter would incorporate "the General Clause Paramount
18 or U.S. or Canadian Clause Paramount whichever applicable as
19 attached."¹ Thereafter, Seyang sub-chartered the vessel to S.M.

¹The USA Clause Paramount is a clause designating the Carriage of Goods by Sea Act, or COGSA, as the controlling law with respect to the rights and liabilities of parties to a bill of lading.

1 China for the voyage from Shanghai to Houston and then to New
2 Orleans. Prior to chartering the Akili from Seyang, S.M. China
3 had executed a part-cargo charter (the "Voyage Charter Party")
4 with Ferrostaal for the carriage of the thin-walled pipes from
5 Shanghai to New Orleans. The Voyage Charter Party did not
6 identify the vessel on which the cargo was to be shipped, stating
7 instead that the ship was "TBN" -- "to be named" in landlubbers'
8 lingo -- by S.M. China.

9 The Voyage Charter Party placed responsibility for loss
10 "caused by improper or negligent stowage, or discharge, or care
11 of the goods" on the "Owners" of the vessel. It further
12 specified that "[s]towage is to be under the Master's supervision
13 and responsibility as Owners' agent." The "Owner" was defined as
14 S.M. China. It also contained a "free-in-and-out" provision that
15 stated that the handling of cargo was to be "free of risk . . .
16 to the vessel."

17 The Voyage Charter Party also contained a "Clause Paramount"
18 that stated in part, "[n]otwithstanding any other provisions in
19 this contract, any claims for loss or damage to cargo shall be
20 governed by the Hague-Visby rules as if comprehensively
21 applicable by law." The Hague-Visby rules are an international
22 convention that are in all pertinent respects literally identical
23 to rules established by the Carriage of Goods by Sea Act, 46

1 U.S.C. § 30701 ("COGSA" or "the Act"). This is no coincidence
2 because the convention requires signatory nations to pass
3 legislation embodying these rules.

4 A bill of lading was issued by China Ports International
5 Shipping Agency Ltd., as the agent of S.M. China, to Zhongqing,
6 the shipper, and then was transferred to Ferrostaal through
7 banking channels pursuant to the "cash against documents" term of
8 the Purchase Order. The bill of lading contained a Clause
9 Paramount that incorporated the Hague rules.²

10 The pipe was carried from China to New Orleans aboard the
11 Akili. Upon arrival in New Orleans, it was discovered that the
12 steel pipes had been placed at the bottom of a cargo hold and

²The Clauses Paramount in the Bill of Lading reads as follows:

This Bill of Lading shall be subject to the Hague Rules contained in International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, dated at Brussels the 25th August, 1924, or the corresponding legislation of the flag state of the ship. If the stipulations of the bill of lading are wholly or partly contrary thereto, this bill of lading shall be read as if such stipulation or part thereof, as the case may be, were deleted.

Because the contract of affreightment is the Voyage Charter Party for reasons stated infra, the differences between the Voyage Charter Party Clause Paramount and the Bill of Lading Clause Paramount do not affect the disposition of this case.

1 damaged when heavier pipes were placed on top. The pipes were
2 repaired by Houston Tubulars, Inc., which was paid \$286,078.32 by
3 Ferrostaal.

4 On July 9, 2007, Ferrostaal filed the present action in rem
5 against the Akili and in personam against Akela, Almi, and S.M.
6 China. Akela and Almi filed a cross-claim against S.M. China.³
7 After a bench trial, Judge Cote held the Akili liable in rem⁴ and

³Akela and Almi filed a motion to dismiss for lack of personal jurisdiction on January 23, 2009, which was stayed pending trial on the issues of in rem and in personam liability.

⁴On February 9, 2009, Ferrostaal made an emergency motion to sever the in rem action and transfer it to the Eastern District of Louisiana because the Akili was expected to call at a Louisiana port. The motion was granted. Then, the Owners' insurance company wrote a Letter of Undertaking seeking to avoid the arrest. Pursuant to a Stipulation and Consent Order entered by the parties, the in rem action was transferred back to the Southern District of New York, where it was assigned a new case number. Although the in rem and in personam claims were tried together, disposed of by a single opinion and order, and resolved by a combined judgment bearing both case numbers, the two cases were never formally consolidated.

