



Carriage of Goods by Sea

The Hon Justice James Allsop
Federal Court of Australia



Carriage of Goods by Sea

- The Basic Contractual Framework
- The Basic Legal Regime



3 Carriage of Goods by Sea

- It is first necessary to understand how ships are contractually dealt with. That provides the basis or framework to approach the question of the contractual and legal regime for the goods that are to be carried.



4 The Basic Contractual Framework (1)

- When an owner wishes to employ a vessel to carry goods, it may do so in a variety of ways. One way of expressing the contract to carry goods is a “contract of affreightment”. This is the wide and general usage of this expression. There is a more narrow and perhaps more usual usage will be discussed briefly later.
- Various types of contracts are used for the employment of the ship in or in connection with the carriage of goods.



5 The Basic Contractual Framework (2)

Charterparties

- The customary division is threefold: (1) demise or bareboat, (2) time, and (3) voyage. To those there can be added a fourth, a space or slot, when considering modern carriage.



6 The Basic Contractual Framework (3)

Charterparties

- A *demise* or *bareboat* charter is one in which in exchange for payment of *hire* possession of the ship is given to the charterer, who then provides all crew, supplies, running costs and all other effective responsibilities of the shipowner to those who wish to use the vessel.



7 The Basic Contractual Framework (4)

Charterparties

- A *time* charter is one in which in exchange for the payment of *hire* the ship's employment is put under the orders of the charterer. The owner retains possession of the ship, employs the master and crew and pays the ordinary running costs. Specific costs connected with the commercial use of the vessel, such as fuel, cargo handling and port charges will generally be to the charterer's account. The element of time will generally be by reference to a period, though it may be by reference to a trip or trips.



8 The Basic Contractual Framework (5)

Charterparties

Though sometimes the time charter plays a role similar to the voyage charter (eg a trip charter), ‘the essential’ nature of the time charter should be recalled: in exchange for the payment of hire the owner agrees to place the carrying capacity of the vessel at the disposal of the charterer for the relevant period of time. The trip charter allows a greater flexibility for the details of the voyage.



9 The Basic Contractual Framework (6)

Charterparties

- The owner or disponent owner is (subject to the vessel's safety) indifferent about the ports travelled to. The owner gets its hire for the vessel's availability for the time.
- A *voyage* charter is one in which in return for the payment of *freight* the owner agrees to perform one or more voyages and carry identified cargo.



10 The Basic Contractual Framework (7)

Charterparties

- A contract of affreightment is an expression used to describe a contractual arrangement for the lifting or carriage of a certain amount of cargo (generally bulk cargo) over a certain time period by reference to a number of voyages.
- A *space* or *slot* charter is one in which the owner guarantees a certain portion or hold of the vessel or a specific number of container spaces on a ship, either over a period or by reference to voyages.



11 The Basic Contractual Framework (8)

Terminology

- The flexible meaning of the word “owner” should be borne in mind in dealing with charters. Very often the “owner” will only be, and will perhaps be described as being, a “disponent owner”. This means the person or entity controlling the commercial operation of the ship, such as a time charterer.



12 The Basic Contractual Framework (9)

- One must be careful, however, not to deal with matters too mechanically by reference to the category ascribed to the contract. A contract is a contract, and axiomatically individual. Various hybrids can be seen: the time charter by way of trip charter, the consecutive voyage charter and the long term freighting contract (or contract of affreightment in the narrow sense).



13 The Basic Contractual Framework (10)

- An understanding of why each may be used helps to understand the law regulating each. In both voyage and time charters, the owner remains responsible for the running of its own vessel; although, in the time charter, the commercial use of the ship is at the charterer's disposition. The charterer may issue bills of lading or have the owner issue them and indemnify the owner thereunder. The voyage charterer on the other hand takes no part in the operation of the vessel save for providing and perhaps attending to the loading or discharging of the cargo.



14 The Basic Contractual Framework (11)

- These different roles in relation to the operation of the ship are reflected in the consideration – *freight* is charged under the voyage charter – lump sum or by reference to the amount of cargo; *hire* is charged under the time charter for the use of the vessel.
- There are a variety of standard form charters tailored for different areas, different parties and different cargoes. They are often modified and added to.



15 The Basic Contractual Framework (12)

- Many charterparties are the result of bringing the owner and the cargo interest together by a broker. Brokers are highly skilled, and knowledgeable about the needs of, and activities in, the freight and shipping markets. In London, the Baltic Exchange is the shipping bourse. Under the aegis of the Chamber of Shipping, the Baltic and International Maritime Conference (BIMCO) and the Federation of National Associations of Shipbrokers and Agents (FONASBA), many forms of charters are approved.



16 The Basic Contractual Framework (13)

- Chartering arrangements are to be distinguished from management agreements whereby know-how and services as to the efficient management of a vessel are provided. The manager may maintain, inspect and equip the vessel, do attendant book-keeping or accountancy, or otherwise attend to the commercial operation of the ship. Generally, the manager will act as agent and will commit the owner to relevant contracts. There is a BIMCO drafted management agreement: the Ship-man.



17 The Basic Contractual Framework (14)

- The contractual and legal structure can vary depending upon who is involved and other variables.

