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# Development of the bill of lading : its future in the maritime industry

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THE DEVELOPMENT OF THE BILL OF LADING: ITS FUTURE  
IN THE MARITIME INDUSTRY

by

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## THE DEVELOPMENT OF THE BILL OF LADING: ITS FUTURE IN THE MARITIME INDUSTRY

This Thesis will consider the development of the traditional bill of lading from its origins, which appear to be much older than previously considered, up to the present day. The development of the bill of lading will be examined in order to answer basic questions: what is a traditional bill of lading, and what functions does it perform. In Part I of the Thesis the development of the three main functions of the traditional bill will be considered, namely receipt, contract, document of title. It will conclude with observations on the nature of the traditional bill of lading and how it differs from the early form of the bill of lading. Part II of the Thesis will then consider the development and nature of related shipping documents (charterparty bills, received for shipment bills, non-transferable bills), how far these documents perform the functions of the traditional bill of lading, and whether they can be truly described as bills of lading. Part II will then go on to consider the development and nature of electronic bills of lading and assess how well such bills perform the functions of the traditional bill of lading. The Thesis will conclude that although most of the functions of the traditional bill are in effect performed by electronic bills, electronic bills are in fact a new type of bill of lading and not merely a traditional bill in an electronic format. Conclusions will then be drawn as to what effect the development of new types of bill of lading will have on the future of the traditional bill of lading in the maritime industry.



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SP

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At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award.

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A programme of advanced study was undertaken, which included a detailed literature review and case review and the presentation of lectures on final year honours maritime law courses.

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Signed..........

Date...16/4/03.....

## INTRODUCTION

The bill of lading is in constant use throughout the world today and this has been the case for many centuries. The definition of a bill of lading should, therefore, be well-known. However, many modern definitions of the bill of lading merely *describe* the bill, rather than define it. Modern definitions tend to concentrate on explaining the functions of the bill of lading, rather than explaining its nature<sup>1</sup>. Often, no definition of the bill of lading is attempted at all, and the author simply concentrates on one particular aspect of the bill of lading's functions.<sup>2</sup> The issue of the nature of a bill of lading is particularly important with the increasing use of electronic data interchange technology (EDI)<sup>3</sup>. This technology allows computers in different countries to "talk" to each other by means of existing telephone lines or cable networks. Such technology assists businesses by enabling them to transmit information to each other, via computers and therefore enables transactions to be completed more quickly. Attempts have already been made to use EDI with bills of lading. It is first necessary to know what a document is as well as what it does in order to be able to convert it into a series of electronic messages and that is the purpose of Part I of this Thesis.

It is important to differentiate clearly the terminology to be used throughout this Thesis. The term "traditional bill of lading" is used to signify the paper bill of lading having the functions described in Chapters 1 to 4. "Electronic bill of lading" will be used to describe an electronic 'document' that performs some or all of the functions of the traditional bill of lading.

Chapter 1 will consider the early history of the bill of lading. This is important because the origins of a document aid in understanding its nature. As Marc Bloch said:

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<sup>1</sup> eg. Wilson J.F., *Carriage of Goods by Sea* (3rd edn.)(2001), p. 6.

<sup>2</sup> Todd P.N., *Contracts for the Carriage of Goods by Sea*(1988), p. 1 (contract), Bools M.D., *The Bill of Lading. A Document of Title To Goods. An Anglo-American Comparison* (1997), p. ix (document of title).

"Misunderstanding of the present is the inevitable consequence of ignorance of the past."<sup>4</sup>

An overview of the history of the traditional bill of lading and its origins will be invaluable in understanding the nature of the bill, but it is all too often neglected by authors<sup>5</sup>. Even where the history of the bill of lading is discussed, emphasis will invariably be put on the later history of the bill from the Sixteenth Century onwards<sup>6</sup>. Chapter 1 will seek to show that there is tantalising evidence through documents and merchants' practices that the use of the bill of lading is much older than previously considered.

Chapters 2, 3 and 4 will trace the development of the three acknowledged functions of the traditional bill, namely receipt, evidence of contract and document of title, up to the present time. These Chapters will show that the traditional bill of lading is a complex document with many functions that do not necessarily complement each other. The conflict of functions is a result of the development of additional functions, such as a function in a sale contract, in addition to the functions that the earliest bills of lading performed. As merchants' practices changed, so the requirements for their documents changed and the traditional bill of lading was no longer required in all circumstances.

Part II of this Thesis will consider the development of certain documents that are related to, but not identical to traditional bills of lading, and will also consider how successfully those documents perform the functions of the traditional bill identified in Chapters 2, 3 and 4. Multimodal documents and through bills of lading will not, however, be considered as these are complex documents that involve more than carriage by sea and are worthy of separate, more in depth treatment. Chapter 5 will consider the development of the charterparty bill of lading. This document is issued when the ship on which the goods are shipped is the subject of a charterparty. This is the oldest of all the documents

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<sup>3</sup> EDI is defined in CMI Rules for Electronic Bills of Lading, Rule 2(b) as the "interchange of trade data effected by teletransmission".

<sup>4</sup> Bloch M., *The Historians Craft* (1953), p. 43.

<sup>5</sup> eg. the seminal work on bills of lading, *Carver on Bills of Lading* (2001), contains little historical information relating to the bill.

considered in Part II. Chapter 6 will consider received for shipment bills of lading. These bills, possibly originating in the Sixteenth Century, are used where a carrier issues a bill before the goods are actually shipped. The bill is issued when the goods have been received by the carrier but not yet loaded on board. This allows a bill to be issued at an earlier stage than a traditional bill which can only be issued when all the goods have been loaded.

Chapter 7 will consider two non-transferable documents, the non-order bill of lading and the sea waybill. Although related because of their non-transferability, the documents are distinct in their history and in their performance of the functions of the traditional bill, most notably the document of title function.

Chapter 8 will commence with an analysis of the problems that affect the use of traditional bills of lading today. The solution to all of these problems seems to lie in the creation of an electronic bill, and the Chapter will consider the requirements of an electronic bill and consider the development of various projects that have attempted to create such bills. As each project is different in its approach to the electronic bill, the question of how the electronic bill performs the functions of the traditional bill will be discussed in the context of each project. The Chapter will conclude that the electronic bill is not merely an traditional bill in electronic format, but a new species of bill.

The final chapter, Chapter 9, will assess what the future is for the traditional bill of lading. The documents considered in Chapters 5 – 8 developed to cater for the particular requirements of merchants in certain situations. If merchants' practices become such that the traditional bill of lading no longer meets their requirements it will cease to be used, and other documents, such as the electronic bill will take its place. The practices, or customs, of merchants were responsible for shaping the bill of lading in its traditional form, and they will be responsible for shaping its future.

This Thesis will focus on the functions performed by the various documents considered in it from a legal point of view with a view to identifying the nature of a bill of

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<sup>6</sup> eg. Bools, *op.cit.*, Chapter 1.



loading. However, due consideration will be given to the practices and concerns of the maritime industry. Because of this, the Thesis will be written in such a way so that laymen within the maritime industry will be able to better understand the nature and development of the document that they use on a daily basis.

## PART I

# DEVELOPMENT OF THE TRADITIONAL BILL OF LADING

# CHAPTER 1

## THE EARLY HISTORY OF THE BILL OF LADING

This Chapter will show that looking at the practices of merchants leads to a more accurate date for the origins of the bill of lading. It will reveal that the true origins of the bill of lading are to be found in Ancient as well as Medieval History. It will also reveal what reasons led to its development, and that these reasons have contributed to the defining characteristics of the early bill of lading.

### 1. The Sources of the Origins of the Early Bill of Lading

There are four possible sources from which the origins of the early bill of lading can be extracted:-

- a) Statute Law regulating bills of lading;
- b) Case Law involving bills of lading;
- c) Surviving copies of early bills of lading;
- d) Merchants' practices.

Each of these will be examined in turn to assess the reliability of using that source to date the earliest bills of lading. The extra-territorial nature of the subject matter requires the use of non-English sources. The conclusions drawn from these sources on the origins of the bill of lading are as valid for English Law as they are for the Laws of other countries, as this is the nature of the Law Merchant<sup>1</sup>.

#### a) Statute Law regulating bills of lading

Some authors<sup>2</sup> have used statutes and 'Sea Codes'<sup>3</sup> referring to 'documents', from

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<sup>1</sup> See p. 24 below.

<sup>2</sup> eg. Mitchelhill A., *Bills of Lading - Law and Practice* (2nd edn.) (1990); McLaughlin C.B., "Evolution of the Ocean Bill of Lading" (1925) 35 Y.L.J. 548

<sup>3</sup> eg. *Le Feuro Real* and *The Customs of the Sea* in Mitchelhill *op. cit.* These 'Codes' were extra-territorial codifications of the customs of merchants and formed part of the Law Merchant.

which the bill of lading could have developed, to try to identify the period in which the bill originated. One author has concluded that because the bill of lading was not mentioned at all in *The Laws of Oleron*, *The Laws of Wisby* or the *Laws of the Hanse Towns* the bill was not of 'legal significance' until the Sixteenth Century<sup>4</sup>. This approach to dating the bill of lading cannot be justified, because it will tend to give a later date than the actual origins of the bill of lading.

The earliest statute identified by Mitchelhill<sup>5</sup> and McLaughlin<sup>6</sup> is *The Ordonnance Maritime of Trani* from Italy dating back to 1063. This required a master to take a clerk on board in order to keep a 'register' of goods loaded on board. Entries were required to be made in the presence of the master, the shipper and one other witness<sup>7</sup>. This register or 'book of lading'<sup>8</sup> is clearly not a traditional bill of lading as it is known today but there is strong support for the theory that the 'bill' of lading developed from the 'book' of lading<sup>9</sup>. Briefly, the theory is that when merchants stopped accompanying their goods on sea voyages they required some sort of receipt to be given to them by the master of the ship that was to carry the goods. The receipt given to the merchant was a copy of the entry made in the ship's Book of Lading. This theory is supported by certain Medieval European statutes which require the clerk to give a copy of the book of lading to the shipper<sup>10</sup>.

Whatever these statutes indicate about the development of the bill of lading itself<sup>11</sup>, they are not an accurate indicator of when it was developed. Statutes require strong stable legislative bodies in order to be enacted. Medieval Europe lacked such legislative bodies on the whole. Statutes only became a weapon in the drive towards law and order with the

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<sup>4</sup> Murray D.E., "History and Development of the Bill of Lading" (1983) 37 *Uni. of Miami L.R.* 689, at 690, n. 1. 'Ship' and 'lading' were mentioned in Rule No. IX, but this did not refer to documentation.

<sup>5</sup> Mitchelhill, *op. cit.*, p. 1.

<sup>6</sup> McLaughlin, *op. cit.*, p. 550.

<sup>7</sup> *ibid.*

<sup>8</sup> McLaughlin, *op. cit.*, p. 551, Bennett W.P., *The History and Present Position of the Bill of Lading* (1914), p. 7.

<sup>9</sup> Bennett, *op. cit.*, pp. 1-9, McLaughlin, *op. cit.*, pp. 550-2, Bensa E. *The Early History of Bills of Lading* (1925),

p. 6.

<sup>10</sup> City of Ancona statute of 1397; French *Ordonnance* of 1552 - McLaughlin, *op. cit.*, p. 551.

<sup>11</sup> See below, p. 18 *et seq.*

rise of the Nation-State. A statute did not 'create' the bill of lading, and so statutes would only regulate the operation of it. Statutes would only start to regulate the bill of lading some time after the introduction of the bill into the practice of merchants. Therefore, these statutes can only be used to show that the bill of lading was in existence some time before the passing of the statute.

As will be seen, the law relating to bills of lading is the product of the Law Merchant<sup>12</sup>, a body of law that depends on custom and the facts of individual cases, not on statutory intervention. Statutes regulating the bill of lading in Medieval Europe will therefore be few. Even now, despite the bill of lading being such an integral part of the international trade of the United Kingdom, it is mentioned in surprisingly few Acts of Parliament: Carriage of Goods by Sea Acts 1971 and 1992, Factors Act 1889, and Sale of Goods Act 1979. Not only are there very few statutes, but those that exist do not deal with all the rules relating to the bill of lading, nor does any contain a statutory definition of the bill. Art. 1.7 of the Hamburg Rules did define the bill of lading as:

"a document which evidences a contract of carriage by sea and the taking over or loading of the goods, and by which the carrier undertakes to deliver the goods against surrender of the document."

The Hamburg Rules are not, however, part of English Law.

#### **b) Case Law involving bills of lading**

With the use of bills of lading over the years disputes arose, disputes which were resolved by the courts. Thus it would seem that early case law may be used to identify the period in which the bill of lading developed. This reasoning is sound, however, the development of the bill of lading appears to have taken place when the English courts, and continental courts, were at an early stage of their development<sup>13</sup>, and so any dates for the origin of the bill of lading suggested by case law are, as will be shown, unlikely to be very

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<sup>12</sup> See p. 25 below.

<sup>13</sup> See p. 26 below.

accurate.

Such case law, because of its mercantile nature, forms part of the Law Merchant, and so, it is necessary at this juncture to discuss the nature of the Law Merchant and its role in recognising the bill of lading. In 1656, Sir John Davies declared,

“That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge.”<sup>14</sup>

Blackstone echoed those sentiments in the middle of the Eighteenth Century when he wrote that,

“The affairs of commerce are regulated by a law of their own called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of, and it is particularly held to be part of the law of England which decides the causes of merchants by the general rules which obtain in all commercial countries...”<sup>15</sup>

The Law Merchant<sup>16</sup> was an extra-territorial body of laws applying to all merchants, because of their status as merchants, wherever their trade takes them. The principle source of the Law Merchant was the customs of the merchants themselves. These customs were recognised and embraced into a body of law administered by special merchants courts, with some customs being codified into statute, whilst the others remained as customs recognised as law by the Courts. Customs and practices involving the use and development of a ‘new’ document, eg. the bill of lading, therefore, would therefore have come to be recognised within the Law Merchant.

In Medieval England, the Court *Pepoudrous* or Piepoudre dealt with cases arising from the disputes of merchants at markets and fairs. Due to the temporary nature of the fairs and the fact that many of the merchants attending them were foreigners in that land, cases had to be decided quickly to enable the merchants to continue with their business.

Lord Chief Justice Coke wrote of the Court Piepoudre,

“This court is incident to every fair and market because that for contracts and injuries done concerning the fair or market there shall be speedy justice done for advancement of trade and traffic as the dust can fall from the feet, the

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<sup>14</sup> Davies, *The Question Concerning Impositions* (1656), p. 10, quoted in Trakman L.E., “The Evolution of the Law Merchant: Our Commercial Heritage” [1980] J.M.L.C. 1.

<sup>15</sup> Blackstone, *Commentaries* (1765), Vol. I, p. 273.

<sup>16</sup> See generally Trakman, *op. cit.* and [1981] J.M.L.C. 153, and the sources referred to therein.

proceeding there being *de hora in horam*.”<sup>17</sup>

Concerning the issue of speed in the merchants courts, the Domesday Book of Ipswich declared in Old English that,

“The plees betwixe straunge folk that men elepeth pypoudrous, shuldene ben pleted from day to day .... The plees in tyme of feyre betwixe straunge and passant shuldene bene pleted from hour to hour .... and the plees yoven to the law maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene been pleted from tyde to tyde.”<sup>18</sup>

In these courts cases involving merchants in ordinary times had to be pleaded from day to day and in time of fair, from hour to hour, i.e. during the fair itself, and cases involving mariners had to be heard before the tide, i.e. before the mariners ship sailed<sup>19</sup>. In order for justice to be administered speedily, the procedure at these merchants’ courts had to be more informal than that in the Royal Courts of Justice. In particular, oral proceedings and unwritten judicial decision-making were used<sup>20</sup>.

Unwritten judgments did not cause any problems for the merchants using the courts at the time because they understood the general principles that would be used by the court -

“he understandeth himself by the custom of merchants, according to which merchants’ questions and controversies are determined.”<sup>21</sup>

Unfortunately this practice does mean that it is impossible to use case law in order to date the bill of lading, because the courts most likely to have been dealing with actions involving the bill of lading in its early stage of development did not as a rule make written judgments, and even when they did, few records of their proceedings exist today. The records of the Mercantile Court of Ipswich, for example, date from 1288 and the bill, or book, of lading is not mentioned at all<sup>22</sup>. This should not, in light of the comments above, be taken as proof that the bill of lading did not exist at that date or for some time after it.

The merchants’ courts were not the only courts concerned with disputes involving

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<sup>17</sup> Coke, *Institutes* (1628), Vol. IV, p. 272.

<sup>18</sup> Twiss T., *Black Book of the Admiralty*, Vol. II, p. 23.

<sup>19</sup> See generally Scrutton T.E., “General Survey of the History of the Law Merchant” in 3 *Select Essays in Anglo-American Legal History* (1909), p. 7.

<sup>20</sup> Trakman, *op. cit.* [1980] J.M.L.C. 1, at 11.

<sup>21</sup> Malynes G., *Constuedo, vel Lex Mercatoria, or The Ancient Law Merchant* (1622), p. 308.

<sup>22</sup> Bennett, *op. cit.*, p. 2.

bills of lading. The High Court of Admiralty, set up some time between 1340 and 1357, dealt specifically with maritime matters, but not, following a 1391 statute, with those relating to contracts made within the jurisdiction<sup>23</sup>. The Court did, however, begin to encroach on the jurisdiction relating to such matters, culminating in the Common Law Courts' attack on the Admiralty Court in the Seventeenth Century<sup>24</sup>. Unfortunately, there are no records from the Court surviving prior to 1524. The earliest recorded English case concerning a bill of lading<sup>25</sup> comes from the records of the Admiralty Court in 1538 - *The Thomas*<sup>26</sup>. The bill of lading quoted in that case and the others of that period<sup>27</sup> reveal a similarity of form<sup>28</sup> that could only be accounted for by long usage, thus underlining that the dates of those cases should not be used alone to determine the date of the origins of the bill of lading. The bill of lading certainly existed before 1538, as will be shown in the next Section.

### c) Surviving copies of early bills of lading

Locating early bills of lading and dating its origin on them is an attractive option. There are two ways in which bills of lading from the earliest period of its development may have survived. Either they have been preserved within a case report, or they have survived in the records of the merchants and shipping companies that used them. The records of the East India Company are well preserved from 1600, but this is a later period of the bill of lading's history. Earlier company records are harder to find. The earliest extant bill was thought by Bennett<sup>29</sup> to be that cited in *The Thomas* in 1538. Bensa, however, cited one from 1390<sup>30</sup>, and Goldschmidt cited one from 1337<sup>31</sup>. The 1248 bill

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<sup>23</sup> 15 Rich. II. c. 3 – Holdsworth W.S., “The Development of the Law Merchant and its Courts” in 2 Select Essays in Anglo-American Legal History, (1909), p. 309.

<sup>24</sup> See generally Holdsworth, *op. cit.* p. 304 *et seq.*

<sup>25</sup> According to Bennett, *op. cit.*, p. 9. The earlier case of *Chapman v. Peers* (1534) concerned a ‘book of lading’; *ibid.* p. 8.

<sup>26</sup> Seldon Society, *Select Pleas in Admiralty* (“*Select Pleas*”), Vol. I, p. 61.

<sup>27</sup> See Appendix 2.

<sup>28</sup> Bennett, *op. cit.*, p. 9.

<sup>29</sup> *ibid.*

<sup>30</sup> Bensa, *op. cit.*, p. 8. See Appendix 2.

<sup>31</sup> Quoted in Sanborn F.R., *Origins of the Early English Maritime and Commercial Law* (1930), p.214, n. 620.



cited by Blancard<sup>32</sup> relates purely to land carriage, but it would be incorrect to simply conclude from these early documents that the bill of lading did not exist before the Sixteenth Century.

As will be seen in the next section, the bill of lading in its earliest form was a simple receipt. In modern times, as in Medieval Europe, the receipt is a document of a transient nature - its usefulness is strictly limited in time. In the case of a receipt evidenced by a bill of lading, once the goods have been delivered to their destination it becomes useless, except for perhaps customs, tax, accounts and other fiscal purposes. Then, as now, merchants are unlikely to keep documents that no longer serve any purpose and so they will tend to destroy them. Documents in the nature of a receipt are therefore unlikely to survive at all, let alone in large numbers, from the early period of their development. Out of the many millions of bills of lading that must have been issued, even this century, remarkably few will still exist. The existence, or rather lack, of old bills of lading, therefore, is not a reliable indication of when the bill developed.

Kozolchyk wrote that the early bill of lading was a mere appendage of the charterparty<sup>33</sup>. His view is perhaps supported by Malynes, who declared that,

“No ship should be freighted without a Charterpartie, meaning a Charter or Covenant between two parties, the Master and the Merchant; and Bills of Lading do declare what goods are laden, and bindeth the Master to deliver them well conditioned to the place of discharge...”<sup>34</sup>

Bools also accepted that, in the early days at least, that the majority of bills of lading were issued to shippers who were also the charterers<sup>35</sup>. Bennett identified the case of *Helenes v. Opwright* in 1293 as the earliest known action in English Law on a charterparty<sup>36</sup>, so Kozolchyk's theory would mean that the bill of lading must have come into existence sometime after 1293, the principal document having had to come into existence before the

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<sup>32</sup> See Appendix 2.

<sup>33</sup> Kozolchyk B., “Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective” [1992] J.M.L.C. 161, at 164.

<sup>34</sup> Malynes, *op. cit.*, p. 134.

<sup>35</sup> Bools M.D., *The Bill of Lading: A Document of Title to Goods* (1997), p. 7.

<sup>36</sup> Bennett, *op. cit.*, p. 3.

appendage. Such methods of dating are necessarily unreliable. Charterparties are also subject to the same comments as the bill of lading<sup>37</sup> regarding their origin being older than Medieval times. Lobingier<sup>38</sup> cited a Roman 'charterparty' of 236 AD and the Babylonian Laws of Hammurabi contain rules concerning the reimbursement for leased watercraft<sup>39</sup>.

It might have been possible to date the bill of lading from other shipping documents, such as the charterparty<sup>40</sup>. If the charterparty was definitely in use at a given time, then it might be reasoned that the bill of lading might also have been in use at, or near, the same time. However, similar problems arise in dating the origin of the charterparty as for the bill of lading. Charterparties suffer from the same deficiencies of sources as bills of lading: there are few statutory references; they too developed out of the Law Merchant, so there are few recorded cases; and they were also documents of limited usefulness time-wise, the early copies of which have largely been destroyed. It would therefore be unwise to attempt to date the bill of lading from the usage of other documents

#### **d) Merchants' practices**

The bill of lading was not 'created' by statute or by case law, but by custom of merchants, as noted above. The origins of the bill are therefore to be found in history, not in law. One must look at the practice of merchants to trace the development of the bill. This method serves a dual purpose. Not only should it mean a more accurate date is reached for the development of the bill of lading, but also it will serve to show what conditions led to the creation of the bill of lading: why was it developed in the first place?

Conventional thinking of the Twentieth Century maintains that the bill of lading's origins are no earlier than the Eleventh Century<sup>41</sup>. While acknowledging that the bill of

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<sup>37</sup> See below, p.30 *et seq.*

<sup>38</sup> Lobingier C.S., "The Maritime Law of Rome" (1935) 47 Jur. Rev. 1, at 26, n.4.

<sup>39</sup> Lobingier, *op. cit.*, p. 2; see further on the Laws of Hammurabi below, p. 10, n. 55.

<sup>40</sup> For the purposes of this discussion, the charterparty should be considered as a contract for the hire of an entire ship to a charterer, whereas the bill of lading only envisages a part of the ship being hired to the shipper.

<sup>41</sup> Boals, *op. cit.*, p. 1, McLaughlin, *op. cit.*, p. 550.

lading may have developed at an earlier date, other authors maintain that the bill of lading was not of legal significance until the Sixteenth Century<sup>42</sup>. However, McLaughlin<sup>43</sup> wrote that the Romans had a similar document to the bill of lading, but did not give examples, nor any authority for that statement. Bennett also acknowledged documents corresponding to the “Registers” or Books of lading may well have existed in the ‘Ancient World’, but of that there was no evidence<sup>44</sup>. There is, however, evidence in the practices of merchants at various times, to suggest that a ‘bill of lading’ existed much earlier than the Eleventh Century AD.

## 2. The Origins of the Bill of Lading<sup>45</sup>

### a) Sumer and Babylonia

The land of Babylonia<sup>46</sup> is a flat alluvial plain, through which the Rivers Euphrates and Tigris head towards the Arabian Gulf, in what is now Iraq. The area is known as the ‘Cradle of Civilisation’ because it was here that one of the first attempts at agriculture took place by the Sumerians in the late 6th millennium BC<sup>47</sup>. Technological advances such as irrigation and the plough helped to increase agricultural efficiency. This led to increasing specialisation - society divided into those who controlled the land and resources, and those who were dependent on it<sup>48</sup>. Once agricultural efficiency reached the point where surpluses of produce became evident and men became available to ‘distribute’ those surpluses, because they were no longer required to work on the land, then one can speak of the

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<sup>42</sup> Murray, *op. cit.*, p. 690, Britton W.E., “Negotiable Documents of Title” (1953-54) 5 Hastings L.J. 103, p. 104, cited in Bools, *op. cit.*, p. 3, n.15.

<sup>43</sup> McLaughlin, *op. cit.*, p. 550.

<sup>44</sup> Bennett, *op. cit.*, p. 8, citing Zouch *Jurisdiction of the Admiralty Asserted* (temp. Car. II) who wrote “Charter Parties seem to have been derived from the Rhodian laws by which it was provided ‘If any man shall have a ship let there be Writings drawn and Sealed thereupon.’” This statement could easily be applied to bills of lading as well as charterparties.

<sup>45</sup> Due to deficiencies in source materials, the discussion of merchants’ practices in this section will be limited to three broad periods:- Sumer and Babylonia; Roman Empire; Medieval Europe. From this delimitation it should not be inferred that trade between these periods did not exist, but that records of trade practices have not survived.

<sup>46</sup> See generally Oates J., *Babylon* (Revised edn.) (1986).

<sup>47</sup> Oates, *op. cit.*, p. 9.

<sup>48</sup> Oates, *op. cit.*, p. 14.

beginning of 'trade'.

It is possible to discuss Sumerian and Babylonian trade because of the existence of written records and documents. Indeed, it is due to agriculture and trade that writing was developed in the 4th millennium, as it is thought the earliest attempts at writing were a method of book-keeping<sup>49</sup>. Before writing became fully developed, the earliest attempts to keep records involved small clay tokens in various shapes, thought to represent various commodities<sup>50</sup>. A simple record of transactions could then be kept by means of these tokens. The next stage was for the tokens in a particular transaction to be placed in a clay ball or *bullā*, which could then be sealed for security. The outside of the *bullā* could be impressed with the shapes of the tokens it contained<sup>51</sup>. However, the *bullae* were not easy to impress with token shapes, so drawings of the tokens may have been incised on them instead. From the drawing of tokens came the drawing of particular objects (pictograms) and from those came full writing<sup>52</sup>.

As important as the development of writing was, an equally important discovery for the Babylonians was a means to permanently record the writing cheaply and easily - the clay tablet. Writing was incised into the soft clay by means of a stylus and when left in the sun to dry the tablets became hard enough to survive for thousands of years<sup>53</sup>. Because of this, many records from the period have survived today from as early as 3100BC. Some eighty per cent of these early records were economic in character<sup>54</sup>, so records of transactions were clearly important to the Babylonians. Certain transactions even had to be recorded on pain of death<sup>55</sup>.

As far as trade practices were concerned, Babylonia had reached a high level of

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<sup>49</sup> Oates, *op. cit.*, p. 15.

<sup>50</sup> Crawford H., *Sumer and the Sumerians* (1991) p. 151.

<sup>51</sup> *ibid.* It has even been suggested that such *bullae* may have acted as bills of lading – Robinson A., *The Story of Writing* (1995) p. 60.

<sup>52</sup> See generally, Robinson, *op. cit.*

<sup>53</sup> Crawford, *op. cit.*, p. 152.

<sup>54</sup> *ibid.*

<sup>55</sup> E.g. buying a man's property from his son or slave had to involve a written bond, duly witnessed - Hawkes J. and Wooley L., *History of Mankind*, Vol. I (1963) p. 607.

sophistication. Merchant colonies were set up along the trade routes<sup>56</sup>. Complex trading relationships were developed. A merchant, the *tamkarum*, would lend money or goods to an agent, the *samullum*, who would give the *tamkarum* a receipt, then embark on a trading journey by sea. The receipt acknowledged what the *samullum* had received, and what the *tamkarum* expected on the *samullum*'s return (i.e. what percentage of the profits of the trading journey). On his return, the *samullum* would settle his account with the *tamkarum*<sup>57</sup>. The agreement normally had a clause that said repayment was only due on the safe return of the ship<sup>58</sup>. There is some discussion as to whether this arrangement was in the nature of a loan or trading partnership<sup>59</sup>.

As well as trade that involved a merchant or agent transporting goods with which to trade, goods were also carried by persons employed purely as carriers. §112 of the Laws of Hammurabi refers to a merchant away from home who, wishing to send goods home, engages a person travelling in the right direction to carry the goods for him.

“If a man is engaged on a trading journey and has delivered silver (or) gold or (precious) stone(s) or any chattels in his possession to a man and has consigned them (to him) for consignment (to their destination), (if) that man has not delivered whatever was consigned (to him) where it was to be consigned but takes and keeps (it), the owner of the consignment shall convict that man of not having delivered what was consigned (to him) and that man shall give 5-fold anything that was delivered to the owner of the consignment.”<sup>60</sup>

Carriage was by land and by water, the two great rivers forming excellent trade conduits. The shipmasters of Ur had even organised themselves into a guild, the *alík Telmun*<sup>61</sup>. A ship's master would do much trading himself, acting as both agent and carrier.

As well as recognising the benefits of extensive trade, the Babylonians recognised the use of money as a means of making more money, by lending it in return for interest. Such a practice was unique in the Ancient world, as the Assyrian and Syrian communities

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<sup>56</sup> See Hawkes and Wooley, *op. cit.*, Vol. I, p. 608 *et seq.*

<sup>57</sup> This mode of Babylonian trade is based on an interpretation of the Laws of Hammurabi (1792-1750 BC), §§101-107. See Driver G.R. and Miles J.C. (Eds.), *The Babylonian Laws*, Vol. I (1952) pp. 188-202 and Trenary C.F., *The Origin and Early History of Insurance* (1926), pp. 54-8.

<sup>58</sup> Hawkes and Wooley, *op. cit.*, Vol. I, p. 613.

<sup>59</sup> Driver and Miles, *op. cit.*, Vol. I, pp. 198-202; Trenary, *op. cit.*, p. 57.

<sup>60</sup> Driver and Miles, *op. cit.*, Vol. I, p. 208; Vol. II, pp. 45-6.

<sup>61</sup> Hawkes and Wooley, *op. cit.*, Vol. I, p. 611.

found it morally unacceptable<sup>62</sup>. The sophistication of Babylonian finance is revealed by the following translated clay tablet -

“5 shekels of silver, at the usual rate of interest, loaned by the Temple of Shamash and by I. Company, to Idin and his wife, are payable with interest on sight of the payors at the market-place to the bearer of this instrument.”<sup>63</sup>

This is clearly a promissory note payable to bearer, and is described as being “the oldest negotiable instrument in the world”<sup>64</sup>.

The high levels of sophistication in Babylonian trade and finance, and the fact that many records were kept and have survived suggests that the origins of the bill of lading may well lie in this period<sup>65</sup>.

## **b) Roman Empire**

Trade in Ancient Rome was regarded as ungentle by landowners and the literati<sup>66</sup>, and lending money at an interest was as morally unacceptable for the Romans as it had been for the Greeks and Assyrians before them<sup>67</sup>. Early in the Roman Empire, the Romans were not interested in maritime ventures at all<sup>68</sup>. This attitude did change though, and the Romans became the masters of the Mediterranean. This was due partly to the expansion of the Roman State to surround the whole Mediterranean and the necessity of using the sea to transport troops<sup>69</sup>.

The Imperial Government was the largest consumer of the day, and was also the greatest trader, employing a great many persons in the Imperial supply chain. While they

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<sup>62</sup> Oppenheim A.L., *Ancient Mesopotamia* (1977) p. 90.

<sup>63</sup> Wigmore J.H., *Panorama of the World's Legal Systems* (1936) (Library ed.) p. 69. Wigmore dated this tablet to 2100 BC, however, if it is properly attributable to the reign of Hammurabi, modern authorities would date it to 1792-1750 BC.

<sup>64</sup> Wigmore, *ibid.*

<sup>65</sup> Wigmore identifies the bill of lading as being one of the various types of Babylonian documents preserved, but sadly he does not give any examples; *op. cit.*, p. 67. Until further research by experts in languages it will not be possible to comment further on the existence of bills of lading and proto-bills in Babylonia.

<sup>66</sup> Wachter (Ed.), *The Roman World*, Vol. II (1987) p. 635.

<sup>67</sup> See n. 52 above.

<sup>68</sup> Lobingier, *op. cit.*, p. 4-5.

<sup>69</sup> *ibid.*

made virtually no use of private merchants themselves<sup>70</sup>, they did not control all trade and private commerce did exist, predominantly with bulk cargoes<sup>71</sup>. A shipper, mindful of the risks of sea carriage would not wish to risk his own capital, preferring to raise a sea loan, which was not repayable if the ship were wrecked or cargo jettisoned during a storm. Such loans were not in the nature of a partnership as the loan was repayable at a fixed rate of interest, regardless of whether a profit was made<sup>72</sup>. Some merchants sold their wares from port to port and large merchants' fairs existed. One at Aegae in Cilicia lasted for 40 days, without toll<sup>73</sup>.

Transport by sea was the business of the guilds of shipowners - the *corpa navicularum*<sup>74</sup>. They were paid fares and freight for the carriage of merchants (*mercatori*) and their wares, but they also carried cargoes of their own<sup>75</sup>. Where carriage on behalf of someone else was undertaken, the *navicularii* were required to return their delivery receipts to the original shipper within 2 years<sup>76</sup>.

There is also some archaeological evidence of trade. Particularly interesting from a documentation point of view are finds of amphorae on ship wrecks, complete with painted labels indicating quantity and ownership. One label from an olive oil amphora out of a mid-Second Century AD wreck at L'Anse Saint-Gervais reads:

“received by Primus, oil from the Charitianus farm, owner Aelia Aeliana; 57½ [unexplained]; 195½ (pounds) weighed by Anicetus”<sup>77</sup>

The name of the oil-merchant responsible for the shipment was also identified on the amphora as “L. ANTONI EPAPHRODITI”. This label is clearly a receipt, but the personnel involved are somewhat obscure: for example, is Primus the shipowner? This difficulty has precluded the conclusion that the label is an early, or even proto-bill of

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<sup>70</sup> Jones A.H.M., *The Later Roman Empire 284-602*, Vol. II, (1986) p. 827.

<sup>71</sup> Wachter, *op. cit.*, p. 636.

<sup>72</sup> Jones, *op. cit.*, p. 868. See below p. 13.

<sup>73</sup> Jones, *op. cit.*, p. 867.

<sup>74</sup> Jones, *op. cit.*, p. 827.

<sup>75</sup> Jones, *op. cit.*, p. 868.

<sup>76</sup> Jones, *op. cit.*, p. 828. This was later shortened to one year by Constantine in 396, due to abuse; *ibid.*

<sup>77</sup> Wachter, *op. cit.*, p. 642. Wachter merely described this as a ‘painted label’.

lading. The fact that the label was attached to the amphora and not given to the shipper indicates the label was more for identification than a shipping document, but it does show that an advanced identification and logging system was in place.

As mentioned above<sup>78</sup>, the lending of money at an interest was frowned upon. Indeed, interest was prohibited altogether by the *Lex Genucia* in 342 BC<sup>79</sup>, though this hard attitude did not prevail throughout the whole life of the Empire. Generally, a bare agreement to lend money at interest was not actionable, but there was a major exception for loans to buy goods to be carried overseas, at the risk of the lender - the *nauticum faenus*. The high risk accepted by the lender in such agreements was acknowledged through the rate of interest, which was without limit, until 528 when Justinian reduced the maximum rate to 12% for these loans and 6% for ordinary loans<sup>80</sup>.

Roman laws did not indicate that a document such as the bill of lading existed, but as noted at pages 1 to 3 of this work, statutes cannot be relied upon with accuracy for details of the bill of lading's origins. It is also significant that Roman maritime law was not codified as a whole; it remained largely as unwritten, customary law<sup>81</sup>. Although certain parts of Roman maritime law were codified<sup>82</sup>, the lack of references to bills of lading should therefore not be surprising.

### c) Medieval Italy

Through its Roman influence, Italy remained the leading trading nation in Europe up to the Sixteenth century<sup>83</sup>. While it was possible for a single merchant to own and

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<sup>78</sup> See above p. 33.

<sup>79</sup> Lee R. W., *Elements of Roman Law* (4th edn.) (1986) p. 291.

<sup>80</sup> Lobingier, *op. cit.* pp. 27-8.

<sup>81</sup> See generally Lobingier, p. 12.

<sup>82</sup> *ibid.*

<sup>83</sup> Towards the end of the Roman Era of supremacy it was Byzantium that took over the role of trade leader. That mantle then returned to Italy by the Eleventh Century with the rise of the great city states, of whom Venice was the richest. The decline of the city states led to commercial power swinging west to Iberia. However, despite being excellent explorers, the Iberians were not commercially minded, and commercial power moved north to Holland, the Baltic and England. England, like France, was a late commercial developer, but by the Eighteenth Century, She was *the* maritime trading power. McDowell and Gibbs, *Ocean Transportation* (1954) p. 9 *et seq.*



navigate his own ship, and carry his own goods, ocean transport was still a hazardous venture, and some way of spreading the risks was needed. Perhaps the first arrangement indicating co-operation was the *rogadia*, which was popular with African Jews. A merchant pledged to transport and trade the goods of another as a friendly gesture without compensation<sup>84</sup>. This arrangement soon became obsolete amongst the commercially-minded Italians, and was replaced by two types of arrangement, the *societas* and the *commenda*.

The *societas* was an arrangement between two or more close family members who contributed to the capital, controlled the business and shared the profits and losses<sup>85</sup>. The earliest example of a *societas* in Italy is dated August 1073<sup>86</sup>. The *societas* was the characteristic form of enterprise in Florence<sup>87</sup>.

The *societas* was followed by the *compagnia* in the Twelfth Century which brought in less close family members and outside investors<sup>88</sup>. According to one writer, the *compagnia* was chiefly used by overland merchants<sup>89</sup>. Both the *societas* and *compagnia* were long term trading arrangements.

In contrast to the *societas* arrangement, the *commenda* was for the duration of a single voyage only. An investing partner, who supplied the capital for the voyage, stayed at home, while the travelling partner went overseas to trade. Having provided most, if not all, of the capital, the majority of the profits went to the investing partner on the return of the traveller. The need for him to keep proper accounts is obvious<sup>90</sup>. This system enabled merchants with no capital to amass a modest fortune through a series of successful *commendas*<sup>91</sup>. There has been fierce debate in Italy as to whether this arrangement was a

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<sup>84</sup> Lopez R.S., *The Commercial Revolution of the Middle Ages 950-1350* (1976) p. 73.

<sup>85</sup> Ball J.N., *Merchants and Merchandise. The Expansion of Trade in Europe 1500-1630* (1977) p. 23.

<sup>86</sup> Postan, Rich, and Miller (Eds.), *The Cambridge Economic History of Europe* (1971) (C.E.H.E.) Vol. III, p. 52.

<sup>87</sup> Hay D., *Europe in the Fourteenth and Fifteenth Centuries* (1989) p. 403.

<sup>88</sup> Lopez, *op. cit.*, p. 74.

<sup>89</sup> Lopez, in C.E.H.E., Vol. II, (1971), p. 384.

<sup>90</sup> Lopez, *The Commercial Revolution of the Middle Ages*, *op. cit.*, p. 76; Ball, *op. cit.*, p. 23.

<sup>91</sup> C.E.H.E., Vol. III, p. 51.

loan or a partnership, though it seems that at the time it was considered to be a partnership<sup>92</sup>.

Overseas merchant colonies were quickly recognised as being beneficial for trade, the first being set up in Constantinople, Antioch and Jerusalem in the Eleventh Century. By the late Twelfth Century, some 10,000 Venetians were resident in Constantinople<sup>93</sup>. According to one writer, merchant communities facilitated the development and spread of new commercial techniques, such as the bill of exchange and double-entry book-keeping<sup>94</sup>.

As trade progressed towards the Fifteenth Century shipowners became more important, with more and more merchants owning shares in ships. These merchants made their money not by buying and selling, but on freight paid by other merchants for the carriage of their goods. Freight was payable only on safe delivery of the goods, but sometimes a small sum would be payable in advance<sup>95</sup>.

The lending of money at interest was still considered distasteful and the Catholic Church prohibited it on the grounds of usury. Pope Gregory IX condemned even the sea loan as usurious in 1236<sup>96</sup>. The Jews<sup>97</sup> were not subject to those restrictions, and it is largely thanks to them that finance developed alongside trade. For them, trade and finance had no stigma attached<sup>98</sup>.

A means of transferring debts was evolved that overcame the ordinary rule of law that a creditor could not assign his debt to another - the bill or writing obligatory. Italian lawyers of the Eighth and Ninth Centuries drew up documents in which the debtor promised payment (or other performance) to the creditor, or the creditor's nominee, or the producer of the document<sup>99</sup>. A typical example from towards the end of the Medieval

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<sup>92</sup> C.E.H.E., Vol. III, p. 50.

<sup>93</sup> C.E.H.E., Vol. II, p. 347-8.

<sup>94</sup> Tracy J.D.(Ed.), *The Rise of Merchant Empires* (1990) p. 285.

<sup>95</sup> Carus-Wilson E.M., *Medieval Merchant Venturers* (1967) (2nd edn.), p. 84.

<sup>96</sup> CEHE, Vol. III, p. 55. Merchants began to use the bill of exchange to evade Church restrictions on usury.

<sup>97</sup> Despite an initial abhorrence for the practice, as evidenced in the Old Testament - Oppenheim, *op. cit.*, p. 90.

<sup>98</sup> Lopez, *op. cit.*, p. 62.

<sup>99</sup> Holdsworth, *op. cit.*, Vol. VIII, pp. 115-126.

period can be found in Malynes' "*Lex Mercatoria*":

"I A.B. merchant of Amsterdam doe acknowledge by these presents to be truly indebted to the honest C.D. English merchant dwelling at Middleborough in the summe of five hundreth pounds currant money for merchandise, which is for commodities received of him to my contentment, which summe of five hundreth pound as aforesaid, I do promise to pay unto the said C.D. (or the bringer hereof) within 6 months next after the date of these presents. In witnesse whereof I have subscribed the same at Amsterdam the 10th of Julie 1622, Stilo novo, A.B."<sup>100</sup>

These documents formed the usual method for buying and selling goods overseas.

Promissory notes developed from writings obligatory in the Seventeenth Century<sup>101</sup>.

### 3. The Development of the Early Bill of Lading

The preceding section has highlighted the usual trading and financial practices of three different eras. The similarity between these practices, particularly between the Babylonian and Medieval Italian, is evident. The relationship between the *samullum* and the *tamkarum* is very close to that of the travelling and investing partner of the *commenda*. There is even a similar debate as to whether the relationship is one of loan or partnership. Although not strictly connected to the bill of lading, the promissory notes from Hammurabi's reign and from 1622 have been quoted to highlight the extraordinary similarity between the two documents<sup>102</sup>. Indeed, the only important difference is that in the 1622 document payment is limited in time, and in the Babylonian document there is no time limit, but payment seems to be restricted to the market-place. It was common for Medieval creditors too to seek out their debtors at the trade fairs<sup>103</sup>. Separated by some 3400 years, is it possible that Medieval practices have been influenced directly by Babylonian trading practices?