Because the Akili filed its notice of appeal only under the docket number of the in personam action, Ferrostaal argues that we lack jurisdiction to consider appellant's arguments insofar as they pertain to the in rem action. We are unpersuaded. The Akili timely filed notice in the district court of its intent to appeal the "judgment, order or decree" entered by the district court as it pertains to the in rem action. 28 U.S.C. § 2107(a). Ferrostaal received notice of the Akili's intent to appeal, and it claims no prejudice as a result of the Akili's failure to file the notice in both actions or to caption it with both district court case numbers. Accordingly, the Akili's oversight is not fatal to its appeal. See Marrero Pichardo v. Ashcroft, 374 F.3d 46, 54-55 (2d Cir. 2004); Conway v. Village of Mount Kisco, N.Y., 750 F.2d 205, 211-12 (2d Cir. 1984).

1 dismissed the claims for in personam liability against Akela and
2 Almi. This appeal and cross-appeal followed.

3 DISCUSSION

4 We review the district court's findings of fact for clear
5 error and its conclusions of law de novo. Mobil Shipping &
6 Transp. Co. v. Wonsild Liquid Carriers Ltd., 190 F.3d 64, 67 (2d
7 Cir. 1999). Mixed questions of law and fact are reviewed de
8 novo. White v. White Rose Food, 237 F.3d 174, 178 (2d Cir.
9 2001).

10 a) The Appeal

11 Boiled down, the parties dispute whether: (i) an in rem
12 proceeding rendering the Akili liable for damage to, or loss of,
13 cargo is unavailable in this matter because a vessel is not a
14 "carrier" within the meaning of COGSA and (ii) the free-in-and-
15 out provision in the Voyage Charter Party purportedly absolving
16 the Akili of in rem liability is enforceable. We hold that the
17 first issue is essentially irrelevant because a vessel's in rem
18 liability for damage to cargo exists under maritime common law,
19 not COGSA, for a violation of a carrier's contractual or
20 statutory -- COGSA's -- obligations. We resolve the second issue
21 against enforcement of the free-in-and-out provision so far as it
22 might be construed to prevent in rem liability of the vessel. In
23 doing so, we do not decide whether COGSA applied as a matter of

1 law to this voyage because, even if it did not, the Voyage
2 Charter Party's Clause Paramount contractually incorporates the
3 Hague-Visby rules prohibiting a carrier from contracting for a
4 waiver of its obligations regarding damage to cargo. See 46
5 U.S.C. § 30701 Note § 3(8).

6 1. The Vessel as a COGSA "Carrier"

7 COGSA sets out the obligations of "carriers" involved in the
8 shipment of goods into the United States from international
9 ports. It requires ocean carriers to "Properly and carefully
10 load, handle, stow, carry, keep, care for, and discharge the
11 goods carried," id. § 30701 Note § 3(2), and forbids carriers
12 from contracting out of these obligations. Id. § 30701 Note §
13 3(8); see also Sogem-Afrimet. Inc. v. M/V Ikan Selayang, 951 F.
14 Supp. 429, 442-43 (S.D.N.Y. 1996), aff'd, 122 F.3d 1057 (2d Cir.
15 1997) ("COGSA does not permit the carrier to divest itself of the
16 duty to insure the proper stowage of the cargo."). COGSA defines
17 a "carrier" to mean "the owner, manager, charterer, agent, or
18 master of a vessel," 46 U.S.C. § 30701, including "the owner or
19 the charterer who enters into a contract of carriage with a
20 shipper." Id. at Note § 1(a).

21 Appellant argues that because a "vessel" is not a carrier
22 under COGSA, the Akili cannot be liable in rem for damage to, or
23 loss of, cargo. We disagree. COGSA assumes the existence of the

1 in rem proceeding rather than creates it. Section 3, the crux of
 2 the Act, sets out duties applicable only to carriers but is
 3 entitled "Responsibilities and Liabilities of Carrier and Ship."
 4 (emphasis added). The very title of Section 3 thus assumes that
 5 maritime law supplies in rem liability coextensive with carrier
 6 liability.⁵

7 Well before enactment of COGSA and its predecessor, the
 8 Harter Act, maritime law held ships liable in rem for cargo
 9 damage due to improper stowage. The Water Witch, 66 U.S. 494,
 10 500 (1862) ("The ship having received the cargo and carried it
 11 . . . is estopped to deny her liability to deliver in like good
 12 order as received"); Demsey & Assoc., Inc. v. S.S. Sea
 13 Star, 461 F.2d 1009, 1014 (2d Cir. 1972) ("Every claim for cargo
 14 damage creates a maritime lien against the ship which may be
 15 enforced by a libel in rem."), abrogated on other grounds by
 16 Seguros Illimani S.A. v. M/V Popi P, 929 F.2d 89 (2d Cir. 1991);
 17 Pioneer Import Corp. v. Lafcomo, 49 F.Supp. 559, 561-62 (S.D.N.Y.
 18 1943), aff'd, 138 F.2d 907 (2d Cir. 1943) ("A lien arises against
 19 the ship for damage to cargo caused by improper stowage."); see
 20 also Gilmore & Black, The Law of Admiralty § 3-45 at 165 (1957).