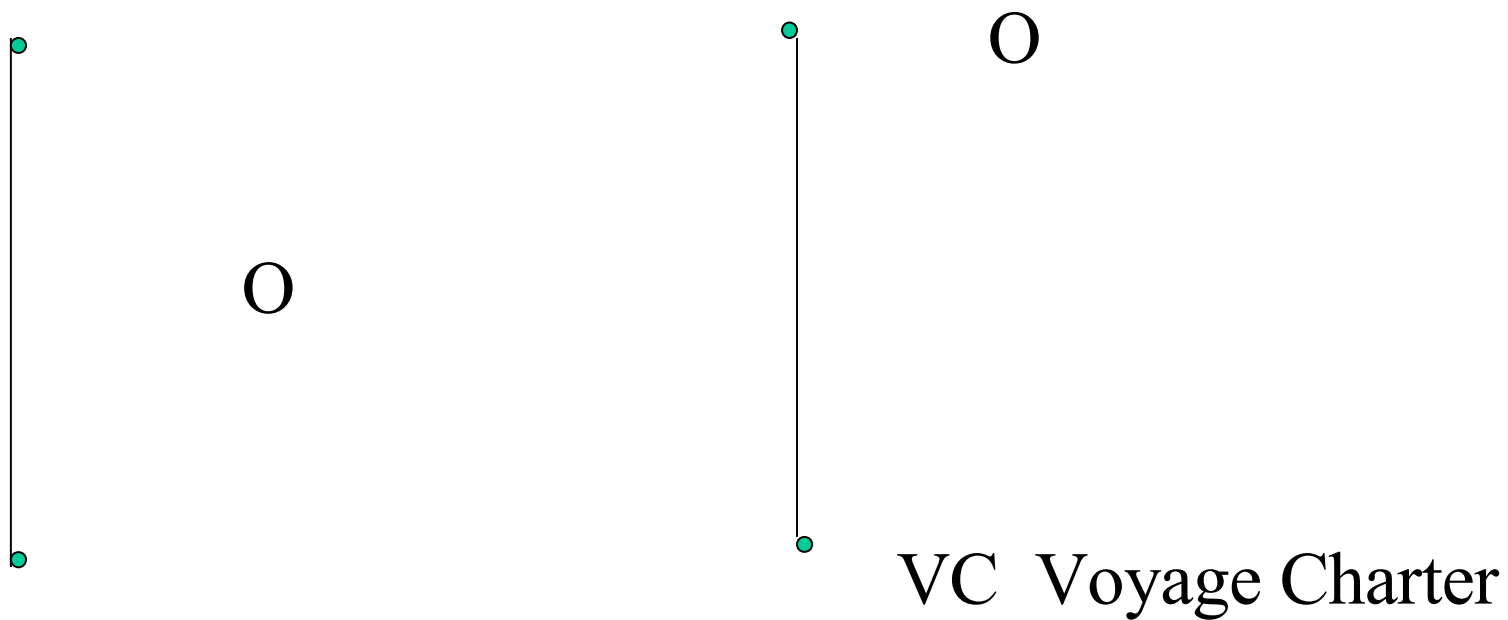
O Owner

DC Demise charterer

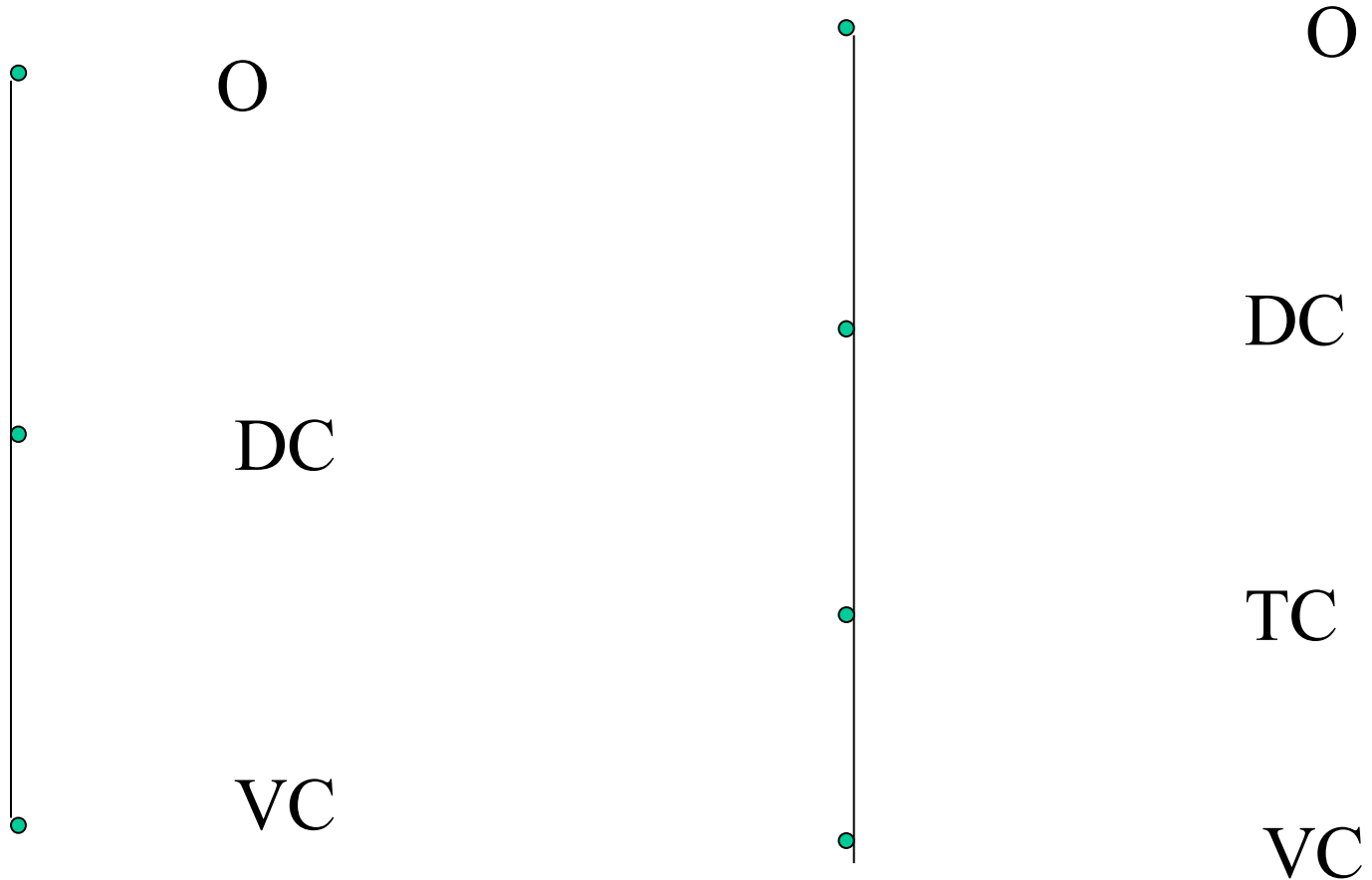
TC Time Charterer



18 The Basic Contractual Framework (15)



19 The Basic Contractual Framework (16)



20 The Basic Contractual Framework (17)

Documents Concerning the Goods

- Whilst these charters are in one sense contracts about the use of the ship, they can also be contracts about the carriage of goods; eg a time charter may be used by the charterer to carry its own goods or to put the ship to profitable use conducting the business of carrying other people's goods.



21 The Basic Contractual Framework (18)

- A voyage charter is really a contract to use the vessel to carry goods. It may be for the whole or only a part of the ship.
- All these contracts can be seen as truly bilateral arrangements between parties who can look after themselves.
- The working out of rights will be between the parties to the contracts.



22 The Basic Contractual Framework (19)

- Into this framework are other documents dealing with carriage of goods.
- The bill of lading is the most important.
- The bill of lading is issued by the carrier to the shipper and has a number of roles:
 - (a) it acts as a receipt
 - (b) it is evidence of the contract of carriage
 - (c) if expressed to be “negotiable”, it gives a right to possession of the goods and can be seen as a document of title



23 The Basic Contractual Framework (20)

- To understand the place of the bill of lading it is helpful to understand an international sale transaction.
- Using the international sale of goods transaction as the paradigm, when A, who is in country X, wishes to sell goods to B, who is in country Y, who in turn may wish to sell the goods to one or more persons in any country of the world, a number of commercial imperatives must be catered for:



24 The Basic Contractual Framework (21)

- A wants its money assured before, or at the point of, delivery to the carrier.
- Whoever is bearing the risk of the sea voyage needs adequate insurance.
- If B is to assure payment for the goods before, or at the time of, delivery of the goods to the carrier/bailee, it needs adequate commercial assurance that it is getting what it has paid for, or necessarily will pay for.
- B wants a regime enabling it to on-sell as soon as possible, and while the goods are on the water, to one or more buyers.



25 The Basic Contractual Framework (22)

- The bill of lading fulfils a central role in the solution to each of these problems. If it is a “shipped on board” bill it is a receipt given by the carrier for what has been delivered to it.