Trenarry formulated Diagram 1, on the next page, to show how modern contracts of bottomry and respondentia were related to their ancient counterparts. In his opinion, a

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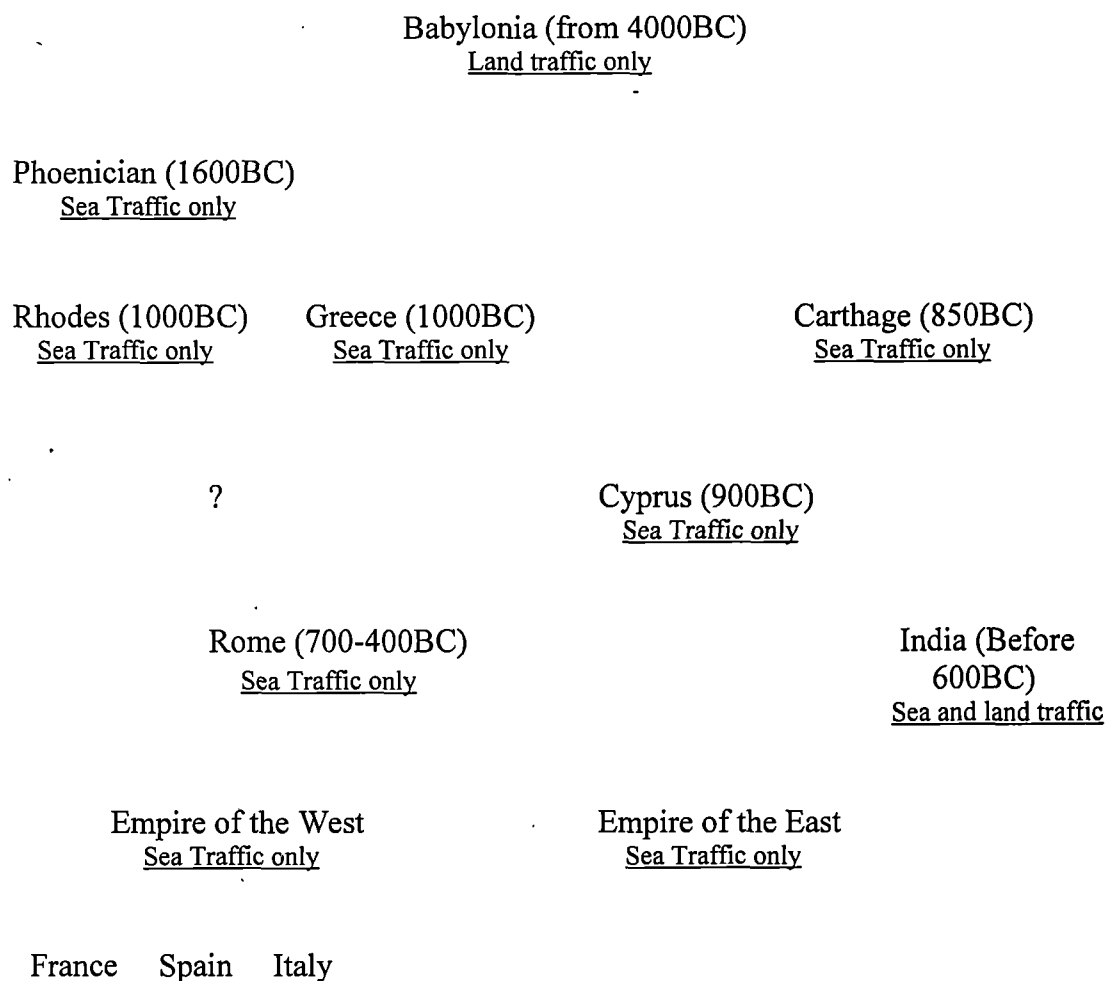
<sup>100</sup> Malynes, *op. cit.*, p. 101.

<sup>101</sup> Harding A., *A Social History of English Law* (1966), p. 318.

<sup>102</sup> See pp. 11 and 16. If a document such as the promissory note payable to bearer existed in both periods, it is conceivable that a document similar to the bill of lading also existed in both.

<sup>103</sup> Holdsworth, *2 Select Essays, op. cit.*, at 298.

direct link existed between Babylonia and the present day, via the Phoenicians, Greeks and Romans. Trenarry relied on trading patterns to establish a link; e.g. the Phoenicians traded with and learnt from the Babylonians, and so on<sup>104</sup>. While recognising that the link between Greek and Babylonian contracts of bottomry was a matter of conjecture, the fact that the countries possessed similar contracts meant that it would be reasonable to conclude that trade practices and customs were passed “in all probability”<sup>105</sup> along the lines indicated in Diagram 1.



Modern custom of bottomry and respondentia

Diagram 1: Trenarry, “The Origin and Early History of Insurance, p. 4

Using Trenarry’s line of argument it would be possible to argue that since the methods of business and finance were so similar in Medieval Italy and Babylonia in all

<sup>104</sup> Trenarry, *op. cit.*, pp.8-9. The link from Rhodes to Rome is the subject of some debate. See Lobingier, *op. cit.*

<sup>105</sup> Trenarry, *op. cit.*, p. 10.

probability the bill of lading that appears to have developed in Italy was a document/practice handed down from Babylonian merchants through the merchants of Phoenicia, Greece and Rome. This is, after all, the method by which knowledge of mathematics was passed on<sup>106</sup>.

Even if Trenarry is not correct and there was no direct passing on of trade practices from Babylonian times to the present day, this does not mean that a document similar to the bill of lading did not exist in Babylon. If the bill developed in Italy from the Eleventh Century onwards<sup>107</sup>, why should it not have developed in Babylon 3000 or more years before? Trade and financial practices were comparable, so if the Medieval Italians felt that they needed a document such as the bill of lading then it is reasonable to suggest that the document-minded Babylonians would also have seen the need and created a similar document<sup>108</sup>. Using this reasoning, if a bill of lading or proto-bill existed in Babylonia, and also Rome, the creation of a bill of lading in the Second Millennium AD was in fact a reinvention. Once trade had reached a certain level of sophistication, a document that performed certain functions was required by merchants. If such a document did not exist, then it would be invented, or, more correctly, reinvented. This reasoning on the bill's origins places the emphasis on custom and not on law, and makes it necessary to look at merchants' practices in more detail.

Whether the Medieval Italian bill of lading was a direct descendant of a Babylonian proto-bill, or a reinvention, the reasons for its development should be the same. Bennett was the first to propose the theory that the modern bill of lading developed from the medieval ship's book of lading or register<sup>109</sup>. Bennett presented evidence of the existence of a ship's register, or book of lading, into which details of all goods carried by the ship must be entered by the ship's clerk. If details of the cargo did not appear in the ship's book

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<sup>106</sup> Trenarry, *op. cit.*, p. 7.

<sup>107</sup> McLaughlin, *op. cit.*, at 550.

<sup>108</sup> Conclusive proof of the bill of lading's existence in Babylon will only come with the translation of existing clay tablets by linguists.

<sup>109</sup> Bennett, *op. cit.*, p. vi. This theory was approved by Boals, *op. cit.*, pp. 1-2; McLaughlin, *op. cit.*, pp. 550-552; Mitchelhill, *op. cit.*, p. 1.

of lading, the shipowner would not be responsible for any damage done to the cargo<sup>110</sup>. When merchants ceased to travel with their goods they required a receipt from the shipowner and a copy of the relevant entry in the Book of Lading was a natural candidate<sup>111</sup> and it is that copy that became the bill of lading. Both book and bill of lading remained in use together for some time. *Chapman v. Peers*<sup>112</sup> in 1534 referred to the book of lading just four years before the case that Bennett identified as the first involving a bill of lading, *The Thomas*<sup>113</sup>.

This theory is, however, not the only possible explanation of the development of the bill of lading. The following theory is based on the trading practices of Medieval Italians and Babylonians detailed in Section 2 of this Chapter. As soon as a merchant could afford to he would want to stop accompanying his wares on trading journeys, wishing to expose himself only to the financial risks and not the personal risks of such ventures. He would engage by loan-cum-partnership a suitable travelling ‘partner’ to whom goods would be given to be traded overseas. Naturally, the non-travelling ‘partner’ would wish to have a receipt for his goods, perhaps embodying their agreement in the same document. Such receipts are well attested in Babylonian times by the Laws of Hammurabi<sup>114</sup>.

The practice of making a separate agreement with a ‘partner’ every time an overseas venture was contemplated was cumbersome, so merchants’ colonies began to grow up in overseas trade centres. These colonies allowed non-travelling merchants to send goods to a favoured agent in one of these colonies for him to trade with and send profits back. In this method of trade, someone is required to carry the goods to the overseas agent. The non-travelling merchant would still want a receipt from the carrier, but instead of being a receipt with a promise to trade the goods and return with profit, it would be a

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<sup>110</sup> Bennett, *op. cit.*, pp. 4-9, citing, *inter alia*, a manuscript known as the “Customs of the Sea”, thought to have been drawn up in Barcelona in the Fourteenth Century.

<sup>111</sup> Bennett, *op. cit.*, p. 6.

<sup>112</sup> Bennett, *op. cit.*, p. 2.

<sup>113</sup> *ibid.*

<sup>114</sup> eg. §§104-5 of the Laws of Hammurabi.

receipt with a promise to delivery to a certain person<sup>115</sup>. As well as sending goods to his agent, the merchant would also send instructions. For example, the following tablet was sent by an Assur merchant to his agents as Kanés,

“[Various commodities]: all of this Assur-taklaku is bringing to you. Sell it at the best price and send me the silver.”<sup>116</sup>

The bill of lading, according to this theory, would have developed from the receipt given by travelling partner into a receipt given by a simple carrier.

It is not claimed that either or both theories did in fact contribute to the development of the modern bill of lading. Indeed, the catalyst for both methods of development was that merchants, at some time, stopped travelling with their goods<sup>117</sup>. However, having had more than one ancestor may explain why there is a slight difference in terminology identified by Knauth<sup>118</sup>. The normal dictionary meaning of bill of lading implies receipt of something put on board a ship, which corresponds to the Spanish *concimiento de embarque* and Italian *polizza di carico*. Some languages' terms for the bill of lading is derived from the Latin word *cognoscere* merely indicating receipt - the French *connaissance*, the Dutch *cognessement* and German *Konossment*. Scandinavians term the bill of lading, *utenriks konossement*, which conveys the idea of transportation. It is possible that different terminology implies a different ancestor document<sup>119</sup>.

Whatever the true reasons for the development of the bill of lading and when that occurred, the basic fact remains that the traditional bill of lading was a product of the customs of merchants, and it will be shown trade custom has added more functions to the early bill of lading and created the bill of lading we have today.

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<sup>115</sup> This type of receipt is reminiscent of that in §112 of the Laws of Hammurabi.

<sup>116</sup> Postgate P.N., *Early Mesopotamia* (1992), p. 213 (after Garelli).

<sup>117</sup> According to the C.E.H.E., Vol. III, p. 69, merchants began to stop travelling with their goods around 1250. It was not a sudden revolution though, and some merchants continued to travel. E.g. In January 1452, on the 26 English ships arriving in Bordeaux there were over 40 merchants - Carus-Wilson, *op. cit.*, p. 273, n. 2. It is not recorded whether these merchants owned the cargoes they were travelling with, or were acting as travelling agents.

<sup>118</sup> Knauth A.W., *The American Law of Ocean Bills of Lading* (1953) (4th edn.) pp. 133-4.

<sup>119</sup> There is little research on this subject, however, Knauth's findings are intriguing.

#### 4. The Functions of the Early Bill of Lading

By looking at bills of lading from the Sixteenth Century it is possible to define the functions of the early bill of lading. These functions can then be used to identify bills of lading from even earlier times. There are, regrettably, very few true early bills from which conclusions can be drawn as to their functions, largely due to the problems identified on pages 27-28 above. All of the bills referred to by Bensa can be classed as early bills, for reasons outlined below. Of the eleven Sixteenth Century bills found in the Seldon Society Publications<sup>120</sup>, eight are recognisably 'modern' bills of lading, in that their final sentence begins "In witness of the truth", "In witness whereof" or "And for the testimony of the truth", which phrase is repeated today on all traditional bills of lading<sup>121</sup>. They also refer to copies "of the same tenor". Another two bills, *The Thomas* and *The White Angle* are similar to the first eight, except that they are sworn before a notary, or other witness, and so may be counted as modern bills. These notarised/witnessed bills do, however, show some evolution of the early bill of lading. Notaries played an important role in commerce, drawing up all types of deeds and contracts. In some cases this was a requirement of law, in other cases it was simply a means by which to lend extra evidentiary weight to the transaction. It was, however, inconvenient and time-consuming to go to a notary for every transaction, and so the Law Merchant gradually recognised the validity of informal, i.e. unnotarised documents<sup>122</sup>. The change, as with all things in the Law Merchant, would have been gradual, and the bills in *The Thomas* and *The White Angle* are simply old-fashioned notarised bills of lading. It is certainly the case today that bills of lading are *not* witnessed by anyone.

The remaining bill, involving an unnamed 'bark', is different in character to the others and should be considered to be an 'early' bill of lading. This bill of lading is quoted on full below.

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<sup>120</sup> Appendix 2.

<sup>121</sup> See further Chapter 4, p. 114 *et seq.* for the meaning of this phrase.

<sup>122</sup> C.E.H.E., Vol. III, pp. 68-9.



“Laude be to God 1544 the xijth daye of the monyth of Maye in Venyce  
The bark whereof is capitayne Alexander de Maistre for the vyage of London  
And God save her Master Venturyn de Varischo and his compyny ladyth ij  
butts saying therein to be reasens of Damask called cibibi [?] Damskim and xv  
chests of galls of Surrey signed of the forsayde marke to be consigned in  
London to Janmes Ragazon or his assigney and hathe payed his freight to the  
patron delyveryng the same sauf on lond as aperyth by the receyte of the patron  
remaynyng with the sayde Venturyn ducatts lj gr. xix cur. for the rest of the  
forsaid freight I Peter Marcudero Io de Master Nicholo purser of the saude bark  
wrote yt by thorder of the sayde patron.”<sup>123</sup>

This bill does not contain the ‘In witness whereof’ phrase or mention accomplishment.

This bill merely records what was received, from who and where it was destined.

As noted on page 6 above, Bensa located an earlier bill from 1390. This bill does not contain the “In witness” phrase, and so is considered to be an early bill. It is quoted below.

“1390, the 25th day of June. Know all men that Anthony Ghileta shipped certain wax and certain hides in the name and on behalf of Symon Maraboths which things must be delivered at Pisa to Mr. Percival who shall deliver all his things to Marcellino de Nigro his agent, and I Bartolomeus de Octavo shall deliver all his goods at Portovenere and for the better caution I affix my mark so.

A copy

Bartholomeus de Octavo mate of the ship Andrea Gavoll”<sup>124</sup>

A second bill from 1397<sup>125</sup> is also in a similar form

These three bills have three things in common. Each contains:

- (i) an acknowledgement of receipt of certain goods;
- (ii) a reference to the goods being on board a certain ship;
- (iii) a with a promise to deliver to a certain person in a certain place.

The bills are separated by some 154 years, so some difference in wording is to be expected, and the latter of the two bills referred to freight and assigns. The fact remains, however, that the three elements identified above are present in both documents, which are, therefore, of the same type of document - an early bill of lading.

Using the elements of an early bill identified above, it is possible to go further back in history and find other documents which have all the functions of early bills of lading.

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<sup>123</sup> Appendix 2.

<sup>124</sup> Appendix 2.

<sup>125</sup> Appendix 2.

Professor Muffs has studied various Aramaic Papyri documents<sup>126</sup> found on the island of Elephantine in the Nile in the first decade of this century, and discussed various interpretations of the following document, whereby Hosea and Ahiab agree to deliver Barley to Government officials in Syene,

“... You have consigned to us barley ... (exact amount) ... and our heart is satisfied therewith. We shall deliver the grain ... We will render an acco[unt before the company commander and the authorities of the] Government House and the clerks of the treasury ... [And if we do not deliver all the grain that is] yours in full we shall be liable (to you) silver ... and you have a right to our wages from the Government House ... you have the right to seize our wages until you are indemnified in full for the grain.”<sup>127</sup>

This document, dated 494BC, acknowledges a receipt of certain goods for delivery to a certain person in a certain place. It does not, it is admitted, refer to receipt on board a ship, but there is no reason to exclude this document from the category of an early bill of lading on this basis. American bills of lading may be issued by any common carrier for transportation by any means<sup>128</sup>. Actual loading on board a ship would not seem to be a strict requirement of modern bills in at least some legal systems<sup>129</sup>, so there should be no need to exclude early bills on the grounds that they do not refer to ships. Whether a document is receipt by a ship, or receipt by a person, what is important is whether or not it is a receipt of goods and a promise to deliver. Muffs specifically referred to it as a bill of lading<sup>130</sup> and stated that it acknowledged receipt of ‘goods-to-be-delivered’. It could be argued that because the document were found in Elephantine, not far from Syene, that it is not a transport document, but some type of warehouse receipt – eg. perhaps Hoshea and Ahiab were charged to deliver the goods from a warehouse. It is true that transport was not mentioned as such in the document, however, it needs to be examined in the light of the economic history of the times. The Ptolemies in Egypt had inherited a system of government granaries, in which corn given by way of taxation was stored. The corn from

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<sup>126</sup> Muffs Y., *Studies in the Aramaic Legal Papyri from Elephantine* (1973), p. 56 *et seq.*

<sup>127</sup> Appendix 1.

<sup>128</sup> 49 U.S.C., s. 80101.

<sup>129</sup> McLaughlin, *op. cit.*, p. 569.

<sup>130</sup> Muffs, *op.cit.*, p. 52.

local barns was transported to larger central stores and maybe even to the huge granaries at Alexandria<sup>131</sup>. From these granaries developed a network of corn banks, payments being made to and from the bank in corn<sup>132</sup>. All of these banking transactions were recorded, and put in this context, Muffs document could easily be a transport document showing the movement of government grain.

There is a transport document dated to 1248<sup>133</sup> which contained an acknowledgement of receipt in Toulouse by the carriers, Cazal and Amiel, and a promise to deliver the cargo back to the cargo-owner at a fair in Provence. No ship is mentioned in the document, and indeed carts and animals are referred to as the mode of transport, indicating it was related to purely land-based transport. However, it also contained the same elements as Muff's bill, despite the 17 century gap.

Leemans has translated a Babylonian clay tablet from 2028BC. Its full text is given below:

"10 talents of different kinds of wool ordinary quality, wool.....put in a boat to Tilmun, Ur-gur, the captain of a large boat, has received.  
In the month of the fest of Ninazu, 14th day of the year Ibbi-Sin I.  
Nanna-andul, scibe."<sup>134</sup>

This 'document', despite it's great age, is recognisably a shipping receipt - it identifies the cargo, the ship and the date. It does not contain a promise to deliver, merely a destination, Tilmun<sup>135</sup>, and so it cannot be described as an early bill of lading according to the definition put forward in this Chapter. However, the wording it contains remains a tantalising indication of the antiquity of proto-bills of lading.

A receipt and a promise to deliver became the basis for the functions of the early bill of lading, and its definition. This definition of a bill of lading using the earliest bills extant is proved to be correct by modern dictionary definitions such as -

"... a *receipt* from the captain given to the shipper or consignor, *undertaking to deliver* the goods on payment of the freight, to some person whose name is

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<sup>131</sup> Rostovtzeff, *The Social and Economic History of the Hellenistic World* (1991) Vol. I, p. 280.

<sup>132</sup> Rostovtzeff, *op. cit.*, Vol. II, p.1286.

<sup>133</sup> See Appendix 2.

<sup>134</sup> Leemans, *Foreign Trade in the Old Babylonian Period* (1960), p. 22. Appendix 1.

<sup>135</sup> It is not clear whether is a person or a place.

expressed in it, or indorsed on it by the consignor." <sup>136</sup>

This definition applies to the unnamed 'bark' bill, the Bensa bills, the Thirteenth Century bill and the Muff bill, save for the lack of reference to a ship in the case of the Thirteenth Century and Muff's bill. It also applies to a general bill in CONLINEBILL form of the Twentieth Century, and also a carrier-specific bill such as the P & O received bill of lading<sup>137</sup>.

This definition also represents the functions of the early bill of lading, i.e. why it was created. Firstly, the receipt function was needed when the true owner of the cargo gave them up to a carrier for carriage - the carrier had to acknowledge what he had received, and give a copy of that to the owner. Secondly, the carrier agreed to deliver the cargo to someone nominated by the owner. This too was written down, because, as a matter of custom, merchant men were bound by their promises simply because they had so promised<sup>138</sup>. If the promise was written down, the carrier could not deny he had made it.

## 5. Conclusions

Evidence suggests that the bill of lading, in a recognisable form, existed as far back as Babylonian times. However, their existence has not been proved conclusively yet, based on the few translations of the thousands of clay tablets so far excavated in the Near East. While it has been said that the origins of the bill of lading are to be found in merchants' practices<sup>139</sup>, final 'proof' of their antiquity will have to come from any surviving bills of lading

The early bill of lading may be a direct descendant from ancient Babylonian documents, or it may be a reinvention from Medieval Italy. In either case the early bill of lading developed because merchants stopped accompanying their goods on trading journeys, and they required a receipt for them and a promise to deliver them from the

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<sup>136</sup>Hardy Ivamy E.R., *Mozley & Whitley's Law Dictionary* (13<sup>th</sup> edn.)(1993), p. 30.

<sup>137</sup> Wilson J.F., *Carriage of Goods by Sea* (4<sup>th</sup> edn.)(2001), Appendix 16.

<sup>138</sup> Trakman, *op. cit.*, [1980] J.M.L.C. 1.

<sup>139</sup> See p. 8 above.

carrier. The functions of a receipt and a promise to deliver are still performed by today's traditional bill of lading, and they represent the *defining* functions of the bill of lading. Any document that does not possess these basic functions is not a bill of lading. The traditional bill of lading has acquired, thanks to the Law Merchant, other functions in addition to the original functions over the last few centuries. The nature and development of the functions of the modern bill of lading will be examined in the following three Chapters.

## CHAPTER 2

### THE BILL OF LADING AS A RECEIPT

#### 1. Introduction

The receipt function of the bill of lading is an important one for carriers, shippers, consignees or indorsees and banks, as it is one of the main means of providing a description of a cargo, now at sea and not available for inspection. One of the two defining functions of a bill of lading identified in Chapter 1 was that of receipt. The bill of lading is regarded as being evidence of receipt of goods for carriage. In particular, it is evidence of the nature, quantity and condition of the goods, and of the leading marks attached or stamped to the goods. This information may be used to facilitate the sale of the goods while at sea: the purchase price may be fixed by the date of the bill of lading<sup>1</sup>; a bank may look at the information to check whether the terms of the letter of credit have been complied with; customs authorities may use the bill of lading to determine liability for duties; the sale contract may require shipment before a certain date, as evidenced by statements in the bill of lading. One of the aims of this Chapter is to explain what sort of evidence is provided by the statements made in the bill of lading.

Evidence provided by statements as to quantity, condition and leading marks in the bill of lading will be examined in Sections 3-5 below. The evidence provided by statements as to other matters will be dealt with in Section 6 below. These statements will be examined in respect of English Common Law and changes made by the Hague Visby Rules<sup>2</sup>. Both systems need to be discussed as not all bills governed by English Law are subject to the Hague Visby Rules, e.g. bills in respect of deck cargo<sup>3</sup>. It has been suggested<sup>4</sup> that the bill of lading also evidences the receipt of the goods on board a particular ship. If true, this would form another aspect of the bill of lading's receipt

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<sup>1</sup> eg. where the sale contract fixes the price as at the date of shipment.

<sup>2</sup> The Hague Visby Rules came into force in English Law in 1977, by virtue of the Carriage of Goods by Sea Act 1971.

<sup>3</sup> Art. I(c), Hague Visby Rules.

<sup>4</sup> McLaughlin *op. cit.* p. 555.

function. However, this aspect will be dealt with in the Chapter concerning Received for Shipment Bills of Lading.<sup>5</sup>

## 2. The Development of the Receipt Function

The lack of large numbers of early bills makes it difficult to be precise as to how the receipt function developed. It would be logical to conclude that the first aspect of receipt to develop was receipt as to quantity and identity: the bill of lading would record details of exactly what was received by the carrier. This is important both for the carrier and the shipper of the goods. The carrier needed to protect himself from claims that the shipper had shipped more than he in fact had. The shipper, and his agents, needed to be able to identify what cargo on the ship belonged to him. The description contained in the bill of lading would satisfy both. The cargo in the Leemans bill<sup>6</sup> is described as "10 talents of different kinds of wool of ordinary quality". Although not very specific about the type of goods received, the description of quantity and quality would be sufficient to identify the goods. Goods might be described more generally as timber or iron, for example, but with a precise indication of quantity, e.g. 2000 tons or 750 bars.

The 1397 bill of lading identified by Bensa<sup>7</sup> must be regarded as an exception, given the vague description of the goods and their quantity - "certain wax and certain hides". Perhaps the explanation for this vagueness is that Ghileta's cargo took up the whole of the ship, therefore there would be no problems with identifying the cargo. Such an imprecise description though could lead to problems if what de Octavo delivered was not what Ghileta shipped. A vague bill of lading could not be used to prove what Ghileta had shipped, and this is an important aspect of the modern bill of lading - it can be used, in certain circumstances, to prove what was shipped<sup>8</sup>.

The next aspect of receipt to develop would appear to be that of recording what

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<sup>5</sup> See Chapter 6 below.

<sup>6</sup> Appendix 1.

<sup>7</sup> Appendix 2.

<sup>8</sup> See Section 3 below.

marks appeared on the goods, by way of further identification. The first appearance of leading marks was in the *Marye*<sup>9</sup> bill of 1541 - "marked all with the mark in the margent". All of the Sixteenth Century bills of lading contain words to this effect, with the exception of the notarised bill in *The White Angle*<sup>10</sup>. Leading marks have been part of the receipt function ever since. All the Seventeenth, Eighteenth and Nineteenth Century bills and indeed the Twentieth Century bills in Appendices 3 and 4 have a similar phrase. In these days of SITPRO aligned documents there is no longer a phrase which says 'marked as in the margin', but a box labelled "Marks and Nos.", wherein the marks on the goods are described<sup>11</sup>. The effect is the same - the bill of lading acknowledges that those marks have been applied to those goods.

The appearance in bills of lading of remarks as to the condition of the goods probably began in the mid-Sixteenth Century<sup>12</sup>. The first appearance of words relating to the condition of the goods was in *The Andrewe*<sup>13</sup> bill in 1544, where the master promised to deliver the cargo "well condyshioned". However, this statement relates to the condition of the cargo on delivery at the port of discharge, rather than on delivery to the ship. The first mention of condition on shipment appears in *The Brandaris*<sup>14</sup> bill in 1546, wherein the master acknowledged the receipt of yarn and canvas "drye and wel condicioned". Such mentions of condition did not occur in all Sixteenth Century bills of lading after that though<sup>15</sup>. *The Job*<sup>16</sup> bill of 1557 described the cargo as being "well and duelic condicioned". The two Seventeenth Century bills both described the cargo as being 'dry and well-conditioned'<sup>17</sup>. A change seemed to occur in the Eighteenth Century when the standard condition formula became 'good order and well conditioned'.

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<sup>9</sup> Appendix 2.

<sup>10</sup> Appendix 2.

<sup>11</sup> eg. CONLINEBILL, Appendix 4.

<sup>12</sup> Murray, *op.cit.*, References to condition were most frequently found in Spanish bills of lading, at p. 691.

<sup>13</sup> Appendix 2.

<sup>14</sup> Appendix 2.

<sup>15</sup> *The White Angle* bill did not, despite its length, contain any statements as to the condition of the cargo.

<sup>16</sup> Appendix 2.

<sup>17</sup> Appendix 2.



The overall format of the bill of lading also changed to a more modern format. The bill of lading now began "Shipped by the Grace of God in good Order, and well conditioned by ... in and upon the good ship called the..."<sup>18</sup>, instead of commencing with the identification of the master, e.g. "I James Harris, dwelling at London, master, under God, of the ship called "Jane"..."<sup>19</sup>. This change perhaps indicated a shift in the importance of the master in relation to the bill. The emphasis in the bill of lading was no longer on *who* received the cargo, but on *what* was received. The master was still named in the bill at this time, but his identity became less important than that of the ship itself<sup>20</sup>.

The next development in the bill of lading did not occur until the Nineteenth Century when it became the custom to refer to the goods as being shipped in *apparent* good order and condition. This is related to the fact that the master and owners were only describing the external aspect of the cargo's condition. The Maritime Ordinance of Louis XIV of France, 1681, required bills of lading to contain the *quality*, quantity and marks of the goods<sup>21</sup>. According to Murray, the Ordinances and the customs that grew up around them recognised that quality meant only the exterior and apparent quality<sup>22</sup>. This custom was almost certainly followed around the world, as masters would only be in a position to check the external condition of the goods<sup>23</sup>. With a custom in place it was just a matter of time before the wording on the bill of lading reflected this. The 1882 model bill of lading from the Liverpool Conference refers to 'apparent order and condition'<sup>24</sup>. Although by no means universal, this format was ultimately followed by Art. III, r. 3(c), Hague Visby Rules. Most bills since then have referred only to the apparent good order and condition of

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<sup>18</sup> 1713 bill - Appendix 3.

<sup>19</sup> 1637 bill - Appendix 3.

<sup>20</sup> It is interesting to note that *in rem* actions and the notion of the ship itself being liable, as opposed to its owner, seem to stem from the same period – Jackson D.C., *The Enforcement of Maritime Claims* (1985), p. 210 *et seq.*

<sup>21</sup> Murray, *op. cit.*, p. 691.

<sup>22</sup> Abbott C. quoted in Murray, *ibid.* Murray went on to identify the first American case, in 1802, where the statement in the bill of lading as to condition was held to relate to apparent condition only, and therefore not conclusive against the carrier, at p. 700. One of the earliest cases in England was *Peter der Grosse* [1875] 1 P.D. 414.

<sup>23</sup> See the discussion in Section 4 below on internal quality and external condition.

<sup>24</sup> Appendix 3.

the cargo, as is shown by the Twentieth Century bills in the Appendix 4.

The modern bills of lading, although drafted for different trades and companies and possessing some variation in contractual terms, usually share the same SITPRO aligned format. However, as receipts their functions are the same. The following sections will be based upon the CONLINEBILL<sup>25</sup>, but could be applied to any modern bill of lading.

### 3. Statements as to Quantity

There is no obligation at common law for a carrier to include in the bill of lading representations as to quantity and condition of the goods shipped, although, if a document is to act as a receipt some statement must be made about the goods it acknowledges. Modern bills of lading always describe the quantity of the goods received by the ship either by weight or by number of packages, e.g. 10 tons of sheet metal, or 100 bales of cotton. The rest of this Section will deal with the question of what effect these statements as to quantity have, ie. are they conclusive evidence, or can the statement be disproved?

Where the carrier has issued a bill of lading that contains a representation as to quantity, at Common Law that representation is *prima facie* evidence of the quantity of goods shipped. Tindal LJ said in 1831 that "as between the original parties, the bill of lading is merely a receipt, liable to be opened by the evidence of the real facts."<sup>26</sup> In other words, the statements of quantity in the bill of lading are evidence of what the carrier received, but other evidence may disprove this. The burden of disproving the evidence provided by the bill of lading lies firmly on the carrier, as it was he who issued the bill<sup>27</sup>. What sort of evidence will the carrier need to disprove quantity represented in the bill of lading? The English Courts have held that strong evidence is required. According to Lord Esher MR, the carrier had to prove "with certainty that it was not possible that the goods

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<sup>25</sup> Appendix 4. The CONLINEBILL is a good example of a traditional bill of lading designed for the liner trade, without cargo-specific terms.

<sup>26</sup> *Bates v. Todd* (1831) 1 M. & Rob. 106, at 107.

<sup>27</sup> *Harrowing v. Katz* (1894) 10 T.L.R. 400, at 401.

could have been extracted [after loading]."<sup>28</sup>

*Smith v. Bedouin*<sup>29</sup> is the leading authority on the standard of proof required of the carrier. The bills of lading in this case described the cargo as being 1000 bales of jute. There were only 988 bales delivered and there was no clear evidence of what had happened to the missing bales. The indorsee of the bills made a deduction from the freight in respect of the value of the missing bales, and the shipowners sued for the freight, arguing that the bills were wrong and they were not guilty of a short delivery, having delivered what they had received. The House of Lords held that there was nothing to displace the evidence of the bills of lading that 1000 bales had been shipped, and therefore the indorsees were entitled to the deduction they claimed. Lord Shand said that it was not enough to show that fraud *may* have been committed,

"it must be shewn that there was in point of fact a short shipment - that is, the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped, but that in point of fact they were not shipped."<sup>30</sup>

Their Lordships in *Smith v. Bedouin* refused to speculate on what may have happened to the goods<sup>31</sup>. Bailhache J in *Venestra v. Walford Lines* put the matter more succinctly - "It requires most cogent evidence"<sup>32</sup>, and according to Viscount Haldane in *Hain v. Herdman*, "mere possibility cannot prevail against the terms of the bill of lading"<sup>33</sup>.

Debattista has noted that maritime arbitrators in London might not require such a heavy burden of proof. He quotes from one arbitration reported in Lloyd's Maritime Law Newsletter 22 where it was merely assumed that "there could have been no loss of cargo during the sea passage, except for those due to natural causes."<sup>34</sup> This seems to be a lower standard of proof than that required by the courts.

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<sup>28</sup> *ibid.*

<sup>29</sup> [1896] A.C. 70.

<sup>30</sup> *ibid.*, at 79.

<sup>31</sup> *ibid.*, at 76.

<sup>32</sup> (1922) 12 Ll. L. Rep. 139, at 141.

<sup>33</sup> (1922) 11 Ll. L. Rep. 58, at 59.

<sup>34</sup> Debattista C., "The bill of lading as a receipt - missing oil in unknown quantities" [1986] L.M.C.L.Q. 468, at 474.

The carrier's ability to disprove the bill of lading statements as to quantity at Common Law extends to situations where the bill of lading has been transferred to a third party. In *Grant v. Norway*<sup>35</sup>, the master signed a bill of lading for 12 bales of silk, which were never in fact loaded. The bill was indorsed as security for a bill of exchange. When the bill of exchange was defaulted on the indorsees tried to recover under the security of the bill of lading, and sued the shipowners when they discovered that the silk was not on board. Jervis CJ held that the master had no authority to sign bills of lading for goods not shipped, and therefore the shipowner was not bound by the bill. He was allowed to prove that the cargo was not in fact shipped, ie. to disprove what the bill of lading said. This judgment alarmed those concerned with the maritime industry, and led to the enactment of s. 3, Bills of Lading Act 1855. This Section made the bill of lading conclusive evidence of shipment in the hands of the consignee or indorsee. Unfortunately, the bill was only conclusive against the *signor* of the document, who would be the master, or the carrier's agent and unlikely to be worth suing.

This situation remained in English Law until 1992 when the Bills of Lading Act was repealed by the Carriage of Goods by Sea Act 1992. S. 4 of that Act states that where a bill represents that certain goods have been shipped, such representations are conclusive against the carrier when the bill of lading is in the hands of a lawful holder<sup>36</sup>. In other words, the carrier can no longer disprove the bill statement as to quantity if the bill has been transferred to a lawful holder. In the hands of the original shipper, the bill statement is still only *prima facie* evidence at Common Law.

While other statements in the bill of lading may give rise to an estoppel, making the bill conclusive evidence in the hands of a third party<sup>37</sup>, statements as to quantity do not give rise to this estoppel. Such statements are either *prima facie* evidence, conclusive evidence by contractual term, or no evidence at all. At Common Law, freedom of contract

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<sup>35</sup> (1851) 10 B. 665.

<sup>36</sup> A lawful holder is defined in s. 5(2) as being someone being in possession of the bill of lading by virtue of them being the identified consignee or an indorsee.

<sup>37</sup> See Sections 4 and 5 below.

existed and this enabled a shipowner to destroy even the prima facie evidentiary nature of the bill of lading simply by clausing it with "weight, quantity unknown" or "said to weigh". As early as 1810, such clauses had been held by the English Courts to be valid and they had the effect of negating a statement as to how much cargo has been received<sup>38</sup>, meaning that the plaintiff could not rely on the bill of lading as evidence of the quantity of cargo, and must prove the quantity by other means. In *New Chinese Antimony v. Ocean Steamship Co*<sup>39</sup>, the bill of lading for 937 tons of antimony oxide ore had the typewritten marginal endorsement of "A quantity said to be 937 tons" as well as a printed clause in the body of the bill which said "weight, measurement, contents and value (except for the purpose of estimating freight) unknown". The Court of Appeal held unanimously that the bill was not even prima facie evidence of quantity<sup>40</sup> and the plaintiff had to prove by other means that 937 tons had in fact been shipped. There was evidence that suggested that the carrier had delivered all that was shipped, less allowable wastage,<sup>41</sup> so the carrier was not responsible for an alleged short delivery.

It may be thought that s. 4, COGSA 1992 would affect the validity of weight unknown clauses, as a contractual term should not be allowed to affect the operation of an Act of Parliament. The matter came before the courts recently, in a case which also considered the effect of the Hague Visby Rules on such clauses<sup>42</sup>. In *The Mata K*<sup>43</sup> the bill of lading 'stated' that 11,000 MT of potash had been shipped. The bill also contained a clause that said "Weight, measure, quality, quantity, condition, contents and value unknown." In an action for short delivery, Clarke J held that the bill of lading was not even *prima facie* evidence of the amount of cargo shipped. It did not, because of the weight unknown clause, 'represent' that 11,000 MT of cargo had been shipped, and therefore s. 4,

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<sup>38</sup> *Haddow v. Parry* (1810) 3 Taunt. 303.

<sup>39</sup> [1917] 2 K.B. 664.

<sup>40</sup> There is no requirement, however, that both "said to be" and "weight unknown" must be included in a bill of lading for it not to be prima facie evidence - *The Atlas* [1996] 1 Lloyd's Rep. 642, at 646.

<sup>41</sup> *op. cit.* at 672.

<sup>42</sup> See below.

<sup>43</sup> [1998] 2 Lloyd's Rep. 614.

COGSA did not operate to make the statement conclusive evidence. It should be seen as a matter of construction whether a bill 'represents' cargo to have been shipped so as to attract the operation of s. 4, COGSA.

Where the Hague Visby Rules apply to a bill of lading, Art. III, r. 3 requires a Carrier to issue, on demand of the shipper, a bill of lading showing, *inter alia*, either the number of packages or weight as furnished by the shipper. The shipper initially has the choice of weight or number, as he will furnish the figures. However, if both are given, the carrier can choose which he shows in the bill of lading<sup>44</sup>. Where both number and weight are shown in a bill, the carrier may qualify one statement, and so prevent it being *prima facie* evidence under Art. III, r. 4. This was the case in *Oricon v. Intergraan*<sup>45</sup> where the bills acknowledged shipment of 2000 and 4000 packages of copra cake. The cargo was further described as "said to weigh gross: 105,000 kgs" and "said to weigh gross: 210,000 kgs" respectively. Roskill J held that the bills, being subject to the Hague Rules, had acknowledged the number of packages shipped and were *prima facie* evidence of those numbers. The bills were not, however, evidence of the weight of the cargo, as the representation as to weight had been qualified.

The carrier is absolved from the requirements of Art. III, r. 3 by virtue of the Proviso at the end of the Rule if he suspects the information he has received is wrong, or he has no reasonable means of checking if it is accurate. For example, if a sealed container is shipped and the shipper says that it contains 10 boxes of tractor spares, then a carrier is not obliged to state this on the bill of lading, as he has no means of checking whether that is what the container contains.

Art. III, r. 4 makes such statements as to quantity, *inter alia*, *prima facie* evidence; however, such statements are conclusive evidence in the hands of a third party acting in good faith. Making such statements conclusive evidence was an amendment to the original

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<sup>44</sup> Wilson, *op.cit.*, at p. 127. Art. III, r. 3(b) refers to *either* number of packages, *or* weight, which implies a choice. Bridge M., *International Sale of Goods* (1999), para. 11.54, thought the choice lay with the shipper.

<sup>45</sup> [1967] 2 Lloyd's Rep. 82.

Hague Rules by the Visby amendments of 1968.

Weight unknown clauses are not prohibited *per se* by the Hague Visby Rules. In the case of *The Atlas*<sup>46</sup> the claimants in an action for short delivery of a cargo of steel coils argued that the use of a weight unknown clause was prohibited by Art. III, r. 3 or r. 8 of the Hague Visby Rules. Rule 8 makes any attempt to lessen the liability of the carrier void. The Court disagreed and held that no request for a bill of lading in Art. III, r. 3 form had been made by the shipper, so a carrier was not bound to show number or weight on the bill. The weight unknown clause was therefore not invalid<sup>47</sup>. Various textbook writers have, however, discussed the opinion that a general weight unknown clause may be incompatible with the requirements of Art. III, r. 3 and therefore void under Art. III, r. 8, if the shipper did demand a bill in Art. III, r. 3 form<sup>48</sup>. The courts have not adopted that opinion though and the cases of *The Atlas* and *The Mata K* would appear to make it imperative for shippers to explicitly ask for a bill of lading in Art. III, r. 3 form, if they want statements as to quantity to be any sort of evidence<sup>49</sup>.

Although in use for many years, the Hague and Hague Visby Rules have not received universal approval. The Hamburg Rules were promulgated in 1978 as a successor to the Hague Visby Rules, but have met with only limited success. The Hamburg Rules' requirements on the contents of a bill of lading go further than Hague Visby. As well as leading marks, condition, number *and* weight, various other details are required, such as name of shipper and freight<sup>50</sup>. The absence of any of these details does not, however, affect the validity of the bill<sup>51</sup>. Art. 16 deals with the evidentiary effect of a Hamburg bill, and this follows the Hague Visby Rules of prima facie evidence which becomes conclusive

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<sup>46</sup> [1996] 1 Lloyd's Rep. 642.

<sup>47</sup> See also *The Mata K* [1998] 2 Lloyd's Rep. 614.

<sup>48</sup> Yates D. (Ed.), *Contracts for the Carriage of Goods by Land, Sea and Air* (1993), para. 1.6.8.3.35; Boyd S.C., (Ed), *Scrutton on Charterparties* (20<sup>th</sup> edn.)(1996)("Scrutton"), p. 119; Baughen S., *Shipping Law* (2<sup>nd</sup> edn.)(2001), p. 70.

<sup>49</sup> Baughen *ibid.*

<sup>50</sup> Art. 15.

<sup>51</sup> Art. 15.3.

when the bill of lading is transferred to a third party who in good faith relies on the bill<sup>52</sup>. One important difference with Hague Visby is the provision in Art. 16.1 relating to reservations. As with Hague Visby, if the carrier suspects the information given to him by the shipper is wrong, or he has no reasonable means of checking it, he may insert a reservation into the bill, i.e. clause it. However, Hamburg requires that reason for the reservation must also form part of the reservation. This should mean that general weight unknown clauses will be ineffective and void under Hamburg Rules, Art. 23, because they do not give reasons why the weight is unknown.