⁵The only portion of Section 3 that applies directly to ships is Paragraph 8, which prevents parties from contracting around the ship's coextensive liability. § 30701 Note § 3(8), discussed infra.

1 In rem liability is derived from a pre-COGSA maritime law
 2 doctrine to the effect that, once cargo is aboard a vessel, the
 3 vessel is deemed to have impliedly ratified the underlying
 4 contract of affreightment and is answerable for nonperformance.⁶

⁶The district court used a combination of maritime law and COGSA to find the Akili liable in rem. See Man Ferrostaal v. M/V Akili, 763 F. Supp. 2d 599, 612 (S.D.N.Y. 2011) ("The Akili, by setting sail with the cargo, is deemed to have ratified the bill of lading, and therefore is liable in rem as a [COGSA] carrier." (emphasis added)). We do not adopt this reasoning.

The "implied ratification" doctrine gives rise directly to in rem liability. It does not render a vessel a carrier under COGSA. See, e.g., Demsey, 461 F.2d at 1015. The ratification doctrine is directly traceable to pre-COGSA maritime law precedent. For example, the seminal implied ratification case, The Esrom, 272 F. 266, 270 (2d Cir. 1921), cites The Schooner Freeman v. Buckingham, 59 U.S. 182 (1855), a case that preceded COGSA and its predecessor, the Harter Act. In Freeman, the Supreme Court stated:

[W]hen the general owner [of a vessel] intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter-parties, must, in the invariable regular course of business be made, for the performance of which the law confers a lien on the vessel.

Id. at 190.

1 Demsey, 461 F.2d at 1014-15; see also Kraus Bros. Lumber Co. v.
 2 Dimon S.S. Corp., 290 U.S. 117, 121 (1933). The Akili, by
 3 setting sail with the cargo on board, impliedly ratified the
 4 contract of affreightment between S.M. China and Ferrostaal. See
 5 Freeman, 59 U.S. at 190 (noting that where a shipowner allows a
 6 special owner to carry cargo of third persons, the law confers a
 7 lien for the performance of bills of lading or charter parties).⁷

8 As between S.M. China and Ferrostaal, the contract of
 9 affreightment was the Voyage Charter Party rather than the bill
 10 of lading.⁸ A carrier may not alter its contractual obligations

⁷Akili argues that Insurance Company of North America v. S/S American Argosy, 732 F.2d 299 (2d Cir. 1984), demands a different conclusion. It does not. American Argosy governs bills of lading issued by non-vessel operating common carriers ("NVOCCs"), which "do not . . . own or charter the ships that actually carry the cargo." Id. At 301. We recognized that the ratification doctrine applies where a bill of lading has been issued "by a charterer of the vessel," and decline to extend the doctrine to situations involving NVOCCs. Id. at 303-04. Unlike an NVOCC, S.M. China operated the ship for the purpose of carrying cargo pursuant to a charter agreement, as authorized by the ship's owner, and the ratification doctrine therefore applies. See Freeman, 59 U.S. at 190.

⁸The fact that a vessel is operated under charter does not absolve it of in rem liability. Demsey, 461 F.2d at 1014; Pioneer Import, 138 F.2d at 908 ("[T]he maritime lien against the ship . . . obtains whether or not [the ship] was under charter."). Even if a charterer enters into a contract of affreightment unauthorized by the vessel owner, the vessel is liable in rem for non-performance even if the vessel owner is absolved of in personam liability. See Demsey, 461 F.2d at 1015; see The Water Witch, 66 U.S. at 500 (holding ship liable for improper stowage by charterer despite master's refusal to sign the bill of lading because "the ship having received the cargo and carried it to the consignees . . . is estopped to deny her liability to deliver in like good order as received.").