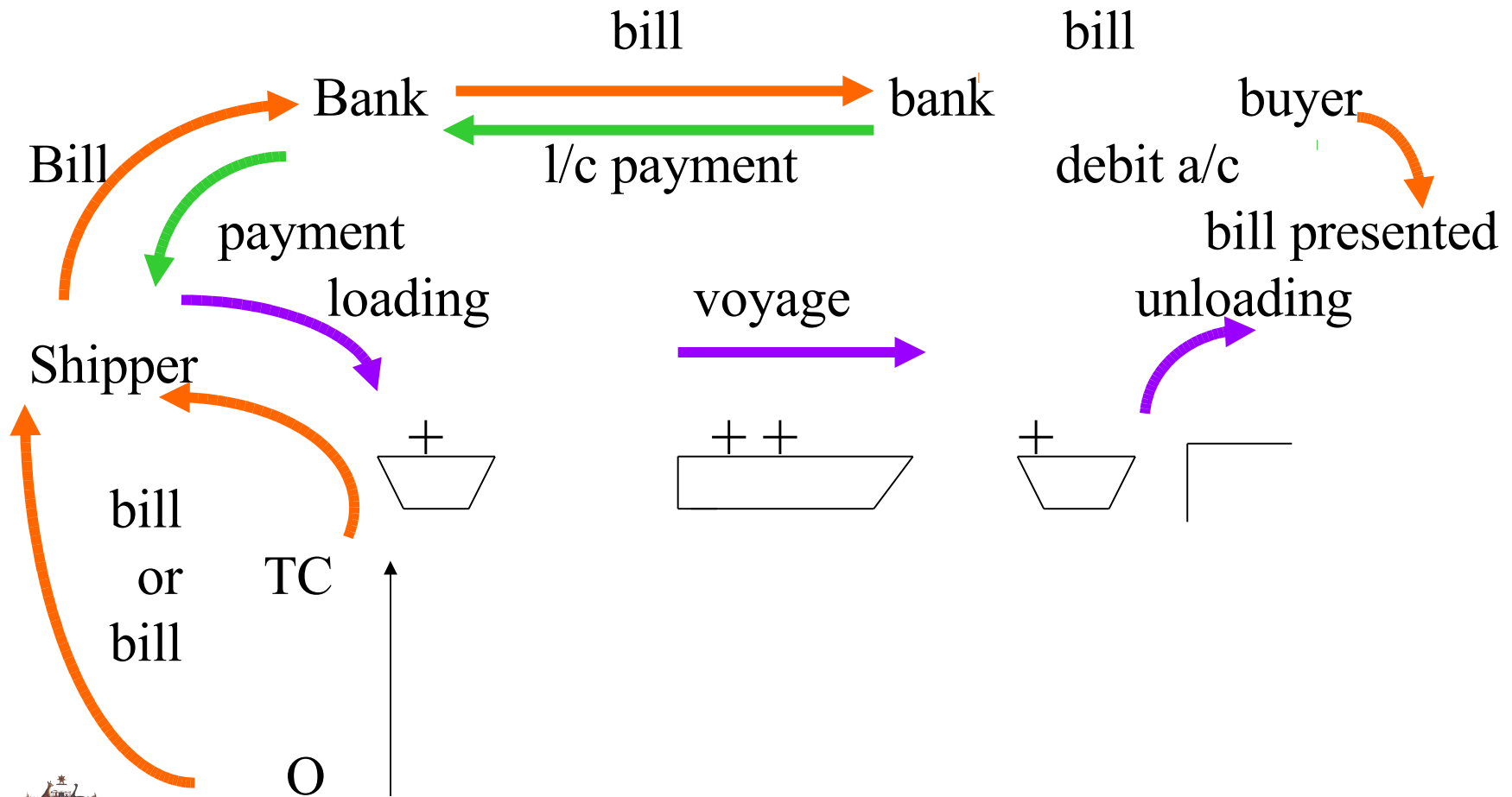


26 The Basic Contractual Framework (23)

- Privity of contract was a problem for the purchaser of the goods – this was solved in common law countries by statute: *Bills of Lading Act 1855 (UK)*, *Usury, Bills of Lading and Written Memoranda Act 1902 (NSW)* and now *State and Territory Sea Carriage Documents Acts*



27 The Basic Contractual Framework (24)



28 The Basic Contractual Framework (25)

- The bill of lading, as a document of title in which the ownership of, and right to possession of, the goods merge, becomes the key to solving the commercial issues referred to above. The buyer B, can safely irrevocably instruct its bank to undertake to pay A's bank if A's bank produces, amongst other documents, a clean or unqualified shipped on board bill describing a complying cargo.



29 The Basic Contractual Framework (26)

- It will also be necessary to stipulate for other documents – various certificates as to state and quality of the subject goods, eg surveyor's certificate, quarantine certificate etc. But once B's bank (on B's behalf) has the bill, it can pay under the letter of credit which A and B have agreed to be established under the contract of sale. B's bank then has the documents to secure its rights against B.



30 The Basic Contractual Framework (27)

So A can safely deliver the goods to the carrier as long as he gets the clean unqualified or unclausured bill, which it can deliver to B's bank in exchange for payment (assuming he has all other necessary documents). Further, B can put in place payment for the goods it has not seen with its risk converted into, and minimised by, a documentary transaction. B can also on-sell, by a similar arrangement, as it, or its bank has, the document of title.



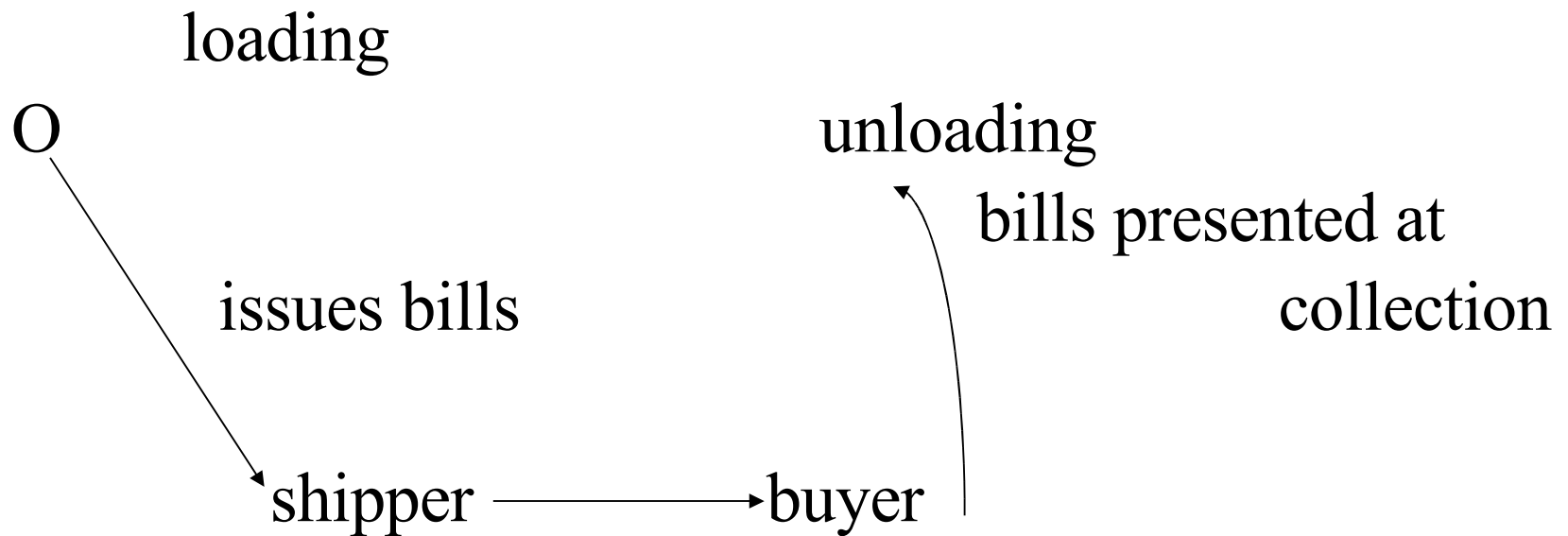
31 The Basic Contractual Framework (28)