The CMI is currently looking at ways of improving the laws relating to the carriage of goods by sea and is considering replacing the Hague Visby and Hamburg Rules with a new convention. While most attention is given to matters such as whether the errors in management and navigation should remain as a defence, the question of the evidentiary effect of bills of lading is being considered, and is indeed causing disagreements already. The discussion over the evidentiary effect of the bill relates principally to where the burden of proof should lie, on the carrier, or cargo owner<sup>53</sup>, and this is the crux of the matter for the bill of lading as a receipt: who has to prove what to succeed? The CMI's Draft Outline Instrument has addressed the issues relating to the receipt function. For non-containerised cargo. Rule 8.3.1 would allow a carrier to qualify statements if the information furnished by the shipper cannot be reasonably checked, or the carrier suspects it is inaccurate. Rule 8.3.1 b) and c) allow a carrier to put an appropriate qualifying statement in the bill relating to leading marks and quantity of goods inside a container, unless the carrier has in fact inspected the contents of the container. The circumstances as to when the bill provides conclusive evidence is still under discussion, but if a qualifying statement is used, the bill

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<sup>52</sup> Art. 16.3. The requirement of reliance is a change from Hague Visby, and is more like the Common Law reliance required for an estoppel; see Section 4 below.

<sup>53</sup> See CMI Newsletter 1999 No. 2 at 5. Some countries, such as Australia and the USA have gone ahead with their own national legislation, or proposals, on carriage of goods by sea. Australia has now enacted Carriage of Goods by Sea Regulations 1998, and the Sea-Carriage Documents Act 1998. The US is still debating changes to their carriage of goods by sea laws, but their proposals for reforms to their COGSA 1936 do deal with the evidential problem concerning containers and bulk cargoes - *Asariotis R. and Tsimplis M.N.*, "The proposed US Carriage of Goods by Sea Act" [1999] L.M.C.L.Q. 126, at 133-4.



provides neither *prima facie*, nor conclusive evidence<sup>54</sup>.

Making the bill of lading conclusive evidence in the hands of the shipper or a third party would be one solution to the problem of where the evidentiary burden of proof should lie. The carrier would be unable to disprove the statements in the bill. This idea would not be a new one. Professor Muffs, a bible scholar rather than a lawyer, discussed in detail the meaning of the phrase "our heart is satisfied therewith" in a bill of lading from 494BC<sup>55</sup> and concluded that in the context of a carriage document it meant that the carriers acknowledged that they had received the amount of goods specified by the owner. They declared that they were satisfied with the amount received and recorded, and consequently, if they made a short delivery of the goods, it would be their responsibility, not the owner's<sup>56</sup>. In other words, the bill had become conclusive evidence as between the carriers and shippers. Today, a bill of lading can similarly be made conclusive evidence by the insertion of an appropriate clause, eg. "This bill is conclusive evidence against the owners of the quantity of cargo stated therein". That was the clause incorporated into the bill of lading in *Fisher, Renwick v. Calder*<sup>57</sup>. The bill of lading stated that 6193 sleeper blocks had been shipped, even though the master knew that 223 blocks had been lost prior to loading. The ship owners lost an action by the cargo owners for short delivery on the grounds that the bill was conclusive evidence of what had been shipped and the owners were not permitted to dispute the figures, despite the fact that the master had entered a protest regarding the lost blocks two days before he signed the bill of lading.

Conclusive evidence clauses are not always effective, as the inclusion of marginal endorsement stating that some cargo was lost before shipment will not prevent the carrier from showing some cargo was not shipped in spite of the conclusive evidence clause<sup>58</sup>.

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<sup>54</sup> Rule 8.3.4. See <http://www.comitemaritime.org/worip/issue/revised.html> for the full text of the Draft Rules.

<sup>55</sup> Appendix 1.

<sup>56</sup> Muffs, *op. cit.*, p. 58.

<sup>57</sup> (1896) 1 Com. Cas. 456.

<sup>58</sup> *Lohden v. Charles Calder* (1898) 14 T.L.R. 311, approved by the Court of Appeal in *Crossfield v. Kyle Shipping* [1916] 2 K.B. 885.

Such conclusive evidence clauses do not conflict with the Hague Visby Rules, as they increase the carrier's liability and this is permissible under Art. V. Carriers would certainly not be happy with this proposal.

Holding that bill of lading statements as to quantity to be evidence at all, be it *prima facie* or conclusive, can also be criticised. It is the shipper who usually supplies the bill of lading figures, and usually completes the bill himself, yet it is the carrier who finds himself bound by the statements in the bill. The carrier may have an indemnity from the shipper<sup>59</sup>, but this may turn out to be worthless, or at least costly to enforce. In particular, the shipment of oil in bulk causes problems in proving a short delivery<sup>60</sup>. These problems relate to the way oil is loaded and discharged, through pipes to and from shore tanks which can be miles away from the ship. Oil may be lost through leaks along the pipe and also at the manifold connections. Problems also occur from the nature of oil itself. It is liable to lose volume from evaporation, clingage or unpumpable residue while on board the ship. Ship figures rarely match shore figures, and while ullage measurements may indicate a loss of cargo, they do little to prove the actual quantity of the cargo. In these circumstances, to hold that the bill of lading figure (based on the shipper's shore figure) is even *prima facie* evidence would be unfair on the carrier, as the bill of lading figure is likely to be as inaccurate as the rest<sup>61</sup>.

Problems in oil measurement only began to be important in the 1970's when the rising price of oil meant that losses (for which the shipowner was paying) were increasing. Previously, shortage lay where it fell and this led, according to Weale, to "sloppy and complacent ways"<sup>62</sup> with respect to the bill of lading. Weale describes the bill of lading's ability to evidence the quantity of an oil cargo as "the attribution of a wholly spurious

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<sup>59</sup> Art. III, r. 5.

<sup>60</sup> See generally Weale J., "Claims for short delivery of bulk oil cargoes: some recent trends" [1978] L.M.C.L.Q. 405 and Yates, *op. cit.*, para. 1.6.8.3.33.

<sup>61</sup> Weale, *op. cit.* An additional problem with oil carriage is the extensive use of charterparties and the problems of whether a charterer/shipper can demand a bill of lading in Art. III, r. 3 form - see Chapter 5.2 below.

<sup>62</sup> Weale, *op. cit.*, p. 405.

accuracy to a once largely ignored document."<sup>63</sup>

Weale is not alone in his misgivings about the receipt function of the bill of lading. Baynard Crutcher said in 1971 that the current bill of lading was based on several fictions, one of which being "that an agent for the carrier actually sees and weighs and counts the individual pieces of cargo when they are loaded."<sup>64</sup> This is clearly not the case with modern transport methods, particularly in the carriage of bulk cargoes. The question is, in the light of the problems mentioned above, should the bill of lading be accorded the status of being evidence of the statements of quantity made in it? The question of the problem of bulk cargoes and the statements of quantity in the bill of lading is not a new one. There were many discussions on the subject during the negotiations for the Hague Rules, and an early draft of Art. III, r. 4 ended with

"Upon any claim against the carrier in the case of goods carried in bulk or whole cargoes of timber, the claimant shall be bound notwithstanding the bill of lading to prove the number, quantity or weight actually delivered to the carrier."

This would have meant the bill was not even *prima facie* evidence of quantity in respect of those cargoes. That amendment was dropped and replaced by the idea of having a reservation to the Hague Rules regarding evidential value, so that countries had a choice as to what sort of evidence the bill of lading was. The reservation was dropped by the time the Hague Rules were signed, but it shows that from the earliest days of the Twentieth Century the question of the evidential value of the bill posed problems.

Another issue surrounds the phrase 'said to contain', frequently found in container bills of lading. If a bill states that a container is said to contain '10 crates motorcycle spares' what sort of evidence does this provide? The matter was touched upon in the case of *The River Gurara*<sup>65</sup> where the court had to decide whether the container itself, or the parcels the container was said to contain, were the 'packages' for purposes of limitation. The court

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<sup>63</sup> *ibid.*

<sup>64</sup> Baynard Crutcher M., "The Ocean Bill of Lading - a Study in Fossilisation" [1971] Tul. L.R. 697, at 731.

<sup>65</sup> [1998] 1 Lloyd's Rep. 225, CA, [1996] 2 Lloyd's Rep. 53, QB.

held, upheld by the Court of Appeal, that it was the separate parcels that formed the basis for limitation, not the container, notwithstanding the use of the phrase 'said to contain'. The carrier is not however under any obligation to record the contents of a container on a bill of lading unless he had had an opportunity to check the contents<sup>66</sup>. The number of parcels said to be in a container would therefore be *prima facie* evidence of that fact, but the carrier would be allowed to disprove it if he could, unless the bill had been transferred to a third party<sup>67</sup>.

The receipt for quantity function of the bill of lading seems to work quite well. Most cases that come to court now tend to be about questions of evidence rather than questions of law. There is an argument that the bill of lading should be made fully conclusive at Common Law and general weight unknown clauses should be banned, in line with the perceived interpretation of the Hague Visby Rules and the Hamburg regime. Carriers would be liable to shippers and third parties on the basis of what the bill of lading said, and be forced to rely on the indemnities provided by the shipper. This would add to the commercial certainty of the bill of lading, making it more acceptable to buyers and banks. However, in certain trades, such as oil, containerised and bulk cargoes, to make the bill conclusive evidence would create certainty at the expense of fairness to carriers. It is to be hoped that any proposals from the CMI will deal with the evidential value of the bill of lading and gain the necessary international agreement required.

#### **4. Statements as to Condition**

At Common Law, statements made in a bill of lading about the apparent condition of the goods are *prima facie* evidence of the condition in the hands of the shipper<sup>68</sup>. However, when the bill of lading has been transmitted to a third party, statements as to condition form the basis of an estoppel. In other words, they become conclusive evidence,

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<sup>66</sup> Art. III, r. 3, Hague Visby Rules.

<sup>67</sup> Art. III, r. 4, Hague Visby Rules.

<sup>68</sup> *Peter der Grosse* [1875] 1 P.D. 414, at 420.

because the carrier is prevented by the estoppel from proving that the bill is wrong. In the leading case of *C.N. Vasconzada v. Churchill & Sim*<sup>69</sup> a cargo of timber was stained with petroleum prior to shipment. This damage should have been apparent at the time of loading, nevertheless the master issued bills of lading which said the timber had been "shipped in good order and condition". The indorsees of the bill sued the shipowner for damages for not delivering the cargo in good condition. Channell J held that since the indorsees had acted on the statement to their prejudice, because they relied on the statement of condition to their detriment and that induced them to hand over the purchase price for the goods, the shipowners were estopped from denying that the goods were shipped in good condition. Channell J said:

"The doctrine of estoppel, however, is that the person estopped is precluded from denying in the same transaction as that which the estoppel arises the truth of the statement acted on. I think, therefore, I have to say that the [shipowners] not being able to deny that the goods were in good condition at the time of shipment, must pay the damage which was on delivery found to be done to the goods."<sup>70</sup>

Condition statements upon which an estoppel may be founded are to be contrasted to quality statements<sup>71</sup>, which are *prima facie* evidence only and they cannot found an estoppel. In *C.N. Vasconzada v. Churchill* Channell J defined the difference as follows:

"I think that 'condition' refers to external and apparent condition, and 'quality' to something which is usually not apparent, at all events to an unskilled person."<sup>72</sup>

The distinction between condition and quality has not always been recognised, and the two terms are sometimes used interchangeably<sup>73</sup>.

A modern interpretation of the distinction can be seen in *National Petroleum Co. v. Athelviscount*<sup>74</sup>. There, a discolouration of kerosene which could only be ascertained by chemical analysis was held to be a defect of quality, not condition, therefore, the question

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<sup>69</sup> [1906] 1 K.B. 237.

<sup>70</sup> [1906] 1 K.B. 23, at 251. Cf. *Peter der Grosse* (1876) 1 P.D. 414 where the statement as to condition in the bill was treated as *prima facie* evidence only in the hands of a third party consignee.

<sup>71</sup> See Section 6 below.

<sup>72</sup> [1906] 1 K.B. 237, at 245.

<sup>73</sup> See Murray, *ibid.* at p. 691-2.

<sup>74</sup> (1934) 39 Com. Cas. 227.

of estoppel did not arise. This would have been so even if the master had been told of the discolouration before he signed the bill. There is no estoppel on statements as to quality marks either.<sup>75</sup>

The basic principle is that if the damage to the cargo is visible on an outward inspection, following the issue of a clean bill of lading which has been transferred into the hands of a third party who relies on the statements therein, the carrier will be estopped from denying that the cargo was in a good condition on shipment. Consequently, he will be liable for the damage unless he can show that the damage occurred through an excepted peril. However, since the damage occurred before shipment, it is unlikely that an excepted peril will assist him. Where the damage is not visible on an outward inspection, the shipowner may disprove the statement in the bill of lading and prove that the cargo was damaged prior to shipment. This principle is illustrated well by the case of *Silver v. Ocean*<sup>76</sup>, where a cargo of cans of frozen eggs were carried under bills of lading, which said they had been "shipped in good order and condition". On discharge, the cargo was found to be damaged. Some cans were seriously damaged, with obvious holes and gashes, whereas others were damaged by pinhole perforations, which were not easily visible on an outward inspection. The shipowner was estopped from denying that the former cans were shipped in good condition in respect of the first type of damage, but was not estopped in respect of the latter cans, and was therefore able to prove that these cans were shipped in this condition.

In order for estoppel to operate, actual reliance on the statement in the bill is necessary. In *The Skarp*<sup>77</sup>, a contract of sale, which the holders of the bill of lading were bound by, stated that the goods could not be rejected, and any disputes had to be referred to arbitration. The court held that this term meant that there was no estoppel against the shipowner because the holders of the bill did not in fact rely on the statements in the bill of

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<sup>75</sup> See Section 6 below.

<sup>76</sup> [1930] 1 K.B. 417.

<sup>77</sup> [1935] P. 134.

lading. It is the fact of reliance on a statement that is important - in *The Dona Mari*<sup>78</sup> the presence of a sale contract and any liability under that was irrelevant as to whether the statement in the bill of lading had been relied upon. *Silver v. Ocean* is authority for the principle that if a bill of lading is taken without objection as a clean bill that is sufficient evidence that it was relied upon<sup>79</sup>.

As with statements as to quantity, a shipowner can destroy even the *prima facie* evidential nature of the bill of lading by indorsing it with a clause such as "condition unknown". Such clauses are however construed strictly against the shipowner. In *Peter der Grosse*<sup>80</sup> a clause which said "weight, contents and value unknown" did not affect the evidential value of the bill which had stated that the cargo had been "shipped in good order and condition".

The words used in the clause must be precise. In *C.N. Vasconzada v. Churchill* the clause "quality and measure unknown" did not qualify the statement that the goods were shipped in good order because quality and condition did not mean the same thing<sup>81</sup>. Even where the clause "condition unknown" is used, it may still not qualify an express statement of the condition of the goods. In *The Tromp*<sup>82</sup> a cargo of bags of potatoes was acknowledged in the bill of lading to be shipped in good order and condition. At the foot of the bill was a printed clause that said "quality, condition and measure unknown". The potatoes were found on discharge to have rotted, due to wet bags. It was held that the qualifying clause related to the state of the potatoes themselves, whereas the statement "shipped in good order and condition" was a representation as to the state of the bags containing the potatoes. The shipowners were therefore estopped from denying that the bags were dry and in good condition when they received them.

In *The Skarp*<sup>83</sup> certain clauses on the reverse of the bill of lading said "condition,

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<sup>78</sup> [1973] 2 Lloyd's Rep. 366. See also Baughen, *op.cit.*, pp. 58-9.

<sup>79</sup> [1930] 1 K.B. 417, at 428.

<sup>80</sup> (1875) 1 P.D. 414.

<sup>81</sup> See p. 64 above. Cf. *The Ida* (1875) 32 L.T. 547, which decided the other way.

<sup>82</sup> [1921] P.337.

<sup>83</sup> [1935] P.134.

quality etc unknown". This was held not to qualify the positive statement on the front of the bill that the cargo was shipped in good order and condition. In *Canadian Sugar Co. v. Canadian Steamships*<sup>84</sup> the cargo was acknowledged "received in apparent good order and condition", but there was also a marginal indorsement which said "signed under guarantee to produce ship's clean receipt". The Privy Council held that there was no unqualified statement as to condition and therefore no estoppel could be founded upon it.

Under Art. III, r. 3(c) Hague Visby Rules the shipper is entitled to demand a bill of lading showing the apparent order and condition of the goods. Art. III, r. 4 makes the statement as to condition conclusive against the carrier in the hands of a third party. The Proviso<sup>85</sup> at the end of the Rule does not apply to condition as it does to quantity and leading marks, therefore the carrier cannot refuse to show the apparent condition of the cargo on the bill. Marginal indorsements indicating that the cargo is damaged in some way comply with Art. III, r. 3. Such indorsements will cause the bill, however, to become unclean<sup>86</sup>, this will inevitably affect the merchantability of the bill<sup>87</sup>. Carriers may come under pressure from shippers to issue clean bills in return for an indemnity. These indemnities do not effect the evidential quality of the bill of lading. They will not protect the shipowner when sued by a third party who relied on the bill, and they may not even be valid against the shipper<sup>88</sup>.

It might be expected that clauses which do not describe the actual condition of the cargo but otherwise try to restrict the carrier's potential liability might fall foul of Art. III, r. 8, which prevents parties from seeking to exclude or restrict the operation of the Hague Visby Rules. However, the courts have not pursued this argument. In *Canada & Dominion Sugar* the marginal indorsement was not held to be void under the Hague Rules as the

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<sup>84</sup> [1947] A.C. 46.

<sup>85</sup> See p. 57 above.

<sup>86</sup> Precisely what makes a bill of lading unclean is beyond the scope of this work, but its effects are discussed in Section 7.

<sup>87</sup> See Section 7.

<sup>88</sup> See *Brown Jenkinson v. Percy Dalton* [1957] 2 Q.B. 621, where the indemnity given was held to be void because of its fraudulent purpose.



shipper had not demanded a bill of lading under Art. III, r. 3<sup>89</sup>.

Art. 15, Hamburg Rules also requires a bill of lading to include a statement as to the apparent condition of the goods. Under Art. 16 a reservation may not be inserted in respect of condition. This is the equivalent provision to the proviso to Art. III, r. 3. There is an additional provision in respect of condition in Art. 16.2. If the carrier fails to make any statement as to condition he is deemed to have noted that the goods were in apparent good order. Art. 16.3 makes the bill for lading *prima facie* evidence of the good described in the bill and conclusive evidence in the hands of a third party who, in good faith, has acted in reliance on the bill of lading's description of the goods. This returns to the Common Law estoppel situation which required detrimental reliance in order for the estoppel to be founded.

Whatever the evidential situation, the words "shipped in good order and condition" were held by Channell J not to be words of contract –

"The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact..."<sup>90</sup>

This means that the bill of lading contract constitutes a promise by the carrier to deliver the goods he received<sup>91</sup>, rather than a promise to deliver to specific goods identified in the bill. In *The Skarp*<sup>92</sup> the claim against the shipowner based on breach of contract failed, while the claim in estoppel failed because the cargo owners had not relied upon the bill of lading statement as to condition. Langton J, following *Vasconzada*, held that since the words "shipped in good order and condition" were not words of contract, the words "to be delivered in the like good order and condition" by themselves could not create a contractual obligation on the shipowner to deliver the goods in the *like* good order and condition, because there was no contractual *like* good order and condition to compare it to.

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<sup>89</sup> See also *Tokio Marine & Fire Ins. Co. v. Retla Steamship Co.* [1970] 2 Lloyd's Rep. 91.

<sup>90</sup> *C.N. Vasconzada v. Churchill* [1906] 1 K.B. 237, 247.

<sup>91</sup> Bools, *op. cit.*, p. 119.

<sup>92</sup> [1935] P. 134.

This lack of a contractual action does not appear to have caused problems in practice<sup>93</sup>, as carriers are sued for damage caused to the goods, using the bill of lading as evidence of the goods' original condition. Carriers are not sued on the bill of lading, but using evidence provided by the bill of lading.

When ascertaining the apparent good order and condition of goods for statement on the bill of lading, bulk and containerised cargoes give rise to specific problems. Apart from obvious defects such as rusty steel and stained timber, bulk cargoes do not generally appear to be externally in a poor condition. Defects in bulk grain cargoes, for example, due to moisture or ripeness would not necessarily be detectable by a ship's master on an external inspection, and as such are not required to be noted on the bill of lading under Hague Visby, Hamburg or the Common Law. This does not mean that masters should not look for defects anyway, loading conditions permitting. These matters relate to quality for which the master has no authority to bind the shipowner<sup>94</sup>. Bills of lading will therefore rarely be of use in proving the condition of bulk cargoes on shipment. Indeed, proving the internal quality of all cargoes represents a problem for which relying on the statements in bill of lading is not the solution.

Statements regarding the containers cause even more problems than bulk cargoes. The carrier may not stuff the container himself, and, once it is sealed, the carrier has no opportunity to inspect the condition of its contents. Indeed, even if the container is not sealed, the movement of the container onto the ship from the terminal might be so quick that inspection is impossible. In these circumstances any statement in the bill of lading as to apparent condition will relate to the condition of the container itself, not its contents. The bill of lading will therefore be less than helpful in proving the condition of the contents of the container on shipment<sup>95</sup>.

It is only fair to a shipowner to allow a bill of lading to become evidence of the

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<sup>93</sup> Bools criticised this as the reasonable man would interpret a bill of lading contract as a contract to deliver the goods recorded in the bill. *Op.cit.*, pp. 120-1

<sup>94</sup> See *Cox v. Bruce*, below pp. 23.

<sup>95</sup> *Esmeralda 1* [1988] Lloyd's Rep. 206, particularly p. 209.

apparent condition of the cargo only. A master cannot be expected to inspect every aspect of every cargo<sup>96</sup>. Shippers and indorsees, however, may be in danger of placing too much reliance on the bill of lading when it comes to an action for damage to the cargo - it may not provide evidence of condition, and will not provide evidence of quality. Other evidence will need to be procured, and it is as well to have that in mind at the time of shipment so that such evidence is obtainable if the cargo is delivered damaged. In this respect, the comments made in Section 3 above concerning receipt for quantity are equally applicable here - the bill of lading is based on a fiction that the master always sees and assesses the cargo as it is loaded, and as a consequence too much reliance is placed on the bill to prove condition.

## **5. Statements as to Leading Marks**

At Common Law, statements in bills of lading regarding the marks displayed on the cargo are capable of founding an estoppel against the shipowner, but only if these marks relate to the identity of the goods, rather than their identification. In *Parsons v. New Zealand Shipping Co.*<sup>97</sup> the bill of lading stated that the cargo of lamb carcasses had either the mark "Sun Brand 488X" or "Sun Brand 622X" on them. On delivery, some of the carcasses were found to be marked "Sun Brand 388X" or "Sun Brand 522X". The indorsee refused to take delivery of those carcasses and sued the shipowner's agent for short delivery, alleging that s. 3, Bills of Lading Act 1855 made the statement regarding marks in the bill of lading conclusive against the agent. After considering the mischief to which that section was addressed, Collins and Romer LJ in the Court of Appeal held that s. 3 did not apply to the statement as to marks because the marks were not material to the identity of the goods. The marks were identification marks, not identity marks, and therefore beyond the scope of the estoppel. The result was that the statement as to marks was prima

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<sup>96</sup> See Mills S., *Bills of Lading. A Guide to Good Practice* (1998), pp. 13-4 for practical guidance for masters on what to include in the bill.

<sup>97</sup> [1901] 1 K.B. 548.

facie evidence only and the shipowner's agents were permitted to show that there was a mistake in the description of the marks and that the indorsee should not have refused delivery of the goods.<sup>98</sup>

The principle decided in *Parsons* was applied in the case of *Compania Importadora de Arroces Collette y Kamp SA v. P & O Steam Navigation Co.*<sup>99</sup>, where the marks were held to relate to the identity of the cargo even though they were quality marks. The marks in question were "ABC" with two stars on bags of rice, as identified on the plaintiff's bill of lading. The star marks related to the quality of the cargo. The ship was carrying bags of rice of other grades, and after making deliveries to other receivers, the plaintiffs took delivery of the remaining 1330 bags which bore the marks "ABC" but not the two stars. Relying on the definition of leading marks in *Parsons*, Wright J held that all those marks were essential to the identity of the goods, and the shipowner could not claim to make a good delivery by delivering goods that formed part of a larger consignment, all bearing "ABC" only and ignoring the second mark<sup>100</sup>. The shipowner was held to be liable for failing to deliver what had been delivered to him, according to the leading marks. Goods with the correct marks had been shipped, but due to re-stowage there was a misdelivery which ultimately caused the loss to the plaintiffs. Bills of Lading Act, s. 3, was not an issue in that case, as the action was not against the signor of the bill.

Art. III, r. 3 of the Hague Visby Rules reflects the Common Law provision in that the carrier is only obliged to show on the bill of lading "leading marks necessary for the identification of the goods", provided that those marks will remain legible until the end of the voyage. Art. III, r. 4 makes statements as to leading marks prima facie evidence, which become conclusive evidence when the bill is transferred to a third party. Art. 15.1 of the

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<sup>98</sup> A.L.Smith MR dissented from the reasoning of the rest of the Court of Appeal and held that the marks were material to the identity of the goods, but the shipowners were exonerated by a clause in the bill of lading.

<sup>99</sup> (1927) 28 Ll.L.R. 63. Cf *Sandeman v. Tyzack* [1913] A.C. 680 (HL, Sc.) where a shipowner could not force consignees to take delivery on unmarked bales of jute when their bills stated that bales with certain marks on had been shipped.

<sup>100</sup> *ibid.* at 68.

Hamburg Rules also requires the carrier to state in the bill "leading marks necessary for identification of the goods", but without the proviso that such marks remain legible throughout the voyage. Art. 16.3 makes statements as to leading marks prima facie evidence, which become conclusive evidence in the hands of a third party who has relied on the statement. This latter provision should make it more difficult for an indorsee to sue the carrier if the leading marks on the goods differ to those in the bill of lading. An indorsee will rarely rely on the leading marks described in the bill before handing over the purchase price, although he may rely on quality marks. An indorsee would only rely on the marks at discharge where many marked goods are being discharged and he takes delivery of goods with the marks identified in his bill of lading, only to find that these are in fact the wrong goods. In those circumstances the marks relate to identification of the goods, not identity and therefore would come within the provision, even though rejection of goods bearing the wrong identification marks would not be permissible under the Common Law<sup>101</sup>.

Bulk grain cargoes will obviously not be marked in any way and marks relating to containerised cargo will only be those on the outside of the container. These cargoes therefore do not create special problems in respect of leading marks<sup>102</sup>. The area of leading marks has created few problems in the past, and therefore relatively little case law. This does not reflect on the importance of placing leading marks on both goods and the bill of lading associated with them. Now, as in the Sixteenth Century, consignees taking delivery of goods from a ship, particularly one with many consignments on board, need to have some method of identifying their goods from the rest.

## 6. Other Statements

Aside from quantity, condition and leading marks, the bill of lading contains many

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<sup>101</sup> See Collins LJ in *Parsons v. New Zealand Shipping* [1901] 1 Q.B. 548, 564-6.

<sup>102</sup> If the bill of lading identifies the leading marks on the packages within the container the carrier is at liberty under the Art. III, r. 3 Proviso to clause that statement "said to contain", as he has no means of inspecting whether those marks are correct.

other statements. These additional statements are not required by the Hague Visby Rules. However, Art. 15 of the Hamburg Rules requires many additional statements to be included in the bill, but only when Hamburg applies. COGSA 1992, s. 4, only applies to quantity<sup>103</sup>, so it is to the Common Law that one must look to discover what sort of evidence these other statements provide.

#### a) Statements as to quality

It has long been established that statements as to quality in a bill of lading do not bind a shipowner. In *Cox v. Bruce*<sup>104</sup> the bill of lading relating to 500 bales of jute described certain quality marks on the jute. On delivery, these marks were found to be inaccurate and the jute was actually of an inferior quality than that indicated. The indorsees sued the shipowner for the difference in value between the goods described and the goods delivered, claiming that the shipowner was estopped from denying the truth of his representation as to the marks. The Court of Appeal dismissed the claim, following *Grant v. Norway*, on the ground that the master did not have the authority to bind his owners as to quality. Lord Esher said

"It is clearly impossible, consistently with [the decision in *Grant v. Norway*], to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner."<sup>105</sup>

"That the captain has authority to bind his owners with regard to the weight, condition and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine the state on the bill of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board...To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain..."<sup>106</sup>

Statements as to quality do still provide *prima facie* evidence though that goods of that

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<sup>103</sup> But s. 4 may also apply to marks, see Baughen, *op.cit.* (1998), p. 66.

<sup>104</sup> (1886) 18 Q.B.D. 7.

<sup>105</sup> *ibid.*, p. 151.

<sup>106</sup> *ibid.* 152.

description have been shipped so that a receiver can succeed in suing a carrier for not delivering what *had* been shipped<sup>107</sup>. This can be distinguished from the situation in *Cox v. Bruce*<sup>108</sup> where the carrier had delivered what had been shipped and the indorsee had no cause of action, in contract or estoppel, based on statements about quality in the bill.

#### **b) Statements as to date**

The date on which a cargo has been shipped will be of importance within associated sale and finance contracts. An international contract of sale will often state that the goods must be shipped by a certain date. Evidence of when the goods were shipped may be provided by the bill of lading, which should be dated at the end of loading<sup>109</sup>. Statements as to date in a bill of lading are *prima facie* evidence of the date when the cargo was shipped. If a third party has relied on that date, then the statement might form the basis of an estoppel. In *Aron v. Comptoir Wegimont*<sup>110</sup>, McCardie J noted that in *Bowes v. Shand*<sup>111</sup> Lord Blackburn had said that the bill of lading provided strong and in most cases conclusive evidence of the date of shipment, but he doubted whether the date on the bill was any more than *prima facie* evidence in 1921<sup>112</sup>.

In *The Saudi Crown*<sup>113</sup>, the bill of lading was issued on 15th July. However, the loading of the cargo was not completed until 26th July. Relying on the date in the bill of lading the purchasers of the cargo authorised payment to the sellers. Towards the end of July the purchasers realised that the cargo would not arrive in time for their mid-August commitments and they had to purchase other goods from a different source. The purchasers claimed damages from the shipowners for misrepresentation as to the date on the bill of lading. They succeeded in their claim because they had relied on the date before

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<sup>107</sup> *Compania Importadora v. P & O, op cit.*, pp. 66-7.

<sup>108</sup> (1886) 18 Q.B.D. 7.

<sup>109</sup> *The Almak* [1985] 1 Lloyd's Rep. 557, at 559.

<sup>110</sup> [1921] 3 K.B. 435.

<sup>111</sup> (1877) 2 App. Cas. 455.

<sup>112</sup> [1921] 3 K.B. at 438.

<sup>113</sup> [1986] 1 Lloyd's Rep. 261.

purchasing the cargo. The shipowners tried to claim that the principle in *Grant v. Norway* regarding a master's authority should be extended to cover statements as to dates. Sheen J refused to extend the principle to the date of loading because the ascertainment of the correct date was not beyond the scope of the master's authority. *The Saudi Crown* was an action under the carriage contract, but it is also an implied condition of a CIF contract that a date of shipment should not be misstated in the bill of lading<sup>114</sup>.

*The Saudi Crown* shows that a statement as to date is not conclusive evidence, and however cogent it is as *prima facie* evidence it is still open for a party to prove that the statement was false and base an action for misrepresentation on it. Even if a false date is deliberately inserted into a bill of lading, the bill is not a nullity<sup>115</sup>, as the false date did not go to the essence of the bill of lading – it was still a document of title entitling the holder to claim delivery from the ship<sup>116</sup>. Statements as to dates are also capable of founding an estoppel against the carrier<sup>117</sup>.

### **c) Statements as to whether the cargo is stowed under deck**

This type of statement was considered in *The Nea Tyhi*<sup>118</sup>. The cargo was described in the bill of lading as being "shipped under deck". The cargo was in fact shipped on deck and suffered rainwater damage. The indorsees sued the shipowners for breach of contract. Sheen J held that *Grant v. Norway* did not apply to this situation and the charterer's agents, who had signed the bill on behalf of the master, had ostensible authority to sign this bill for the master. In finding that the shipowners had been in breach of contract Sheen J must have considered the statement as to shipment on deck to be a contractual term rather than merely the basis of a misrepresentation or estoppel.

Statements other than quantity, condition and leading marks are *prima facie*

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<sup>114</sup> *Finlay (James) & Co. Ltd v. Kwick Hoo Tong Handel Maatschappij NV* [1929] 1 K.B. 400.

<sup>115</sup> *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 Q.B. 459.

<sup>116</sup> *op.cit.*, pp. 475-6.

<sup>117</sup> *Alimport v. Soubert Shipping Co. Ltd.*[2000] 2 Lloyd's Rep. 447.

<sup>118</sup> [1982] 1 Lloyd's Rep. 606.



evidence, which may be rebutted by other evidence. If a third party has relied on the statement, the statement becomes conclusive by virtue of estoppel. This is true except for statements as to quality, which are bound by the decision in *Cox v. Bruce* and are only *prima facie* evidence. Statements may also be the basis of an action for misrepresentation, as in *The Saudi Crown*, or they may be deemed to be terms of the contract, which, if not complied with, lay the shipowner open to an action for breach as in *The Nea Tyhi*. As far as statements go that goods have been shipped when they have not, *Grant v. Norway* is confined to its facts, and overruled by Art. III, r. 4, Hague-Visby Rules, where they apply, and s. 4 COGSA 1992, where they do not.

## **7. Conclusions - The Receipt Function Today**

The receipt function of the bill of lading is still an important one today. Overseas purchasers and banks rely on the bill to ensure that what has been shipped is what they have agreed to buy, or provide finance for. If a letter of credit states that the bill of lading must be clean, they will reject anything less than a clean bill<sup>119</sup>. An unclean bill will affect the price a shipper can get for his cargo, and his ability to raise finance through a letter of credit. Even if the bank or buyer is happy to pay on the basis of what the bill says about the goods, it may not, however, be the best evidence of what is on board a ship today, particularly for containerised and bulk cargoes. Gone are the days when a master checks off the cargo loaded onto his ship and issues a bill of lading to the shipper which serves as the best evidence of what, and how much, was shipped. Whether by operation of law, or by the insertion of qualifying clauses, the bill may not necessarily prove what the litigant wishes to prove. Because of the possibility that the statements in the bill of lading will not be conclusive evidence, shippers and carriers alike must seek to protect their interests by ensuring that other vital evidence is obtained *on shipment*, regarding the weight and

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<sup>119</sup> Although not all 'clausings' will make a bill unclean - 'shipper's load and count' and the like are specifically allowable, according to UCP500, Art. 31, and according to Mills *op. cit.* para. 145, 'condition unknown' will not normally offend the terms of the letter of credit.

condition of the cargo, before evidentiary problems with the bill arise. The bill of lading still has a major role to play in evidencing what has been received on the ship, but the various parties should take steps to ensure that other evidence is also available, eg. arranging for certificates of quantity and quality; know who you are dealing with etc.

The CMI now has the opportunity to address the issue of the bill of lading as evidence and take into account the problems caused by different types of cargoes. A bill that is unclean is unmerchantable, a bill that is automatically conclusive evidence may be unfair to carriers, but a bill that is not any sort of evidence of the amount and condition of the goods it is supposed to receipt is not satisfactory either. The CMI should consider carefully what sort of evidence the bill of lading should be, taking into account different trades, but in the meantime, carriers and cargo owners must attempt to protect themselves as best they can.

## CHAPTER 3

### THE BILL OF LADING AS A CONTRACT OF CARRIAGE

The traditional view of the bill of lading is that it is only evidence of the contract of carriage in the hands of the shipper. This Chapter will seek to consider the development of the bill of lading's contractual function, assess the traditional view and advance an alternative view that the bill of lading should be considered to be the contract itself.

#### 1. Introduction - Development of the Bill of Lading's Contractual Function

It has often been said that the bill of lading started life as a mere receipt<sup>1</sup>. Bools, for example, denied that the bill had any contractual role until during the Sixteenth Century<sup>2</sup>. He regarded the lack of contractual terms in Bensa's Fourteenth Century bills as an indication that the bill of lading at that time performed no contractual function. However, this assertion ignores the fact that contractual terms did exist in even the earliest bills - namely the names of the parties, the goods to be carried and the promise to deliver those goods to a named person. These terms are in fact the essential terms in every contract of carriage. It is true that in the earliest bills the terms as to *how* carriage was to be performed were largely not expressed. However, the non-expression of these terms should not lead to the conclusion that the bill was not a contract of carriage. Terms could always be implied into a contract by custom<sup>3</sup>.

Freight, the payment a carrier receives for the carriage, is obviously an important contractual term, and its omission from any contract of carriage is surprising. The Sixteenth Century bills all referred to freight, either as so much money per ton<sup>4</sup>, or by a

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<sup>1</sup> Knauth, *op. cit.*, p. 115; Wilson, *op. cit.*, p. 119; McLaughlin, *op. cit.*, p. 556.

<sup>2</sup> Bools, *op. cit.*, p. 4.

<sup>3</sup> *Hutton v. Warren* (1836) 1 M. & W. 466.

<sup>4</sup> eg. *The Thomas* (1538), Appendix 2.

reference to the freight clause in a charterparty<sup>5</sup>. The two Bensa bills and the Muffs bill<sup>6</sup> did not contain freight clauses, but this may be explained by the presence of customary charges for carriage of certain goods at that time, or that it was implied that a reasonable freight would be paid. There was, and still is, no legal necessity at Common Law to record the amount of freight (or indeed any part of a contract of carriage) in writing, though the advantages of doing so are obvious. If there was no customary payment for the carriage of particular goods, the courts would imply a clause granting the carrier a reasonable freight for the carriage<sup>7</sup>.

Bools argued,<sup>8</sup> that as a mere receipt there was no need for the bill of lading to usurp the contractual function of the charterparty. However, he thought that the bill of lading did develop a contractual function during the Sixteenth Century. He identified two types of Sixteenth century bills:-

(i) bills that contained no independent terms and making reference to a charterparty, meaning that the charterparty was the sole contract of carriage, ie bills that were still 'mere receipts'.

(ii) bills that contained terms which governed the shipment and made no reference to other agreements.

In the latter category Bools placed the bills in *The Thomas*, *The Andrewe*, *Anon 'bark'*, *The George of Legh*. Because of the extra terms and lack of reference to other agreements, the implication in these bills of lading is that they were intended to contain the contract between the carrier and shipper. Bools also relied on the bill of lading in *The White Angle*,<sup>9</sup> to support this implication, because "it contains a full agreement"<sup>10</sup>, and is three times longer than other Sixteenth Century bills. However, the length of a document cannot be

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<sup>5</sup> eg. *The Mary Martyn* (1539), Appendix 2.

<sup>6</sup> Appendices 2 and 1, respectively.

<sup>7</sup> To give the contract 'business efficacy', unless of course the carrier was in the habit of giving his services for free. See the discussion in Furmston M.P., *Cheshire, Fifoot & Furmston's Law of Contract* (14<sup>th</sup> edn.) (2001) ("*Cheshire*"), p. 144 *et seq.*

<sup>8</sup> Bools, *op. cit.*, p. 4.

<sup>9</sup> *Select Pleas*, Vol. II, pp. 59-60.

<sup>10</sup> Bools, *op. cit.*, p. 5.

used to determine whether or not it is a contract; in this case the additional clauses and length can be explained by the fact that the document was drawn up by a notary, unlike the other Sixteenth Century bills. As it would be in the notary's interests to have a lengthy document<sup>11</sup>, it includes much repetition incorporates certain terms that would be implied into the carriage contract in any event. For example, the bill stated that "the master shalbe bounde to make [the damage] good". However, according to Malynes:

"When any goods or merchandise are delivered unto the master, or to his Clearke the Purser of the Shippe, and laid within boord, or to the ship's side, both wayes, *is at the Master's perill.*"<sup>12</sup>

The clause in *The White Angle* therefore unnecessary, and merely serves to lengthen the document.

Bools' discussion as to whether charterparties were always issued at this time<sup>13</sup> is not relevant if it is accepted that the bill of lading had a contractual function at this time. Whether a charterparty exists or not, any bill of lading issued is a receipt and an obligation to deliver.<sup>14</sup> Five of the eleven Sixteenth Century bills in Appendix 2 do not refer to charterparties at all<sup>15</sup>, and today a standard form of bill of lading may be issued when the ship is not under charter<sup>16</sup>. It is not, and never has been, necessary for a ship to be under charter in order for it to carry goods. When Malynes said "No ship should be freighted without a Charterpartie"<sup>17</sup> he was not stating a law that said there must always be a charterparty for there to be a carriage of goods by sea. It was more in the nature of advice to those concerned to have a charterparty which expressly set out all the terms of the contract of carriage, rather than relying on a bill of lading and its implied terms.

If Bools was correct and the very earliest bills of lading were merely receipts, then

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<sup>11</sup> Notaries and lawyers would have been paid according to the length of the document. It was not until 1882 that the principle of payment by length was abandoned for conveyances – Holdsworth W.S., *A History of English Law* (1937), Vol. XV, p. 227.

<sup>12</sup> Malynes, *op.cit.*, p. 143, emphasis added.

<sup>13</sup> Bools, *op. cit.*, pp. 6-7.

<sup>14</sup> The position of bills of lading issued under charterparties is considered, see Chapter 5 below.

<sup>15</sup> *The Thomas, The Andrewe, Anon, The George of Legh, The Sampson* - Appendix 2.

<sup>16</sup> eg. CONLINEBILL, Bimco, amended January 1st 1978, Appendix 4.

<sup>17</sup> Malynes, *op. cit.*, p. 134.

they should all have been signed by the master/purser of the ship receiving the goods, it being a matter of common sense that a receipt should be signed by the person who does the receiving. However, some of the Sixteenth Century bills had been signed by the shipper<sup>18</sup>. This implies that those documents concerned had a contractual function, which may have involved an exchange of documents, as with modern conveyancing, whereby each side ends up with a contract signed by the other side. This implication is supported by the fact that two of the Sixteenth Century bills, *The Thomas* and *The Marye*<sup>19</sup>, are described as “indentures”. “Indenture” was used to signify a contract written twice on one piece of parchment. The two parts were then separated along an indented, or “toothed” line and each party kept one part<sup>20</sup>. The authenticity of a contract could then be ascertained by matching together the two parts. Contracts are today no longer separated in this manner and modern ‘indentures’ signify a deed made between two or more parties. It is not unreasonable to suggest that a Sixteenth Century document described as an ‘indenture’ performed some sort of contractual function. The practice of indenting bills of lading does not appear to have been carried on for long. *The Thomas* and *The Marye* are two of the earliest Sixteenth century bills in Appendix 2, and since then no other bill of lading has been issued in that format<sup>21</sup>

As was seen in Chapter 1 above, one of the original functions of the bill of lading was to embody a promise to deliver the goods, as stated on the bill, to someone nominated by the shipper - either his agent, or a third party. For every express promise to deliver there must be an implied promise to carry, because without carriage, there can be no delivery. Therefore, from its beginnings, the bill of lading has always had a contractual function. At first, not many terms of the contract were stated in the bill lading, just the names of the persons and ship involved, a description of the cargo, its destination and the freight

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<sup>18</sup> eg. *The Marye*, *The Andrewe*, *The George of Legh*. *The Thomas* was signed by both shipper and master.

<sup>19</sup> Appendix 2.

<sup>20</sup> *Jowitt's Dictionary of English Law* (2<sup>nd</sup> edn.)(1977), p. 960

<sup>21</sup> *The George of Legh*, *op. cit.*, contain the phrase “... have unto this presents set our hands enterchangeable...” which implies the exchange of contract 'parts' without specifically mentioning indenting.

payable. These terms were either expressly stated or incorporated from a charterparty. Few of the Sixteenth Century bills in Appendix 2, with the exception of *The White Angle*, contain any further terms. From the early Seventeenth Century onwards though, further terms were being included. The 1609 bill in Appendix 3 contains the phrase “the danger of the seas only excepted”. This is the earliest attempt on the part of the carrier to reduce his liability. A similar phrase is included in virtually every bill issued after that date. Further exceptions were added, such as Act of God. Following the fashion of the Nineteenth Century, bills of lading started to include terms that tried to exclude a carrier’s liability for most things, including his own negligence<sup>22</sup>. This led eventually to attempts to curb carrier’s attempts to avoid liability and ultimately to the Hague and Hague Visby Rules. These Rules effectively stated the minimum requirements for a contract of carriage of goods by sea ‘covered by a bill of lading’<sup>23</sup>. What the Rules do not do is say whether the bill of lading *is* the contract of carriage, or merely contains the evidence of it.