1 to a shipper under a Voyage Charter Party by issuing a bill of
2 lading with different terms, Asoma Corp. v. SK Shipping Co., 467
3 F.3d 817, 823-24 (2d Cir. 2006), albeit when the bill of lading
4 is negotiated to a good faith third party, which did not occur
5 here, the bill governs the third party's rights. Id. at 824.

6 To sum up, even if a vessel is not a "carrier" within the
7 meaning of COGSA, maritime law renders vessels liable in rem for
8 a carrier's violations of its obligations. Therefore, while
9 COGSA, if applicable, may affect or alter a carrier's obligations
10 and thereby determine the outcome of an in rem proceeding against
11 a carrier's vessel, the in rem remedy is a creature of maritime
12 law, not COGSA.

13 2. Enforceability of a Waiver of the Vessel's In Rem
14 Liability

15 The applicability of COGSA in this appeal arises in a second
16 and different context. Appellants argue that the free-in-and-out
17 provision of the Voyage Charter Party relieves the vessel of
18 liability for improper stowage. The free-in-and-out provision
19 reads:

20 The cargo to be loaded, stowed, lashed,
21 secured, and dunnaged free of risk and
22 expenses to the vessel in accordance with
23 local regulations for steel cargoes, under
24 deck only.

25 Appellee disagrees with this interpretation of the
26 provision, but we need not resolve that issue in light of our
27

1 disposition. As discussed above, COGSA and its predecessor, the
2 Harter Act, were meant to modify, not displace, in rem liability
3 under maritime law. A principal modification was to prohibit
4 carriers from contracting out of their obligations under maritime
5 law and out of their vessel's exposure to in rem liability. §
6 30701 Note § 3(8).

7 As the classic admiralty treatise states, "The general law
8 of maritime carriage made the public carrier of goods by sea
9 absolutely responsible for their safe arrival," with a few
10 exceptions. Gilmore & Black, supra § 3-22 at 139. "When the
11 bill of lading came into general use as a receipt for goods and
12 document of title, [however], shipowners [and other carriers] . .
13 . began to set out on the face of the bill various 'exceptions'
14 [to liability]." Id. § 3-22 at 140. "Bills came to include
15 stipulations that the carrier was not to be liable even for the
16 results of his own negligence or that of the ship's people. . .
17 Instead of being absolutely liable, irrespective of negligence,
18 [the carrier] enjoyed an exemption from liability, regardless of
19 negligence, as wide as his bargaining position enabled him to
20 contract for." Id. § 3-23 at 142. The dissatisfaction of
21 American cargo interests with these exemptions from liability
22 prompted Congress to enact the Harter Act of 1893, the
23 predecessor to COGSA. Id. § 3-24 at 142-43.

1 COGSA, therefore, prevents international ocean carriers from
2 contracting out of certain specified obligations, including the
3 responsibility to stow cargo properly. See Nichimen Co. v. M.V.
4 Farland, 462 F.2d 319, 327 (2d Cir. 1972); see also § 30701 Note
5 § 3 (setting forth carrier duties); id. Note § 3(8) (preventing
6 carriers and ships from contracting out of the duties set forth
7 therein). These obligations are deemed as a matter of law to be
8 incorporated by reference into every bill of lading where COGSA
9 applies. See § 30701 Note ("Every bill of lading . . . in
10 foreign trade, shall have effect subject to the provisions of
11 this chapter."); Gilmore & Black, supra § 3-25 at 145.

12 The relevant COGSA provision reads:

13 Any clause . . . in a contract of carriage
14 relieving the carrier or the ship from
15 liability for loss or damage to or in
16 connection with the goods, arising from . . .
17 obligations provided in this section . . .
18 shall be null and void and of no effect.
19

20 § 30701 Note § 3(8).

21 The Hague-Visby Convention sets out an identical rule -- in
22 haec verba -- and the parties here have incorporated the
23 Convention and its rules into the Clauses Paramount of the Voyage
24 Charter Party and the bill of lading. If COGSA applies as a
25 matter of law, the free-in-and-out provision is unenforceable
26 insofar as it is a waiver of in rem liability. If the cargo
27 damage rules of Hague-Visby apply as a matter of contract, the
28 same result is reached.

1 The applicability of either approach, however, is not self-
2 evident. Both COGSA and Hague-Visby contain the following
3 provision:

4 "[C]ontract of carriage" applies only to
5 contracts of carriage covered by a bill of
6 lading or any similar document of title, in
7 so far as such document relates to the
8 carriage of goods by sea, including any bill
9 of lading or any similar document as
10 aforesaid issued under or pursuant to a
11 charter party from the moment at which such
12 bill of lading or similar document of title
13 regulates the relations between a carrier and
14 a holder of the same.