- Travelling with the bill are the rights of suit against the carrier should anything happen to the goods in transit. This may be important for an insurer to know of because it may insure the cargo and if its insured suffers the loss – because it was the holder of the bill at the time of the loss (ie entitled to possession of the goods at the time) that insurer will want to make a subrogated claim against the other party of the bill.



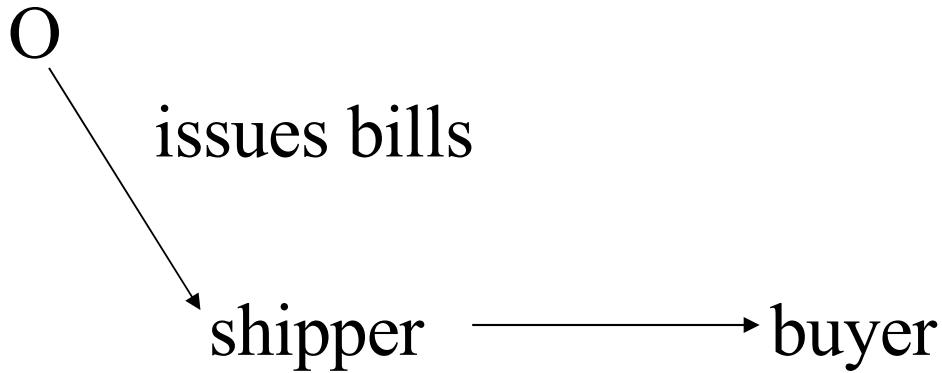
32 The Basic Contractual Framework (29)