From the above it is clear that the bill has always had a contractual function, derived from the obligation to deliver the goods. The question, equally applicable to the earliest bills as to Twentieth Century bills, remains: is the bill of lading the contract of carriage itself, or is it merely evidence of that contract? The next two sections will consider the traditional view of the bill of lading’s contractual function and contrast this with an alternative view.

## **2. Overview of the Bill of Lading’s Contractual Function**

### **a) The Traditional View**

The traditional view of the bill of lading’s contractual function is that in the hands of the original shipper, the bill is only evidence of the contract of carriage.<sup>24</sup> The rationale

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<sup>22</sup> eg. The Liverpool Conference Bill [1882], Appendix 3.

<sup>23</sup> Art. I(b).

<sup>24</sup> Tetley W., *Marine Cargo Claims* (3<sup>rd</sup> edn.)(1988), p. 216; Todd P.N., *Bills of Lading and Banker's Documentary Credits* (2<sup>nd</sup> edn.)(1993), p. 90; *Scrutton, op. cit.*, p. 55; Guest A.G.(Ed.), *Benjamin's Sale of Goods* (5<sup>th</sup> edn.)(1997)(“Benjamin”), para. 18-013; de Wit R., *Multimodal Transport* (1996), para. 4.6; Wilson, *op. cit.*, pp. 134-137.

of this view is that the contract of carriage is made before the bill has been issued, and therefore the bill cannot be the contract itself. The contract of carriage, according to the traditional view, comes into being when a shipowner makes an offer to carry cargo for a certain freight and that offer is accepted by the shipper, or when the shipper asks a shipowner if he will carry his cargo and that offer is accepted by the shipowner<sup>25</sup>. The actual negotiations are nowadays carried out by agents on both sides, but the contract appears to be formed when the cargo space is fixed, rather than when the bill of lading is issued. As Devlin J noted in *Pyrene Co. Ltd v. Scindia Navigation Co. Ltd*, “the issue of the bill of lading does not necessarily mark any stage in the development of the contract.”<sup>26</sup>

The chief support for the traditional view comes from certain comments *obiter* of Lord Bramwell in *Sewell v. Burdick*<sup>27</sup>. The actual decision in *Sewell* concerned an attempt by the shipowners to claim unpaid freight from the indorsees of a bill of lading. The shipowners argued that under s. 1, Bills of Lading Act 1855<sup>28</sup> the indorsees had had transferred to them the rights and liabilities under the contract of carriage, including the payment of freight. The House of Lords held that “property” had not in fact passed to the indorsees, as they were bankers who had had the bills indorsed to them by way of security, and therefore the rights and liabilities under the contract were not transferred. While discussing certain inaccuracies in the drafting of the Bills of Lading Act Lord Bramwell said:

“[The Bills of Lading Act 1855] speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given.”<sup>29</sup>

Lord Bramwell’s views have found support elsewhere since. In *Harland & Wolff*

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<sup>25</sup> For a useful discussion of the formation of contracts in the context of carriage by road see Clarke M.A., *International Carriage of Goods by Road: CMR* (1997) (3rd edn.), p. 405 *et seq.*

<sup>26</sup> [1954] 2 Q.B. 402, at p. 419.

<sup>27</sup> (1884) 10 App. Cas. 74.

<sup>28</sup> See p. 87 below.

<sup>29</sup> *Op cit.*, p. 105.



*Ltd v. The Burns & Laird Lines Ltd*<sup>30</sup> the plaintiff shippers wished to transport a piece of machinery to their shipyards in Belfast. The shipowners stipulated that the cargo was to be carried at the shippers' risk and subject to their 'normal' conditions. One of the 'normal' conditions excepted the shipowners from liability due to unseaworthiness if no bill of lading was issued. No bill was issued and the ship was lost due to alleged unseaworthiness. The plaintiffs sued for their loss, pleading that the contract was covered by the Hague Rules and the shipowners could not therefore rely on their 'no liability for unseaworthiness' clause. The Scottish Court of Session held that the contract between the parties was not a 'contract of carriage' under Art. I(b), Hague Rules because the parties never contemplated the issue of a bill of lading<sup>31</sup>, therefore the carriage was never covered by a bill. Lord President Clyde described the relationship between the bill and the contract of carriage as follows:

“A bill of lading is not itself a contract of affreightment or carriage. The contract of affreightment must be precedent to, or at any rate independent of the mere fact of shipment of the goods. The bill of lading may be, and often is in practice, given after shipment in exchange for the “mate’s receipt”, or even after the vessel has sailed. Nevertheless, it vouches and identifies the conditions of the pre-existing or independent contract, whose terms normally follow the custom of merchants in the particular trade in the course of which the shipment takes place. In this way the bill of lading “covers” the contract of affreightment or carriage made between the shipper and the shipowner.”<sup>32</sup>

This statement is clearly within the traditional view.

The case of *The Ardennes*<sup>33</sup> is the only modern case to deal directly with the issue of whether the bill of lading is a contract<sup>34</sup>. The defendant shipowners had agreed to carry the plaintiffs' cargo of mandarins directly to London. The plaintiffs were anxious to have the cargo delivered by 1st December 1947 because the import duty was due to rise. The defendants were aware of this. After loading a bill of lading was issued containing a clause

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<sup>30</sup> [1931] S.C. 722, at 727.

<sup>31</sup> The carriage was between two parts of the same company. No sale during the carriage was ever contemplated, therefore a bill of lading was strictly unnecessary.

<sup>32</sup> *op. cit.*, p. 727.

<sup>33</sup> (1950) 84 Ll.L.Rep. 340.

<sup>34</sup> In *Cho Yang Shipping v. Coral* [1997] 2 Lloyd's Rep. 640 the Court of Appeal, in overruling the Judge at first instance, said that the Judge had not taken adequate account of the fact that the bill of lading was only

which permitted the defendants the liberty to call at any port on the way to the port of destination. In the event, the ship called first at Antwerp and did not deliver the mandarins to London until 5th December, causing the plaintiffs loss. The plaintiffs sued for breach of contract, and in their defence the defendants claimed that they were entitled to proceed via Antwerp under the terms of the bill of lading. The question for the King's Bench Division was whether the bill of lading alone contained the terms of the contract. Lord Goddard, CJ had no doubts:

“It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms. The contract has come into existence before the bill of lading is signed; it is signed by one party only and handed by him to the shipper usually after the goods have been put on board.”<sup>35</sup>

Lord Goddard held that evidence of the earlier oral promise to proceed direct to London would be admitted to contradict the terms of the bill of lading, which were not conclusive. In other words, the earlier oral promise was part of the contract of carriage and the liberty to deviate clause in the bill of lading was not.

Further support for the traditional view comes from two other cases from the 1950's - *Heskell v. Continental Express Ltd* and *Pyrene Co. Ltd v. Scindia Navigation Co. Ltd*<sup>36</sup>. In *Heskell*, a bill of lading was issued for cargo, which was never actually loaded. The shipowner in that case was not sued, according to Devlin J, because of the ordinary rule that a master or broker could not bind the shipowner by signing bills for goods that were never shipped<sup>37</sup>. The shipowner's agents who actually issued the bills were sued instead, but the mere issue of a bill of lading did not create a contract with them either. Devlin J was clear that no contract of carriage existed with anyone:

“The whole truth of this matter is that, in the absence of a contract of carriage, the bill of lading is a nullity .... It could never have been more than a bit of paper purporting to record a bargain that had never been made.”<sup>38</sup>

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evidence of the contract of carriage (at 645). The Court referred to the statement of principle in *The Ardennes*, but did not discuss it in any detail.

<sup>35</sup> *ibid.* at 344.

<sup>36</sup> [1950] 1 K.B.D. 1033 and [1954] 2 Q.B. 402 respectively.

<sup>37</sup> This is the case where the bill of lading is in the hands of the shipper, but in the hands of a third party the bill of lading is conclusive evidence of shipment - s. 4, COGSA 1992.

<sup>38</sup> [1950] 1 K.B.D. 1033, at p. 1044.

The mere issue and acceptance of a bill of lading does not create a contract of carriage, adding weight to the view that the bill is not in itself a contract.

The position of where a bill of lading is not issued at all was discussed in *Pyrene*. In that case the cargo, a fire tender, was dropped on the quayside and damaged. A bill of lading was never issued in respect of that tender, though there was a bill for the rest of the cargo loaded. The issue for the Queen's Bench Division was whether the Hague Rules applied so that the shipowner could take advantage of the limitation of liability provisions. Art. I(b) of the Rules states that the Rules apply to "contracts of carriage covered by a bill of lading or similar document of title". The Court had to determine whether that carriage in this case, as in *Harland & Wolff*, had been "covered" by a bill of lading when one was never actually issued. The Court held that the parties had contemplated the issue of a bill of lading when the contract was concluded, and therefore the contract was "covered" by a bill of lading from the start. In a comment *obiter* Devlin J reiterated the traditional view that:

"It is not disputed that in this case, as in the vast majority of cases, the contract of carriage was actually created before the issue of the bill of lading which evidences its terms."<sup>39</sup>

The existence of a contract does not depend on the issue of a bill of lading, again strengthening the traditional view. If the bill of lading were the contract itself, where there was no bill there would be no contract. This clearly does not accord with commercial expectations. There are still situations where a bill of lading is not issued because it is not required by the parties, e.g. in coastal shipping, but there is still a contract of carriage in existence. There is no requirement in English Law for a bill of lading to be issued<sup>40</sup>.

Using the traditional view, the terms of the contract of carriage are to be found in:

"the mate's receipt, shipping-cards, placards, handbills announcing the sailing of the ship, advice-notes, freight-notes, or undertakings or warranties of the broker."<sup>41</sup>

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<sup>39</sup> [1954] 2 Q.B. 402, at p. 414.

<sup>40</sup> Except where the Hague-Visby Rules apply. Carriage of Goods by Sea Act 1971, Schedule 1 (incorporating the Hague Visby Rules) Art. III, r. 3 requires carriers to issue bills of lading if so demanded by the shipper. This is in contrast to carriage of goods by rail under the CIM Uniform Rules, Art. 11 of which makes the existence of a contract of carriage dependent on the issue and acceptance of a consignment note.

<sup>41</sup> *Scrutton, op. cit.*, p. 55.

If any of these conflict with the bill of lading when issued, they prevail, according to *The Ardennes*, and if no bill of lading is ever issued they will be the only evidence of the contract according to *Pyrene*. In practice, the bill of lading will govern relations between the shipper and carrier<sup>42</sup>, particularly if there has been a previous course of dealing<sup>43</sup>.

## **b) Impact of the Bills of Lading Act 1855**

Even within the traditional view, the bill of lading is sometimes regarded as the contract itself. This occurs when the bill is in the hands of a third party, consignee or indorsee. Prior to 1855 it was not possible to assign a contract of carriage, and therefore the contractual position of a third party did not need to be considered. In 1855 a statute was passed to enable the assignment of contracts of carriage<sup>44</sup>. S. 1 of the Bills of Lading Act stated:

“Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if *the contract contained in the bill of lading* had been made with himself.” (Emphasis added)

When the property in the goods is transferred, the rights and liabilities of the contract *contained in the bill of lading* are also transferred<sup>45</sup>.

After the Bills of Lading Act, a new question arose: in the hands of a consignee or indorsee was the bill of lading merely evidence of the contract, or the contract itself. All commentators<sup>46</sup> have no doubt that in these circumstances the bill of lading is the entire contract. The case usually cited in this respect is *Leduc v. Ward*<sup>47</sup>. The plaintiffs in that case were the indorsees of a bill of lading which stated that the cargo was bound for

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<sup>42</sup> Treitel G. & Reynolds F.M.B., *Carver on Bills of Lading* (2001) ("*Carver*"), para. 3-003.

<sup>43</sup> See p. 98 below.

<sup>44</sup> Other contracts were not generally assignable at common law until 1873.

<sup>45</sup> The problems relating to the linking of the transfer of property to contractual rights are dealt with in Chapter 4 below.

<sup>46</sup> eg. Wilson, *op.cit.*, p. 135; Baughen, *op.cit.*, p. 24.

<sup>47</sup> (1888) 20 Q.B.D. 475.

Dunkirk, “with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property.” Instead of going to Dunkirk the ship proceeded to Glasgow and was lost through perils of the sea. The plaintiffs subsequently sued the shipowners for non-delivery and the shipowners sought to rely on the exemption for perils of the sea contained in the bill. The plaintiffs then argued that the contract of carriage was contained in the bill of lading and the defendants were in breach of that contract by deviating to Glasgow. That breach of contract meant that the defendants were unable to rely on the contractual defences. The defendants wished to bring evidence that showed that the plaintiffs knew that the ship was due to go via Glasgow, and that the 'deviation' was therefore part of the contract. If it was part of the contract, then there would be no breach. Lord Esher was in no doubt that the bill of lading was the contract of carriage and not merely evidence of it:

“If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner. But, if the goods have been received by the captain, it is the evidence in writing of what the contract of carriage between the parties is; it may be true that the contract of carriage is made before the goods are sent down to the ship: but when the goods are put on board the captain has authority to reduce that contract into writing; and then the general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract.”<sup>48</sup>

It should be noted that Lord Esher's *dictum* quoted above makes no reference to the fact that the bill of lading in that case was in the hands of a third party, and the case will be discussed further in Section 3 below. Fry LJ agreed with Lord Esher that the bill of lading was indeed the contract of carriage, but he based his view of the bill of lading on the wording of s. 1:

“Here is a plain declaration of the legislature that there is a contract contained in the bill of lading, and that the benefit of it is to pass to the indorsee under such circumstances as exist in the present case. It seems to me impossible therefore now to contend that there is no contract contained in the bill of lading, whatever might have been the case before the statute.”<sup>49</sup>

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<sup>48</sup> *ibid.* at 479.

<sup>49</sup> *ibid.* at 483.

Once the court had decided that the bill of lading was the contract itself in the hands of the plaintiff indorsee, the main issue of the case then became whether Glasgow was a port at which the liberty to deviate clause gave the shipowners liberty to call at, i.e. it became a matter of construction.

In *The Ardennes*<sup>50</sup>, Lord Goddard declined to follow the decision in *Leduc* because he said that that case involved an indorsee and the effect of the Bills of Lading Act was to make the bill of lading conclusive evidence of the contract between shipowner and indorsee<sup>51</sup>. More recently, Lord Justice Megaw also considered that in the hands of a buyer, who would be the consignee or indorsee, the bill of lading would be the contract itself. *S.I.A.T. di del Ferro v. Tradax Overseas SA*<sup>52</sup> concerned the right of a buyer to reject bills of lading presented under a CIF sale contract. Relying on *Benjamin's Sale of Goods* Lord Megaw said:

“The buyer [i.e. consignee or indorsee] is not under any obligation to speculate or to investigate, or to accept assurances outside the bill of lading. The bill of lading is the document to which he is entitled to look as being definitive of the contract of carriage binding on the shipowner, as being a contract entered into or in existence at the time of shipment of the goods, so as to cover the whole of the carriage from the port of loading to the port of discharge provided for by the contract of sale.”<sup>53</sup>

That the bill of lading is the contract of carriage itself in the hands of a third party is illustrated by *George Kallis (Manufacturers) Ltd v. Success Insurance Ltd*<sup>54</sup>. This case involved the insurance of a cargo of jeans which, according to the bill of lading, had been shipped on board the *Ta Shun*. The cargo was in fact shipped on the *Ta Hung* and transhipped onto the *Intellect*. That ship caught fire and the cargo was water-damaged. The buyers, the indorsees of the bill of lading, claimed on their insurance policy. The insurers declined to pay as the voyage they had insured was the voyage on the *Ta Shun*. That voyage never took place and since the goods were never appropriated to the insured

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<sup>50</sup> (1950) 84 Ll. L. Rep. 340.

<sup>51</sup> (1950) 84 Ll. L. Rep. 340, at 345.

<sup>52</sup> [1980] 1 Lloyd's Rep. 53.

<sup>53</sup> *ibid.* at 63.

<sup>54</sup> [1985] 2 Lloyd's Rep. 8.

voyage they were never at the insurer's risk. The Privy Council, upholding the Hong Kong Court of Appeal, held that the insurers did not have to pay. Lord Roskill said:

"The only contracts of affreightment to which the buyers were parties were those contained in or evidenced by the bills of lading. The buyers were the indorsees of the bills of lading and as stated in *Scrutton on Charterparties* (19th ed. (1984) p. 55): ... "The bill of lading ... in the hands of an indorsee is the only evidence".<sup>55</sup>

The only contractual voyage was that identified in the bill of lading. No evidence beyond that contained in the bill of lading would be admitted, and since the insured voyage never took place, so the insurers were not liable to pay under the insurance.

More recently, Judge Diamond QC stated the position more succinctly:

"Bills of lading are transferrable documents which come into the hands of consignees and indorsees who may be the purchasers of goods or banks. The transferee of the bill of lading does not, however, take precisely the same contract as that between the shipper and the shipowner (of which the bill of lading is merely evidence). What is transferred to the consignee or indorsee consists, and consists only, of the terms which appear on the face and on the reverse of the bill of lading."<sup>56</sup>

In the hands of the original shipper then, the bill is merely evidence, but after it has been transferred, the bill becomes the entire contract. This is the traditional view of the contractual function of the bill of lading. There are, however, alternative views.

### **3. Alternative Views of the Bill of Lading's Contractual Function**

#### **a) Existing caselaw**

While the traditional view of the bill of lading has been dominant since 1884 there has always been support for the opposing view. In *Van Casteel v. Booker*, Parke B said "The contract for carriage, which the bill of lading is, is made expressly with the consignor."<sup>57</sup> Blackburn J was even more adamant in *Fraser v. Telegraph Construction and Maintenance Co.*:

"The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas, must be taken to be the contract under which the goods are

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<sup>55</sup> *ibid.* at 11.

<sup>56</sup> [1994] 2 Lloyd's Rep. 287, at 310.

<sup>57</sup> (1848) 2 Ex. 691 at 708.

shipped, and until I am told differently by a Court of Error, I shall so hold.”<sup>58</sup>

Brett J was equally forthright in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*:

“The contract no doubt is a contract of carriage, but the contract has been by the consent of the parties been reduced into the form of a bill of lading and therefore the whole of the contract is contained in that bill of lading, and no terms of the contract outside of the bill of lading, can be looked at.”<sup>59</sup>

In *Margetson v. Glynn*<sup>60</sup>, a cargo of oranges was shipped under a bill of lading containing a wide liberty to deviate clause. After loading at Malaga the ship went first to Burriana, and then on to Liverpool, the port of discharge. As a result of the deviation to Burriana, the oranges arrived in a rotten state. The plaintiff shippers sued the shipowners for breach of contract. Lord Esher, relying on his own decision in *Leduc*, held that the bill of lading was *the* contract of carriage. The task for the Court of Appeal was then to construe the deviation clause as part of the contract, which they did in the plaintiffs’ favour<sup>61</sup>. *Margetson* was not a case involving a third party indorsee and there is scope for arguing that the decision in *Leduc* that the bill of lading was the contract itself was not intended to be limited to a bill in the hands on an indorsee, as will be seen below.

#### **b) Debattista's View**

Debattista<sup>62</sup> has suggested that the members of the Court of Appeal in *Leduc* did not intend their comments on the bill of lading to apply *only* in situations where the bill is in the hands of a third party. According to Debattista, Lord Esher identified only two situations where the bill of lading could not be said to contain the contract of carriage:- where the bill is in the hands of a charterer; and where the bill has been issued for goods

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<sup>58</sup> (1872) L.R. 7 Q.B. 566 at 571.

<sup>59</sup> (1883) 10 Q.B.D. 521 at 528.

<sup>60</sup> [1892] 1 Q.B. 337.

<sup>61</sup> In *Connolly Shaw Ltd v. Nordenfjedske S.S.* (1934) 49 Ll. L. Rep. 183, at 190, Branson J held that he would be prepared to disregard parts of a deviation clause, if they had conflicted with the main purpose of the contract.

<sup>62</sup> Debattista C., “The Bill of Lading as the Contract of Carriage - A Reassessment of *Leduc v. Ward*” (1982) 45 M.L.R. 652.



which have never been shipped at all. Debattista suggested<sup>63</sup> that Lord Esher did not think that the status of the plaintiff as an indorsee was an important consideration, and therefore did not mention it. If Lord Esher thought that what he was saying only applied to bills in the hands of indorsees, then surely he would have said so? In addition, two of the cases referred to by Lord Esher in support of his view that the bill of lading contained the entire contract were actions by shippers not by indorsees.

Debattista further relied on the comment of Fry LJ in *Leduc*, quoted at page 10 above. Fry LJ had found it impossible to conclude that, following the Bills of Lading Act, the bill did not contain the contract.

Having decided that *Leduc* was authority for the view that following the Bills of Lading Act the contract of carriage was to be found exclusively in the bill of lading<sup>64</sup>, Debattista acknowledged that this would undermine cases like *Pyrene* and *The Ardennes* which accorded with good sense. Debattista thought that the reasoning of the Court of Appeal in *Leduc* was faulty, particularly in respect of Fry's interpretation of s. 1, but nevertheless it remained high authority. What was needed was a clear House of Lords decision to overrule it, in so far as it decided that the bill of lading normally contains the contract of carriage, even in the hands of the original shipper.

### **c) Continental position of the bill of lading**

Although Debattista was not apparently in favour of the interpretation of *Leduc* that he advanced, because of the danger he perceived to the 'good sense' of the decisions in *Pyrene* and *The Ardennes*, the view that the bill of lading is the contract of carriage draws some support from the contractual position of the bill in other jurisdictions. In the USA, the dominant view is that as between shipper and shipowner, the bill of lading is the contract itself. In *The Delaware* Clifford J in the Supreme Court said

“in so far as [the bill of lading] is evidence of a contract between the parties, it

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<sup>63</sup> *op. cit.*, p. 659.

<sup>64</sup> *op. cit.*, p. 660.

stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence.”<sup>65</sup>

Although Clifford J described the bill as ‘evidence of a contract’, the fact that parol evidence (earlier oral promises) could not be brought in evidence to contradict the terms of the bill meant that in the eyes of the Court, the bill contained the whole contract.

McLaughlin also considered the bill of lading to be the contract itself:

“When it became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract. Of course, in the case of railroad shipments, this situation has always prevailed, since there was never any preliminary negotiating in writing prior to the issuance of a bill of lading. Accordingly, the view that a bill of lading does not constitute the contract, but is evidence of it, would seem to be unsound.”<sup>66</sup>

The different American approach to the bill of lading’s contractual function can also be seen in their dictionary definitions applied to the bill of lading. Black’s Law Dictionary described it as a “receipt for goods, contract for their carriage, and is documentary evidence of title to goods.”<sup>67</sup> English Law Dictionaries usually refer to the bill being evidence of the contract of carriage only<sup>68</sup>.

It may be that the contractual function of the bill of lading goes even further in certain jurisdictions. Some continental commentators have said that the bill of lading exclusively governs the rights and duties of all those involved in the carriage, even to the extent of taking precedence over the charterparty between carrier and charterer:

“But, once the bill of lading has been accepted and signed, it becomes the definitive title which will exclusively govern the rights and duties of all those involved in the carriage.”<sup>69</sup>

De Wit doubted though that the commentators quoted above meant that the bill of lading always took precedence over a charterparty, as between the carrier and the shipper/charterer. If the parties wished to alter the terms of their charterparty they are at liberty to do so by mutual agreement, and there is no reason why that agreement cannot be

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<sup>65</sup> (1871) 20 L. Ed. 779, at p. 783.

<sup>66</sup> McLaughlin, *op cit.*, p. 556.

<sup>67</sup> (1990) (6th edn.), p. 168.

<sup>68</sup> eg. *Stroud’s Judicial Dictionary* (1986) Vol. 1, p. 1290.

<sup>69</sup> Smeesters C. and Winkelmolen G., quoted and translated in de Wit, *op. cit.*, para. 4.7, fn. 20.

in the bill of lading<sup>70</sup>. It would therefore be necessary to examine the intentions of the parties in the issue of the bill before deciding whether its terms formed part of the contract of carriage.

The basis of these continental and American views may be that the form of bills of lading became standardised and became contracts of adhesion<sup>71</sup>. A contract of adhesion contains terms fixed by one party to the contract in advance which are 'accepted' by the other party to the contract, the adherent. French commentators distinguish contracts of adhesion from *les contract types* (standard form contracts) where the terms are dictated by a professional organisation. In either case, providing sufficient notice of the terms are given, the adherent is fully bound by the contract<sup>72</sup>. American judicial opinion agrees with this and goes further. In 1870 it was held a shipper who accepts a bill of lading at the time he delivers his goods to the carrier is conclusively presumed to have agreed to the terms of the bill of lading<sup>73</sup>. This is because:

“[The shipper] is conclusively presumed to know the general custom to print such regulations in bills of lading, and if he chooses to accept them without reading them he is estopped from denying his assent so far as the regulations are reasonable and just.”<sup>74</sup>

US law it seems does not require specific notice of the terms to be given to the adherent – they know where they are if they wish to check what terms they are agreeing to. As a contract of adhesion though, the terms will be construed strictly against the carrier<sup>75</sup>. The move towards standard form contracts seems to create a presumption, in foreign law at least, that the bill of lading will embody the contract and not be merely evidence of it.

#### **d) Carriage of Goods by Sea Act 1924 and General English Contract Law**

Although the traditional view of the bill of lading's contractual function is well

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<sup>70</sup> *ibid.*

<sup>71</sup> The term 'contract of adhesion' was invented in 1901 - Lawson, Anton and Brown (Eds.), "Amos and Walton's Introduction to French Law" (1963), p. 152.

<sup>72</sup> *ibid.*, p. 153.

<sup>73</sup> Goddard E.C., "Outlines of the Law of Bailments and Carriers" (1928), p. 222.

<sup>74</sup> *ibid.*, p. 223.

<sup>75</sup> *Porky Products Inc. v. Nippon Express (Illinois) Inc.*, reported in *American Shipper* [1997] October 49.

entrenched, it is possible to reappraise it and the existing case law in the light of the Carriage of Goods by Sea Act 1992 (COGSA 1992) and general contract law.

Due to the defects in the Bills of Lading Act<sup>76</sup> it was repealed and replaced by COGSA 1992. S. 2(1) is the equivalent of s. 1, Bills of Lading Act<sup>77</sup> and states:

“... a person who becomes the lawful holder of a bill of lading ... shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.”

The term “contract of carriage” is defined in s. 5(1) as the contract “contained in or evidenced by” the bill of lading. This definition does not answer the question whether the contract is wholly contained in the bill of lading, but the change of wording from s. 1, Bills of Lading Act makes it impossible to take Fry LJ’s view that since the legislature says there is a contract contained in the bill of lading, then there must be a contract there all the time. COGSA did not resolve the argument one way or the other. The current wording of s. 5(1) may lead to problems, as prior oral promises are part of the contract of carriage, according to *The Ardennes*, but are not part of the contract of carriage “contained in or evidenced by” the bill of lading<sup>78</sup>. The question concerning the operation of s. 2(1) remains: what are the terms of the contract of carriage?

There is no requirement for a contract of carriage to be in writing, and if it is in writing, there is no need for it to be contained in a single document - it depends upon what the parties intended. Contractual principles relating to ordinary contracts may assist in resolving the dispute between the traditional view of the contractual function of the bill and the alternative view. In *Cheshire*<sup>79</sup> the learned author identified three possibilities when there has been an oral promise followed by a written contract:

“(1) the contract is contained wholly in the written document;  
(2) the contract is partly written and partly oral; or  
(3) there are two contracts, there being an oral collateral contract as well as the written contract.”

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<sup>76</sup> See Chapter 4 below.

<sup>77</sup> See p. 87 above.

<sup>78</sup> See p. 100 below.

<sup>79</sup> *op.cit.*, p.145.

These possibilities apply to contracts of carriage as they would to other contracts. Which possibility represents a given case is a question of fact, as noted in *Carver's Carriage of Goods by Sea*, where the author reviewed the conflicting cases on the contractual status of the bill and commented that:

“The true view of the authorities may be that it depends on the facts of each case whether the bill of lading contains the actual contract.”<sup>80</sup>

The new revised edition of Carver's seminal work, now called *Carver on Bills of Lading*, went further and stated:

“... the probability is that the terms of the bill will, in most cases, prevail, even between shipper and carrier, over those of the antecedent contract between them ...”<sup>81</sup>

This surely represents acknowledgement that the traditional view of the bill's contractual function will in practice rarely be correct.

The first possibility identified by *Cheshire* can be applied to situations where the contract of carriage is found to be wholly contained within the bill of lading. This is obviously the case where the bill is in the hands of a third party. Debattista's alternative view proposed that this was the case even in the hands of the original shipper, given Lord Esher's views in *Leduc* that where the contract had been reduced to writing in the bill of lading, parol evidence to qualify it was inadmissible. Brett J in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*<sup>82</sup> saw that case too as one where the contract was reduced to writing in the form of a bill of lading, and no terms outside the bill would be admissible.

How do parties evidence their intention that the bill of lading comprises the contract between them? Lord Russell of Killowen CJ in *Gillespie Bros. v. Cheney, Eggar & Co.*<sup>83</sup> said that it will be presumed “that a document which looks like a contract is to be treated as the whole contract.” A bill of lading certainly looks like a contract - the parties

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<sup>80</sup> Colinvaux R., *Carriage of Goods by Sea* (13<sup>th</sup> edn.)(1982), para. 63.

<sup>81</sup> *Carver, op. cit.*, para. 3-005.

<sup>82</sup> (1883) 10 Q.B.D. 521.

<sup>83</sup> [1896] 2 Q.B. 59 at p. 62.

are named, the subject matter is identified, and the rights and liabilities of both sides are set out. It is true that only one party has signed the document, unlike most bilateral contracts. However, the shipper will invariably fill out the bill of lading himself and present it to the shipowners for signature. He will then accept the signed bill. If there is something in the bill which he does not agree with he has ample opportunity to make representations to the carrier. If he does not reject the bill of lading at any stage, he may find he is bound by the terms of the bill of lading. That was the result in *Armour & Co. v. Leopold Walford (London) Ltd*<sup>84</sup>. Although McCardie J accepted that the bill of lading was not conclusive evidence of the contract, he nevertheless held that if the shipper “has chosen to receive without protest a bill of lading in a certain form he should be bound by it.”<sup>85</sup>

Unusual clauses, not used before in the parties' dealings, will not form part of the contract unless they are brought to the attention of the shipper. Lush J in *Crooks v. Allan*<sup>86</sup> cautioned as follows:

“If a shipowner wishes to introduce into his bill of lading so novel a clause ... he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such a type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it.”

That said, Lush J returned to the traditional view that the bill of lading is only evidence of the contract and a shipper accepting a bill does not necessarily bind himself to all its terms. The question still remains, if the bill of lading was not the contract, why did novel terms have to be highlighted?

This alternative view of the contractual function of the bill, that it is the contract even in the hands of the shipper, accords with commercial reality. Many contracts of carriage are formed by a simple exchange of faxes or telexes detailing nothing more than cargo, ship, freight, destination and parties. These communications will sometimes say “Carriage subject to carrier’s standard conditions”, in which case the bill of lading

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<sup>84</sup> [1921] 3 K.B. 433.

<sup>85</sup> *ibid.* at 477.

<sup>86</sup> (1879) 5 Q.B.D. 38 at 40.

containing those conditions should be treated as the contract, because that is what the parties expressly intended. Even where there is no such clause it is open to the Court to regard the bill of lading terms as the contract because that was what the parties impliedly intended. Such implied intentions are normally found where there has been a previous course of dealing. It may even be the case that the carrier's standard bill of lading conditions form part of the contract even though a bill of lading was never issued. In *Anticosti Shipping Co. v. Viateur St. Amand*<sup>87</sup> the parties had dealt with each other before and that since both parties contemplated carriage in accordance with the carrier's normal procedure, i.e. under its standard bill of lading, the bill of lading's terms were part of the contract, even though a bill of lading was never issued in that case<sup>88</sup>.

If the parties are concerned that "terms" from outside the bill of lading may become terms of the contract they can include a clause in the bill of lading that the bill contains the whole of the agreement between the parties. This should strengthen the presumption that the bill of lading contains the whole contract, but whether such a clause makes the presumption irrebuttable remains unclear. A variant on this clause would be a clause which said:

"In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its terms."<sup>89</sup>

This clause, frequently used in Japan, puts merchants and shippers on their guard that the carrier wishes to treat the bill of lading as the contract, and that they will be bound by it if they accept the bill without question<sup>90</sup>.

A contract reduced into writing may not be amended by the introduction of evidence of previous oral terms. This is the parol evidence rule, which applies equally to previous written as well as previous oral terms. However, there are a number of exceptions

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<sup>87</sup> [1959] 1 Lloyd's Rep. 352.

<sup>88</sup> The opposite conclusion was reached in *McCutcheon v. David MacBrayne Ltd* [1964] 1 W.L.R. 125, but in that case there was no consistent previous course of dealing, and the shipper did not know the specifics of the conditions that the carrier alleged he was subject to.

<sup>89</sup> Yiannopoulos A.N. (Ed.), "Ocean bills of lading: traditional forms, substitutes and EDI systems" (1996), p. 219.

<sup>90</sup> Such a clause will be construed *contra proferentem* - see *Witter Ltd v. TBP Industries Ltd* [1996] 2 All

to this rule<sup>91</sup>:-

- (1) evidence of additional customary terms (e.g. carriage on deck).
- (2) evidence that the contract is in fact conditional on some event (e.g. the ending of a war).
- (3) equitable rectification where both parties are under a common mistake<sup>92</sup>.
- (4) evidence of other terms where the document was never intended to be the whole contract.

Where oral evidence is permitted under exception (4) the courts may interpret the contract as being partly oral and partly written, e.g. *The Ardennes* where the earlier oral promise was part of the contract, or as two contracts, one written and the other an oral collateral contract<sup>93</sup>, ie. the second and third possibilities mentioned by *Cheshire*. An example of this is the case of *Evans & Sons (Portsmouth) Ltd v. Andrea Merzario Ltd*<sup>94</sup>. The plaintiff importers used the defendant forwarding agents to import machines. Up until 1967 the machines had been carried under deck. In 1967 the defendants proposed containerised carriage and orally assured the plaintiffs that their containers would be carried under deck. The plaintiffs agreed to the containerisation of their cargo on that basis. However, the defendants written contract of carriage under which the cargo was carried incorporated the printed standard conditions of the forwarding trade. These included a clause which permitted on deck carriage. On one carriage the plaintiffs' container was mistakenly carried on deck and was lost overboard. The plaintiffs sued the defendant, alleging a breach of contract in failing to carry the plaintiffs' goods under deck in accordance with their oral promise. The Court of Appeal refused to allow the defendants to rely on their standard conditions permitting deck carriage. Lord Denning MR considered the earlier oral promise of under deck carriage to be a collateral contract, whereas Roskill

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E.R. 573.

<sup>91</sup> *Cheshire, op. cit.*, p. 128.

<sup>92</sup> Also, rectification because of a unilateral mistake made by one party and that mistake was known to the other party - *A. Roberts & Co. Ltd v. Leicestershire County Council* [1961] 1 Ch. 555.

<sup>93</sup> *Cheshire, op. cit.*, p. 137. See pp. 16-7 above.

<sup>94</sup> [1976] 2 All E.R. 930.



and Geoffrey Lane LJJ considered the contract of carriage to be partly oral and partly written. In either view, there were two parts to the contract.

Furmston considered<sup>95</sup> that the difference between these two approaches is significant when considering what rights under the written contract are transferred. Furmston acknowledged a possibility that rights under the bill of lading may be transferred, whereas rights under the collateral contract may not. Under s. 2(1), COGSA 1992, only rights and liabilities under the contract of carriage contained in or evidenced by the bill of lading are transferred. A prior oral promise, if it is a collateral contract might not be transferred automatically under COGSA 1992- in the hands of a third party the bill of lading is the entire contract. In this case an indorsee should check whether there are any additional oral promises made by the carrier to the shipper and require a formal assignment of them in addition to the statutory assignment of the bill of lading contract.

Using general contract law principles it is possible to construct an alternative view of the bill of lading's contractual function to accommodate Debattista's interpretation of *Leduc* without disturbing *The Ardennes*, *Pyrene* and *Heskell*. If the bill of lading is considered to be the contract of carriage reduced into writing and subject to the usual parol evidence rule, the circumstances in *The Ardennes* will fall into the fourth exception to that rule identified above on page 99 above. Because this interpretation recognises the existence of a contract prior to the issue of the bill of lading, the non-issue of a bill does not affect the contract at all, covering the situation in *Pyrene*. By the same reasoning, if there has been no contract of carriage agreed there is nothing to reduce to writing and so the decision in *Heskell* remains untouched. The position of the bill of lading in the hands of an indorsee will also remain the same.

#### 4. Conclusions

From its beginnings the bill of lading has had a contractual function - the obligation

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<sup>95</sup> *op. cit.*, p. 145.

to deliver. The purpose of this chapter has been to discover whether the bill is the contract itself, or merely evidence of that contract. In light of the comments above, the bill of lading should either be considered to be a contract reduced into writing or a contract of adhesion, the terms of which become binding when accepted by the shipper. Either way, it is *the* contract in the hands of an indorsee. It is *the* contract in the hands of the shipper, subject to the exceptions to the parol evidence rule, principally, where the parties intended the contract to be partly oral and partly written, and, in the case of contracts of adhesion, where insufficient notice of unusual terms has been given. In any given case, whether the bill of lading is a contract or not is a question of fact.

This interpretation of the bill of lading's contractual function will normally have the same result as saying that the bill of lading is only evidence of the contract, except in the hands of an indorsee. It does, however, remove the anomaly identified in the law by Debattista in *Leduc* and satisfies the practical situation where the bill of lading is in most cases, the only evidence of the contract, and therefore can be properly described as *the* contract.

Which interpretation of the bill of lading is correct should not affect commercial transactions, nor should it weigh on the minds of commercial men. In the words of Reed J in *The Roseline*<sup>96</sup>:

“After reviewing some of the authorities and learned authors cited to me I have come to the conclusion that this distinction seems somewhat metaphysical.”

However, the interpretation of the bill of lading's contractual function will be an issue in the context of electronic bills of lading<sup>97</sup>.

As noted previously, *The Ardennes* is the only case to deal with the matter directly and this may be explained by the attitude of commercial men. If they have agreed to a particular clause they are not likely to then argue that they did not so agree, as that would be bad for their commercial reputation. Instead, they would prefer to try and construe the

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<sup>96</sup> [1987] 1 Lloyd's Rep. 18, at 20.

<sup>97</sup> See Chapter 8 below.

clause in their favour, hence the number of cases about construction.

A change in the law so that the bill of lading in the hands of the shipper is conclusive of both the formation of a contract and of its terms (as in the carriage by rail) would end any remaining doubts. As it is widely acknowledged that shippers fill out the bill of lading forms it should be easy for them to check that all oral terms have been included in the contract. Such a change in the law would mean overruling *Heskell*. If a bill of lading is issued a contract of carriage would come into existence, entitling the cargo owners to sue the carrier in contract for non-delivery of goods never in fact shipped. Such a change should make agents and masters more careful about issuing bills of lading. Making the issuance of a bill of lading conclusive evidence of the making of a contract need not harm the decision in *Pyrene*, as the absence of a bill of lading would not automatically mean there was no contract of carriage.

Modern practice has been to describe the contract as “contained in or evidenced by the bill of lading”, as in COGSA 1992. Indeed, the authors of *Carver* go so far as to say there is little difference between the two statements<sup>98</sup>. Until the matter is resolved with a change in the law though it would be more correct to consider the bill of lading to be the contract of carriage itself, except in certain circumstances.

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<sup>98</sup> *Carver, op.cit.*, para. 3-005.

## CHAPTER 4

### THE BILL OF LADING AS A DOCUMENT OF TITLE

This is the most difficult of the functions of the bill of lading to understand. The difficulty comes largely from the mysterious origins of this function in mercantile custom and the lack of an authoritative definition at Common Law of 'document of title'<sup>1</sup>. This has led to the situation today where the functions and uses of the bill of lading as a document of title are well known, but the theoretical basis behind them is either not known or misunderstood. The aim of this Chapter is to understand the nature of the bill of lading as a document of title, with a view to explaining its significance in the use of the bill by the maritime industry. The bill of lading has a role to play in the sale contract, the finance contract and the carriage contract<sup>2</sup>, roles which rely on the bill being a document of title. In order to understand how the bill performs these roles it is necessary to understand what is meant by 'document of title'. The final Section of the Chapter will draw conclusions as to the true essence of what a document of title is, and relate this to the early bill of lading identified in Chapter 1.

#### **1. The Notion of 'Document of Title'**

The purpose of this Section will be to identify a meaning for 'document of title' upon which to base the structure of this Chapter. As mentioned above, one reason for the confusion surrounding this function is the lack of an authoritative definition of 'document of title' at Common Law<sup>3</sup>. Although the case of *Lickbarrow v. Mason*<sup>4</sup> recognised that the bill of lading was a document of title, it did not define what that meant. Since then

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<sup>1</sup> See below Section 1.

<sup>2</sup> Palmer N. & McKendrick E. (Eds.), *Interests in Goods*, (1998)(2nd edn.), pp.569-577; Wilson, *op.cit.*, pp. 137-148.

<sup>3</sup> *Benjamin, op.cit.*, para. 18-005; *Carver, op.cit.*, para. 6-001/A.

<sup>4</sup> See p.104 below.

commentators have been free to define it as they wished, depending on the case law available to them and the element that they wished to emphasise.

The phrase 'document of title' has itself added to the confusion. 'Title' generally denotes a right of ownership or property in the goods, which may lead to the impression that the function of a 'document of title' refers only to the ownership in the goods. This could lead to a document of title to goods being equated with documents of title to land. This would be incorrect as they are entirely different. As noted by Professor Goode<sup>5</sup>, documents of title to land are used to prove who owns the land and they form a permanent record of the chain of ownership of the land, giving a written assurance of the owner's entitlement to the land. It would be difficult, and not very helpful, to create such a document for goods, which are usually only semi-permanent in nature, and it is unfortunate that the phrase 'document of title' has become associated with this important function of the bill of lading. Professor Goode thought it would be more accurate to describe the bill of lading as a 'control document'<sup>6</sup>.

The over-emphasis on the transfer of title when considering the bill of lading as a document of title can be seen in *Scrutton*<sup>7</sup>. The Chapter headed "The Bill of Lading as a Document of Title" contains no definition of the term, but the Chapter concentrates on the effect of indorsement of the bill on the passing of title. The transfer of the contract of carriage upon indorsement is mentioned<sup>8</sup>, but the main focus of the Chapter is on the passing of title. This over-emphasis on title<sup>9</sup> is largely due to the fact that the classic authorities on the bill as a document of title used the term to mean a document of ownership or property in the goods. *Lickbarrow v. Mason*<sup>10</sup> was the first case where the English courts recognised that indorsement and delivery of the bill of lading would be effective to transfer the property in the goods, but there is more to the document of title

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<sup>5</sup> Goode R.M., *Proprietary Rights and Insolvency in Sales Transactions* (1989) (2nd edn.), p. 59.

<sup>6</sup> *ibid.* p. 60 - see further Section 2.

<sup>7</sup> *op. cit.*, See Section X generally.

<sup>8</sup> *ibid.* Art. 93.