15
16 § 30701 Note § 1(b); Hague-Visby Rules, Art. I. For convenience
17 sake, we will refer to this provision as "the Applicability
18 Provision" or "Provision".

19 With regard to the applicability of COGSA as a matter of
20 law, the Applicability Provision has led to a division among
21 American courts. Although the provision does not specifically
22 mention a distinction between public and private carriage, most
23 American courts, including the district court in this case, treat
24 the Applicability Provision as calling for a determination of
25 whether the vessel was engaged in public -- roughly speaking,
26 multiple cargos and shippers -- or private -- again, roughly
27 speaking, a single cargo and shipper -- carriage. Akili, 763 F.
28 Supp. 2d at 609-10; see, e.g., Jefferson Chem. Co. v. M/T Grena,
29 413 F.2d 864, 867 (5th Cir. 1969); Pac. Vegetable Oil Corp. v.

1 M/S Norse Commander, 264 F. Supp. 625, 627 (S.D. Tex. 1966); J.
2 Gerber & Co. v. SS Sabine Howaldt, 310 F. Supp. 343, 350
3 (S.D.N.Y. 1969), reversed on other grounds, 437 F.2d 580 (2d Cir.
4 1971). As we explained in Nichimen, the public-private carriage
5 distinction is a relic of case law applying COGSA's predecessor,
6 the Harter Act. 462 F.2d at 327-28. COGSA's language includes
7 no mention of the public-private distinction but states only that
8 the Act applies "from the moment at which such bill of lading or
9 similar document of title regulates the relations between a
10 carrier and a holder of the same." 46 U.S.C. § 30701 Note §
11 1(b).

12 We have sometimes labored to treat charter parties and bills
13 of lading as proxies for private and public carriage,
14 respectively. See, e.g., Madow Co. v. S.S. Liberty Exporter, 569
15 F.2d 1183, 1186-87 (2d Cir. 1978) (arguing that the charter
16 arrangements deemed to be outside the reach of COGSA generally
17 involve engagement of the entire vessel by the charterer for the
18 purpose of shipping his own cargo). In Nichimen, however, we
19 noted that there is no necessary correlation between public
20 carriage and carriage pursuant to a bill of lading, or private
21 carriage and voyage charter parties. 462 F.2d at 328. Indeed,
22 in Nichimen, we declined to treat the applicability of COGSA as
23 turning on whether the vessel was engaged in public or private

1 carriage, id. at 326-28, finding instead that COGSA applied of
2 its own force because the parties privately agreed that a
3 subsequently-issued bill of lading would govern relations between
4 them. Id. at 328-29; see Blommer Chocolate Co. v. Nosira Sharon
5 Ltd., 776 F. Supp. 760, 767-68 (S.D.N.Y. 1991) (discussing
6 Nichimen).

7 Application of the public-private carriage analysis probably
8 favors appellees, as the district court held, because the voyage
9 here involved multiple cargos and multiple shippers. However,
10 the Fifth Circuit has recently refused to treat carriers that
11 transport multiple shippers' cargo as per se subject to COGSA.
12 See Tradearbed Inc. v. Western Bulk Carriers K/S, 374 Fed. App'x.
13 464, 473-74 (5th Cir. 2010). Instead, it treats the
14 applicability of COGSA as turning on which document -- charter
15 party or bill of lading -- governs relations between the
16 litigants. See Id. at 374; see also Thyssen, Inc. v. Nobility
17 MV, 421 F.3d 295, 297, 307 (5th Cir. 2005).

18 Based on the "governing-instrument" standard, appellants
19 argue that COGSA does not apply because the bill of lading here
20 was only a receipt and the Voyage Charter Party -- with the free-
21 in-and-out provision -- is the governing document. It is
22 established that a bill of lading issued under a charter party is
23 only a receipt when it remains in the hands of the shipper-

1 charterer. See Nichimen, 462 F.2d at 328; see Asoma, 467 F.3d at
2 824. In such a case, the charter party continues to govern
3 relations between the parties. See Asoma, 467 F. 3d at 823-24;
4 The Fri, 154 F. 333, 336-37 (2d Cir. 1907). Otherwise, as we
5 have noted, a carrier could alter the terms of the charter party
6 by issuing inconsistent bills of lading. Asoma, 467 F.3d at 824
7 (citing Hellenic Lines, Ltd. v. Embassy of Pakistan, 467 F.2d
8 1150, 1154 (2d Cir. 1972)). Therefore, the bill of lading
9 becomes the governing instrument only after it is negotiated to a
10 subsequent holder who is not bound by the charter party. Id.;
11 see Ministry of Commerce v. Marine Tankers Corp., 194 F. Supp.
12 161, 162-63 (S.D.N.Y. 1960). The governing instrument test,
13 therefore, would favor appellants' theory of this case.