- Variations

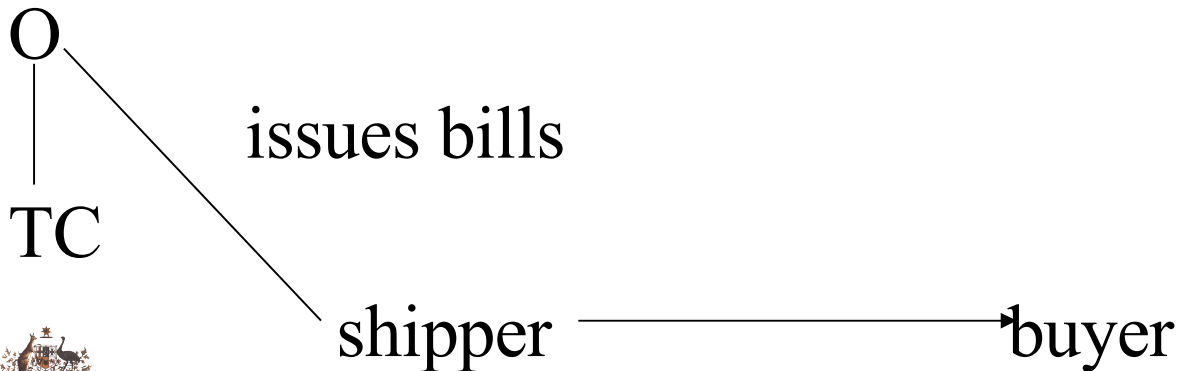


33 The Basic Contractual Framework (30)

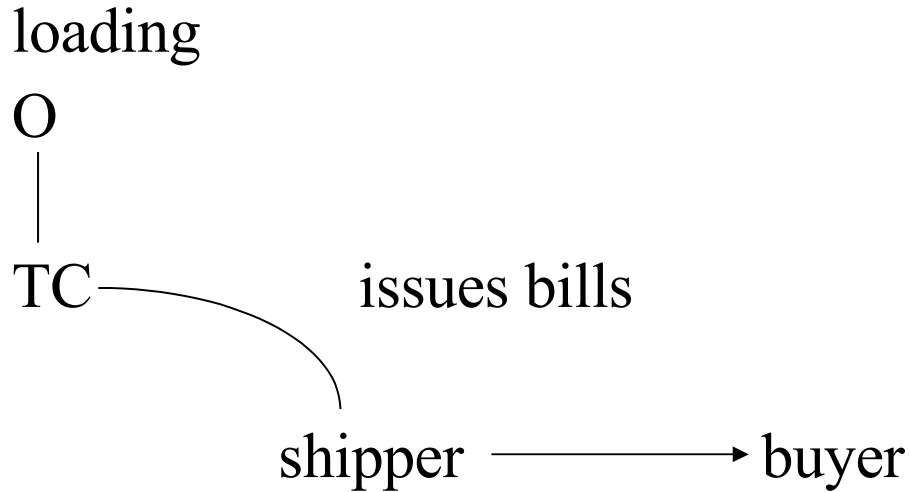
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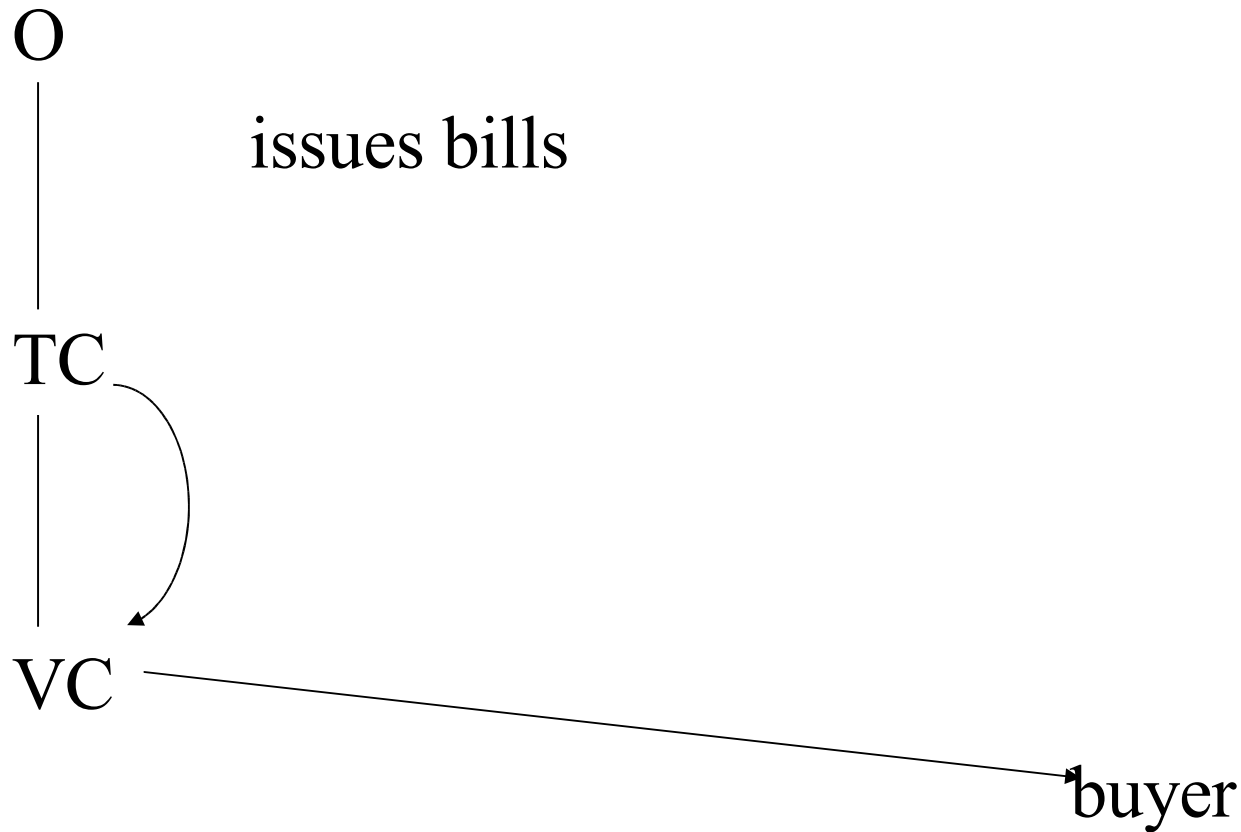
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34 The Basic Contractual Framework (31)