<sup>9</sup> Palmer & McKendrick *op. cit.*, p. 550, n. 24, 25.

<sup>10</sup> (1794) 5 TR 683. See Section 3 below.

function than just the passing of property.

This early overemphasis in the courts on the passing of property has not prevailed to modern times. In *The Delfini*<sup>11</sup> Mustill LJ said

"I put ['document of title'] in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for goods and as evidence of the contract of carriage between shipper and shipowner, the bill of lading fulfils two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable 'key to the warehouse'. 2. It is a document which, although not itself capable of directly transferring the property in the goods to which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed."

Here Mustill LJ recognised that as a document of title the bill of lading was involved in more than just involved in the transferring of property, but also transferring constructive possession of the goods represented by the bill. This recognition was noted by Simon Baughen when he was classifying the functions of the bill of lading<sup>12</sup>. Baughen states that the bill of lading has four functions:- receipt, document transferring constructive possession, document of title, potentially transferable carriage contract. While this assessment of the bill's functions may assist a layman to come to terms with its complexity it does fall into the trap of using the term 'document of title' to refer only to the bill of lading's role in the passing of property. Having done this, Baughen had no option but to 'create' a fourth function for the bill's role in transferring constructive possession. As will be seen<sup>13</sup>, there should be no need to artificially increase the number of functions of the bill of lading if the term 'document of title' is defined so as to include all aspects of the transfer of the document itself and any rights that may also be transferred. Indeed, as will be seen, the transfer of constructive possession is an integral part of the function of the bill as a document of title.

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<sup>11</sup> [1990] 1 Lloyd's Rep. 252, at p. 270.

<sup>12</sup> *ibid.* pp.5-8.

<sup>13</sup> See below, p. 110.

In *Benjamin's Sale of Goods*, the authors submitted that document of title to goods meant

"a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in the goods."<sup>14</sup>

This notion incorporates, unlike Baughen's classification, the transfer of constructive possession and property within the phrase 'document of title'. *Benjamin* also acknowledged that the bill of lading had a role to play in the transfer of contractual rights, in relation to the Carriage of Goods by Sea Act 1992, but since that Act did not deal with the transfer of possessory or proprietary rights in the goods *Benjamin's* authors thought it was therefore not relevant when considering the question of whether a certain document was a document of title<sup>15</sup>. In his book *Multimodal Transport*<sup>16</sup>, de Wit identified two functions within documents of title. Firstly to operate as a transfer of contractual rights, and secondly to operate as a transfer of the property in the goods.

*Carver* referred to document of title in two senses. The authors submitted that at common law the expression meant

"a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them."<sup>17</sup>

*Carver* also noted that the phrase had a specific statutory definition under the Factors Act 1889, which also applied to documents other than the bill of lading<sup>18</sup>.

Other authors have emphasised the constructive possession aspect of the bill as a document of title. For Palmer & McKendrick, the essential features of a document of title are identified as the bestowing of constructive possession and its transferability<sup>19</sup>. Goode identified two functions of the document of title in relation to rights *in rem*. The first and

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<sup>14</sup> *op.cit.*, para. 18-005.

<sup>15</sup> *op.cit.*, para. 18-006.

<sup>16</sup> de Wit *op. cit.*, para. 5.17.

<sup>17</sup> *op.cit.*, para. 6-001/A.

<sup>18</sup> *op.cit.*, para. 6-002. See below, p. 108.

<sup>19</sup> *op.cit.*, p. 550. Although the editors did acknowledge that the bill had a role to play in the transfer of ownership and contractual rights.

primary function was to allow control of the goods to be transferred by delivery of the document, and the second subsidiary function was to provide the parties with a 'convenient mechanism' to transfer ownership<sup>20</sup>.

Bools stated that "the bill of lading's status as a document of title to goods gives it the ability to transfer legal possession of the goods to its transferee"<sup>21</sup>. This seems, on the face of it, to be quite similar to Debattista's statement that

"the *right* to demand possession of the goods from the person currently *having* physical possession of them lies at the core of the common law notion of a 'document of title' and an accurate definition of the phrase should include those ingredients and those alone."<sup>22</sup>

Quite how these statements differ will be dealt with in Section 2 below, but what they have in common is that they both concentrate on the possessory aspects of documents of title.

Debattista's Second Edition of *Sale of Goods Carried by Sea* was completely restructured and there is no equivalent passage to the one quoted above<sup>23</sup>. Debattista now recognised that unanimity on the definition of 'document of title' was difficult but thought it important to identify the constituent features of it:-

- (i) the right to delivery;
- (ii) the right to transfer the right to delivery to someone else;
- (iii) the right to transfer any accrued rights of suit against the carrier;
- (iv) the right to the goods in the event of the insolvency of the seller or buyer<sup>24</sup>.

None of these rights involved the transfer of property to the goods.

So far, all the authors quoted have mentioned that the function of a document of title included the transfer of constructive possession and/or proprietary rights and/or contractual rights. Wilson took a different approach in his *Carriage of Goods by Sea*<sup>25</sup>. At page 138 he stated

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<sup>20</sup> *Op. cit.*, p. 60.

<sup>21</sup> *Op. cit.*, p. 173.

<sup>22</sup> Debattista, *Sale of Goods Carried by Sea* (1<sup>st</sup> edn.), p. 29, original emphasis.

<sup>23</sup> In Debattista's view, the right to demand delivery from the carrier was solved by COGSA 1992 and no longer turned on whether the claimant held a bill of lading, (2<sup>nd</sup> edn.), paras. 2-07 and 2-08.

<sup>24</sup> Debattista, *op. cit.*, para. 2-05.

<sup>25</sup> *Op. cit.*, pp. 138-148.



"The development of the bill of lading as a document of title has been so successful that, over the years, it has come to exercise a tripartite function in relation to the contract of carriage, to the sale of goods in transit, and to the raising of a financial credit."

Wilson acknowledged that possession of the bill of lading is equivalent to the possession of the goods themselves, but he gave no overall definition of what a document of title is. Mills, whose book was aimed at shipping personnel rather than lawyers, also took a different approach. When referring to the bill's document of title function, he preferred to consider it as embodying "the right to control receipt of the cargo at its destination."<sup>26</sup>

Aside from case law and commentaries, there are other sources that may reveal the common law definition of document of title. The Factors Act 1889, s. 1(4) stated that

"the expression 'document of title' shall include any bill of lading, dock warrant, warehousekeeper's certificate, and warrant or order for the delivery of goods, and any document used in the ordinary course of business as proof of the possession or control of the goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possession of the document to transfer or receive goods thereby represented."

This definition obviously only applies when the Factors Act is under consideration. The definition is wider than any common law definition as it covers documents other than the bill of lading, whereas only the bill of lading can be a document of title at common law<sup>27</sup>. The statutory definition refers to other documents which are used as proof of *possession* or *control* of the goods, or authorising the transfer of the document to transfer possession of the goods. The language used here is of possession, with no reference to contractual or proprietary rights. In this sense the statutory definition is narrower than any common law one. A document may be a document of title under the Factors Acts, but it is not necessarily a document of title at common law. As will be seen below, at common law the document of title should be seen as capable of transferring possession, property and contractual rights.

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<sup>26</sup> Mills S., *Bills of Lading. A Guide to Good Practice* (1998), para. 207.

<sup>27</sup> *Official Assignee of Madras v. Mercantile Bank of India* [1935] A.C. 53, at p. 60, although it is possible for other documents to be recognised by the courts as documents of title, if there is a mercantile custom to that effect (see *Kum v. Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439, at p. 443). Custom is, after all, how the bill of lading came to be recognised as a document of title in the first place.

The Hague and Hague Visby Rules and Hamburg Rules are of no help in identifying what a document of title is. The Hamburg Rules do not mention it at all, while the Hague and Hague Visby Rules mention it only while defining a contract of carriage as a contract covered by a bill of lading or "similar document of title"<sup>28</sup>. A definition of document of title is not provided and it is left to the courts<sup>29</sup> to decide whether a document is a "similar document of title" to a bill of lading so as to be covered by the Rules. The discussion as to which other documents qualify as documents of title at common law will be dealt with in Part II of this thesis.

In the USA, Sec. 1-202(15) of the Uniform Commercial Code states

"Document of title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing it is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible proportions of an identifiable mass."

Thus, a document of title under US law must be issued by or addressed to a bailee, relate to identifiable goods and is treated by merchants as evidencing the holder's right to receive, hold or dispose of the document and the goods. This definition neatly avoids the terms possession and property, but brings in bailment, identifiability and other documents. Bailment is not mentioned *per se* in the common law definition of documents of title, though it is implied as the goods to which the document relates are invariably held by someone else<sup>30</sup>.

By comparison, the definition of document of title in Swiss Law is simple. Art. 965 of the Swiss Code of Obligations stated<sup>31</sup> that a document of title is a document in which a right is incorporated in such a way that it may be transferred by means of the document

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<sup>28</sup> Art. I(b).

<sup>29</sup> There have only been two cases on the construction of this phrase by UK courts, neither of which was before an English court. See further M. Hannesson, Unpublished Thesis, *Carriage by Sea: The Nature of Transport Documents, Carriers, and Regulation by Mandatory Conventions*. Exeter (1991), pp.183-6.

<sup>30</sup> cf. Bools, *op. cit.* pp. 180-1.

<sup>31</sup> As outlined in de Wit, *op. cit.* para. 5.15.

alone - ie the transfer of the document may transfer the right incorporated within it. There is no mention of what rights may be incorporated, just that they may be transferred by means of the document.

At the root of all the definitions and descriptions of the document of title quoted above, with the exception of the US one, is that something is *transferred*. The essence of a document of title is that it is a document whose transfer *may* transfer rights, be they possessory, proprietary or contractual. This should lead to the conclusion that a document that is not transferable is not a document of title at common law<sup>32</sup>. By defining document of title in this way, and by dealing with the transfer of possessory, proprietary and contractual rights separately below it is hoped that some of the complexity surrounding the bill of lading's function in this regard will be reduced.

It should be noted that the word 'transferable' will be used in this Chapter to denote that the bill may pass into the hands of another person. This is used in preference to 'negotiable', which may lead to the conclusion that the bill is a negotiable instrument. Negotiability is a term of art which should be used in the appropriate circumstances. Why it is not appropriate to use it when discussing the bill as a document of title will be dealt with in Section 3 below.

In *Sanders v. Maclean*<sup>33</sup>, Bowen LJ said that

"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. For the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also the rights created by the contract of carriage between the shipper and shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

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<sup>32</sup> The question of whether a non-transferable document is a document of title is considered in Chapter 7.

<sup>33</sup> (1883) 11 Q.B.D. 327, at 341.

Bowen LJ principally referred to the passing of property in this oft-quoted statement, although he does allude to the passing of contractual rights. In particular, the key analogy points to the importance of the bill of lading, being a document of title, as a symbol of the goods. This should be taken as a symbol of *possession* of the goods, rather than of *ownership* of the goods. This analogy will be used in Section 2 to show how the bill of lading is involved in the transfer of possessory rights and their importance.

The following sections will deal with the transfer of possessory, proprietary and contractual rights. The fifth Section will deal with the extent of the bill of lading's status as a document of title, as in certain circumstances it is not a document of title. The sixth Section will assess the bill of lading's role as a document of title in today's modern trading conditions. It is anticipated that the definition outlined in this Section will be refined in the Conclusion of this Chapter following the assessment of the transfer of the various rights in Sections 2-4. This refinement of the definition will lead to a conclusion as to what the important aspect of the document of title status is, and also what makes the modern bill of lading different from the early bill identified in Chapter 1.

## **2. Transfer of Possessory Rights**

Once the over-emphasis of title has been accounted for, all the definitions of document of title discussed in the first section include the transfer of some sort of possessory rights, indicating perhaps that these are the most important rights transferred by the document of title. These possessory rights can be divided into two parts:-

- a) the right to delivery of the goods on production of an original bill of lading; and
- b) the rights available the holder of a bill of lading as they would be to the holder of the goods themselves, eg. the right to pledge the goods<sup>34</sup>.

These parts are two sides of the same coin. It could be said that since the bill of lading is a

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<sup>34</sup> These rights are available because possession of the bill gives constructive possession of the goods - It is a symbol of the goods. See below Section 2b).

symbol of the goods, the holder of the symbol is entitled to take possession of the goods, as well as having all the rights that they would have if they possessed the goods. The notion of constructive possession is a relatively modern one<sup>35</sup>, yet bills of lading seem to have been transferable and produced to the carrier for the purpose of obtaining the cargo for many centuries<sup>36</sup>, and so we should look further back into the history of the bill of lading for the development of this function.

We should not be afraid of concluding that transfer of the bill of lading and other documents, for whatever purpose, were known in the 14th and 15th Centuries. Bensa quoted a written indorsement of 1401 which he says is the oldest known formal written indorsement<sup>37</sup>. The indorsement is to a letter of advice, which gave instructions to an agent to deal with cargo. The agent, Ziame de Zenajo, had been directed to deal with the cargo according to the wishes of Bindo Piaciti. Piaciti then indorsed the letter of advice instructing de Zenajo to deal with the cargo according to the wishes of two other merchants. This manner of dealing with the right to the cargo is similar to the indorsement and transfer of the bill of lading<sup>38</sup>, although it is not suggested that the letter of advice transferred the property in the goods, or represented the goods in any way. It merely gave instructions to an agent as to how he should deal with cargo. Its existence however means that it is perfectly possible for the bill of lading to have been transferable and indorseable in the same way at the same time.

There are indications that bills of lading could have been transferable at least since the Fifteenth Century, and certainly in the Sixteenth Century. There must have been a reason why the bill of lading developed from a simple receipt and obligation to deliver, to a transferable document. It is submitted that the purpose behind the transfer of the bill of lading was to allow someone, other than the person who shipped the goods, to claim

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<sup>35</sup> Bools, *op.cit.*, p. 196.

<sup>36</sup> Delivery against production had been mentioned in the facts of *Lickbarrow v. Mason* without comment, indicating at least a practice that was not worthy of judicial comment.

<sup>37</sup> Bensa, *op.cit.*, p. 11.

<sup>38</sup> Indeed, Bensa postulated that the indorseable letter of advice and mate's certificate of receipt were amalgamated and became the modern bill of lading - *ibid.*

delivery of the goods. From this grew the modern notion of constructive possession. Delivery against production should properly be treated as part of constructive possession in modern law. When bills of lading were first in use and being transferred, the notion of constructive possession did not exist, so, in the interests of clarity, the two will be dealt with separately.

#### **a) Delivery Against Production of the Bill of Lading**

A modern statement of the law relating to the production of the bill of lading can be found in *The Houda*<sup>39</sup>. The Court of Appeal in this case had to consider whether a time charterer could order the master to deliver without production of the bill of lading, which had disappeared following the Iraqi invasion of Kuwait. Neill LJ, in the course of his judgment, said

"The case for the owners is based on the general principle that once a bill of lading has been issued only a holder of the bill can demand delivery of the goods at the port of discharge. It is because of the existence of this principle that a bill of lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge."<sup>40</sup>

Here, it is stated that only a holder of the bill can demand delivery of the cargo, ie. is entitled to possess the cargo, and this principle enabled the bill to be a document of title, implying that this aspect is not part of the document of title function itself. This is echoed by Todd who said

"... in order for [the bill of lading] to operate properly as a document of title, it is essential that delivery of the goods from the ship should only be made to the holder of the original bill."<sup>41</sup>

However, since property to the goods is not always transferred but the ability to demand possession of the cargo on production of the bill is, it would be more appropriate to consider this and the other aspect of 'possession' to be within the document of title

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<sup>39</sup> [1994] 2 Lloyd's Rep. 541.

<sup>40</sup> *ibid.*, at 550.

<sup>41</sup> Todd, *op.cit.*, p. 1.

function.

As mentioned above, delivery against production seems to be older than notions of constructive possession. The following sentence is from a modern bill of lading.

"In witness whereof the Master of the said vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void."<sup>42</sup>

This can be traced back to at least 1539. In *The Mary Martyn*<sup>43</sup>, the equivalent phrase was

"In wytness of the truythe I the sayde master or the purser for me have firmyd iij bylls of the one tenor the one complyed with and fulfyllled the other to stand voyd".

Over 400 years lie between these two sentences, yet their wording is remarkably similar. The meaning of these sentences is clear, and the same - the goods will only be delivered upon production of an original bill of lading. If this were not its meaning, the sentence would make little sense. If one bill of lading is accomplished, the others become void: there would be no need for the other bills to become void unless the transfer of the bill actually meant one part of the bill was used for something, other than as a receipt. During the Sixteenth Century, the only thing the bill could have been used for was to obtain delivery of the cargo. If the master was to deliver the goods simply to a named person there would be no need to have a provision for 'accomplishment' - Bensa's Fourteenth Century bills were deliverable to a named person and did not contain the accomplishment statement.

The meaning of accomplishment has been considered by the courts. In *The Sormovskiy 3068*<sup>44</sup>, Clarke J described it thus:

"...subject to the terms of the particular contract and save in exceptional circumstances a shipowner must not deliver otherwise than against the presentation of an original bill of lading. That seems to me to be implicit in the express provision quoted above that any one of the bills of lading being accomplished the others to stand void. In my judgment it is implicit in that provision that, save in exceptional circumstances, one would expect one of the

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<sup>42</sup> Appendix 4, CONLINEBILL, p. 2. Indeed, it appears in virtually every modern bill of lading.

<sup>43</sup> Appendix 2.

<sup>44</sup> [1994] 2 Lloyd's Rep. 266.

bills to be 'accomplished' by being presented to the master or shipowner."<sup>45</sup>

The meaning of the 'accomplishment' statement seems to be clear in modern law - there is no reason to suppose it was any different in the Sixteenth Century. In 1882 at least, Earl Cairns thought that delivery against production of an original bill was the "plain and natural meaning" of accomplishment, and was unable to elicit from the Bar any other explanation of the words<sup>46</sup>.

There is no evidence to suggest a practice of delivery against presentation of the bill prior to 1539<sup>47</sup>. The early bills of lading quoted in Chapter 1 do not contain an accomplishment statement. In particular, the Fourteenth Century bills quoted by Bensa<sup>48</sup> do not contain it. It is not unreasonable to suppose that this practice developed between the Fourteenth and Sixteenth Centuries<sup>49</sup>.

It might be said that the bill of lading was not used for the purpose of obtaining delivery at this time, as the bill could not have got to the discharge port before the ship. This is not necessarily the case. In the absence of mechanical help, ships took longer to load and discharge. A bill might have been sent on ahead on a ship due to leave port before the carrying ship. Another alternative might be that the bill travelled on the ship in the possession of a courier or factor, whose job would be to deliver the bill to the person named in it, who might then present it for delivery to the master. There is little concrete evidence for this, except for the almost blanket use of the 'accomplishment' sentence, from the Sixteenth Century to the present day. As stated before, the statement sentence must have had a purpose, and at that time it could only have been for delivery against

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<sup>45</sup> *ibid.* p. 272. See also Bennett, *op.cit.*, p. 10.

<sup>46</sup> *Glyn Mills v. East & West India Dock Co.* (1882) 7 A.C. 591, at 599.

<sup>47</sup> Further evidence of the ancient practice of delivery against production can perhaps be obtained from the use of indentures. An indenture is a document written in duplicate on the same piece of paper, which is then divided into two parts by cutting through in a wavy line; Rutherford L & Bone S. (Eds.), *Osborn's Concise Law Dictionary* (1993) (8<sup>th</sup> edn.), p. 176. The two parts could then be fitted together to prove their genuineness. If the master kept one part of the indenture, he could be assured he was delivering to the right person if their indenture fitted together with his. This practice is hinted at in the bill of lading from 1541, which refers to the document being an indenture. The numbers of early bills are, however, too small for this argument to be conclusive.

<sup>48</sup> See Appendix 2.

<sup>49</sup> In the absence of bills of lading from this period, this will remain only a supposition.



production.

Exactly when it became necessary to produce the bill in order to get delivery is by no means clear. However, it is well established in English law now that a shipowner is in breach of contract if he delivers other than against production of an original bill<sup>50</sup>. Modern textbooks<sup>51</sup> use *The Stettin*<sup>52</sup> as their authority for this statement. In that case, the master delivered to the consignee named in the bill of lading but without requiring production of the bill. The case was subject to German Law, and Butt J decided that English Law and German Law were the same on this point - that a shipowner was not entitled to deliver goods to the consignee without production of the bill, even though the consignee had every right to the goods. No authorities were cited for this statement, implying that it was common knowledge. In *Skibsaktieselskapet Thor. Thoresens Linje v. H. Tyrer & Co Ltd*<sup>53</sup> Wright J went further and said

“it is not necessary to refer to authority for the proposition that such a delivery to anyone but the holder of the bill was *prima facie* wrongful.”<sup>54</sup>

Courts have referred to the bill as a 'key' to the warehouse since at least 1883, following the decision in *Sanders v. Maclean*. This too implied that delivery is against production of the bill: produce the bill of lading key and release the cargo from the warehouse or ship.

Bools discussed in detail the cases relating to delivery of the goods<sup>55</sup>. He concluded that mere possession of the bill of lading does not give the transferee of it the right to delivery of the goods<sup>56</sup>. According to Bools, any right to the delivery of the goods comes from a contractual or proprietary right in the goods, not the fact of possession of the bill. The fact that a holder may not have any right to delivery does not make any difference - if the bill of lading is presented the carrier will deliver the goods. However, practically

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<sup>50</sup> *The Sormovskiy 3068* [1994] 2 Lloyd's Rep. 266, and the cases referred to therein.

<sup>51</sup> eg. Baughen *op.cit.* p. 7; Wilson, *op.cit.*, p. 162; Yates, *op.cit.*, para. 1.6.15.2.8.

<sup>52</sup> (1889) 14 P.D. 142.

<sup>53</sup> (1929) 35 L.L.R. 163.

<sup>54</sup> *ibid.*, p. 170.

<sup>55</sup> *op.cit.* Chapter 6.

<sup>56</sup> *ibid.*, p. 156.

speaking<sup>57</sup>, the fact remains it is the presentation of the bill that allows delivery of the goods to be made, and the carrier is protected if he delivers to a person who presents a bill of lading, so long as he has no knowledge of a prior claim by someone other than the presenter of the bill<sup>58</sup>.

If the carrier is in breach of contract because he has not delivered against an original bill, and is protected if he has so delivered, providing he has no notice of other claims, then surely any sensible carrier will insist on the production of the original bill. He will not, in the absence of notice of problems, inquire into the *right* of a person to take delivery<sup>59</sup>, but whether they have possession of a properly indorsed bill of lading. This should lead to a custom of always requiring production of an original before discharge. This custom is not always followed<sup>60</sup>, but there is nevertheless a custom to that effect. It is a custom which, as noted previously, cannot be dated. However, it is noted in the case of *Lickbarrow v. Mason*<sup>61</sup> that the holders of the bill of lading presented it to the master 'who thereupon delivered [the goods]'. This fact was not commented upon in that case, so one may conclude that it was an established custom.

Assuming Bools is right in holding that the bill of itself does not give any rights *per se* to its holder for delivery, nevertheless, the bill of lading is the mechanism by which the goods *are* delivered. Put simply, being in possession of a bill of lading gives the holder the *ability* to obtain delivery of the goods. Returning to Bowen LJ's key analogy, a thief who steals the key to a warehouse has the ability to obtain possession of whatever is in the warehouse. He has no *right* to do so, but he has the *ability*. If a security guard blocked his way, the thief would have no ability to take court proceedings to obtain the goods. The same principle applies to the bill of lading in the hands of a thief or fraudster - he has the

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<sup>57</sup> See below.

<sup>58</sup> *Glyn, Mills, Currie & Co v. The East & West India Dock Co.* (1882) 7 App. Cas. 591. Interestingly, under US law, the carrier has no such protection - see Bools, *op. cit.* p. 164.

<sup>59</sup> *Fearon v. Bowers* (1753) 1 H.Bl. 364; *Glyn Mills & Co. v. East and West India Dock Co.* (1882) 7 App. Cas. 591, at 611.

<sup>60</sup> See the problems with presentation identified in Section 6.

<sup>61</sup> (1787) 2 T.R. 63. See further Section 3.

*ability* to present the bill to the shipowner and ask for delivery, but he has no *right* to do so, and will be unable to commence court proceedings if the carrier refuses. To hold that even the thief of a bill of lading had a *right* to obtain delivery of the goods would mean that the bill of lading would be a negotiable instrument, and this has never been the case<sup>62</sup>.

It is important to note that while the holder of a bill may have no right to delivery of the goods *per se*, the carrier does have a right to demand production of the bill before he delivers the goods<sup>63</sup>. In English Law then, the shipowner has the right to demand production of the bill before he delivers the goods, and a holder of an original bill has the ability to obtain delivery on production of the bill. However, the holder of the bill does not have a right to delivery on production, in the absence of a contractual or proprietary right.

It should also be considered what would happen if there is a custom or law at a port that states delivery need not be against production of a bill. In *Sormovskiy 3068*<sup>64</sup>, the carrier delivered without production of the bill of lading. The carrier submitted that if it had discharged the cargo in accordance with the 'practice, custom and law' of the discharge port it would not be in breach of contract because it had not required production of the bill. Clarke J held that if it was the law of a discharge port that goods must be delivered to, say, a state authority without production of the bill, then the obligations under the contract would have been performed. The learned judge reasoned that to hold otherwise would mean the contract could never be lawfully performed<sup>65</sup>. This is the situation, for example, in Chile where all cargo entering the country is placed in the custody of an authorised customs warehouse, and is not delivered to the consignee until cleared by the customs authority. In these circumstances, the shipowner would not be liable for delivering the cargo to the warehouse without requiring production of the bill<sup>66</sup>.

Clarke J thought that if the custom of a port was for delivery without production of

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<sup>62</sup> See further Section 3.

<sup>63</sup> *Glyn, Mills, Currie & Co v. The East & West India Dock Co.* (1882) 7 App. Cas. 591.

<sup>64</sup> [1994] 2 Lloyd's Rep. 266.

<sup>65</sup> *ibid.*, p. 275.

<sup>66</sup> UK P&I Club, [1996] P. &I. Int. 105. *cf. East West Corp v. DKBS 1912 and AKTS Svenborg* [2002] 2 Lloyd's Rep. 182, at 222.

the bill, then the shipowner would also have satisfied his contract. He distinguished though between a custom forming a settled and established practice and a mere practice<sup>67</sup>. Delivery in accordance with the latter would leave the shipowner liable to the owner of the cargo if he did not also require production of the bill, and as the carrier could not show a custom existed in this case he was held so liable.

So far, the discussion has concerned the production or presentation of the bill of lading. The question arises, is the shipowner permitted to demand the surrender of the bill? Such a practice may give the shipowner a vital piece of evidence should proceedings be commenced. The authors of *Maritime Notes and Queries*<sup>68</sup> could not identify any cases on the subject. They submitted that following delivery the bill is exhausted and is merely a receipt, and there was no custom for exhausted bills to be surrendered. More recently Staughton J reviewed the practice of delivery without production of the bill of lading in the oil trade in *The Sagona*<sup>69</sup>. Of the masters giving evidence before him, most delivered without production of the bill and some had had bills 'presented' to them. Only in one case was the bill surrendered to the master<sup>70</sup>. In *The Sormovskiy 3068*, Clarke J seemed to use the phrase 'production of the bill' interchangeably with 'in return for the bill'<sup>71</sup>. The latter phrase would indicate the bill is surrendered, but his use of the term is too inconsistent to draw conclusions from it.

In the earlier case of *The Houda*, Millett LJ pointed out that

"[The shipowner] does not obtain a good discharge unless the person to whom he delivers the goods is the person entitled to them, and he has no means of satisfying himself that he is the person entitled except he produce the bill of lading. In a case like the present, where bills of lading have been signed in triplicate, the others to be void when one is accomplished, he has no means of defending himself against a later claimant who produces a copy of the bill of lading, unless he has obtained a copy himself from the person to whom he delivered the goods."<sup>72</sup>

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<sup>67</sup> *Sormovskiy 3068, ibid.*, at 275.

<sup>68</sup> Vol.IX, (1896), p. 5.

<sup>69</sup> [1984] 1 Lloyd's Rep. 194.

<sup>70</sup> *ibid.*, p. 202, col. 1.

<sup>71</sup> [1994] 2 Lloyd's Rep. 266, at 270-274.

<sup>72</sup> [1994] 2 Lloyd's Rep. 550, at p. 556.

Millett LJ clearly thought surrender of the bill was a good idea, but it would not seem to be part of English Law, nor is it an established custom. A recent book giving practical advice on dealing with bills of lading counsels ships' masters to retain the original bill of lading produced to him<sup>73</sup>.

In addition to the ability of an indorsee to obtain delivery by producing the bill of lading, there is also a separate contractual right to delivery under the Carriage of Goods by Sea Act 1992<sup>74</sup>. Under s. 2(1), the lawful holder of a bill of lading (ie. an indorsee, or consignee) has transferred to him, when he becomes a lawful holder, "all rights of suit under the contract of carriage as if he had been a party to that contract".<sup>75</sup> The contract of carriage will inevitably be for the carriage of goods to a particular destination. If the carrier refuses to deliver to the lawful holder, the latter has a contractual right of action, in addition to any right he may have as the owner of the cargo. This is so even if the carrier delivers to another person on the orders of an unpaid seller – a lawful holder of the bill still has a contractual action against the carrier<sup>76</sup>. It should be mentioned though that this contractual right of action also depends upon the holder actually having possession of the bill<sup>77</sup>.

#### **b) Constructive Possession of the Goods by Possession of the Bill of Lading**

Delivery against production is just one aspect of the possessory rights attached to the transfer of the bill of lading. The other aspect is the ability of the bill to give its holder constructive possession of the goods represented by the bill. This section will not address the transfer of the property in the goods, but the transfer of 'constructive possession' of them.

Many of the definitions of document of title cited in Section 1 referred to the

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<sup>73</sup> Mills, *op.cit.*, paras. 217-8.

<sup>74</sup> Bools, *op.cit.*, p. 150.

<sup>75</sup> See further Section 4.

<sup>76</sup> Debattista, *op.cit.*, para. 2-48.

<sup>77</sup> s. 5(2).

transfer of constructive possession as being one attribute of documents of title. Like the term 'document of title', 'constructive possession' does not appear to have a categorical definition. It is recognised that in general there is no agreed terminology for different types of possession in general English Law<sup>78</sup>, let alone for the possessory rights represented by the bill of lading. It is left for each commentator to define his own terminology. Bools<sup>79</sup> attempted to define 'legal possession', 'constructive possession' and 'symbolic possession'. He defined legal possession as a relationship to the goods which gives the legal possessor the same rights and remedies as a person in actual possession of the goods. He acknowledged that some commentators call this constructive possession<sup>80</sup>. He then defined constructive possession as being the same as legal possession, except that the goods are held by someone on behalf of the person with constructive possession. Bools then went on to define symbolic possession as another sub-category of legal possession. It is like constructive possession, except that no one holds the goods 'on behalf' of the person with symbolic possession. Using this definition, Bools stated that because a carrier is under no obligation to the transferee to hold the goods on his behalf, therefore, the bill of lading in the transferee's hands merely gives him symbolic possession<sup>81</sup>. Bools acknowledged that his definitions were complicated, and it is submitted that they are too complicated for the purpose of this thesis.

Todd noted Bools' definitions, but preferred to define them differently. Todd saw symbolic possession as giving the possessor of the bill all the rights that he would have if he were in actual possession of the goods, eg. a right to sue in conversion<sup>82</sup>. Elsewhere, he stated that

"...the important feature of the document of title is that it gives its holder the right to take delivery of the goods, as against the carrier, in other words 'constructive possession' of the goods."<sup>83</sup>

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<sup>78</sup> Goode, *Commercial Law*, (2<sup>nd</sup> edn.) (1995)p. 46.

<sup>79</sup> Bools, *op.cit.*, pp. 180-1; Debattista, *op.cit.*, para. 2-08.

<sup>80</sup> *ibid.*, p. 180, fn. 50.

<sup>81</sup> *ibid.*, p. 181.

<sup>82</sup> Todd, *op.cit.*, p. 103, fn. 13.

<sup>83</sup> *ibid.*, p. 107.

Todd acknowledged that constructive possession *may* be passed, but that this was not automatic. In this respect he and Bools are in agreement. There is no automatic *right* to delivery of the goods simply from a transfer of the bill, and what makes the bill of lading special is its ability to transfer symbolic possession, not the possibility that constructive possession may pass<sup>84</sup>. They both also note that the holder of the bill of lading does not have a cause of action for non-delivery based simply on possession of the bill<sup>85</sup>.

Palmer & McKendrick divided possession into actual and constructive possession<sup>86</sup>, constructive possession being when possession of the document gives control over the goods<sup>87</sup>. They noted that attempting to draw a distinction between constructive and symbolic possession can be confusing<sup>88</sup>, and so they limited references to symbolic possession or delivery. In fact they only referred to 'symbolic delivery' in relation to bills of lading given gratuitously<sup>89</sup>. It is submitted that avoiding the use of the term 'symbolic' is a good idea when referring to possessory rights, and therefore this section will avoid the use of the term, except in so far as the bill of lading can be regarded as a 'symbol of the goods'.

What is clear from these definitions is that constructive possession arises when goods are in the possession of one person, but under the legal control of another, the holder of the bill of lading. The holder has rights over the goods that would be available if the holder were in fact in possession of the goods themselves. These rights include the ability to sue in conversion, the ability to pledge the goods, and also the right to delivery of the goods on production of the bill. Constructive possession gives the holder of the bill *control*<sup>90</sup> of the goods. As stated by Bowen LJ, the bill is a symbol of the goods, and

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<sup>84</sup> Todd, *op. cit.*, p. 107, Bools, *op. cit.*, p. 200.

<sup>85</sup> Todd, *op. cit.*, p. 111; Bools, *op. cit.*, p. 156.

<sup>86</sup> *op. cit.*, p. 550.

<sup>87</sup> *ibid.*, p. 549.

<sup>88</sup> *ibid.*, p. 550, fn. 27.

<sup>89</sup> *ibid.*, pp. 590-1.

<sup>90</sup> Goode, *Proprietary Rights, op. cit.*, pp. 59-60; Palmer, *op. cit.*, p. 547 *et seq.*

therefore possession of the bill is only equivalent to possession of the goods themselves<sup>91</sup>. This Section will now consider the possessory rights to arise from the bill of lading representing the constructive possession of the goods.

What does the fact that a bill of lading can give its holder constructive possession of the goods enable the holder to do? Aside from allowing the holder to obtain delivery of the goods from the shipowner<sup>92</sup>, the bill of lading is treated as the goods themselves and therefore delivery of the bill is treated as delivery of the goods. The possessory function of the bill therefore allows goods that are in fact at sea to be delivered from the constructive possession of one person to the constructive possession of another by means of transferring the bill of lading. Bools identified the case of *Barber v. Meyerstein*<sup>93</sup> as the first to judicially recognise the possessory function of the bill of lading, if not actually establishing it. *Barber v. Meyerstein* concerned the transfer of two original bills to a buyer, followed by the transfer of the third remaining original bill to someone who advanced money on the security of the bill. The original buyer was held to have had the property<sup>94</sup> in the goods transferred to him by the transfer of the bill. Lord Hatherley said

"...when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of the property, and which, for the purpose of conveying a right and interest in the property, *is the property itself*."<sup>95</sup>

Lord Hatherley saw the bill as representing the goods when considering the transfer of property in the goods. As Bools noted<sup>96</sup>, it is a short step from this position to conclude that possession of the bill is equivalent to possession of the goods themselves.

Taking Lord Hatherley's *dictum* on its face, the bill of lading's ability to symbolise

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<sup>91</sup> After an exhaustive study, Bools came to the conclusion that the English Law relating to bills of lading is very different from US Law, because the English courts treated the bill simply as representing the goods, rather than being a document which gives rise to particular rights and is traded as a document, *op. cit.*, p. 197.

<sup>92</sup> See p. 113, *et seq.*

<sup>93</sup> (1870) L.R. 4 H.L. 317.

<sup>94</sup> The notion of the transfer of the bill transferring the property or ownership of the goods is discussed below in Section 3.

<sup>95</sup> *ibid.*, p. 326 (emphasis added).

<sup>96</sup> Bools, *op.cit.*, p. 179. The notion of symbolic delivery was certainly not new in 1870, as symbolic transfers of land by delivery of a stick or the charter making the transfer was known in Anglo-Saxon times, Holdsworth, *op.cit.*, Vol. III, pp.221-3.



the goods allows the delivery of the bill to perfect transfer of property in the goods. For example, in a sales contract which says that property in the goods is only to pass on delivery, the actual delivery of the goods must take place before the property passes. Where those goods are at sea, however, such delivery is impossible until the ship reaches its destination. By looking on the bill as the symbol of the goods it was possible for the courts to hold that the delivery of the bill of lading was equivalent to delivery of the goods, triggering a transfer of property, depending on the terms of the sale contract<sup>97</sup>.

Aside from the passing of property in the goods, the bill may also be important in triggering payment under a sale contract. If the contract states payment is to be made on delivery, then in the case of the sale of goods carried by sea, payment is to be made on delivery of the bill of lading<sup>98</sup>, and other documents required by the contract. This is the effect of a modern CIF sale contract<sup>99</sup>.

The bill of lading's possessory function is important in financing international sales<sup>100</sup>. The fact that the bill is the symbol of the goods enables goods to be pledged. A pledge can only be created if actual or constructive possession of the goods is delivered to the bank. Obviously, a cargo at sea cannot be delivered to a bank anymore than it can be delivered to a buyer. It is the ability of the bill of lading to transfer constructive possession of the goods, which allows constructive possession of the goods to be delivered to the bank and so create the pledge<sup>101</sup>.

The fact that the bill gives the holder constructive possession of the goods also gives a 'real' right to the goods which may be asserted in the event of seller's or buyers insolvency or bankruptcy<sup>102</sup>. According to Goode<sup>103</sup>, real rights take one of three forms: ownership, possession for a limited interest, or security not based on ownership or

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<sup>97</sup> See Section 3 in general.

<sup>98</sup> *Sanders v. Maclean* (1883) 11 Q.B.D. 327.

<sup>99</sup> Considered further on p. 139.

<sup>100</sup> See further Section 6. See also Palmer & McKendrick, *op.cit.*, p. 571 *et seq.*

<sup>101</sup> *Official Assignee of Madras v. Mercantile Bank of India* [1935] A.C. 53.

<sup>102</sup> Palmer & McKendrick, *op.cit.*, p. 553; Goode, *Proprietary Rights*, *op. cit.*, pp. 2-3.

<sup>103</sup> *op.cit.*, pp. 1-2.

possession. A holder of a bill of lading may not own the goods (that would depend on the terms of the sale contract), but his constructive possession of the goods through holding the bill may be sufficient to protect his interest in the goods. For example, prior to becoming insolvent, a seller could transfer a bill of lading to a bank as security for a pledge. The insolvent's liquidator will seek to distribute the assets of the insolvent's estate amongst his creditors. However, because the bank has constructive possession of the goods through possession of the bill, the liquidator is unable to recover the goods for the general creditors<sup>104</sup>. If a creditor does not have possession of the goods, either actual or constructive, or ownership of them, only a personal right to the goods, he would have to claim as a general creditor against the insolvent's estate.

The transfer of constructive possession by the bill of lading is also important in identifying whether a plaintiff has title to sue in conversion. Because conversion can be committed in many different ways, it is difficult to give a comprehensive definition<sup>105</sup>. However, for present purposes it can be defined as a denial of the plaintiff's rights or the assertion of inconsistent rights in relation to goods<sup>106</sup>. In order to maintain an action for conversion the Plaintiff must have

"(1) ownership and possession of the goods, *or*  
(2) possession of them, *or*  
(3) an immediate right to possess them, but without either ownership or actual possession"<sup>107</sup>

at the time of the conversion.

In *The Future Express*<sup>108</sup>, the buyer of a cargo agreed with his bank that the bills of lading be made in the bank's favour and passed on to them as soon as they arrived from the seller. The buyer then persuaded the carrier to deliver the goods to him. It was not until a year after the delivery that the bills were finally sent to the bank. The bank sued the

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<sup>104</sup> The bank would only have a limited interest in the goods though. Once sold, the bank retains the proportion of the sale proceeds that their interest is in and the remainder is returned to the insolvent's estate.

<sup>105</sup> Roger W.V.H., *Winfield & Jolowicz on Tort* (1998)(15th edn.), p. 588.

<sup>106</sup> *ibid.*

<sup>107</sup> *op. cit.*, p. 597, and the cases cited therein.

<sup>108</sup> [1992]2 Lloyd's Rep. 79, affirmed on appeal [1993] 2 Lloyd's Rep. 542

carriers for damage caused by the misdelivery. The Court of Appeal held that the bank had no title to sue as they had never obtained a possessory title to the goods and had never in fact become pledgees, because at the time the bills were transferred the goods had been delivered and dispersed<sup>109</sup>. At the time of the delivery, the bank had no possessory rights, and the fact they were the named consignees on the bills did not give them a cause of action<sup>110</sup>. There is an exception to this rule based on the case of *Bristol and West of England Bank v. Midland Railway*<sup>111</sup>, where a bank became a pledgee of bills of lading after the goods had been delivered to someone else, and therefore at the time of the wrongful delivery the bank did not in fact have any interest in the goods. The bank sued the carrier and the court held that if the transferor of the bill had a possessory right at the time of the wrongful delivery and was able to sue, then any transferee from him would also acquire the right to sue.

Roskill J considered the *Bristol and West* case in *Margarine Union v. Cambay Prince Steamship Co. Ltd*<sup>112</sup>. He thought that the true interpretation of the case was that the successful cause of action was not the original conversion of the goods, but the conversion following the inability of the carrier to deliver the goods to the bank. It was also suggested by *Clerk & Lindsell on Tort* that the *Bristol and West* rule was not followed in *The Future Express* because the seller had consented to the misdelivery of the goods and therefore had no right to sue the carrier for wrongful delivery. The bank, which received the bill from the seller, did not therefore acquire a right to sue the carrier as the seller had no right himself<sup>113</sup>.

Because the bill of lading usually gives its holder constructive possession of the goods it allows the holder to sue in the tort of conversion. It is therefore within the second of the three alternative requirements for a right to sue in conversion listed above. Even if

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<sup>109</sup> See further on the exhaustion of bills of lading in Section 5.

<sup>110</sup> [1992] 2 Lloyd's Rep. 79, at 88.

<sup>111</sup> [1891] 2 Q.B. 653.

<sup>112</sup> [1969] 1 Q.B. 219.

<sup>113</sup> Brazier M.R. (Ed.), *Clerk & Lindsell on Torts* (2000)(18th edn.), para. 14-49. See also pp. 154-5 below.

possession of the bill does not mean the holder has constructive possession of the goods, a holder may be able to argue he has an immediate right to possession. However, it should be noted that the mere fact of possession of the bill does not mean an automatic *right* to demand possession of the goods<sup>114</sup>.

It should not be assumed that the transfer of the bill of lading will automatically transfer constructive possession of the goods. The only aspect that is always transferred, regardless of the legitimacy of the transfer, is the ability to demand possession of the goods from the ship. All other aspects of the transfer of possessory rights *may* be transferred in the right circumstances. According to Palmer & McKendrick there are two requirements for constructive possession to pass with the bill<sup>115</sup>. Firstly, there must be an intention to transfer constructive possession. Secondly, the goods must be identifiable, creating the inevitable problems with bulk cargoes. Both of these requirements have parallels in the transfer of proprietary rights<sup>116</sup>. However, in respect of the passing of property, the Sale of Goods (Amendment) Act 1995 allowed the property in part of an identified bulk to pass, but this does not apply to the passing of constructive possession, which will not pass until the goods have been ascertained<sup>117</sup>.