14 The adoption of either the "public/private carriage" or the
15 "governing instrument" interpretation of the Applicability
16 Provision might well, therefore, affect the outcome in this
17 matter. However, we need not resolve the various issues raised
18 because the Voyage Charter Party's Clause Paramount incorporates
19 the Hague-Visby Rules. Even if COGSA does not apply, therefore,
20 the Voyage Charter Party provides rules regarding the
21 impermissibility of a waiver of in rem liability -- Hague-Visby
22 -- identical to those of COGSA.

1 The Clause Paramount of the Voyage Charter Party reads:

2 Notwithstanding any other provisions in this
3 contract, any claims for loss or damage to
4 cargo shall be governed by the Hague-Visby
5 rules as if compulsorily applicable by law,
6 and any other clauses herein repugnant to the
7 Hague-Visby rules shall be null and void and
8 of no force or effect as respects cargo
9 claims. Any clauses in this contract
10 allocating responsibility or risk with
11 respect to loading, stowing, stevedoring,
12 lashing, securing, dunnaging, discharging and
13 delivery shall be deemed to apply only as
14 price terms and shall not be interpreted to
15 alter in any way the responsibilities of the
16 owner and the ship as carriers as defined in
17 the Hague rules as respects claims for cargo
18 loss and damage.
19

20 In maritime law, a Clause Paramount "identifies the law that
21 will govern the rights and liabilities of all parties to the bill
22 of lading," Sompo Japan Ins. Co. Of America v. Union Pac. R.R.
23 Co., 456 F.3d 54, 56 (2d Cir. 2006) abrogated on other grounds by
24 Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S.Ct. 2433
25 (2010), and, therefore, supersedes the free-in-and-out provision.
26 See Asoma Corp. v. M/V Seadaniel, 971 F. Supp. 140, 143 (S.D.N.Y.
27 1997) (finding in a similar case, with similar contractual
28 provisions, that the Clause Paramount governed). Indeed, the
29 Clause Paramount itself states that its provisions govern
30 "[n]otwithstanding any other provisions in this contract."

31 The Clause Paramount, therefore, incorporates Hague-Visby's
32 prohibitions on waivers of in rem liability into the Voyage

1 Charter Party. See Koppers Conn. Coke Co. v. McWilliams Blue
2 Line Inc., 89 F.2d 865, 866 (2d Cir. 1937) (noting that the
3 Harter Act [COGSA's predecessor] could apply where the parties to
4 a charter incorporated it, even in instances where it did not
5 apply of its own force); see also Nichimen, 462 F.2d at 328
6 (finding that parties may render COGSA applicable through
7 contractual arrangements where it does not apply of its own
8 force); see also Thyssen, 421 F.3d at 307 (noting that parties may
9 incorporate COGSA into a private carriage agreement using a
10 Clause Paramount). To the extent that the free-in-and-out
11 provision might relieve the Akili of liability for improper
12 stowage it is, therefore, of no effect because it is prohibited
13 by Hague-Visby.

14 A final matter. We noted above a concern that the
15 applicability of Hague-Visby's rules invalidating a waiver of a
16 carrier's obligations was not self-evident. That was perhaps a
17 tad of an overstatement, but it might be argued that the Voyage
18 Charter Party's contractual incorporation of Hague-Visby includes
19 the Applicability Provision, thereby requiring us to interpret
20 that provision and address the complexities explored above in the
21 interpretation of the identical provision in COGSA. However, the
22 language of the Clause Paramount in the Voyage Charter Party
23 states that "any claims for loss or damage to cargo shall be

1 governed by the Hague-Visby rules as if cumpulsorily applicable
2 by law." (emphasis added). This clearly applies the substantive
3 rules in question without regard to the proper interpretation of
4 the Applicability Provision.