35 The Basic Contractual Framework (32)

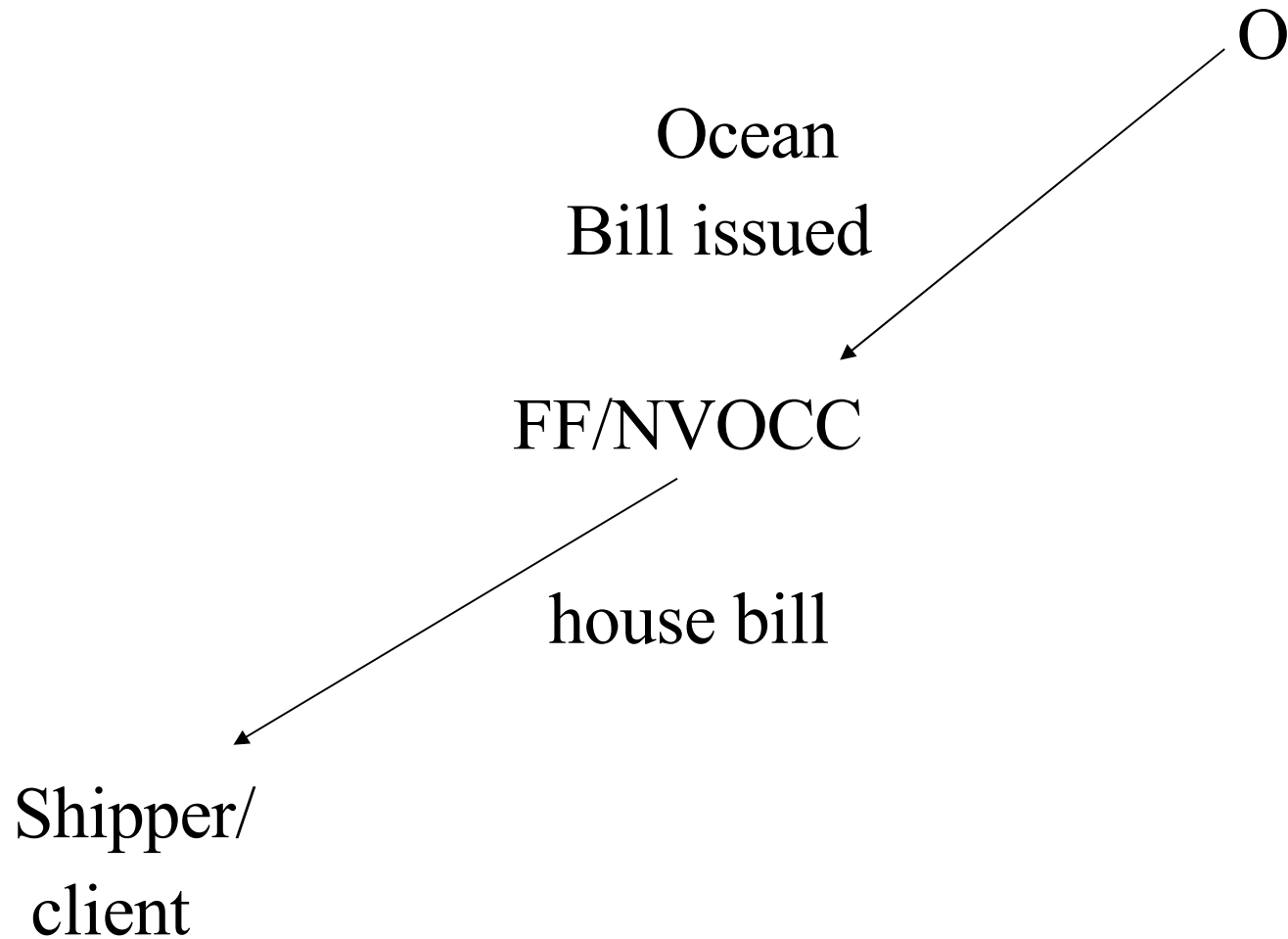


36 The Basic Contractual Framework (33)

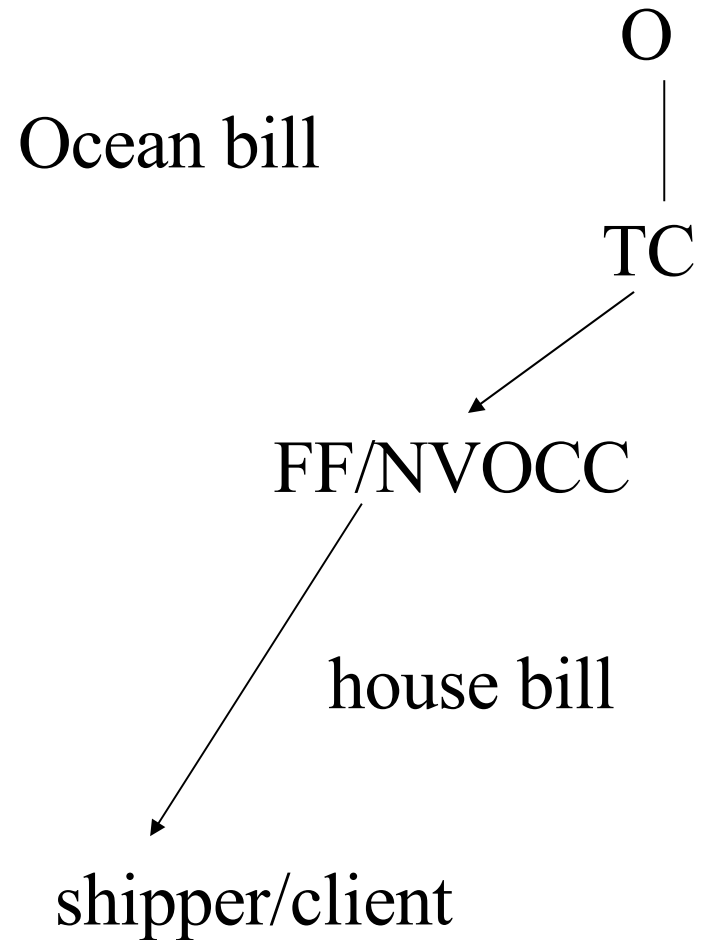
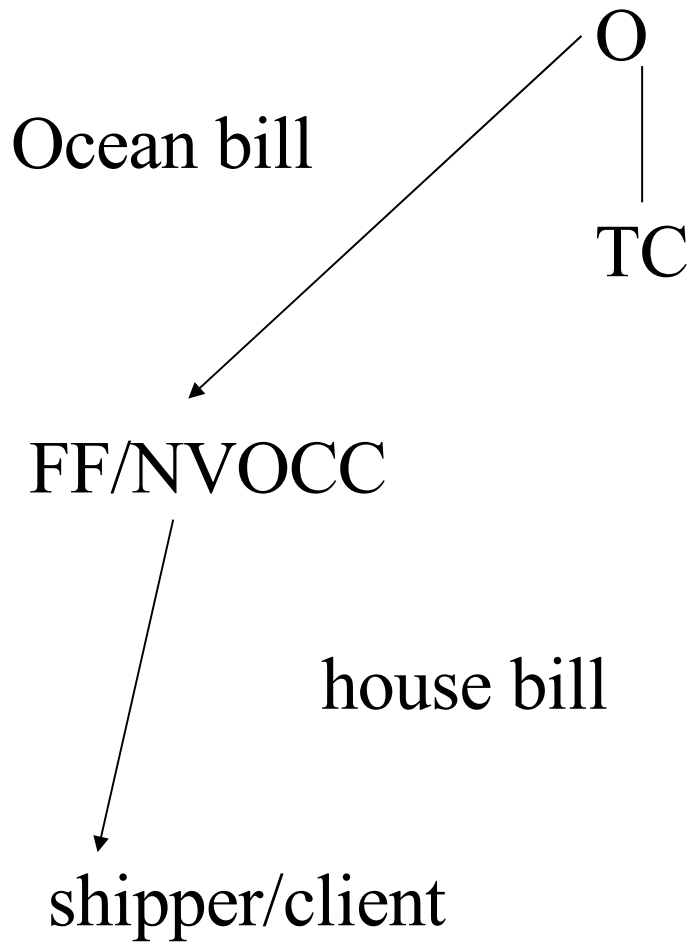
- Very often, if not usually, space on a vessel will be arranged by or through a freight forwarder at the place of shipment. If the freight forwarder chooses to, for example if it is a large organisation, it may itself undertake (contractually, not physically) the carriage responsibilities by issuing a “house bill”. In these circumstances, especially where the customer is small, the freight forwarder will provide a one-stop service to the shipper. In these circumstances the “ocean bill” issued by the master may only be to the freight forwarder and be non-negotiable, being the freight forwarder’s means of executing its obligations under the house bill and of obtaining recourse against the carrier should the good be damaged or lost.