Bools stated that the bill's ability to transfer constructive possession, which he called symbolic possession, rested on three rebuttable presumptions<sup>118</sup>. These presumptions are:-

1. The bill of lading manifests the carrier's intention to deliver the goods to the presenter of the bill and not to interfere with the presenter's ability to obtain custody of the goods on arrival.
2. The transfer of the bill raises a presumption that the transferor no longer intends to exercise control over the goods or to interfere with the transferee's ability to obtain

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<sup>114</sup> See pp. 116-7 above.

<sup>115</sup> Palmer & McKendrick, *op.cit.*, pp. 553-4.

<sup>116</sup> See Section 3.

<sup>117</sup> Cf. Goode considered that the buyer would acquire constructive possession in the same way as property, but he gave no argument in support of his statement. *Commercial Law* (2<sup>nd</sup> edn.), p. 247, fn. 149.

<sup>118</sup> Bools, *op.cit.*, p. 190 *et seq.*

possession of the goods.

3. The transfer of the bill raises a presumption that the transferee intends to exercise control over the goods and to exclude all others from exercising control over the goods.<sup>119</sup>

The latter two presumptions can be seen as two sides of the same coin - did the transferor intend to transfer constructive possession and did the transferee intend to receive it. Only one case has considered this issue. Judge Diamond at first instance in *The Future Express*<sup>120</sup> considered that intention to transfer constructive possession was important. He decided that since the parties were aware that the goods had been discharged long before the bills were transferred there could have been no intention to transfer constructive possession.

Bools' first presumption is interesting in that it makes delivery against production a pre-requisite for the bill's ability to transfer constructive possession. This Chapter has considered delivery against production separately from constructive possession as delivery against production existed centuries before the notion of constructive possession existed, but in fact delivery against production can be seen as part of the rights that the holder of the bill of lading has by virtue of constructive possession. If you have constructive possession, you must have the right to obtain actual possession of them.

One of the main reasons why the transfer of constructive possession by transfer of the bill of lading is so important is because it enables the transfer of proprietary rights to be enforced. A transferee of the bill may get property in the goods, but as well as title, he wants the goods themselves. The fact that possession of the bill gives its possessor the ability to demand delivery of the goods makes it an ideal means of perfecting the sale transaction - transfer of the bill transfers the property in the goods; presenting the bill allows the transferee to take actual possession of them. The transfer of constructive

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<sup>119</sup> Bools, *op.cit.*, p. 183.

<sup>120</sup> [1992] 2 Lloyd's Rep. 79, not decided on this issue by the Court of Appeal.

possession and property therefore go hand in hand in sale transactions, and it is unlikely that property would be transferred without constructive possession also being transferred, subject to the problems in relation to bulk cargoes highlighted above.

It would be impossible to identify exactly when the bill of lading became an instrument for the transfer of constructive possession, and a symbol of the goods. Boals concluded transfer of possession grew out of the transfer of property sometime between 1850-1870<sup>121</sup>, but the practice of delivery of the cargo only against production of an original bill of lading surely existed before then. *Lickbarrow v. Mason* recognised the practise of transferring the bill so as to pass the property in the goods, but that practice must have been around for some years before then. All of which begs the question, which came first - the transfer of property, or the transfer of constructive possession, including delivery against production. Delivery against production had been mentioned in the facts of *Lickbarrow v. Mason*, without comment, and so again must have been a common practice not worthy of comment. Transfer of property and delivery against production probably developed together, as it is unlikely that transfer of property came first. If the transfer of the bill transferred property in the goods, but the bill gave the buyer no means to claim the goods from the carrier few buyers would take the risk. Delivery against production must therefore have developed at the same time as, if not before, transfer of property, with the more refined concept of constructive possession appearing in the Nineteenth Century.

There is little doubt that possessory rights became important in the Nineteenth Century<sup>122</sup> because of the problems of the passing of property and contractual rights<sup>123</sup>. If property did not pass, contractual rights did not pass, and a buyer might find himself without a remedy for damage to the goods. Possessory rights were therefore used as a substitute for other more valuable rights. With the amendment to the Sale of Goods Act

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<sup>121</sup> Boals, *op.cit.*, p. 196.

<sup>122</sup> Boals, *op.cit.*, pp. 174 *et seq.*

<sup>123</sup> The problems were caused by the wording of the Bills of lading Act 1855, see pp. 143-4 below.

1979 to allow property in bulk cargoes to pass before ascertainment<sup>124</sup>, and the passing of COGSA 1992 removing the link between property and the transfer of contractual rights, there is therefore less need to rely on a possessory right. The provisions of COGSA 1992 will also mean less reliance on any possessory right to delivery that may exist, as more cargo receivers will now be able to sue the carrier in contract for misdelivery<sup>125</sup>.

### 3. Transfer of Proprietary Rights

In 1794, the landmark case of *Lickbarrow v. Mason* was finally brought to an end. After many hearings the final decision was that the court judicially recognised that by the custom of merchants bills of lading were transferable by indorsement, or delivery, and by such indorsement, or delivery, the property in the goods may be transferred<sup>126</sup>. Although the jury, which declared the custom, actually referred to negotiability of the bill of lading and did not speak of the possibility of transferring property to the goods with the bill, it seems to have been assumed that the property would be transferred with the bill. These two aspects, whether the bill of lading is truly negotiable, and in what circumstances will the transfer of the bill transfer the property will be dealt with in this section.

#### a) The 'Negotiable' Bill of Lading<sup>127</sup>

The traditional bill of lading is a transferable document in that it can be passed from one lawful holder to another. It is, however, sometimes described as a *negotiable* document<sup>128</sup>, and this can lead to confusion as the word 'negotiable' has a particular meaning in English law. Strictly speaking, a negotiable document, or instrument, is one that on its transfer will give a transferee in good faith a good title free from any

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<sup>124</sup> s. 20(A).

<sup>125</sup> Palmer, *op.cit.*, p. 593. Unlike the Bills of Lading Act, COGSA 1992 applies to received for shipment and waybills, which will be discussed in Chapters 6 and 7.

<sup>126</sup> (1794) 5 T.R. 683.

<sup>127</sup> See in general Debattista, *op.cit.*, paras. 3-01 to 3-07.

<sup>128</sup> eg. *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317, at 337; *Carver, op. cit.*, para. 1597; Gilmore G. & Black C.L., *The Law of Admiralty* (1975)(1<sup>st</sup> ed.), p. 94.

defects that may have affected the transferor's title<sup>129</sup>. As will be seen below, a bill of lading is not fully negotiable, in that a transferee will not get a better title than the transferor<sup>130</sup>, but it does share certain characteristics with truly negotiable instruments.

According to Holdsworth, there are three characteristics of negotiability:-

- (i) the document is transferable by indorsement and/or delivery, and the transferee can sue in his own name;
- (ii) consideration is presumed; and
- (iii) a transferee in good faith and for value acquires a good title, even if his transferor did not possess one<sup>131</sup>.

Of these characteristics, only the first is shared by the bill of lading. In *Lickbarrow v. Mason*<sup>132</sup> the court recognised a custom of merchants that the transfer of the bill of lading could transfer the property in the goods. The court acknowledged the *effect* of the transfer of a bill, but the *ability* of the holder of a bill of lading to transfer it must predate that case. In 1753, the case of *Fearon v. Bowers*<sup>133</sup> referred to the indorsement of bills without comment, implying that the practice of indorsement was common, even though the effect of the indorsement was not yet settled. Virtually all the 16th Century bills of lading referred to the 'assignees' of the consignee, implying that a transfer was contemplated when the bill came into existence. Therefore the practice of 'indorsing' the bill, ie. writing the name of the transferee on the reverse of the bill of lading, must have developed during the Sixteenth and Seventeenth Centuries<sup>134</sup>. At the same time as the practice of indorsing the reverse of bills of exchange was developing<sup>135</sup>. Holdsworth stated that the practice of indorsing bills of exchange grew up in the latter half of the Sixteenth Century, but the

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<sup>129</sup> *Osborn's Concise Law Dictionary, op. cit.*, p. 227.

<sup>130</sup> Subject to the *nemo dat* exceptions also discussed below.

<sup>131</sup> Holdsworth W.S., "The Origins and Early History of Negotiable Instruments I" (1915) L.Q.R. 12.

<sup>132</sup> (1794) 5 T.R. 683.

<sup>133</sup> (1753) 1 H. Bl. 356 n. (a).

<sup>134</sup> Although Bensa did refer to an indorsement on the back of a letter of advice from 1401, Bensa, *op. cit.* p. 10-11.

<sup>135</sup> Holdsworth W.S., "The Origins and Early History of Negotiable Instruments II" (1915) 72 L.Q.R. 173, at 182.



development of repeated indorsements did not take place until the Seventeenth Century<sup>136</sup>. It is not unreasonable to suppose that similar indorsements to the bill of lading were taking place at the same time.

The bill of lading is transferable by indorsement. It is also transferable by mere delivery. If it is indorsed in blank, ie. no transferee is named, or if it has been indorsed "to bearer", the transfer of it is achieved by simply delivery of the bill. The practice was judicially recognised by Lord Selborne in *Sewell v. Burdick*<sup>137</sup>, although again the practice of indorsing in blank must have been in existence for some time. In the Eighteenth Century case of *Snee v. Prescott*<sup>138</sup> some of the bills of lading which were the subject of the proceedings had been indorsed in blank. The Lord Chancellor commented that promissory notes and bills of exchange were frequently indorsed in this way, implying that it was a practice worthy of comment because it was not yet well established in transfers of bills of lading. Indorsement in blank or to bearer in bills of lading seems to have developed later than indorsement to a named person, although in bills of exchange, there is evidence for the practice of making them payable to bearer in the early Seventeenth Century<sup>139</sup>.

The second half of Holdsworth's first characteristic of negotiability is that the transferee must be able to sue in his own name. In terms of the bill of lading this refers to the ability to sue the carrier in his own name for damage to the goods. The Bills of Lading Act 1855, followed by COGSA 1992 provided the transferee with a contractual right of action against the carrier and this will be dealt with in Section 4 of this Chapter.

The second characteristic of negotiability is that consideration is presumed, ie. value is presumed to have been given by the transferee and the burden of proof is therefore on the transferor to prove that no value was given. There is no such presumption that the

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<sup>136</sup> *ibid.*

<sup>137</sup> (1884) 10 App. Cas. 74, at 83.

<sup>138</sup> (1743) 1 Atk. 157.

<sup>139</sup> Holdsworth W.S., "The Origins and Early History of Negotiable Instruments III" (1915) 74 LQR 376, at 384, although the bearer of such a bill did not have an independent right of action against the issuer of the bill recognised until 1764, Holdsworth W.S., "The Origins and Early History of Negotiable Instruments IV" (1916) 75 L.Q.R. 20, at 25.

transferee of a bill of lading has given consideration for the transfer<sup>140</sup> and valuable consideration is required in order for transfer of the bill to transfer the property in the goods<sup>141</sup>.

The third characteristic of negotiability is that the transferee in good faith obtains a good title, even if the transferor did not have a good title. For example, if a thief stole a bill of exchange, and then transferred it for value to a third party in good faith, that third party would acquire a good title under the bill even though his transferor, the thief, clearly did not have a good title. This characteristic is not shared by the bill of lading. According to Lord Campbell in *Gurney v. Behrend*<sup>142</sup>

"Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by the appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent bona fide purchaser for value cannot make title under it, as against the shipper of the goods."

This is so because in English Law the bill of lading merely represents the goods, and since the goods themselves are not negotiable, neither is the bill of lading<sup>143</sup>. If the bill of lading were a truly negotiable instrument the transferee in good faith from a thief would obtain a good title. Holding the bill of lading to be negotiable would mean that the 'key to the warehouse' would be negotiable, and keys have never had that quality.

The bill of lading is, therefore, transferable rather than truly negotiable. The bill of lading does, however, go beyond merely being a transferable document, and can, in certain circumstances allow a transferee to obtain a better position than his transferor had. These circumstances relate to stoppage in transit and the general exceptions to the rule that a transferee of goods can take only the title the transferor had.

Stoppage in transit is a remedy of the seller in a sale contract. When the buyer of goods becomes insolvent before he has paid for the goods the unpaid seller who has parted

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<sup>140</sup> See *Benjamin's Sale of Goods, op. cit.*, para 18-051.

<sup>141</sup> *Lickbarrow v. Mason* (1794) 5 T.R. 683.

<sup>142</sup> (1854) 3 E.&B. 622, at 634.

<sup>143</sup> cf. Bools, *op. cit.* Chapter 3 wherein he describes the American position which gives the bill of lading greater negotiability in this respect.

with possession of the goods has the right to stop the goods in transit and retain them until they are paid for<sup>144</sup>. The seller's right of stoppage may be defeated, however. If the bill of lading has been lawfully transferred to the buyer and he then transfers the bill on to a third party who takes it in good faith and for valuable consideration, then the seller's right to stoppage is defeated. This was the ultimate decision of the courts in *Lickbarrow v. Mason* and now enshrined in s. 47(2)(a), Sale of Goods Act 1979. In this sense, the transferee is in better position than the transferor: when the bill is in the hands of the transferor the goods could be stopped; after it has been transferred, the right of stoppage is extinguished. When the transferee is a pledgee the seller's rights are not extinguished, but they can only be exercised subject to the rights of the pledgee<sup>145</sup>.

That the transfer of the bill of lading in these circumstances can 'improve' the position of the transferee can be seen as an 'accident of litigation'. Throughout the hearings of *Lickbarrow v. Mason* the weight of judicial opinion was against the transfer of the bill diminishing the seller's rights in this way, and one reason why the decision finally went the other way was because the defendants gave up the litigation before a final appeal to the House of Lords<sup>146</sup>. In the event, when the law relating to the sale of goods was consolidated in the Nineteenth Century the exception for transferees of the bill of lading taking free from the seller's right of stoppage was extended to other documents of title covered by the Sale of Goods Acts.

Because the bill of lading is treated as a symbol of the goods it should be expected that the circumstances in which the transferee of goods get a better title to the goods than his transferor also apply to the transfer of the bill of lading. These circumstances relate to the exceptions to the rule of *nemo dat quod non habet*<sup>147</sup>, whereby a transferee of goods may receive a better title than the transferor. There are various exceptions, some of which

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<sup>144</sup> Now s. 44, Sale of Goods Act 1979.

<sup>145</sup> s. 47(2)(b), Sale of Goods Act 1979.

<sup>146</sup> Chorley R.S.T., "The Conflict of Law and Commerce" (1932) 139 L.Q.R. 51, at 58. It is interesting to note that under US law the transfer of the bill to the buyer himself will terminate the right of stoppage - see Atiyah P.S., *Sale of Goods* (9th edn.), p. 412; Bools, *op.cit.*, p. 160.

<sup>147</sup> Literally, no one can give what he has not got.

would be relevant to bills of lading. Those that would be relevant include mercantile agent, seller or buyer in possession, estoppel<sup>148</sup>.

If goods or documents of title are in the possession of a mercantile agent, whose ordinary business is to buy and sell goods, and he sells the goods without the owner's permission, then the innocent buyer will get a good title. This situation is obviously one that could relate to a bill of lading. An agent with possession of bills in order to transfer them on to those he is ordered to, may sell them for his own benefit. Even though the agent has no title to the bill or the goods, anyone to whom he transfers the bill will nevertheless get a good title by virtue of s. 2, Factors Act 1889.

If a seller keeps possession of the bill of lading after a sale, or if the buyer of goods obtains possession of the bill of lading before the sale, neither has a good title to the goods. However, if they transfer the bill of lading in those circumstances the innocent transferee will obtain a good title by virtue of Factors Act 1889, ss. 8 & 9, and Sale of Goods Act 1979, ss. 24 & 25.

Estoppel is an equitable device used in many areas of law to prevent injustice. In this case, if the owner of the goods knows they are being sold by a seller with no title to sell them, he will be 'estopped' from denying later that the seller had no right to sell<sup>149</sup>.

In all these exceptions, the seller or transferor's title is defective or non-existent, yet first the Common Law and then Statutory Law provides that the buyer or transferee still acquires a good title. These exceptions, as applied to the bill of lading, and the rule relating to stoppage in transit, give the bill an element of negotiability. To say that the bill of lading is semi-negotiable would be too simplistic<sup>150</sup> - it is a transferable document, with elements of negotiability in certain circumstances. The use of the word 'negotiable' in relation to bills of lading should be restricted where possible. However, it seems to be an established

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<sup>148</sup> Exceptions also include sales under common law, or statutory powers of sale, sale under a voidable title, motor vehicles subject to a hire-purchase agreement. The exception of market overt was abolished by Sale of Goods (Amendment) Act 1994.

<sup>149</sup> Referred to in s. 21(1), Sale of Goods Act 1979.

<sup>150</sup> See Negus R.E., "Negotiability of Bills of Lading" (1921) 37 L.Q.R. 442, at 460.

practice to describe non-transferable bills as non-negotiable<sup>151</sup> and so the use of the term seems likely to persist.

## **b) When is Property Transferred?**

It has long been recognised that the transfer of the bill of lading, of itself, does not transfer the property in the goods<sup>152</sup>, but the transfer of the bill gives effect to the transfer of the transfer of property under the underlying sale contract. As Bools has pointed out<sup>153</sup>, *Lickbarrow v. Mason* only decided that the bill of lading was a document capable of transferring property, not that property was automatically transferred with the bill.

According to Lord Mustill in *The Delfini*<sup>154</sup>

"[The bill of lading] is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by indorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed."

The property then is passed in accordance with the sale contract, and the transfer of the bill of lading is merely a 'convenient mechanism'<sup>155</sup> by which property is transferred. The reason why the bill of lading has been for many years a convenient mechanism was explained in Section 2 of this Chapter. The transfer of the bill will usually transfer the ability to take possession of the goods. If the transfer of the bill were also to trigger the passing of property, not only would the sale contract be accomplished, but also the buyer would have some measure of security in being able to claim the goods from the carrier by producing the bill. It will be considered in Section 5 of this Chapter how real that security is.

### **(i) Requirements for the transfer of property**

As mentioned above, the sale contract will govern when property is to pass. It may

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<sup>151</sup> See further Chapter 7.

<sup>152</sup> Lord Bramwell in *Sewell v. Burdick* (1884) 10 App. Cas. 74, at 105.

<sup>153</sup> *op. cit.*, p. 18.

<sup>154</sup> [1990] 1 Lloyd's Rep. 252, at 268.

<sup>155</sup> Goode, *Proprietary Rights*, *op. cit.*, p. 60.

state expressly that property will only pass on payment of the price, or on actual delivery of the goods. In those cases, the transfer of the bill of lading will not affect the passing of property. By s. 17, Sale of Goods Act 1979, property passes when the parties to the contract intend it to pass. However, while intention is the most important aspect of the passing of property, it is not the only requirement when it is intended that the transfer of the bill of lading triggers the passing of the property.

According to Wilson<sup>156</sup>, there are four requirements for the transfer of the bill to transfer property in the goods:-

**(A) The bill must be transferable on its face.**

This requirement comes from the custom of merchants as found by the jury in *Lickbarrow v. Mason*:

"... by the custom of merchants, bills of lading, expressing goods or merchandizes to have been shipped by any person or persons to be delivered to *order or assigns*, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred to such person or persons."<sup>157</sup>

As far as that jury was concerned, the bill of lading had to be an order bill, ie with the words "order" or "assigns" present, if it were to transfer property. The affect of this requirement will be considered further in Chapter 7.

**(B) The goods must be in transit at the time of the indorsement**

This requirement also comes from the jury finding of custom quoted above. They identified the relevant time for indorsement as "after such goods have been shipped, and before the voyage performed". The goods do not necessarily have to be at sea, but the basic requirement is that they must not yet have been delivered to someone entitled to their

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<sup>156</sup> Wilson, *op. cit.*, pp. 138-140.

<sup>157</sup> (1794) 5 T.R. 683, at 685 (emphasis added).

delivery<sup>158</sup>.

**(C) The bill must be initiated by someone with good title**

This requirement is to be expected as the bill of lading is not a negotiable instrument, and therefore in order to transfer a good title, the transferor must himself possess one, subject to the exceptions outlined above.

**(D) The indorsement must be accompanied by an intention to transfer the ownership in the goods covered by it**

As the transfer of the bill itself is not enough to transfer the property in the goods, it is necessary to look at the intention of the parties - what did they intend by the transfer of the bill? If they intended the property in the goods to pass to the buyer and all the other requirements are satisfied, then property will be transferred<sup>159</sup>.

The transfer of the bill of lading for value is treated as *prima facie* evidence of an intention to pass the property in the goods<sup>160</sup>. However, it may be that the parties intended that less than the full property would be transferred on the transfer of the bill. In *Hibbert v. Carter*<sup>161</sup> the bill of lading had been indorsed to a creditor, but the shipper only intended to indorse it as security for a debt. The court held that where a bill was transferred to a creditor, the property will usually pass to the creditor, but that the parties were free to agree something else. A new trial was ordered to allow the plaintiff the chance to prove he did not intend to transfer the whole property in the goods but that the creditor was to receive the net proceeds of sale of the goods. The plaintiff succeeded in showing this at the new trial and so was able to claim on the insurance policy in respect of the goods.

According to s. 19, Sale of Goods Act 1979, if the bill of lading states the goods are deliverable to the order of the seller, the seller is *prima facie* taken to reserve the right of disposal, ie. to retain the property in the goods until a condition, such as payment or

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<sup>158</sup> See further Section 5 below on the extent to which the bill is transferable.

<sup>159</sup> *Newsom v. Thornton* (1805) 6 East 17.

<sup>160</sup> *Dracachi v. The Anglo-Egyptian Navigation Company* (1868) L.R. 3 C.P. 190.

<sup>161</sup> (1787) 1 T.R. 746.

acceptance of a bill of exchange, has been performed. This means that unless the condition is satisfied, the transfer of the bill of lading will not be taken as *prima facie* intention to pass property.

Under s. 17, Sale of Goods Act 1979, property in the goods passes when the parties intend it to pass. Each sale contract therefore needs to be looked at separately to see what the parties intended. Some generalisations can be made about the most common sale contracts in carriage of goods by sea, CIF<sup>162</sup> and FOB<sup>163</sup>. Under a CIF contract, the seller is responsible for the cost, insurance and freight for the transport of the cargo. The seller will not release the documents (invoice, insurance policy and bill of lading) until he has been paid for the goods. The risk of shipment under a CIF contract passes to the buyer, who must accept the documents if tendered, and pay the purchase price, even though the goods have been lost<sup>164</sup>. Under s. 20, Sale of Goods Act 1979, risk normally passes with the property. However, in CIF contracts property in the goods does not pass on shipment, but usually on transfer of the bill and other documents<sup>165</sup>, because that is what the parties have agreed.

FOB contracts are very different type of contract, and there are many variations of them<sup>166</sup>. Under a classic FOB the buyer arranges the shipment of the goods and pays the freight and insurance himself, whereas the seller arranges for the delivery of the goods to the ship and obtains a bill of lading. Property in the goods under a FOB contract passes when they cross the ship's rail, ie. on shipment<sup>167</sup>. However, this still depends on the intention of the parties. Where the FOB seller has taken the bill of lading to his own order, according to *Carver*<sup>168</sup>, the prevailing view appears to be that property passes only on full

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<sup>162</sup> Cost; insurance; freight.

<sup>163</sup> Free on Board.

<sup>164</sup> *Groome Ltd v. Barber* [1915] 1 K.B. 316.

<sup>165</sup> *Smyth (Ross T) & Co Ltd v. T D Bailey, Son & Co* (1940) 45 Com. Cas. 292.

<sup>166</sup> See Carr I., *International Trade Law* (1996), p. 30.

<sup>167</sup> *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance* (1886) 12 App. Cas. 128. See Bridge, *op.cit.*, para.10-06; Chuah J.C.T., *Law of International Trade* (2<sup>nd</sup> edn.)(2001), para. 5-29 *et seq.*

<sup>168</sup> *Carver, op.cit.*, para. 6-023.



payment, regardless of shipment or the transfer of the bill of lading. The fact remains, however, that whatever the type of sale contract used, the intention of the parties as to when property is transferred is paramount. All the circumstances of the case will be looked at to decide when property passes, not just when the bill of lading is transferred.

*Halsbury*<sup>169</sup> suggested that a fifth requirement may be added to Wilson's four, that the transfer of the bill of lading must be accompanied by consideration. It is the accepted view that property will not pass unless value is given for the transfer of the bill. This view is based on the *dictum* of Lord Selborne in *Sewell v. Burdick*. He said that *Lickbarrow v. Mason* could not be taken to mean that the property will be transferred even when there is no consideration<sup>170</sup>. However, as Palmer & McKendrick point out<sup>171</sup>, Lord Selborne's comment was *obiter* and the case concerned a pledgee not a voluntary transferee. They consider that there is no reason why value needs to be given for property or possessory rights to pass on a transfer of a bill. There is, after all, no requirement in English Law that goods may only be transferred in return for consideration - the test is one of intention.

## **(ii) Where no property is transferred**

According to *Halsbury*<sup>172</sup> a transfer of the bill of lading purporting to transfer property in the goods will not do so in the following circumstances:-

(A) where there is no consideration.

(B) where the transfer is made to a transferee who is aware of circumstances which would make the transfer inoperative, such as the insolvency of the buyer through whom he claims<sup>173</sup>.

(C) where the transferor has no property to pass. This would include the situation of when one original bill of lading has already been indorsed - any indorsements of other originals are ineffective. This will be dealt with further in Section 5 below.

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<sup>169</sup> *Halsbury's Laws of England* (4<sup>th</sup> edn. Reissue)(1997) Vol. 43(2), para. 1558.

<sup>170</sup> (1884) 10 App. Cas. 74, at 80. He did not however give authority for his statement.

<sup>171</sup> *op. cit.* at 590. See also Debattista, *op. cit.*, paras. 3-20 to 3-24.

<sup>172</sup> *ibid.* See the comment above.

<sup>173</sup> *Cumming v. Brown* (1837) 1 Camp. 104.

(D) where there is no intention for property to pass. This is dealt with in (i) above and (iii) and (iv) below.

(E) where the goods have already been delivered to a person entitled to delivery. This will be dealt with further in Section 5 below.

### **(iii) Special property**

The parties may intend the general property to remain with the transferor of the bill and the transferee receives a *special* property. The splitting of property into different types is hinted at in *Hibbert v. Carter*<sup>174</sup>, where the court acknowledged that the parties could intend to pass less than the full property in the goods. It was recognised by Lord Selborne in *Sewell v. Burdick* that parties may refer to the 'absolute' passing of property between them, when in fact all that has been transferred is a special property. In truth the most apt description of the transaction between them is pledge, rather than assignment or transfer<sup>175</sup>. Where a special property passes to the transferee, the general property will normally remain with the transferor, but this is again subject to intention<sup>176</sup>.

### **(iv) Transfer of property without the bill of lading**

As mentioned previously, it is not necessary to use the transfer of the bill of lading to trigger the passing of property. In *Coxe v. Harden*<sup>177</sup>, one of the bills of lading had been indorsed to the plaintiffs. However, the court held that property in the goods was intended to pass to the defendants upon delivery of the goods. The defendants had managed to obtain possession of the goods using an unindorsed bill of lading. The court decided that however wrongfully the Captain had acted in releasing the goods, the defendants title to the goods was perfected upon delivery, as that is what the parties had intended. The fact that a bill was in fact indorsed to someone else did not affect the property in the goods in that case. More evidence of the limited role that the bill of lading has to play in transferring

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<sup>174</sup> (1787) 1 T.R. 746.

<sup>175</sup> (1884) 10 L.R. H.L. 74, at 82.

<sup>176</sup> *Carver, op.cit.*, para. 6-032.

<sup>177</sup> (1803) 4 East 211.

of property comes from *The Future Express*<sup>178</sup> and the oil trade in general. In that case the goods had been delivered before the bill of lading had been transferred to the bank financing the deal. The bill of lading was not in fact transferred to the buyers until a year after actual delivery of the cargo. Judge Diamond QC held at first instance that the parties intended property to pass without the transfer of the bill and indeed property did pass shortly before actual delivery of the oil. The transfer of the bill of lading, while a convenient mechanism for the passing of property in other trades, is clearly not convenient for the oil trade, and will be considered further in Section 6.

Many of the cases regarding when property was passed came about because between 1855 and 1992 the transfer of rights under the carriage contract was linked to the passing of property, because of the wording of the Bills of Lading Act 1855. In these circumstances, whether or not property had passed was crucial, and the problems of the passing of property were highlighted. The transfer of the contractual rights themselves will be dealt with in Section 4 below.

#### **4. Transfer of Contractual Rights and Liabilities**

Although the terms of the contract of carriage are dealt with in Chapter 3, the transfer of them is part of the document of title function. Assignment of the contract of carriage was not possible at all until the passing of the Bills of Lading Act in 1855, and then the transfer of contractual rights was linked to the transfer of property. The Bills of Lading Act was repealed and replaced by the Carriage of Goods by sea Act 1992 (COGSA 1992). The link between the passing of property and contractual rights has now been removed in English Law<sup>179</sup>, but the development of the transfer of contractual rights and liabilities occurred at a later stage than the transfer of constructive possession or proprietary rights and will be briefly summarised before COGSA 1992 is considered.

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<sup>178</sup> [1993] 2 Lloyd's Rep. 542 (CA).

<sup>179</sup> Some Commonwealth jurisdictions still have national laws based on the Bills of Lading Act 1855.

### a) Common Law Position

Before 1855, the Common Law rule was that a transferee of the bill of lading might well have had the property in the goods transferred to him, but he could not sue the carrier if the goods were damaged. This is attributable to the Doctrine of Privity - only the original parties to a contract at Common Law could sue or be sued on a contract, and those rights and liabilities could not be transferred to a third party. The Doctrine has now been modified by the Contracts (Rights of Third Parties) Act 1999. A third party may now rely on a defence in a contract of carriage for goods by sea if the contract was intended to benefit him that way. However, the provision is not intended to give positive rights<sup>180</sup>. A transferee of a bill of lading, being a third party, had no right to sue on the carriage contract even though he had had the bill of lading transferred to him<sup>181</sup>.

Various means were used to circumvent this rule, including suing the carrier in tort<sup>182</sup>, arguing that the shipper made the contract as agent of the transferee<sup>183</sup>, arguing that a new implied contract occurs between carrier and transferee<sup>184</sup>, allowing the shipper to sue on behalf of the transferee<sup>185</sup>, and equitable assignment of contractual rights<sup>186</sup>. None of these methods was entirely successful in meeting the requirements of a transferee in possession of damaged goods, and so, as with many areas of commercial law, it was a statutory change in maritime law that led the way towards fully transferable contracts<sup>187</sup>.

### b) Bill of Lading Act 1855

This Act linked the transfer of the contract to the transfer of property<sup>188</sup>, ie. if

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<sup>180</sup> s. 6(5)(a).

<sup>181</sup> *Thompson v. Dominy* (1845) 14 M. & W. 403.

<sup>182</sup> *The Aliakmon* [1986] A.C. 785.

<sup>183</sup> *The Kapetan Marcos NL* [1987] 2 Lloyd's Rep. 321.

<sup>184</sup> *Brandt v. Liverpool Brazil & River Plate SN Co.* [1924] 1 K.B. 575.

<sup>185</sup> *Dunlop v. Lambert* (1839) 6 Cl. & F. 600.

<sup>186</sup> Curwen N., "The problems of transferring carriage rights: an equitable solution" [1992] J.B.L. 245

<sup>187</sup> A general right of legal assignment of contracts was introduced by the Judicature Act in 1873. However, this required notice to be given to the carrier that the contract had been assigned. This provision is now s. 136(1) Law of Property Act 1925.

<sup>188</sup> See Section 3 above.

property passed to the transferee "upon or by reason of" the transfer of the bill then the contractual rights and liabilities automatically passed to him, without any formalities<sup>189</sup>. This linking of the contract and property in the goods was not, with hindsight, a good solution to the problem of transferring the contract. Changes in shipping technology, such as bulk carriage, and the development of new shipping documents, such as sea waybills, meant that the 1855 Act caused more problems than it solved<sup>190</sup>. Because property in bulk goods could not pass under s. 16 Sale of Goods Act 1979<sup>191</sup> until the bulk is ascertained, ie. separated on delivery, or by exhaustion, the transfer of the bill would never transfer the property in bulk goods. Because property does not pass "upon or by reason of" the transfer of the bill of lading, the contractual rights did not pass under the 1855 Act<sup>192</sup>. Also, a transferee of any other shipping document, such as the increasingly popular sea waybill, would not get the carriage contract passed to him under the Act, which only applied to true bills of lading<sup>193</sup>.

Criticism of the Act started in the 1890's<sup>194</sup> and reached a crisis point in the 1980's and 1990's when it was feared that the UK would lose its place in world shipping if the defects in the Act were not addressed<sup>195</sup>. The Law Commission commenced an investigation of the passing of property in bulk goods<sup>196</sup> but soon realised that the problems were wider than just bulk goods<sup>197</sup> and could not be solved by altering the way in which property in bulk goods could be transferred. They drafted a final report regarding the Rights of Suit in Respect of Carriage by Sea<sup>198</sup>, which culminated in enactment of the Carriage of Goods by Sea Act 1992<sup>199</sup>. The problem of transferring property in bulk goods

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<sup>189</sup> s. 1.

<sup>190</sup> eg. Hudson A.H., "Sales from Bulk" [1989] L.M.C.L.Q. 420, Lord Lloyd, "The Bill of Lading: Do We Really Need It?" [1989] L.M.C.L.Q. 47.

<sup>191</sup> Before the amendments in 1995.

<sup>192</sup> *The Aramis* [1989] 1 Lloyd's Rep. 213.

<sup>193</sup> The reasons why a sea waybill is not a true bill of lading will be discussed in Chapter 7.

<sup>194</sup> Carver T.G., "On Some Defects in the Bill of Lading Act 1855" (1890) 23 L.Q.R. 289.

<sup>195</sup> Davenport B.J., "Archaic Laws that leave us all at sea" *The Times*, [1991] 23 April.

<sup>196</sup> Law Com. Working Paper No. 112: *Rights of Goods in Bulk*.

<sup>197</sup> Law Com. No. 196, *Rights of Suit in Respect of Carriage by Sea* (1991) ("Law Com. No. 196"), para. 1.5.

<sup>198</sup> *op. cit.*

<sup>199</sup> See the excellent assessments of the Act and the problems leading to it in Howard T., "Carriage of Goods by Sea Act 1992" [1993] J.M.L.C. 181, Reynolds F.M.B., "Further Thoughts on The Carriage of Goods by

was eventually tackled in the Sale of Goods (Amendment) Act 1995, but that is beyond the scope of this Thesis.

### c) Carriage of Goods by Sea Act 1992<sup>200</sup>

The basic scheme of COGSA 1992 is that a person who becomes a lawful holder of the bill of lading has transferred to him all the rights of suit under the contract of carriage, as if he had been an original party to the contract<sup>201</sup>. A lawful holder of the bill is defined<sup>202</sup> as a person who takes a bill in good faith by virtue of him being in possession of the bill and being: the named consignee; the transferee by virtue of an indorsement of the bill; or the transferee by virtue of delivery of a bearer bill; or the transferee who took possession of the bill after it became exhausted as a document of title, by virtue of a contract made before the exhaustion<sup>203</sup>.

By this Section, the old link between the passing of property and contractual rights is removed. This could, however, create the situation where the person who suffered a loss (the owner of the goods) did not have a contractual right of action. This is partially remedied by s. 2(4), which gives the lawful holder of the bill the ability to sue the carrier on behalf of the loss sufferer. This is only a partial remedy, as the loss sufferer has no means to compel the lawful holder to commence an action on his behalf<sup>204</sup>.

Another old link removed by COGSA 1992 is the link between contractual rights and contractual liabilities. Rights and liabilities were passed together under the 1855 Act. This was unsatisfactory for certain holders of the bill, who held for security purposes only. To render them automatically liable under the carriage contract would leave them open to

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Sea Act 1992 (UK)" [1994] J.M.L.C. 143, and Reynolds F.M.B., "Carriage of Goods by Sea Act 1992" [1993] L.M.C.L.Q. 436.

<sup>200</sup> Hereafter "COGSA 1992".

<sup>201</sup> s. 2(1)(a).

<sup>202</sup> s. 5(2).

<sup>203</sup> s. 5(2)(a)(c). In *The Aegean Sea* [1998] 2 Lloyd's Rep. 39, the Court held that a sub-buyer who had been sent an indorsed bill of lading in error had not become a lawful holder.

<sup>204</sup> Reynolds identified this a possible 'lacuna' in the new, particularly in respect of pledgees who may not become a lawful holder themselves: see Reynolds "*Further Thoughts*" *op. cit.*, at 150-151.

actions, such as for freight<sup>205</sup>, which are wholly inappropriate<sup>206</sup>. The Law Commission decided the fairer solution was to transfer liabilities only to a lawful holder who takes or demands delivery of the goods from the carrier, or makes a claim under the contract against the carrier<sup>207</sup>. Thus a pledgee holder of a bill would have *rights* under the contract transferred to him under s. 2(1), but not the liabilities unless, to enforce security, he had taken the goods or made a claim against the carrier. Only then would the carrier be able to maintain an action against him.

With the automatic transfer of rights, and those rights being divorced from liabilities, the position of the original shipper and intermediate holders of the bills needs to be discussed. COGSA 1992 provides that the rights of the original shipper are extinguished by the transfer of the bill<sup>208</sup>. In contrast, s. 3(3) makes it clear that the original shipper remains liable under the contract of carriage. This treatment of the shipper has been criticised<sup>209</sup> and it remains to be seen whether any injustice is caused.

For intermediate holders of the bill the position is simple - his rights under the contract are extinguished when he transfers the bill by virtue of s. 2(5). With regard to his liabilities, it is considered that these are also extinguished on transfer as he will no longer be "the person in whom rights are vested" in order for s. 3(1) to attach liabilities to him<sup>210</sup>. One of the few cases to consider COGSA 1992 was in relation to this area. *The Berge Sisar*<sup>211</sup> concerned a claim by buyers of propane against the sellers and carriers for defective goods and/or damaged caused to the goods. The carriers counterclaimed against the buyers for damage done to the ship by the cargo. The carriers claimed on the basis that the buyers were liable as lawful holders of the bill of lading under s. 3(1) because they had demanded delivery of the cargo, although they had subsequently sold the cargo and

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<sup>205</sup> As in *Sewell v. Burdick* (1884) 10 L.R. H.L. 74

<sup>206</sup> Law Com. No. 196, para. 3.3.

<sup>207</sup> s. 3(1).

<sup>208</sup> s. 2(5).

<sup>209</sup> See the Note of Partial Dissent to the Commission Report by Clive, and Bradgate R.& White F., "The Carriage of Goods by Sea Act 1992" [1993] M.L.R. 188, at 197-200.

<sup>210</sup> Benjamin, *op. cit.*, para. 18-097.

<sup>211</sup> [1998] 2 Lloyd's Rep. 475.

transferred the bill to someone else before actual delivery. The matter came before the courts on a preliminary hearing as to whether the buyer was entitled to an indemnity against the seller in respect of liability they might have had to the carrier. Waller J concluded that the carriers had a *bona fide* claim against the buyers. The Court of Appeal allowed an appeal against his decision. They decided that the lawful holder of the bill became subject to contractual liabilities if they take any of the steps in s. 3(1), but their position was not irreversible unless they actually took delivery<sup>212</sup>. If the lawful holder is subject to the contractual liabilities and subsequently transfers the bill, he remains liable until the new lawful holder does one of the acts mentioned in s. 3(1), but once the new holder becomes liable the previous holder is exonerated.

The Court of Appeal decision allowing the appeal was only by a 2-1 majority. Sir Brian Neill thought the appeal should not be allowed, because he considered that once the liabilities had attached to a holder it required clear words in the statute to transfer or extinguish those liabilities and COGSA 1992 did not contain those clear words<sup>213</sup>. The majority view was based on a reasonable interpretation of COGSA 1992. On appeal to the House of Lords, the appeal was dismissed on the grounds that on consideration of the facts the buyers had not demanded delivery and so never had the liabilities of the contract transferred to them under s. 3(1)<sup>214</sup>. The House then went on to consider, albeit *obiter*, what would happen if a buyer did make a demand for the goods and subsequently transfer the bill of lading. Lord Hobhouse considered that the mutuality of the contractual relationship of the buyer and carrier meant that if a person ceased to have contractual rights vested in him after transfer of the bill, he should no longer be subject to the liabilities<sup>215</sup>. The decision seems to be a logical one for there can be little reason to have all intermediate holders of the bill liable to the carrier for any breach of the contract.

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<sup>212</sup> *ibid.* at 486.

<sup>213</sup> *ibid.* at 484.

<sup>214</sup> [2001] 1 Lloyd's Rep. 663, at 676.

<sup>215</sup> *ibid.* at 678.



#### **d) Consideration**

Whatever the case may be for the transfer of possessory and proprietary rights, COGSA 1992 does not refer to consideration or value at all, which should lead to the conclusion that it is not required in order for contractual rights to pass<sup>216</sup>. Consideration had been impliedly required for transfers under the Bill of Lading Act 1855, because contractual rights were linked to the passing of property, so consideration, according to Lord Selborne at any rate, would have to have passed in order to trigger the passing of property<sup>217</sup>.

#### **e) Other Documents**

COGSA 1992 not only altered the regime under which contractual rights and liabilities passed, but also extended the regime to documents other than the traditional bill of lading, such as the received for shipment bill, sea waybill, and has the potential to extend to 'electronic bills'<sup>218</sup>. These other documents will be dealt with in more detail in Part II of this Thesis.

#### **f) Conclusion**

Unlike the transfer of possession and property rights, the transfer of contractual rights is purely statutory and does not have a background in mercantile custom. Although the Bills of Lading Act, has given rise to some litigation, due to poor drafting and the specific problems relating to bulk carriers, the operation of the transfer of contractual rights is easy to understand, particularly since the enactment of COGSA 1992. It does not rely on intention or consideration, but the mere transfer of the bill to a 'lawful holder'. In this respect, contractual rights are arguably 'more transferable' than the other rights. Because of its more recent history and statutory basis it should not be thought that the transfer of the

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<sup>216</sup> Benjamin, *op. cit.*, para. 18-051.

<sup>217</sup> See p. 140 above

<sup>218</sup> s. 1(5), COGSA 1992.

contract is an essential part of the function of the bill as a document of title. If the transfer of a bill of lading did not attract the operation of COGSA 1992 it would not diminish the bill's role in transferring property and possessory rights.

## **5. Extent of Document of Title Status**

### **a) Commencement of Document of Title Status**

#### **(i) Shipped bills**

Traditionally, in order to qualify for the status of a document of title a bill of lading had to be a shipped bill, ie. one that represents the goods to be actually loaded on board a ship. This is based on the custom found by the jury in *Lickbarrow v. Mason* who referred to goods "*shipped* by any person or persons to be delivered to order or assigns"<sup>219</sup>. The custom of treating bills as transferable documents only applied therefore to shipped bills. There is, however, no reason why new customs can not grow up involving different documents. This will be dealt with further in Chapter 6.

#### **(ii) Goods never loaded**

Where goods were never in fact loaded on a ship, but a bill was nevertheless issued stating goods had been loaded, then that bill is not a document of title<sup>220</sup>. This accords with the view in English Law that the bill of lading is purely a symbol of the goods - if there are no goods, there can be no symbol of them. In *Hindley v. East Indian Produce Co*<sup>221</sup>, the action was between the parties to the sale contract and the major issue was whether the bill presented was a 'valid and effective' document under the sale contract. The judge was not called upon to decide whether the carrier would have been liable under such a bill. This area is now governed by s. 4, COGSA 1992, which states that the shipped bill is conclusive evidence of shipment in the hands of the lawful holder, ie. all holders except the original shipper. The carrier is not able to deny that the goods were shipped and will be

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<sup>219</sup> (1794) 5 T.R. 683, at 685, emphasis added.