5 We also note that courts have read charter parties
6 incorporating COGSA to incorporate the substantive rules of COGSA
7 governing cargo damage claims whether or not the Applicability
8 Provision would normally render COGSA inapplicable. See e.g.,
9 Itochu Int'l, Inc. v. M/V Western Avenir, 1997 WL 537698, *5
10 (E.D. La. 1997); Horn v. CIA de Navegacion Fruco, 404 F.2d 422,
11 429 n.6 (5th Cir. 1968); Hartford Fire Ins. Co. v. Calmar
12 Steamship Corp., 404 F. Supp. 442, 445 (W.D. Wash. 1975); cf.
13 Koppers, 89 F.2d at 866. This seems to us a common sense
14 interpretation. If COGSA or Hague-Visby apply by force of law,
15 contractual incorporation into a charter party or bill of lading
16 is unnecessary. Incorporation of the substantive rules governing
17 cargo damage without regard to the Applicability Provision makes
18 sense largely as a protection against judicial rulings that the
19 statute and convention are not applicable as a matter of law.

20 b. The Cross Appeal

21 Ferrostaal argues in its cross-appeal that the district
22 court erred in holding there was no in personam liability for
23 Akela and Almi. We disagree.

1 One can recover for damage to cargo under COGSA or under a
2 bailment theory. See Rationis Enters. Inc. of Pan. v. Hyundai
3 Mipo Dockyard, Co., Ltd., 426 F.3d 580, 587 n.3 (2d Cir. 2005).
4 Ferrostaal does not contend it is entitled to recover under the
5 former theory. To prevail under the latter theory, there must
6 have been a bailment relationship between the claimant and the
7 ship owner or manager. A "bailment does not arise unless
8 delivery to the bailee is complete and he has exclusive
9 possession of the bailed property." Thyssen Steel Co. v. M/V
10 Kavo Yerakas, 50 F.3d 1349, 1355 (5th Cir. 1995). When a
11 charterer has taken responsibility for stowage of cargo aboard a
12 ship, the ship owner does not have exclusive possession and
13 cannot be held liable as a bailee. Id. at 1354-55. Therefore,
14 "no inference of negligence against the bailee arises if his
15 possession of the damaged bailed property was not exclusive of
16 that of the bailor." United States v. Mowbray's Floating Equip.
17 Exchange, Inc., 601 F.2d 645, 647 (2d Cir. 1979) (citing Pan-Am.
18 Petrol. Transp. Co. v. Robins Dry Dock & Repair Co., 281 F. 97,
19 107 (2d Cir. 1922)).

20 Neither Akela nor Almi authorized S.M. China to issue bills
21 of lading on their behalf. Ferrostaal could not have believed
22 such authorization to exist when the bill of lading named only
23 S.M. China as carrier and did not purport to be a document signed

1 “for the master.” See Demsey, 461 F.2d at 1015 (finding that
2 ship owner could not be made personally liable when charterer had
3 no actual or apparent authority to so bind it); Yeramex Intern.
4 v. S.S. Tendo, 595 F.2d 943, 948 (4th Cir. 1979) (same).⁹

5 The carriers remained responsible for delivery of the goods
6 and maintained exclusive control and custody over the cargos
7 through agents they hired directly. Akela and Almi, on the
8 contrary, did not issue receipts for the subject cargo, enter
9 into contracts of carriage with Zhongquing or Ferrostaal, hire
10 the stevedores, or have any agreement to load or to stow the
11 cargo. See OT Trading, L.P. v. M/V Saga Morus, 641 F.3d 105,
12 109-10 (5th Cir. 2011) (even though the charter’s agent had
13 authority to sign bills of lading on behalf of the ship owner, it
14 signed on behalf of the sub-charterer carrier, and that therefore
15 the owner and the charterer were both in possession of the cargo,
16 and thus did not have exclusive control over the cargo). Akela
17 and Almi are, therefore, not liable.

⁹Both David Crystal, Inc. v. Cunard Steamship Co., Ltd., 339 F.2d 295 (2d Cir. 1964), and Leather’s Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) are relied upon by Ferrostaal for the proposition that a bailment exists even when the cargo has been turned over by a carrier to stevedores, despite non-exclusivity. However, these cases both address the special question of the liability of a carrier to a shipper post-discharge but pre-delivery where the bill of lading is silent as to the exact time at which the carrier’s obligations cease. They are, therefore, inapposite.

1 CONCLUSION

2 We affirm for the reasons stated.