37 The Basic Contractual Framework (34)



38 The Basic Contractual Framework (35)



39 The Basic Contractual Framework (35)

- The above is an outline of the contractual position. Variations and other complications can occur. Into that one must infuse the potential liabilities in bailment and negligence.
- The TC may be the contractual carrier, but the O or DC has possession and its servants and agents or the stevedores do the work.
- This interrelationship between contract, tort, bailment and relevant Rules can be very complex.



40 Australian Regime for the Carriage of Goods by Sea (1)

- **Carriage of Goods by Sea Act 1991 (Cth) (COGSA)**
- Schedule 1A to COGSA – the modified Hague Visby Rules.
- This regime deals with carriage under bills of lading and like documents.
- Schedule 1A does not govern charterparties.
- Schedule 1A is a variant of the Hague Visby Rules of 1968 and 1979 which themselves are a variant of the Hague Rules of 1924.



41 Australian Regime for the Carriage of Goods by Sea (2)

- COGSA

- s 4

- s 7

- s 8 Schedule 1A has the force of law

- s 10(1) application of AHR:

- s10(1)(b)(i) – Art 10 AHR

- outward carriage

- inward carriage unless a relevant Convention or a modification thereof applies



42 Australian Regime for the Carriage of Goods by Sea (3)

- interstate carriage
- not charterparty unless a sea carriage document issued thereunder

s 10(1)(b)(ii) coastal trade with qualifications

s 10(1)(b)(iii) certain non-negotiable documents

s 11(2) Note the public policy involved

s 17

s 18

s19



43 Australian Regime for the Carriage of Goods by Sea (4)

Schedule 1A

- Article 1: Definitions
- Article 2: Application of Rules and deck cargo
- Articles 3 and 4 - Basic Interlocking Relationships
- Article 3(1) – **non-delegable duty**
at the core of any problem
- Article 3(2) Links conduct with Art 4.



44 Australian Regime for the Carriage of Goods by Sea (5)

- Article 3(3), (4), (5) and (7) reflect what should occur at loading and the consequences thereof
- Article 3(6) & (6^{bis}) time limit
- Article 3(8) invalidity of contracting out
- Article 4(1) – reflection of Article 3(1)
 - linkage with Article 3(2)
 - note onus of proof – see *Great China Metal Industries v MISC* (1998) 196 CLR 161



45 Australian Regime for the Carriage of Goods by Sea (6)

- Article 4(2) – list of exceptions
 - but operation is subject to the non-delegable duty in Article 3(1)
- Article 4(3) – shipper’s responsibility and protection
- Article 4(4) – permitted deviation



46 Australian Regime for the Carriage of Goods by Sea (7)

- Article 4(5) – limitation of liability. This is often central to the usual cargo claim.

Note Article 4(5)(c) as to container carriage: *The 'MSC Melbourne'* [2004] 2 Lloyd's Rep 537.

- Article 4(6) – dangerous goods
- Article 4A – delay claims
- Article 4^{bis} – defences and limitations are available to servants or agents



47 Documents in relation to Carriage

- The above does not deal with the complexity of the different types of carriage document apart from the traditional negotiable or transferable bill of lading.
- Other documents are the “non-negotiable” or straight bill, the sea waybill, ships delivery order. See generally the various State and Territory *Sea-Carriage Documents Acts* which are all identical in substance and replace the various Bills of Lading Acts of the late 19th and early 20th centuries. See generally MWD White (ed) *Australian Maritime Law* (2nd Ed) ch 4.