<sup>220</sup> *Hindley v. East Indian Produce Co* [1973] 2 Lloyd's Rep. 515, at 519.

<sup>221</sup> [1973] 2 Lloyd's Rep. 515.

liable to the lawful holder if he cannot produce the goods<sup>222</sup>.

## b) Fraud

If a bill of lading, valid on its face, has in fact been issued due to a fraud, it will not be a document of title. In *Schuster v. McKellar*<sup>223</sup> the plaintiff sellers purchased goods for their buyer, Coles. Coles then engaged a ship for their carriage. The plaintiffs delivered the goods to the ship and received the mates' receipts in blank. Coles induced the carrier to issue bills of lading to his order. These bills were then indorsed to a *bona fide* indorsee, who then took delivery of the goods. The plaintiffs sued the carrier for conversion, and the court found for the plaintiffs. The issue and transfer of the bill had no effect on the ownership of the cargo, which remained at all times with the plaintiffs, and carrier was not justified in issuing bills of lading in those circumstances<sup>224</sup>.

In *Finlay v. Liverpool and Great Western SS Co*<sup>225</sup> the goods were shipped by Mann who had in fact fraudulently obtained possession of the goods from the true owner. Mann obtained bills of lading and indorsed them to the plaintiff. The carrier later delivered to Porter, who was the true owner. The plaintiff sued the carrier, but the court held that as Mann had never had any title to the goods he was unable to pass on a good title to the plaintiff. This case is often used as authority for the statement that the carrier is protected, even against the holder of a bill of lading, if he delivers to the true owner. It could equally be used as authority for the statement that if you do not own the goods that you ship any bill you obtain from the carrier is not a symbol of them, is not a document of title, and will have no effect on the transfer of property in the goods. The bill is not a true negotiable instrument - the issue of the bill will not allow a transferee to obtain a title if the transferor

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<sup>222</sup> See Chapter 2, p.55 .

<sup>223</sup> (1857) 7 El. & B. 1704.

<sup>224</sup> Cf. *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429, where in similar circumstances the carrier was not held to be liable. In *Nippon Yusen* property in the goods had already passed to the buyers on delivery alongside, and the carrier had been justified in issuing bills of lading to the buyers who were named as shipper on the mates receipt.

<sup>225</sup> (1870) 23 L.T. 251.

did not in fact have a title to transfer<sup>226</sup>. However, the transferee of such a bill, provided he takes in good faith, would have transferred to him the rights under the contract of carriage by virtue of s. 2(1), COGSA 1992, which does not make a distinction between bills relating to cargo the shipper owns and bills relating to cargo he does not.

Another type of fraudulent bill of lading is a forged bill, ie. one which relates to real goods but which has been fraudulently produced by someone other than the carrier. This issue first came before the courts in *Motis Exports v. Dampskibsselskabet*<sup>227</sup>. There the plaintiff shipped goods and received a bill of lading from the defendant carrier. A forged bill was presented to the carrier by someone who took delivery of the goods and stole them. The plaintiff then sued the carrier for misdelivery. The court held that the defendant carrier, although a victim of the fraud too, was liable. Allowing the carrier to deliver against a forged bill of lading without liability would mean "the integrity of the bill as the key to the floating warehouse would be lost"<sup>228</sup>. A forged bill was not a key to the warehouse, but a copy which sadly was good enough to gain access to the warehouse.

The transfer of this type of forged bill will obviously not transfer property, nor possession, for the same reason as the fraudulently obtained bill - it is not a symbol of the goods and it is not put into circulation by someone with a good title. The transfer of this type of forged bill will not trigger the operation of COGSA 1992. A forged bill of lading, not having been issued by the carrier, does not contain or evidence any contract of carriage with him and so no rights of suit can therefore be transferred<sup>229</sup>.

### **c) Exhaustion of Bills of Lading**

When the ship arrives at the discharge port an original must be produced in order to obtain the goods. As already discussed<sup>230</sup> it would be good practice to insist on its

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<sup>226</sup> Subject to the exceptions to the *nemo dat* rules discussed in Section 3. a) above.

<sup>227</sup> [1999] 1 Lloyd's Rep. 837.

<sup>228</sup> *ibid.*, at 843.

<sup>229</sup> The action in *Motis* was commenced by the plaintiff who held a valid bill of lading for the goods shipped, not a transferee of a forged bill.

<sup>230</sup> See p. 119 above.

surrender. This action would take the bill out of circulation and no further indorsements could occur. However, sometimes production rather than surrender will be required, and sometimes even production is not required, as when goods are delivered against an indemnity<sup>231</sup>. Where delivery is against an indemnity there is a real risk that the goods have not been delivered to the right person and the bill of lading is still in circulation.

In *Barber v. Meyerstein*<sup>232</sup>, Lord Hatherley said the force of the bill of lading as a document of title "does not become extinguished until possession, or what is equivalent in law to possession, has been taken [of the goods] on the part of the person having a right to demand it". There must be more than just delivery of the goods to exhaust the bill - it must be a delivery to the *right* person. In *London Joint Stock Bank v. British Amsterdam*<sup>233</sup> the buyers of a cargo obtained possession of it by giving an indemnity for non-production to the carrier. They then approached the bank which held the unindorsed bill and arranged for them to advance the funds to purchase the goods, in return for which the buyers indorsed the bill to the bank. The bank then sued the carrier in trover as the carrier no longer had the goods. The court held that as the buyer was not entitled to the cargo the bill of lading was not exhausted, and therefore the plaintiff bank obtained rights by the indorsement of the bill after delivery. Channell J took the matter further, albeit *obiter*:

"... if [the buyers] in this case had really been the persons who were entitled to have the oil delivered to them, then it seems to me that the bill of lading would be exhausted, its function would be over by the delivery to the right person, and that, when that right person afterwards got hold of the bill of lading, he could not by that document convey an effective title to the goods."<sup>234</sup>

Channell J seems to be saying that if the bill of lading holder had a right to the goods and induced the carrier to deliver them without producing the bill, then the bill becomes exhausted. Channell J's opinion was later criticised in *The Future Express*<sup>235</sup>.

The goods in *The Future Express* had been delivered under an indemnity to

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<sup>231</sup> See Section 6 below.

<sup>232</sup> (1870) L.R. 4 H.L. 317, at 330.

<sup>233</sup> (1910) 104 L.T. 143.

<sup>234</sup> *ibid.*, at 144.

<sup>235</sup> [1992] 2 Lloyd's Rep. 79 and also in Palmer & McKendrick, *op. cit.* 592.

someone not entitled to them. The ship was under a charterparty, and so it was argued at the end of discharge the carrier's obligations under the charterparty had come to an end and the bill of lading ceased to be a document of title. Judge Diamond QC held that that was not the case and relied on the test laid down by *Barber v. Meyerstein* that the bill becomes exhausted when delivery of possession is given to someone having a right to claim the goods under the terms of the bills<sup>236</sup>. It was not relevant to consider whether obligations under a separate document had been performed. To put it another way, the rights that occur in respect of a bill of lading are independent of the contract in the charterparty. Judge Diamond QC thought that to hold the bill ceased to be a document of title on delivery to someone not entitled would diminish the use of the bill of lading as security<sup>237</sup>.

To allow a bill of lading to retain its status as a document of title even after delivery of the goods to someone entitled to delivery may however diminish the security of the bill in the hands of a buyer or pledgee of the bill<sup>238</sup>. If, after delivery of the goods in circumstances which did not exhaust the bill, the bill is pledged or sold, property and/or constructive possession of the goods would transfer with the bill, if so intended. However, the transferee would be unable to claim the goods on production of the bill. The transferee may have an action against the transferor, but no action against the carrier if he delivered the goods to the true owner, even in the absence of the bill<sup>239</sup>. One thing is clear though, that there must be a real delivery to a true owner, with or without the bill. A delivery by the carrier into a transit warehouse will not exhaust the bill of lading<sup>240</sup>.

Although the bill of lading becomes exhausted as a document of title on delivery of the goods to a person entitled to delivery under the terms of the bill of lading, one set of rights can still be transferred after exhaustion. Under s. 2(2), COGSA 1992, contractual

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<sup>236</sup> *ibid.* at 100.

<sup>237</sup> [1992] 2 Lloyd's Rep. 79, at 99.

<sup>238</sup> It would also lead to uncertainty as to when it will, if ever, cease to be a document of title - *Benjamin, op.cit.*, para. 18-046.

<sup>239</sup> *Finlay v. Liverpool SS Co* (1870) 23 L.T. 251.

<sup>240</sup> *Barclays Bank v. Customs & Excise* [1963] 1 Lloyd's Rep. 81; *Hayman v. M'Lintock* (1907) S.C.936, at 952.

rights may still be transferred under s. 2(1) even if the bill is transferred after "possession of the bill no longer gives a right, as against the carrier, to possession of the goods", ie is exhausted, if the transfer is in pursuance of a contract made before the bill became exhausted.

#### **d) Several Bills of Lading**

It is worthwhile considering in this Section the effect on the document of title function of the practice of issuing bills in sets of more than one original. All original bills in the set are treated as documents of title and any one of them can be used to transfer possessory, proprietary or contractual rights<sup>241</sup>. Once one original bill has been accomplished the others become void, and indorsement of them will not affect the property, *inter alia*, in the goods<sup>242</sup>. If only one bill is pledged, pledgees of the remaining bills rank in successive order of pledge<sup>243</sup>, ie. the first pledgee takes priority. However, if a pledgor remained in possession of an original bill of lading following the pledge it would be possible for a subsequent pledgee to obtain priority over the first pledgee by virtue of the Factors Act 1889<sup>244</sup>. Following a pledge of one bill of lading then, the others may still be used to create pledges, albeit subject to the rights of the first pledgee. More importantly, the remaining bills of lading following a pledge or sale should be regarded as exhausted as documents of title. A subsequent transferee of a void bill of lading in these circumstances may obtain property in the goods, but this is by virtue of the Factors Act rather than the bill still acting as a document of title.

The practice of issuing bills in sets has been criticised for many years<sup>245</sup>; however it still persists to this day, although no reasonable explanation is given for the practice. The potential for fraud created by this practice is clear to see.

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<sup>241</sup> *Sanders v. Maclean* (1883) 11 Q.B.D. 327, at 334.

<sup>242</sup> *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317

<sup>243</sup> *ibid.*

<sup>244</sup> See p. 135 above, and *Lloyd's Bank Ltd v. Bank of America* [1938] 2 K.B. 147.

<sup>245</sup> eg. Lord Blackburn in *Glyn Mills* (1882) 7 App. Cas. 591, at 605.

## 6. Documents of Title Today

### a) Transfer of Tortious Rights

The transfer of the bill of lading may also transfer a tortious right to sue for conversion<sup>246</sup> along with possessory, proprietary and contractual rights. In *Bristol & West of England Bank v. Midland Railway Company*<sup>247</sup>, cheese had been delivered by the carrier without requiring the production of the bill. The plaintiff bank, without knowledge of the delivery of the goods became a pledgee of the bill. When the goods were not paid for the bank demanded delivery from the carrier, which he could not comply with. The Court of Appeal decided that the bank should be able to recover damages from the carrier, despite the fact they did not hold the bill nor have an interest in the goods when they were wrongfully delivered. The court based its decision on the 'prior default rule', ie. that although at the time of the delivery the bank had no interest in the goods, the carrier should not be able to avoid liability because of his wrongful act.

The reasoning of the *Bristol Bank* case, and the authorities relied on in it has been criticised<sup>248</sup>, but the result of it is a just one as the nature of financing sales of goods at sea means there is always a risk that the goods have been lost or damaged before the bank obtains the bill and an interest in the goods. Curwen suggested<sup>249</sup> that it would be better to view the bill of lading as embodying any accrued rights to sue in tort acquired by the holder, and that those rights should be made transferable too. It would only take a slight amendment to COGSA 1992 to allow for the automatic transfer of these accrued rights with the contractual rights. However, if contractual rights have passed to a lawful holder under COGSA 1992 there should be less need for a claimant to rely on tortious rights, accrued or otherwise.

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<sup>246</sup> An action in negligence will not lie if the claimant did not have a proprietary or possessory interest in the goods at the time the wrongful act occurred – *The Aliakmon* [1986] A.C. 785.

<sup>247</sup> [1891] 2 Q.B. 653.

<sup>248</sup> Curwen N., "An Unacknowledged Defect in Bills of Lading" [1995] J.B.L. 373. See also the interpretation of Roskill J in *Margarine Union* [1969] 1 Q.B. 219, at 246-250 (see page 126 above).

<sup>249</sup> *ibid.*, at 383.



## b) Finance

The bill of lading has become vital to the finance of international trade, due to its properties outlined above<sup>250</sup>. The transfer of a bill of lading to a bank will, if that is the intention, give him constructive possession of the goods, ie. a special property in them. If he exercises one of his contractual rights in respect of the goods, he will also gain the contractual liabilities. There is, however, an anomaly with the use of documentary credits. The credit, while helping the seller as well, is usually created by the buyer<sup>251</sup>. However, at the time the bill of lading is tendered to the bank, the property in the goods will usually be with the seller, not the buyer, therefore the buyer is unable, technically, to perfect a pledge of the goods as he is not the owner of them. It would certainly be very inconvenient if this technicality threatened the documentary credit system, so it is assumed that the pledge is created by the seller on behalf of the buyer<sup>252</sup>.

In order to achieve uniformity in the types of bills of lading that the banks are willing to accept under a documentary credit, the Uniform Customs and Practice for Documentary Credits was developed, now in its 1993 Revision<sup>253</sup>. Art. 23 of UCP 500 states what types of bills of lading are acceptable, eg. they must indicate that the goods are shipped loaded on board a named vessel, but it does not state that the bill has to be 'negotiable'.

Changes in trade have led to changes in the requirements for documentary credits that have reduced the need for the use of a document of title. This will be looked at further in respect of certain documents in Part II of this Thesis.

The basic problem with the bill of lading today is that the ability of the bill to transfer property and constructive possession conflicts with that of its role in the delivery of the goods. Does the bill of lading still need to perform all of these functions? This

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<sup>250</sup> See Kozolchuk B., "Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective" [1992] J.M.L.C. 161.

<sup>251</sup> Palmer & McKendrick, *op.cit.*, p. 573.

<sup>252</sup> *The Future Express* [1993] 2 Lloyd's Rep. 542, at 547.

<sup>253</sup> Hereafter UCP 500.

question will be addressed in Part II of this Thesis, but it is worth pointing out at this stage that in *Merchant Banking v. Phoenix*<sup>254</sup> two documents were sent to the buyers of steel rails - an invoice and an 'iron warrant'. The invoice, by itself, was described as an ordinary document of title, enabling the purchaser to obtain the goods. The iron warrant, on the other hand, was created for the purpose of pledging or selling the goods. The traditional bill of lading performs all these functions, at present.

## 7. Conclusions

The major difference between the early bill of lading of Chapter 1 and the modern bill is that the early bill is in no way a document of title, as defined in Section 1 of this Chapter<sup>255</sup>. The early bill only involved two parties - the carrier and the shipper. The document of title function, which allowed the bill of lading to be transferred, allowed a third party to become involved, either through a sale, or the financing of a sale of goods carried by sea. More specifically, it enabled the shipper to sell or pledge goods, and enabled the transferee to obtain possession of the goods, hold the bill for security, sell/pledge the goods himself, and maintain an action against the carrier for damage to the goods.

It has been shown in this Chapter that the importance of the bill of lading as a document of title is in its role in securing delivery of the cargo covered by it. The other aspects of the document of title function, such as its role in the sale contract, owe much to the fact that the carrier must deliver against an original bill of lading. The document of title function of the bill of lading should principally be seen as about gaining access to the goods. The carrier is obliged to deliver according to the carriage contract which, in the case of a traditional bill of lading, says that he must deliver to the person entitled under the bill of lading - either to the holder of an original bill or to someone whom the holder instructs

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<sup>254</sup> (1877) 5 Ch. D. 205.

<sup>255</sup> At p. 110.

the carrier to deliver to.

What is important about the traditional bill of lading as a document of title is that it is transferable, and it always transfers with it the ability to obtain delivery and the obligation on the carrier to deliver to the new holder. Other things may be transferred with the bill too, but it is largely dependent on intention. It is this transferability and its ability to bring in third parties to the transaction that marks the traditional bill from the early bill. The bill of lading won its transferability through custom and the Common Law. How far other documents can become documents of title like the traditional bill of lading will be dealt with in Part II of this thesis, which deals with developments from the traditional bill

The proliferation of the functions of the bill of lading has created a document which can do many things. It is very difficult for it to perform all its functions at the same time – the bill of lading, like the goods, cannot be in two places at once. These strains on the bill of lading have led, over the last 150 years or so, to the development of alternative shipping documents, such as the received for shipment bill, sea waybill and electronic bill of lading. Part II of this thesis will seek to compare the functions of these alternative documents to the functions of the traditional bill, and assess how far these other documents perform the functions of the traditional bill, without their associated problems. The ultimate future of the traditional bill of lading will be assessed against the success, or failure, of the alternative shipping documents.

## PART II

# DEVELOPMENT OF DOCUMENTS RELATED TO THE TRADITIONAL BILL OF LADING

# CHAPTER 5

## THE CHARTERPARTY BILL OF LADING

This Chapter will show that the charterparty bill of lading is a true bill of lading because it acts as a receipt and contains an obligation to deliver.

### 1. Introduction

A charterparty is a contract of hire of the services of a shipowner, to be performed by his equipment and usually by his crew. There are three main categories of charterparty:-

- (1) a voyage charterparty, where the vessel is chartered for a specific voyage, or voyages;
- (2) a time charterparty, where the vessel is chartered for a specific period of time;
- (3) a demise charterparty, where the vessel is leased to the charterer.<sup>1</sup>

If a shipper has a large amount of goods to ship he may charter a whole ship for a particular voyage, or, if he has a need to transport large amounts of cargo over a particular period of time, he may time charter a whole ship. Voyage and time charterparties are easily distinguished. However, the distinction between time and demise charterparties is less clear, since both will normally run for a period of time. The difference is that instead of being a contract of hire like the time charterparty, the demise charterparty is more in the nature of a lease. The demise charterer becomes the person entitled to the possession and control of the ship for the time being, and is usually called the disponent owner<sup>2</sup>. It is the disponent owner who will insure the ship. The true owner of the ship gives up most rights in relation to the ship, save from collecting the hire monies, and he will not be liable to third parties whose goods have been carried in the ship.<sup>3</sup>

A charterparty bill of lading will be defined for the purposes of this Chapter as any

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<sup>1</sup> See generally *Scrutton op. cit.*, *Halsburys Laws, op. cit.*, para. 1411.

<sup>2</sup> Demise charters are often used as a method of purchasing ships, and the charterer will supply his own crew. There are also hybrid charterparties, such as trip charters, consecutive voyage charters and long-term freighting contracts – *Wilson, op. cit.*, p. 4.

<sup>3</sup> *Baumwoll Manufactur von Carl Scheibler v. Furness* [1893] A.C. 8.

bill of lading issued in relation to goods carried by a ship which is subject to a charterparty. The bill of lading may be issued by the shipowner or charterer, and it may or may not incorporate certain clauses of the charterparty. It has been said<sup>4</sup> that the expression 'charterparty bills' is not usually used to describe bills issued where a ship just happens to be subject to a time charterparty, but is more used for bills which incorporate terms of the charterparty. This is unnecessarily limiting, because if the bill of lading incorporates the terms of a charterparty this only affects what the terms that are contained in the bill of lading. It should not affect whether the bill is a charterparty bill, or other type of bill.

The earliest extant charterparty bill of lading appears to be that of the *Mary Martyn* from 1539:

“Jesus. In Bilbowe the vijth day of November anno 1539 Mr Collette hath the ladyne by the grace of God in good saffettye I Thomas Holande in the good shypp named the Mary Martyn wherein is master for this present vyage Thomas Hege lxxj kintalls of yron in ends 44 . . . the which 71 kintalls to be consygned in London unto John Collet mercer And it goes for iij tone and xj kintalls he paying for the freight of every tonne accordyng to the charter party made in London In wytness of the truythe I the sayde master or the purser for me have firmyd iij bylls of one tenor the one complyed and fullfyled and the other to stand voyd By me Thomas Heygge.”<sup>5</sup>

This is a simple bill of lading which is similar in format to other Sixteenth Century bills, save that freight details are not given, freight being paid according to the charterparty made in London. The charterparty was presumably made previously between the ship owner and John Collet, although the charterparty details given are rather vague.

If Collet had arranged for the goods to be transported by chartering the whole of the ship, it might be wondered why he required the issue of a bill of lading at all. This question is partly answered by the note accompanying the bill of lading in the Seldon Society publication, which reveals that Collet sold the cargo while afloat to Messrs. Hurlocke and Saunderson. A cargo which is afloat is not available for inspection. Collet required proof of the existence of the cargo and its condition. The charterparty is merely a contract of

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<sup>4</sup> Yates, *op.cit.*, para. 1.6.1.5.2.2.

<sup>5</sup> *Select Pleas of the Court of Admiralty Vol. 1* (1897) Seldon Society, p. 88-9.

carriage and nothing else.

Debattista said of charterparties in general:

“It is a contract of carriage - and only a contract of carriage. There is nothing in a charterparty which looks remotely like a representation by the shipowner that goods have been shipped on board the vessel in any given quantity and in apparent good order and condition. Neither does a charterparty of itself entitle anyone to claim possession of the goods on discharge: its possession represents no proprietary interest in the goods.”<sup>6</sup>

Collet, and countless charterers before and since, have needed a bill of lading in addition to the charterparty to show the precise location of the goods, what condition they were in and to provide a document of title to the them.<sup>7</sup> Whether or not a charterer requires a bill of lading depends on his intention towards the cargo. If there is a possibility that the cargo will be sold, then a bill of lading will be required to enable constructive possession of property in the goods can be transferred more easily. Even if the cargo is not to be sold, the evidence of quantity and condition of the goods provided by a bill of lading may help protect the charterer’s rights under the charterparty in the event of damage to the goods.<sup>8</sup>

This Chapter will now consider the receipt, contractual and document of title functions of the charterparty bill of lading.

## **2. The Charterparty Bill of Lading as a Receipt**

When a charterparty bill is issued today it will be normally be in the traditional bill of lading form, i.e. a single sheet of A4, with printing on both sides. A common form is the CONGENBILL<sup>9</sup> which is specially designed for use with charterparties. On a single sheet of A4, the CONGENBILL conforms to the International Chamber of Shipping Format for the Bill of Lading 1972 and is therefore compatible with various other documents used in international trade. It contains a small number of contractual terms, including a clause incorporating all the terms of the relevant charterparty and an indication that freight will be

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<sup>6</sup> Debattista C., *Sale of Goods Carried by Sea* (2<sup>nd</sup> edn.)(1998), para. 8-03

<sup>7</sup> See Chapter 4 for details of when the bill of lading became a document of title.

<sup>8</sup> See Chapter 2 above.

<sup>9</sup> BIMCO (1978), Appendix 4.

calculated according to the charterparty, much like calculation of freight in the *Mary Martyn* bill<sup>10</sup>. The cargo will be described and enumerated as on a traditional bill. The question is: what sort of evidence do these representations constitute?

In terms of a receipt as to quantity, a charterparty bill of lading is prima facie evidence of the receipt of the goods for shipment which becomes conclusive evidence in the hands of the lawful holder of the bill, according to s. 4, COGSA 1992. The lawful holder of the bill would not include a charterer-shipper, but would include a charterer-consignee/indorsee<sup>11</sup>. The only types of bill of lading excluded from the operation of s. 4 are bills which are incapable of transfer<sup>12</sup>. A non-negotiable charterparty bill would therefore not be covered, and s. 4 only covers statements as to quantity. For statements as to condition and leading marks<sup>13</sup>, the parties would have to rely on their common law status unless the Hague Visby Rules applied to the bill.

Art. III, r. 3 of the Hague Visby Rules states that a shipper can demand a bill of lading showing leading marks, condition and quantity, without qualifications, except where the carrier has no reasonable means of checking, or he suspects the figures are not accurate. The Hague-Visby Rules do not apply to charterparties themselves<sup>14</sup>. However, if the Rules have been voluntarily incorporated into the charterparty terms, then the charterer will obviously be able to rely on Art. III, r. 3 to demand a bill of lading<sup>15</sup>.

Where the Hague Visby Rules have not been incorporated into the charterparty, can the carrier be compelled by the charterer to issue a bill of lading in Art. III, r. 3 form following the shipment of cargo? The authors of *Scrutton* and the authors of the Thirteenth Edition of *Carver's Carriage of Goods by Sea* have taken opposing views on the subject. The authors of *Scrutton*<sup>16</sup> wrote that a charterparty bill of lading issued to a charterer did

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<sup>10</sup> See p. 161.

<sup>11</sup> s. 5(2), COGSA 1992.

<sup>12</sup> s. 1(2), COGSA 1992.

<sup>13</sup> Hague Visby also deals with statements as to quantity in Art. III, r. 3, but where s. 4, COGSA 1992 applies it would be better to rely on that.

<sup>14</sup> Art. V, Hague-Visby Rules - see below.

<sup>15</sup> Debattista, *op. cit.*, p. 177.

<sup>16</sup> *Scrutton*, *op. cit.*, p. 417.



not come within the definition of a 'contract of carriage' in Art. I(b) because in the hands of a charterer the bill of lading is a mere receipt<sup>17</sup>. Therefore, the Hague-Visby Rules did not apply to the bill at all and the carrier cannot be compelled by the charterer to include the Art. III, r. 3 statements in the bill. The authors of *Carver*<sup>18</sup>, on the other hand, took a different view because the Hague-Visby Rules have been given the force of law in s. 1(2), Carriage of Goods by Sea Act 1971 (COGSA 1971). Art. V of the Hague Visby Rules states:

“... The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules....”

Nothing in s. 1(2) of COGSA 1971 limits the application of the Hague Visby Rules to bills of lading or similar documents of title. S. 1(4) limits the application of the Section to where the contract of carriage expressly or impliedly provides for the issue of a bill of lading. However, s. 1(4) does not require that the bill of lading must be the contract itself<sup>19</sup>, and it therefore follows that bills issued under charterparties are not excluded from the operation of COGSA 1971, thus enabling a charterer to demand a bill of lading in Art. III, r. 3 form. A shipper who is not the charterer, eg. an FOB seller, however, can demand a bill in Art. III, r. 3 form<sup>20</sup>. Indeed, if a bill of lading has been issued to a charterer and subsequently transferred to a third party the Hague Visby Rules most certainly apply to the bill from the moment of transfer<sup>21</sup>.

Debattista<sup>22</sup> supported the original *Carver* view with the argument that the view taken did not seek to impose the whole of the Hague Visby Rules into a charterparty contract, it merely ensures that a bill of lading, even in the hands of a charterer, complied

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<sup>17</sup> See section 3 below.

<sup>18</sup> *Carver on Carriage of Goods by Sea* (13<sup>th</sup> edn.), para. 567. The new edition, *Carver on Bills of Lading*, *op.cit.* seemed to take broadly the same approach, though perhaps a little less forcefully and with an allusion to the 'force of law argument – paras, 9-089 and 9-262. In any event the authors of the new edition thought that it was desirable that the Hague Visby Rules as a whole should apply to charterparty bills of lading – para. 9-262.

<sup>19</sup> Debattista C, “The bill of lading as a receipt - missing oil in unknown quantities” [1986] L.M.C.L.Q. 486, at 477.

<sup>20</sup> *Carver, op.cit.*, para. 9-089.

<sup>21</sup> Art. I(b).

<sup>22</sup> See fn. 19.

which as much of the Hague Visby Rules as have to do with form, eg. Art. III, r. 3. Debattista noted<sup>23</sup> that the language of Art. V—“issued in the case of a ship under a charterparty”—differs from that used in Art. I(b)—“issued under or pursuant to a charterparty”—and this difference means the Art. V did not distinguish between charterer and indorsee, unlike Art. I(b). Debattista also argued that if the object of COGSA 1971 was to assist the negotiability of bills of lading, then his and the original *Carver* arguments are in line with that policy<sup>24</sup>.

The argument that Art. III, r. 3 applies to bills issued under charterparties is compelling. The language of Art. V seems clear enough. Indeed, there would have been little point in having the middle sentence of Art. V if the wording of Art. I(b) always ensured that the Rules did not apply to charterparty bills. The reason for having a charterparty bill in the first place is because a sale is contemplated. Such sales will be facilitated by the fact that the charterparty bill must comply with Art. III, r. 3, and there is no reason to discriminate against charterparty bills by excluding them from the operation of the Rules in this respect.

It should be noted that Art. V in any event only becomes effective once a bill has been issued. A shipper-charterer cannot demand that the carrier issue a bill of lading under Art. V. Fortunately, most charterparties expressly provide that charterers have the right to demand the issue of bills of lading from carriers, e.g. cl. 33(1), SHELLVOY 5<sup>25</sup>. Once issued, the charterer/shipper is entitled to have the bill in Art. III, r. 3 form.

The Hamburg Rules, which have not been ratified by the UK, have a clearer formulation with regard to their applicability to charterparty bills of lading. Art. 2.3 states that:

“... where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.”

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<sup>23</sup> *ibid.* at pp. 477-8.

<sup>24</sup> *ibid.* at p. 478.

<sup>25</sup> nb. - cl. 33(5) of SHELLVOY 5 expressly incorporates Art. III, r. 3 into the charterparty.

As far as the Hamburg Rules are concerned then, they cannot apply to bills of lading in the hands of charterers. This, it is submitted, may cause problems for a third party to whom a bill has been transferred. Applying the Hamburg Rules only when the bill has been transferred to a third party may not be enough to protect that third party's position with respect to statements in the bill. The charterer should have the ability to request compliance with Art. 15 of the Hamburg Rules<sup>26</sup> at the time the bill of lading is *issued*, as it may be too late to change things when it reaches the hands of a third party.

### **3. The Traditional View of the Contractual Function of the Charterparty Bill of Lading**

The traditional view<sup>27</sup> of the contractual function of the charterparty bill is that in the hands of the charterer the bill of lading is a mere receipt and a potential document of title: i.e. there is no contractual function at all. The leading authority for this view is given as *Rodocanachi, Sons & Co. v. Milburn Brothers*<sup>28</sup>. In that case the plaintiffs chartered the defendant's vessel and by the terms of the charterparty the master was obliged to sign bills of lading "without prejudice to the stipulation of the charterparty". A bill of lading was signed which contained an exception from liability for damage caused by the master's negligence. This exception did not appear in the charterparty. The cargo was ultimately lost due to the master's negligence, and the plaintiff sued the defendant under the charterparty.

In the absence of any custom at the port of loading for bills of lading to contain such exception clauses, the Court of Appeal held that the defendant was liable because the terms of the charterparty prevailed over those of the bill of lading. Lord Esher said:

"... unless there be an express provision in the documents to the contrary, the proper construction of the documents taken together is, that as between the shipowner and the charterer the bill of lading, although inconsistent with

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<sup>26</sup> Art. 15 details the statements a bill of lading must contain.

<sup>27</sup> *Carver*, para. 3-009 and 5-036; *Halsburys Laws, op. cit.*, para. 1540; *Benjamin, op. cit.*, para. 18-016; *Wilson, op. cit.*, p. 229. The same view is held in US law - *Tetley, op.cit.*, p. 36 - and in Continental law - *de Wit, op. cit.*, para. 4.7.

<sup>28</sup> (1886) 18 Q.B.D. 67.

certain parts of the charter, is to be taken only as an acknowledgement of the receipt of the goods.”<sup>29</sup>

These words were echoed by Lindley and Lopes LJJ, but none of their Lordships gave any authorities for their decision. At first instance though, Manisty J<sup>30</sup> thought the case of *Gledstanes v. Allen*<sup>31</sup> was directly on point and he approved the *dicta* of Lord Bramwell in *Wagstaff and Others v. Anderson and Others*<sup>32</sup>, and *Sewell v. Burdick*<sup>33</sup>.

In *Gledstanes v. Allen* the dispute was whether the shipowners had a lien on the goods for lump sum freight under the charterparty. Bills of lading had been issued and were consigned to the charterer’s correspondents. Jervis CJ found that the correspondents stood in the same position as the charterers and were not indorsees for value. Consequently, the shipowners could exercise their lien for freight under the charterparty. A clause in the charterparty that said master “to sign bills of lading at any freight, without prejudice to this charterparty” did not change that.

In *Wagstaff and Others v. Anderson and Others* Bramwell LJ said, *obiter*:

“... to say that [the bill of lading] is a contract superseding, adding to , or varying the former contract under the charterparty, is a proposition of law to which I never can consent.”<sup>34</sup>

There have been other cases where *obiter* support has been given to the traditional view.

Lord Esher made the following comment in the course of his judgment in *Leduc & Co v. Ward*<sup>35</sup>:

“It is true that, where there is a charterparty, as between shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit....”

In *A. Delaurier & Co. v. James Wyllie and Others*<sup>36</sup>, Lord Kyllachy said:

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<sup>29</sup> *ibid.* at p. 75.

<sup>30</sup> 17 Q.B.D. 316 at pp. 319-320.

<sup>31</sup> (1852) 12 C.B. 202.

<sup>32</sup> (1880) 5 C.P.D. 171.

<sup>33</sup> See Chapter 3, p. 83.

<sup>34</sup> *ibid.* at p. 177.

<sup>35</sup> (1888) 20 Q.B.D. 475, at p. 479.

<sup>36</sup> (1889) 17 Rettie 167.

“In the hands of the charterer the bill of lading is a mere ancillary document, having no other effect than a receipt for the goods.”<sup>37</sup>

The issue of a bill of lading in no way affects the charterparty. For example, in *Temperley Steam Shipping Co. v. Smyth & Co.*<sup>38</sup> a charterparty provided for arbitration in the event of disputes and the usual cesser clause. Bills of lading issued under the charterparty stated that all terms and exceptions of the charterparty were incorporated. A dispute arose over delays in loading, and the Court of Appeal held that notwithstanding the cesser clause and the fact that the charterers were the holders of the bill of lading, the arbitration clause was still effective. Lord Collins M.R. said:

“The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the c/p which remains until cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so.”<sup>39</sup>

In *Steamship Den of Airlie Co. Ltd v. Mitsui and Co. Ltd and British Oil and Cake Mills Ltd*<sup>40</sup> at first instance Bray J also had to deal the issue of the relationship between a bill of lading and a charterparty cesser clause. He declined to hold that the issue of a bill of lading meant that the charterer’s liability under the charterparty ceased, because in the circumstances the parties had not evinced that intention. The obligation to deliver cargo did not commence until the issue of bills of lading, and to hold that the obligation also ceased on issue of the bills incorporating the cesser clause meant that the obligation would never really exist. Bray refused to imply such a situation where that was not the intention of the parties.

There is no doubt that a charterparty bill of lading is a contract in the hands of a third party consignee/indorsee. In *Rodocanachi*, Lord Esher adopted the reasoning of Lord Bramwell in *Sewell v. Burdick*, and said:

“This doctrine [i.e. Lord Bramwell’s] gives effect to both instruments, because, although as between the shipowners and the charterer the bill of lading is only

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<sup>37</sup> *ibid.* at p. 192.

<sup>38</sup> [1905] 2 K.B. 791.

<sup>39</sup> *ibid.* at p. 802.

<sup>40</sup> (1911) 17 Com. Cas. 116.

a receipt for the goods, it will be a contract upon which the holder of the bill of lading to whom it is indorsed must rely as between himself and the shipowner.”<sup>41</sup>

The situation is basically the same as for bills indorsed where there is no charterparty<sup>42</sup>.

The authors of *Scrutton*<sup>43</sup> and *Carver*<sup>44</sup> also agree that on indorsement, the charterparty bill of lading becomes the contract between the holder and the carrier. In the words of Lord Atkin in *Hain Steamship Co. Ltd. v. Tate and Lyle Ltd*<sup>45</sup>:

“A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading.”

However, where the indorsee happens to be the charterer, it is the charterparty, not the bill of lading, which governs his relationship with the carrier. Both the authors of *Scrutton*<sup>46</sup> and *Carver*<sup>47</sup> give the case of *President of India v. Metcalfe Shipping Co.*<sup>48</sup> as authority for this proposition. Charterers had arranged the purchase of a quantity of urea, FOB. A charterparty was signed which stated that bills of lading were to be signed without prejudice to the charterparty terms. The charterparty provided for London Arbitration, but this clause was not incorporated into the bill of lading. The bill was subsequently indorsed to the charterers. A dispute arose over an alleged short delivery and the charterers sought to refer the matter to arbitration. The carrier claimed that the bill of lading governed relations and so there was no entitlement to arbitration. The shipowner succeeded before the Arbitrator, but lost at first instance and in the Court of Appeal. Lord Denning reviewed the authorities and decided there was no authority for the statements in earlier editions of *Carver's Carriage of Goods by Sea* and *Scrutton* that where the charterer is an indorsee the bill of lading prevails over the charterparty and held that the dispute should go to arbitration. He held that the bill in this case was not severable from the charterparty, which

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<sup>41</sup> *op. cit.*, p. 75 (emphasis added).

<sup>42</sup> See Chapter 3.

<sup>43</sup> *Scrutton, op. cit.*, p. 74.

<sup>44</sup> *Carver, op. cit.*, para. 5-040.

<sup>45</sup> (1936) 41 Com. Cas. 350 at p. 357.

<sup>46</sup> *Scrutton, op. cit.*, p. 71.

<sup>47</sup> *Carver, op. cit.*, para. 5-043.

<sup>48</sup> [1970] 1 Q.B. 289.

had been entered into to carry out the sale contract:

“The bill of lading was a mere instrument to carry out those contracts. It did not evidence any separate contract at all. As between charterers and shipowners, it was only a receipt for the goods.”<sup>49</sup>

Lord Denning relied on the little-known case of *Love and Stewart Ltd v. Rowtor Steamship Co. Ltd*<sup>50</sup> for support. There the House of Lords reversed a decision of the Court of Session and held that a charterparty regulated relations between the carrier and charterer/indorsee and that the bill of lading was “only the ship’s receipt for the goods”<sup>51</sup>. Lord Denning<sup>52</sup> identified four features present in both cases:-

- (i) contract of sale
- (ii) charterparty entered into to implement the sale
- (iii) bill of lading taken by the seller
- (iv) indorsement of the bill of lading to charterer.

The bill of lading was never meant to be a contract, or even evidence of a contract - that was the job of the charterparty. The function of the bill was a receipt to prove the seller had performed his part of the sale contract.

The traditional view of the charterparty bill of lading can be summarised as follows. When the bill is in the hands of the charterer, whether he is the shipper or the indorsee, the charterparty governs the relationship between the carrier and the charterer and the bill of lading is a mere receipt. If the bill is in the hands of a third party, the bill of lading will govern the relationship between the carrier and the third party, whether he is the shipper or the indorsee. The same arguments as to whether the traditional bill contains or merely evidences the contract of carriage will apply equally to the charterparty bill in such circumstances<sup>53</sup>.

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<sup>49</sup> *ibid.* at p. 306.

<sup>50</sup> [1916] 2 A.C. 527.

<sup>51</sup> Lord Sumner, *Ibid.* at p. 540.

<sup>52</sup> [1970] 1 Q.B. 289, at p. 301.

<sup>53</sup> See Chapter 3 above. COGSA 1992 was not intended to alter the traditional view of the charterparty bill – Law Com. No. 196, para. 2.53; *Carver*, para. 5-043.

#### 4. Problems with the Traditional View

Under the traditional view set out above, the charterparty bill of lading is a mere receipt in the hands of the charterer, yet it becomes *the* contract as soon as it is transferred to a third party. The ability of a contract to ‘spring’ up from nowhere is surprising in view of the consensual nature of contract, and its effect on the shipowner is one of uncertainty. If the bill is merely a receipt in the hands of the charterer, but a contract in the hands of somebody else then the shipowner will not know whether the bill is a contract or not unless he knows who holds it. The problem for shipowners is that they will not know who holds the bill of lading until it is presented at the port of discharge. Until then the contractual status of the bill of lading, under the traditional view, is uncertain. If the cargo is damaged, the carrier will not know who is going to sue, and under which contract.

A further problem of the bill only becoming a contract when transferred into the hands of a third party is that the consignee or indorsee of a charterparty bill of lading is permitted to sue on the bill for breaches of ‘contract’ that occurred while the bill was in the hands of the charterer and therefore only a receipt. The authority for this proposition is the case of *Monarch SS. Co. Ltd. v. Karlshamns Oljefabriker (A/B)*<sup>54</sup>. Here a chartered British ship was delayed in arriving at the port of discharge, in Sweden, due to her unseaworthiness. During the delay the Second World War broke out and the ship was prohibited by the British Authorities from sailing to the port of discharge. Transshipment on to neutral ships had to be arranged, and the indorsees of the bills of lading claimed that the costs of the transshipment resulted from the shipowner’s breach of contract in allowing the ship to be unseaworthy. The unseaworthiness, and therefore the breach, occurred while the bills were still in the hands of the charterers and therefore, under the traditional view, they were merely receipts, so how could the indorsees sustain a claim for the breach of a contract which did not exist at the time of the alleged breach? The House of Lords (Scottish) found that they were able to sustain that claim. Lord Porter acknowledged that

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<sup>54</sup> [1949] A.C. 196.



this attitude involved the

“acceptance of the view that the taking of the bill of lading by the charterer of a ship confers no immediate rights upon him under the bill of lading, but gives him an inchoate right, by indorsing the bill of lading to a third party, to make it an effective document from the beginning of the voyage so as to enable the indorsee to sue upon it for any breaches of contract committed during the voyage but before its transfer to him: “As if”, it was put in the course of argument, “the contract contained in the bill of lading had at the time of shipment been made with himself.”<sup>55</sup>

No authority is given for this neat piece of legal fiction.

Whilst the authors of *Carver*<sup>56</sup> saw no problem with this view, the authors of *Scrutton*<sup>57</sup> acknowledge that the view is not easy to explain. The authors of *Scrutton* proposed that the difficulty could be resolved by an interpretation of the Bills of Lading Act 1855 which was subsequently replaced by COGSA 1992, under which rights of suit under the bill of lading are transferred to a third party. S. 2(1) of the COGSA 1992 transfers to the lawful holder of the bill of lading rights of suit “under the contract of carriage as if he had been a party to that contract”. S. 5(1)(a) defines the ‘contract of carriage’ as the contract of carriage contained in or evidenced by the bill of lading, or sea waybill. If the charterparty bill of lading does not contain or evidence a contract the Act would apparently not apply to such bills. This would obviously be inconvenient. The authors of *Scrutton* suggested that the true meaning of the words in s. 2(1) was that the lawful holder of the bill of lading has transferred to him all rights of suit “as if there had been a contract in the terms contained in the bill of lading and he had been a party to that contract.”<sup>58</sup> This interpretation, it is suggested, reads far too much into the Act, and is perhaps unnecessary in light of the argument outlined below that the charterparty bill is in fact a contract, even in the hands of the charterer.

An additional problem with the view that the charterparty bill is not a contract in the hands of the charterer is that the charterparty bill would not then fall within the

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<sup>55</sup> *ibid.* at p. 218.

<sup>56</sup> *Carver's Carriage of Goods by Sea, op. cit.*, para. 702. The case is not referred to in this context by the authors of *Carver on Bills of Lading*.

<sup>57</sup> *Scrutton, op. cit.*, p. 74.

<sup>58</sup> *ibid.* at pp. 74-5.

definition of a bill of lading outlined in Chapter 1, namely a document that is a receipt and contains an obligation to deliver. The obligation to deliver is a contractual obligation on the part of the carrier and is owed to the presenter of the bill of lading under the terms of the accomplishment statement<sup>59</sup>. If the charterparty bill of lading had no contractual function in the hands of the charterer, then on what basis can delivery be obtained from the carrier? If delivery cannot be obtained through possession of the bill, the charterer would have to rely on his right of direction under the charterparty, or any right he might have as the owner of the cargo. Since charterparty bills will usually always contain the accomplishment statement<sup>60</sup> it is tempting to conclude on this basis alone that the charterparty bill of lading must have some contractual function. The next Section will discuss an alternative view of the charterparty bill of lading that allows it to have a contractual function.

## 5. The Alternative View

As with the alternative view of the contractual function of the traditional bill of lading<sup>61</sup> there have always been cases in opposition to the traditional view outlined in Section 3 above. The authors of *Carver's Carriage of Goods by Sea*<sup>62</sup> stated that the case of *Gullischen v. Stewart*<sup>63</sup> is commonly regarded as an exception to the rule in *Rodocanachi*. In *Gullischen*, a voyage charterparty was signed between the plaintiff shipowners and the defendants. It contained a cesser clause. Goods were loaded and a bill of lading was issued whereby the goods were made deliverable to the defendant charterers "they paying freight and all other conditions as per charterparty." There was a delay in delivery, through no fault of the ship, and the lay days set out in the charterparty were exceeded by five days. The plaintiffs claimed demurrage from the defendants as

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<sup>59</sup> See Chapter 4, p. 113, *et seq.*

<sup>60</sup> eg. the *Mary Martyn* and SOVCOALBILL (1971).

<sup>61</sup> See Chapter 3 above.

<sup>62</sup> *op. cit.*, para. 699, fn. 3.

<sup>63</sup> (1884) 13 Q.B.D. 317.

consignees of the bill of lading. The defendants claimed that the charterparty cesser clause was incorporated into the bill of lading excusing them from liability for the demurrage under the bill, as well as under the charterparty.

At first instance<sup>64</sup> Pollock B noted that defendants were sued upon the bill of lading, not the charterparty, and that the charterparty incorporation clause in the bill only incorporated into the bill:

“so much of the charterparty as is referable to the subject-matter of the discharge and receipt of cargo at the port of discharge.”<sup>65</sup>

Pollock B thought that the cesser clause could not be incorporated into the bill of lading to deprive the shipowner of the right to sue the consignee of the bill for freight and demurrage at the port of discharge. He said:

“If my view be correct, I do not think the fact that the defendants were charterers as well as consignees of cargo makes any difference. The consignees because they are charterers are not the less liable in respect of *the stipulations of the contract which they have made by the bill of lading*.”<sup>66</sup>

Lopes J was of the same opinion and judgment was given for the plaintiffs. That judgment was upheld in three very brief judgments in the Court of Appeal. Brett J said:

“The contract by a bill of lading is different from a contract by a charterparty, and the defendants are sued upon the contract contained in the bill of lading.”<sup>67</sup>

All their Lordships were of the opinion that the bill of lading was a contract between the plaintiffs and the defendants, despite the existence of a charterparty between the same parties.

*Gullischen* was not mentioned in *Rodocanachi*, even though Lopes J had been elevated to the Court of Appeal by the time of *Rodocanachi*. The two cases are difficult to reconcile. In *Gullischen* the charterer was the consignee as well as the shipper. It is unclear from all the reports of *Rodocanachi* whether the charterer/shippers there were also

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<sup>64</sup> (1883) 11 Q.B.D. 186.

<sup>65</sup> *Ibid.* at p. 189.

<sup>66</sup> *Ibid.* at p. 190 (emphasis added).

<sup>67</sup> (1884) 13 Q.B.D. 317, at p. 318.

consignees, but they are recorded as being the cargo owners<sup>68</sup>. When the authors of *Carver's Carriage of Goods by Sea* said that *Gullischen* was an exception to the rule in *Rodocanachi* it is not entirely clear what was meant. They referred to the judgment of Roche J in *Rederiaktiebolaget Transatlantic v. Board of Trade*<sup>69</sup> where he said:

“if the charterer becomes liable under some other contract as, for example, a bill of lading, he is not protected in that capacity by the protection which the cesser clause affords to him in his capacity of charterer.”

The charterers in that case were the shippers and it was again unclear whether they were also the consignees. The court found the charterers liable for freight independently of the charterparty, ie. under the bill of lading. Neither *Gullischen* nor *Rodocanachi* was mentioned in Roche J's judgment, but it does seem to confirm the decision in *Gullischen* that a charterparty bill of lading can be a contract in the hands of a charterer.

It is still not clear whether it is the status of the charterer as a consignee that makes *Gullischen* an exception from *Rodocanachi*. Indeed, it would be surprising if this were the case in light of the decision in *President of India* - if the bill of lading is not a contract in the hands of a charterer/indorsee, then it should not be a contract in the hands of a charterer/consignee either. One difference is that in *Rodocanachi* the defendants were sued upon the charterparty, whereas in *Gullischen* the action was upon the bill of lading. According to *Rodocanachi* though, the action in *Gullischen* upon the bill should have been impossible.

The only real distinguishing feature between the two cases is the nature of the claims. In *Rodocanachi* the bill of lading contained an exception clause dealing with the loss of the cargo which did not appear in the charterparty and the claim concerned the loss of cargo during the voyage. In *Gullischen* the dispute was over demurrage at the port of discharge. That was an issue relating to the delivery of goods rather than their carriage. In *Rodocanachi* the argument was whether the terms of carriage were in the charterparty or

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<sup>68</sup> (1886) 18 Q.B.D. 67.

<sup>69</sup> (1924) 30 Com. Cas. 117, at p. 126.

bill of lading, and it was held the charterparty terms governed the relationship because the bill was a mere receipt. In *Gullischen* and *Rederiaktiebolaget* the argument was whether a cesser clause was incorporated into the bill of lading contract so as to relieve the charterers from responsibility to pay demurrage or outstanding freight under that contract. The difference must lie in the nature of the matter in dispute, conditions of carriage as opposed to freight/demurrage, or it would not matter whether the cesser clause was incorporated or not, as there would be no contractual liability for anything under a bill of lading in the charterer's hands. Therefore, it would seem that the bill of lading is a contract in the hands of the charterer in respect of certain matters, while the charterparty settles the terms of carriage. As mentioned before, a charterparty bill of lading embodies an obligation to deliver on the part of the shipowner. It normally also contains a corresponding obligation on the part of the consignor/consignee to pay freight and demurrage before discharge. These obligations are independent of the charterparty, and a cesser clause in the charterparty will not avail the charterer sued for breaches of these obligations under the bill unless the clause has been properly incorporated. In short, the bill of lading is still capable of being a contract in the hands of the charterer, if only in respect of certain terms.

This interpretation of *Gullischen* and *Rodocanachi* is supported by the comments of the editors of *Scrutton*<sup>70</sup> who said:

"It may be said that in *Gullischen* and *Bryden v. Niebuhr* the liability was not on the contract originally evidenced by the bill of lading, but on the contract implied from the charterer-consignee's taking the goods under the bill of lading by which he was a consignee."

ie. by taking delivery of the goods he made himself liable for obligations under the bill of lading that he would not be liable for under the charterparty owing to the cesser clause. The authors of *Carver on Bills of Lading* reviewed *Gullischen* and *Rodocanachi* and declared that on the basis of the widespread acceptance of the rule in *Rodocanachi* an action on the 'contract contained in the bill of lading' on facts such as those in *Gullischen*

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<sup>70</sup> *Scrutton, op. cit.*, p. 73.

would not now lie<sup>71</sup>.

There are other cases in opposition to *Rodocanachi*. In *Bryden v. Niebuhr*<sup>72</sup> the charterers were sued by the shipowners in respect of demurrage at the port of loading. Charterer's agents had indorsed the bills to charterers which said "he or they paying freight and performing all other conditions, as and in the said charterparty." The defendants argued that the claim was distinguishable from *Gullischen* because the claim was not in respect of demurrage at the port of discharge. Stephen J had no doubt that the defendants were liable for demurrage because they were indorsees and holders of the bill of lading.

In *Barwick v. Burnyeat, Brown & Co.*<sup>73</sup> the facts were similar to *Bryden* save that the claim concerned the balance of freight due and the cesser clause in the charterparty specifically named the charterers. Denman J held that the cesser clause was incorporated into the bill of lading and relieved the charterer from liability under the bill of lading. The editors of *Scrutton* considered this case to be impliedly overruled by *Gullischen* and *Bryden*, but it can also be explained on the grounds of construction. The incorporation of the cesser clause in *Barwick* succeeded in avoiding liability of the charterer when sued under the bill of lading.

The underlying feature of *Barwick* was that the bill of lading was never considered to be a mere receipt. If the cesser clause had not worked in *Barwick*, the charterers, as consignees and holders of the bill of lading would have been liable under the bill, thus implying that the charterparty bill is a contract all along. However, liability could still be avoided by effectively incorporating the charterparty cesser clause into the bill of lading contract

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<sup>71</sup> *Carver*, para. 5-039. According to *Carver*, it is a *prima facie* rule that the charterparty will govern relations between the carrier and charterer, unless there is an *express* provision in the documents that the bill of lading will govern relations - *ibid*.

<sup>72</sup> (1884) C. & E. 241. Although the case of *Davidson v. Bisset* is linked by earlier editions of *Carver* to *Gullischen* and *Bryden*, it differs from those cases because there was a clear intention from the charterer's agents to vary the terms of the charterparty in the bill of lading. *Carver on Bills of Lading*, at para. 5-037, fn. 59, noted that Scots Law does not appear to follow the English rule that in the hands of the charterer the bill is a mere receipt.

<sup>73</sup> (1877) 36 L.T. 250.

In the Scottish case of *Hill Steam Shipping Co. v. Hugo Stinnes Ltd*<sup>74</sup> Lord MacKay thoroughly reviewed the authorities in a case concerning the non-payment of freight under a charterparty and was of the opinion that the bill of lading formed a separate agreement on the payment of freight:

“There is, by [the bill of lading], a special arrangement, not arising out of any charterparty, special or general, as to who is to be obliged for the freight to the owner. And it is not any person, either as charterer, or as agent for any unknown charterer, that is to be responsible. It is the shipper or consignor and *his* consignee.”<sup>75</sup>

Lord MacKay also endorsed what Roche J had said in *Rederiaktiebolaget*<sup>76</sup> and thought there to be very little authority for the charterer’s case that the bill of lading was a mere receipt. He clearly stated:

“I am of opinion, for my part, that the notion that, when a consignor comes to the dock with a shipload of goods and desires that, in exchange for a bill of lading, his goods shall be taken on board for a foreign port, there is set up an *independent contract in writing of freightage*; and that there is no presumption (unless the document stipulates nothing with regard to lien, freight, demurrage and the rest) that it is merely a receipt.”<sup>77</sup>

The fact that the shipper or consignee was also the charterer was accidental in Lord MacKay’s view.

“The farthest the idea [of the charterparty taking precedence] can logically be pushed is that, where there is a known and named charterer and the same name is given for the bill of lading, then possibly the bill will be construed as subordinate. I will not accept it further.”<sup>78</sup>

Even as a subordinate document the bill of lading would still have a contractual function in relation to freight and demurrage, under this seemingly rather large exception to *Rodocanachi*.

Additional support for an alternative view of the charterparty bill of lading comes from the case of *Calcutta SS. Co. Ltd v. Andrew Weir & Co.*<sup>79</sup> This case involved a ship under a voyage charter which was put up as a general ship at the port of loading. A cargo

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<sup>74</sup> [1941] S.C. 324.

<sup>75</sup> *ibid.* at p. 338.

<sup>76</sup> See above.

<sup>77</sup> *ibid.* at p. 344 (emphasis added).

<sup>78</sup> *ibid.* at p. 346.

<sup>79</sup> [1910] K.B. 759.

of dates was received from Jacob Noates who, in return, received a bill of lading which contained exceptions from liability not present in the charterparty. During the voyage the charterers made an advance of monies to Noates, who indorsed the bill of lading to them as security. The charterers presented the bill at the port of discharge and received the goods which were found to be in a poor condition. The charterers were sued for freight by the shipowners and the charterers counterclaimed under the charterparty for damage done to the goods. The shipowners claimed to be entitled to rely on the exceptions in the bill of lading.

Hamilton J decided, at first instance, that the goods were not shipped under the charterparty, and were not acquired by the charterers under the charterparty. He said:

“From the first the contract for the carriage of these goods was in the terms of the bill of lading given to Noates; and whatever title to the goods the charterers subsequently acquired, they acquired under and upon the terms of that bill of lading and not under the charterparty.”<sup>80</sup>

Hamilton J also made reference<sup>81</sup> to *Sewell v. Burdick* and the fact that when the charterers demanded delivery of the goods upon production of the bill of lading, under the Bills of Lading Act 1855 the contract evidenced by the bill of lading became binding as between the charterers and the shipowner<sup>82</sup>. The charterers’ counterclaim therefore failed because the exceptions in the bill of lading were effective.

This case caused the authors of *Carver’s Carriage of Goods by Sea* to write in editions up to and including the Eleventh editions that where the charterer is the indorsee of a bill of lading, the bill became the governing document in his relationship with the carrier. Following the comments of their Lordships in the *President of India* case the Twelfth and Thirteenth editions have abandoned the original position taken and stated that in the hands of a charterer/indorsee the bill of lading is only a receipt<sup>83</sup>. It is important to note the *President of India* did not overrule or distinguish *Calcutta*; it merely ‘explained’

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<sup>80</sup> *ibid.* at p. 770.

<sup>81</sup> *ibid.* at p. 771.

<sup>82</sup> See Lord Selborne in *Sewell v. Burdick* (1884) 10 App. Cas., at p. 86.

<sup>83</sup> This view has continued into *Carver on Bills of Lading, op.cit.*, para. 5-045.



it. As with *Rodocanachi* and *Gullischen* it is necessary to explain the differences between the two cases.

Much assistance can be derived here from the views of Debattista<sup>84</sup>. He identified<sup>85</sup> two types of situations where the charterer may be the indorsee of a bill of lading:

(i) the shipper sells goods to the charterer FOB. The bill of lading is issued to the shipper, who then indorses it to the charterer.

(ii) the vessel is run as a general ship and the charterer purchases goods loaded onto the vessel during the voyage and has the bill of lading indorsed to him.

The *President of India* case falls into situation (i) and *Calcutta* falls into situation (ii). The difference between the two lies in the fact that in situation (ii) the charterer is always just a charterer, making a profit by running a general ship: shipping the goods of others for more freight than he has to pay the shipowner under the charterparty. When the charterer purchases goods carried by the ship he has chartered, the fact that he is the charterer should not make any difference. He has entered into two contracts with the shipowner for different purposes; the charterparty regulates the charterer's use of the whole vessel, whereas the bill of lading relates to the particular regime for the carriage of a particular parcel of goods. In Debattista's opinion:

"It is not so much a question of whether the charterparty or the bill of lading applies as much as when the charterparty or bill of lading applies."<sup>86</sup>

In *President of India* the charterparty was entered into to satisfy the buyer's obligations under an FOB sale contract and the bill of lading was only ever expected to perform the functions that the charterparty could not: receipt and document of title. In *Calcutta*, the bill of lading reached the hands of the charterer entirely independently of the charterparty and therefore:

"the charterparty or the bill of lading can provide the contractual terms for the resolution of disputes between the parties, the choice of regime depending on

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<sup>84</sup> See fn. 6 above, and Chap. 7.

<sup>85</sup> *ibid.* at p. 166.

<sup>86</sup> *ibid.* at p. 168.

the subject matter of the particular dispute concerned.”<sup>87</sup>

In other words, it depends on the exact circumstances of the case whether the bill of lading or the charterparty is the governing document. In Debattista’s opinion the views of the authors of *Carver’s Carriage of Goods by Sea* and *Scrutton* are too rigid in this respect<sup>88</sup>.

Debattista’s interpretation of *President of India* and *Calcutta* is in line with the interpretations given above for *Rodocanachi* and *Gullischen* that the charterparty bill of lading does have a contractual function, even in the hands of the charterer. This contractual function is based on the obligation to deliver, which is always present in charterparty bills of lading. In respect of freight and demurrage the bill should be regarded as the contract, even in the hands of the charterer, while the terms of the carriage will be found in the charterparty.

Further support for the Alternative View can be found from the view of the bill of lading embodying the terms of a bailment. Hobhouse J in *The Torenia*<sup>89</sup> described charterparties as executory contracts for the carriage of goods, which are intended to give rise to bailments:

“They may include terms of an intended bailment, but they are not normally the contract of bailment itself. They cover other matters besides the bailor/bailee relationship.”

This is easiest to understand in respect of time charterparties. There the language is of hire and off-hire, not of an obligation to deliver. A time charterparty is most definitely not a bailment. The position of the voyage charterparty is less certain as this is usually specifically entered into to provide carriage for a particular cargo. The vast majority of voyage charterparties, however, do not contain obligations to deliver the cargo to certain people<sup>90</sup>. In BIMCO’s *Forms of Approved Documents* only the Chamber of Shipping

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<sup>87</sup> *ibid.* at pp. 168-9.

<sup>88</sup> The view in *Carver on Bills of Lading* remained substantially the same on this point as in *Carriage of Goods of Sea*.

<sup>89</sup> [1983] 2 Lloyd’s Rep. 210, at p. 216.

<sup>90</sup> It is submitted that the statement of Lord Denning in *President of India* [1970] 1 Q.B. 289, at p. 305 that the charterparty is “a contract by which the shipowners agree to carry goods and to deliver them” goes too far.

Cement Charter-Party, 1922 (CEMENCO) contains such an obligation. Other charterparties merely require the shipowner to deliver at the port of discharge. In such circumstances then the charterparty settles the terms of the hire of the whole ship, while the charterparty bill of lading settles the terms of bailment with its correspondent obligation to deliver a particular cargo.

Finally, the case of a bill of lading issued under a demise charterparty adds support to the Alternative View. Bills of lading issued to third parties evidence or contain contracts between the demise charterer and the third party. Suppose the shipowner buys a particular cargo and has the bill of lading indorsed to him. It surely cannot be the case that the demise charterparty represents the contract for the carriage of the goods between the shipowner and demise charterer, as it is in the nature of a lease. The bill of lading must therefore be the contract in this situation.

Following the above discussions, there would seem to be three circumstances where a charterparty bill of lading will be the contract. The first circumstance is where the bill is in the hands of a third party. There is no doubt that *Leduc* makes the bill a contract in the hands of a third party.

The second circumstance is that which occurred in *Calcutta*. There the ship was run as a general ship and the charterer just happened to buy the cargo carried on the ship he has chartered. Where the charterparty was entered into entirely separately from the sale contract there is no reason to prevent the bill of lading from governing the relations of the shipowner and the charterer in respect of that particular cargo. What is important in this circumstance is the relationship between the charterparty under which the ship sails and the identities of the buyer and seller in an international sale contract, and the type of sale contract. After agreeing a sale, the seller (CIF) or buyer (FOB) will arrange for the carriage of the goods. A bill of lading in the hands of the charterer (CIF seller, or FOB buyer) will merely be a receipt, and the contract of carriage is the charterparty under the traditional view. The bill of lading in this situation only came into existence to perform the functions

that the charterparty could not. This was the result of the decision in the *President of India*. The position is, however, unclear for a charterer who is also a CIF buyer or FOB seller. Certainly a buyer under a classic CIF contract and a seller under a classic FOB contract would not arrange the carriage of the goods and so would be unlikely to be the charterer at all. If, however, they happened to be the charterer, and the charterparty was entered into independently of the sale contract, then the case should fall properly within the circumstances of *Calcutta*, rather than the *President of India*. Conversely, when the charterparty and sale contract under which the bill of lading is transferred are related, the case is likely to be governed by the *President of India*.

The third circumstance where the charterparty bill is the contract in the hands of the charterer centres around the case of *Gullischen*. Although the charterparty and shipment of cargo were related - the charterers were the shippers - the contract under which the charterers were sued was that contained in the bill of lading, because the subject matter of the dispute was related to the delivery of the cargo. Where the dispute concerns freight, demurrage or delay at the port of discharge it is the terms of the bill of lading that govern the dispute. The charterparty would only be relevant in this circumstance if its terms had been effectively incorporated into the bill of lading.

Whether or not the charterparty or bill of lading governs relations between a shipowner and a charterer is a question of fact. The Law Commission considered the effect of the Carriage of Goods by Sea Act 1924 on the relationship between the charterparty and bill of lading<sup>91</sup>. They accepted that the wording of s. 2(1)<sup>92</sup> may have the effect that the charterer has transferred to him rights of the contract contained in or evidenced by the bill of lading, but whether that contract prevails over the charterparty contract was not a problem they thought the legislature should address:

“Ultimately, the question will be a factual one for the courts to decide,

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<sup>91</sup> The effect of s. 4 COGSA 1924 on statements in charterparty bills is not contractual in nature. See p. 4 above.

<sup>92</sup> See p. 172 above.

depending on the terms of the relevant charterparties and bills of lading.”<sup>93</sup>

If the issue is a question of fact, then a general principle will only govern some of the possible situations.

## **6. The Charterparty Bill of Lading as a Document of Title**

It has never been argued that the charterparty bill of lading is not a document of title, and this is not surprising given the fact that charterparty and traditional bills have existed alongside each other since at least 1539. That said, this Section will now examine whether all of the document of title functions are in fact performed by the charterparty bill of lading. There are two basic questions that need addressing: is the charterparty bill of lading transferable; and, does the charterparty bill perform all the functions of a document of title described in Sections 2 to 4, Chapter 4?

### **a) Is the Charterparty Bill of Lading Transferable ?**

A document of title was defined in Section 1 as a document whose transfer *may* transfer possessory, proprietary or contractual rights over the goods<sup>94</sup>. This was refined in the conclusion to Chapter 4 to emphasise the bill of lading's role in gaining access to the goods at the port of discharge - it is a transferable document containing an obligation on the carrier to deliver only against production of an original bill of lading. The latter point will be dealt with in the second part of this Section.

In order to be a transferable bill it must contain the words "or order" or "or assigns"<sup>95</sup>, ie an order bill. Looking at the Sixteenth Century charterparty bills in Appendix 2 most are order bills, some are not, eg. the *Mary Martyn* bill of 1539 is not an order bill. The cargo under that bill was consigned to John Collet, but because the bill was not made out to him, or his order, he was unable to transfer the bill on. This type of bill is not

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<sup>93</sup> Law Commission Joint Report “Rights of Suit in Respect of Carriage of Goods by Sea” (1991), para. 2.53.

<sup>94</sup> See Chapter 4, p. 110.

<sup>95</sup> Based on the custom of merchants found in *Lickbarrow v. Mason*. This requirement will be discussed further in Chapter 7.

transferable and is a non-order bill of lading<sup>96</sup>, or more properly a non-order charterparty bill of lading. Whether or not a charterparty bill of lading is transferable or not depends on the wording used on the face of the bill. Order bill status on a modern charterparty bill does not come from the printed form. On the CONGENBILL<sup>97</sup> there is no indication in the printed form that it will be used as a order bill. If it is to be used in that way the shipper will indicate it by use of the phrase "or order" in the box marked Consignee. Whether or not they choose to make the bill and order bill and transferable depends on what they wish to use the bill for. This will be discussed further in the next section.

#### **b) Does the Charterparty Bill Perform the Document of Title Functions?**

These functions were outlined in Chapter 4, but briefly comprise the transfer of possessory, proprietary and contractual rights.

##### **(i) Transfer of Possessory Rights**

Possessory rights were split in Chapter 4 into the right to delivery of the goods against production of the bill of lading, and the rights available to the holder of the bill as if he held the goods. Whether or not the bill will transfer the right to take delivery depends on whether the statement regarding accomplishment<sup>98</sup> is present. If it is, the carrier is under an obligation, in the absence of suspicious circumstances, to deliver the goods to the holder of an original bill. Consequently the holder of the bill has the ability to obtain the goods from the carrier<sup>99</sup>. A charterparty bill of lading may or may not contain this phrase. The *Mary Martyn* bill<sup>100</sup> does, while the GENWAYBILL<sup>101</sup> does not. The lack of the accomplishment statement means that the GENWAYBILL is not a bill of lading at all, but

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<sup>96</sup> The position of the non-order bill of lading and other non-transferable documents is discussed fully in Chapter 7.

<sup>97</sup> See Appendix 5.

<sup>98</sup> See Chapter 4, p. 114.

<sup>99</sup> Whether the holder has the *right* to take possession of the goods depends on the intentions of the parties on the indorsement of the bill, and the general circumstances in which the bill got into the holder's possession - see Chapter 4.

<sup>100</sup> Appendix 2.

<sup>101</sup> Appendix 5.

a sea waybill. The position of sea waybills will be discussed in Chapter 7.

Whether or not a charterparty bill can transfer rights based on constructive possession of the goods<sup>102</sup> depends on the intentions of the parties. If the rights were intended to be transferred, they will be transferred. The fact that it is a charterparty bill of lading that facilitates the transfer will not affect whether that transfer is in fact possible.

### **(ii) Transfer of Proprietary Rights**

Exactly the same considerations apply to the charterparty bill in this respect as to the traditional bill. As noted on page 162 above, if the charterer wishes to sell the cargo during transit he will require a document that allows property in the cargo to be transferred during transit. That document is the bill of lading, and it does not matter whether a charterparty is in existence. The tender of a charterparty bill under a CIF contract is still a good tender<sup>103</sup>. Whether or not transfer of a charterparty bill actually transfers property depends on the same considerations as the traditional bill, particularly whether there is an intention to transfer<sup>104</sup>.

### **(iii) Transfer of Contractual Rights**

So far, the charterparty bill of lading has performed all the traditional bill's functions as a document of title. Whether or not contractual rights are transferred depends on which view of the contractual function of the charterparty bill is accepted. If the traditional view is accepted that the charterparty bill in the hands of the charterer is not a contract or even evidence of the contract, when the charterparty bill is transferred, contractual rights are not transferred, but *created* in the hands of a third party. This will lead to the problems referred to on pages 166 to 173 above. If the alternative view is accepted, then there will be more situations where the charterparty bill *is* the contract, and the contractual rights and liabilities will be transferred by COGSA 1992 in the same way as rights and liabilities under traditional bills.

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<sup>102</sup> See Chapter 4, Section 2b).

<sup>103</sup> *Finska Cellulosaforeningen v. Westfield Paper Co. Ltd* [1940] 4 All E.R. 473.

<sup>104</sup> See Chapter 4, pp. 138-9.

It has never been suggested that the charterparty bill of lading is not a document of title. If the charterparty bill is made out to order it is transferable and capable of transferring such rights as the parties intend to transfer. If it does not require delivery against production it is not a bill of lading at all, but a sea waybill. It is not the presence of a charterparty that affects the document of title function, or status as a bill of lading, but the terms used in the document and the purposes for which the parties created it in the first place.

## **7. Conclusions**

In view of *Rodocanachi* and *President of India* the charterparty bill of lading will not normally be the contract of carriage in the hands of the charterer. Nevertheless, it will always contain the obligation to deliver, which underlies the contract of carriage and is separate from it. Disputes concerning delivery and payment of freight will be resolved under the terms of the bill of lading. Following *Calcutta*, the charterparty bill of lading will also be the contract where the sale contract, shipment and subsequent indorsement of the bill and the charterparty are not related.

Whether or not the terms of the charterparty bill are used to resolve disputes between charterer and shipowner, the status of the charterparty bill as a true bill of lading is unaffected. The definition of a bill of lading identified in Chapter 1 does not require it to contain the terms of the contract of carriage, merely that it is a receipt and contains an obligation to deliver. As it performs these functions and may be a transferable document of title, if the parties so desire, the charterparty bill lading is indeed a true bill of lading.



## CHAPTER 6

### RECEIVED FOR SHIPMENT BILL OF LADING

There are several types of received for shipment bills of lading<sup>1</sup>. The most obvious one is that which recites that goods have been received by a carrier for shipment on a particular ship. A further type acknowledges receipt for shipment on a particular ship, or any other unnamed ship. A third type acknowledges receipt by someone other than the carrier of goods for shipment. This latter type may be described as a freight forwarder's bill of lading, and is beyond the scope of this Thesis, as it is not issued by a carrier. This Chapter will deal only with received for shipment bills of lading issued by carriers or their agents, where goods have been received into their custody for shipment, but not yet loaded on board any ship, whether named or not.

#### 1. Development

According to Hannesson<sup>2</sup>, the received bill of lading was created by mercantile custom in the Nineteenth Century. McLaughlin stated that bills of lading were customarily shipped bills 'almost to the end of the Nineteenth Century'<sup>3</sup>. However, received for shipment bills of lading did exist prior to the Nineteenth Century<sup>4</sup>. Their presence in the Sixteenth Century, while not conclusive of anything, does indicate that there was some variety in bills of lading issued in that Century. Appendix 2 contains received and charterparty bills, as well as the traditional shipped bills. It may be that these 'received' bills are in fact shipped bills that simply use alternative terminology to describe the fact of

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<sup>1</sup> Benjamin, *op.cit.*, para. 18-016.

<sup>2</sup> Hannesson M., *Carriage of Goods by Sea: The Nature of Transport Documents, Carriers, and Regulation by Mandatory Conventions. A Study in English and Scandinavian Law* (1991) Unpublished PhD Thesis, Exeter University, p. 15.

<sup>3</sup> McLaughlin C.B., "The Evolution of the Bill of Lading" (1935) 35 Y.L.J. 548, at 559.

<sup>4</sup> See the 1397, 1546, 1549 and 1570 bills in Appendix 2, which do not contain an acknowledgement that goods have been physically placed on board a ship, although they are signed by the master of a particular ship.

shipment. However, given the fact that the other bills of the Sixteenth Century, and indeed since then, refer specifically to the goods having been shipped it seems unlikely that the alternative terminology meant the same thing. What is unclear is the reason why received bills were used in the Sixteenth Century.

Whatever the early use of received bills, they became more prominent during the Nineteenth Century. Hannesson noted<sup>5</sup> that the rise of the received bill coincided with the growth of liner services. If a received bill were to be issued the carrier need not wait for goods to be loaded in order to issue it. It could be issued as soon as the goods were in the carrier's custody. The shipper could then send the bill on ahead to ensure that it arrived in time to obtain delivery on production of it at the port of discharge. The use of received bills increased during the First World War as disruption to shipping meant it was uncertain which ship the goods would actually be loaded on, so the use of a traditional shipped bill would not have been appropriate<sup>6</sup>. After the War the carriers were unwilling to return to issuing shipped bills, as the use of received bills allowed them the freedom from having to ship the goods on a particular ship. At the time McLaughlin was writing though, shipped bills were still in use for bulk trades<sup>7</sup>. Even so, some commentators were predicting in 1921 that received bills would replace shipped bills altogether<sup>8</sup>.

McLaughlin identified 4 factors that contributed to the decline of the bill of lading as evidence of shipment:- the gradual disappearance of the personification of the ship; the introduction of other modes of transport; the building of railways across America; the development of cable and wireless and the diminishing role of the master<sup>9</sup>. It is submitted that changes in shipping and transport in general are more likely to have contributed to the growth of new forms of shipping documentation, than theoretical changes to the nature of ships or their masters. The received bill grew up because of a need in the shipping industry

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<sup>5</sup> *ibid.*

<sup>6</sup> McLaughlin, *ibid.*

<sup>7</sup> *ibid.*, pp. 560-561.

<sup>8</sup> Negus R.E., "The Evolution of Bills of Lading" (1921) 147 L.Q.R. 304, at 309.

<sup>9</sup> *ibid.* at pp.561-565.

to solve certain problems associated with the use of the traditional bill. The main problem with using traditional bills during wartime situations was that it could be months before cargo could be shipped and a bill of lading issued. If the shipper wished to sell the goods before shipment he would need a warehouse receipt. Following shipment a traditional bill would be issued and the shipper would have two documents of title<sup>10</sup>. The issue of a single received for shipment bill following receipt for carriage by the carrier could avoid this duplication of documents.

Although the carriers were happy to issue received bills, the cargo interests were less happy to receive them. Following the First World War, American carriers reluctantly agreed to stamp a received for shipment bill, 'so far as reasonably practicable', that the goods were now on board a vessel<sup>11</sup>. The Hague Rules recognised this practice, and Art. III, r. 7 allows a shipper to demand that a shipped bill replace the issued received bill following actual shipment of the goods. The carrier may choose to annotate "shipped" on the existing received bill, or insist that the existing received bill be surrendered and a shipped bill issued.

According to Hannesson<sup>12</sup>, use of received bills increased again during the Second World War for the same reason as during the First World War - disruption to shipping. However, during the Fifties the received bill was losing ground to the shipped bill, for a number of reasons. One of the reasons included the increasing use of air carriage to send documents on ahead, meaning a shipped bill could be sent in time to meet the ship. A further reason was the increasing threat of theft from dockside warehouses - at least when a shipped bill was issued the buyer could be reassured that the goods were safe at sea<sup>13</sup>. However, problems with the presentation of traditional shipped bills from the 1970's onwards, due to containerisation and faster ships, has seen an increase in the use of

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<sup>10</sup> Negus, *op.cit.*, p. 305. A warehouse receipt is a document of title by virtue of s. 1(2) Factors Act.

<sup>11</sup> *ibid.*

<sup>12</sup> Hannesson, *op.cit.* p 16-17.

<sup>13</sup> Subject to the problems noted in Chapter 2 above.

received bills of lading<sup>14</sup>. In combined transport contracts, where the carriage will be from an inland point, the bill of lading issued by the contracting carrier will usually be a received bill<sup>15</sup>, as it would be clearly inappropriate to issue a shipped bill in those circumstances.

The question remains for the received bill of lading today, is it a bill of lading in the same way as the traditional bill of lading? It is instructive to note at this stage the attitude of other jurisdictions towards the received bill. Some countries have, for many years treated the received bill exactly the same as a shipped bill. In the mid-Nineteenth Century, the US courts began to have trouble with the requirement that the cargo must be loaded before a bill of lading could be issued, as they thought it was impractical to force a shipowner to wait until the cargo was fully loaded before issuing a bill<sup>16</sup>. The use of received bills became customary and their ability to act as documents of title was recognised by statute in the early Twentieth Century<sup>17</sup>.

Now in the United States Commercial Code, UCC, s. 1-201(6) the bill of lading

"means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill..."

Not only does this definition refer specifically to received for shipment documents, but also includes documents for carriage other than by sea.

In Scandinavia the position is also clear<sup>18</sup>. In the Scandinavian Maritime Code, SMC s. 151(1), the definition of the bill of lading is stated as follows:

"The expression bill of lading shall be deemed to mean a document signed by the carrier or on his behalf, wherein it is acknowledged that goods of a certain nature and quantity have been *received for carriage* or loaded on board, provided that the document calls itself a bill of lading, or states that goods will only be delivered against return of the document." (emphasis added)

The emphasised words make it clear that received bills are included in the definition of a

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<sup>14</sup> Hannesson, *op.cit.*, p. 17. See further on the problems of presentation of the shipped bill Section 6, Chapter 4.

<sup>15</sup> Baughen, *op.cit.*, p. 13.

<sup>16</sup> McLaughlin, *op.cit.*, p. 559.

<sup>17</sup> Benjamin, *op.cit.*, para. 18-045.

<sup>18</sup> Hannesson, *op.cit.*, pp. 98 and 108.

bill of lading, and this have the effect that all Scandinavian Laws applicable to bills of lading apply to received bills without distinction. A similar position was reached in New Zealand in 1922 with the enactment of the Mercantile Law Amendment Act No. 25 to amend the Mercantile Law Act 1908. S. 3(4) of the Amendment Act stated that the received bill of lading was

"for all purposes deemed to be a valid bill of lading with the same effect and capable of negotiation in all respects, and with the same consequences as if it were a bill of lading acknowledging that the goods to which it relates had actually been shipped on board."<sup>19</sup>

The Hague Rules and Hague Visby Rules dealt only with shipped bills, although received bills could be converted to shipped bills, either by surrender and reissue, or annotation. The Hamburg Rules 1978, on the other hand, defined a bill of lading as evidencing a contract of carriage, and "the *taking over* or loading of goods by the carrier..."<sup>20</sup>, and Art. 14.1 places an obligation on the carrier to issue a bill of lading on demand of the shipper after the goods have been taken into the carrier's charge. Following actual loading of the goods the shipper may demand a shipped bill in the same way as under Hague Visby<sup>21</sup>.

The situation in English Law is less clear, as will become obvious in the rest of this Chapter. Whilst other countries have definitions of bills of lading, the UK does not, and so the question of whether a received bill is a true bill of lading or not needs to be looked at on the facts of the particular situation - it may be a bill of lading for one purpose, but not for another. The law did become clearer in one respect in 1992 with the enactment of COGSA 1992. The Law Commission had considered whether received bills should be covered by the Act, and decided that since traders and bankers dealt with received and shipped bills in the same way they would recommend that both be treated in the same way

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<sup>19</sup> s. 3(4).

<sup>20</sup> Art. 1.7, emphasis added.

<sup>21</sup> Art. 15.2.

by COGSA 1992.<sup>22</sup> According to s. 1(2)(b)<sup>23</sup>, references to a bill of lading in COGSA 1992 include references to received bills. However, COGSA 1992 does not deal with all of the law relevant to bills of lading, so it is still necessary to discuss the attitude of the Common Law to received bills.

Cases concerning the status of the received bill of lading in English Law have been relatively few, and seem to only have occurred since the 1920's. These cases are mostly concerned with whether the received bill is a document of title. This Chapter will go further than this and consider how far the received bill performs all the functions of the traditional bill outlined in Part I. Superficially, modern received bills are virtually identical to traditional bills<sup>24</sup>, with the only obvious difference being that a traditional bill starts with the words "Shipped" and a received bill starts with "Received for shipment".

## **2. Received Bill of Lading as a Receipt**

Chapter 2 described what sort of evidence statements in the traditional bill of lading make. This Section will discuss the evidential nature of the statements in a received for shipment bill, in particular in respect of statements as to quantity, condition and leading marks. One major difference between the received bill and the traditional bill is that the Hague and Hague-Visby do not apply to received bills as such. However, Art. III, r. 7 allows a received bill to be converted into a shipped bill, at the shipper's request, on actual loading of the cargo, and from then on the Rules apply to the bill in the manner described in Chapter 2 above. This Section will therefore only deal with the Common Law applicable to received bills in situations where the Hague Visby Rules have not become applicable.

One thing a received bill does not evidence is receipt *on board* a ship. However, their Lordships in *The Marlborough Hill*<sup>25</sup> did not think there was a difference in principle

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<sup>22</sup> Law Com. No. 196, para. 2.48.

<sup>23</sup> s.13A of New Zealand's Mercantile Law Act 1908 (as amended) contains a virtually identical provision, although such a provision was probably not necessary bearing in mind the earlier 1922 provisions relating to received bills referred to above.

<sup>24</sup> See Appendix 5.

<sup>25</sup> [1921] 1 A.C. 444.

between an acknowledgement of receipt of goods into custody to await shipment and an acknowledgement that the goods have actually been put over the ship's rail<sup>26</sup>.

#### **a) Statements as to Quantity**

As with traditional bills, statements as to quantity in received bills are *prima facie* evidence that may be rebutted. Even the *prima facie* nature of a received bill may be destroyed by the insertion of a weight "weight unknown" clause. This occurred in *New Chinese Antimony Co Ltd v. Ocean SS Co*<sup>27</sup>, a case which despite involving a received bill of lading<sup>28</sup> is used as an authority for traditional bills. The fact that it involved a received bill was not mentioned at all in the judgment.

The Common Law situation was altered by COGSA 1992, s. 4 of which states that statements in the bill of lading as to quantity are conclusive in the hands of a lawful holder. As noted on page 193 above, by s. 1(2)(b) the Act applies to received bills as it does to traditional bills.

All the problems associated with quantity statements in traditional bills equally apply to received bills, with the added complication that received bill of lading figures will be those given when received into the custody of the carrier. Those figures may be correct at the time of the issue of the bill of lading, but while awaiting loading losses could be sustained, ie. they could be stolen. This is a problem for the carrier because taking over the goods before they are loaded onto a ship increases the time span for which they are his responsibility. At least when the carrier has issued a shipped bill the goods are actually on board a ship and less likely to be stolen.

#### **b) Statements as to Condition**

Statements as to condition in a received bill are *prima facie* evidence and may

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<sup>26</sup> *ibid.* p. 451.

<sup>27</sup> [1917] 2 K.B. 664.

<sup>28</sup> The bill concerned stated "shipped or delivered for shipment", *ibid.*, p. 665.

found an estoppel against the carrier if the bill is transferred to a third party<sup>29</sup>. Estoppel in the context of received for shipment bills was discussed in *Canada and Dominion Sugar Co. Ltd v. Canada National (West Indies) Steamships Ltd*<sup>30</sup>. The court decided whether an estoppel had been founded on the facts of the case without passing comment on the fact that the bill of lading under discussion was a received for shipment one. The distinction between condition and quality also remains the same as for traditional bills.

Containerised cargo is more likely to be carried as part of a multimodal carriage and so it is more likely that a received bill will be issued by a carrier in respect of containers<sup>31</sup>. Any statements about condition made in the bill only relate to the external condition of the container, and only relate to the time of delivery of the container to the carrier. Holders of such bills of lading should be wary of the poor quality of the evidence in the bill of the condition of the cargo in these circumstances.

### **c) Statements as to Leading Marks**

The position of these statements in a received bill is exactly the same as for traditional bills<sup>32</sup>. The potential problems from relying on statements as to leading marks in received bills is illustrated by *Elder Dempster and Co v. Dunn and Co*<sup>33</sup>. There, two sets of bills were issued for the cargo, one received for shipment and one shipped, and both seemed to be in circulation – delivery was to be on presentation of both sets of bills, or just the first set together with an indemnity. The consignees refused to accept cargo with no or different leading marks according to the second set of bills. On loading, the master was aware of the lack of marks on some of the cargo and employed a man to remark the cargo before shipment<sup>34</sup>. Even so, some cargo still bore no marks, or had marks different to those stated in the shipped bills, and this led to the carrier being liable. Carriers, shippers

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<sup>29</sup> See Section 3, Chapter 2.

<sup>30</sup> [1947] A.C. 46.

<sup>31</sup> Baughen, *op.cit.*, p. 149.

<sup>32</sup> See Section 5, Chapter 2.

<sup>33</sup> (1909) 15 Com. Cas. 49.

<sup>34</sup> *ibid.* at p. 53.



and consignees should be wary of relying on leading marks stated in received bills, as these could deteriorate before loading, and mistakes, as the carrier in *Elder Dempster* found out, are difficult to correct during loading.

### 3. Received Bills of Lading as Contracts

Chapter 3 discussed the Traditional View of the contractual function of the traditional bill of lading. The Traditional View holds that the bill is only evidence of the contract of carriage while it is in the hands of the original shipper<sup>35</sup>. This evidence then becomes conclusive when the bill is transferred to a consignee or indorsee. The Alternative View proposed in Chapter 3 holds that the bill of lading should be considered to be the contract of carriage reduced into writing<sup>36</sup>, ie it is a contract no matter who holds the bill. Whichever view is preferred, the fact that a bill of lading is a received for shipment bill of lading does not matter. In fact, if a received bill is issued it is easier to consider it to be the actual contract as it is issued as soon as the goods come into the carrier's custody, rather than at the later stage of loading. This is particularly so where the cargo is received by a freight forwarder who issues his own received bills of lading<sup>37</sup>.

Received bills of lading may also be issued under charterparties. The fact that a bill of lading is a received charterparty bill does not affect its contractual function, or indeed any other function of the bill. In *The Ines*<sup>38</sup> the carriers were sued for breach of contract for a misdelivery of the cargo by the holders of a received for shipment charterparty bill of lading. The fact that it was a received bill made no difference to the outcome of the case.

So far received bills have been virtually identical to traditional bills, but it is with the document of title function where the main difference lies.

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<sup>35</sup> Chapter 3, p. 82.

<sup>36</sup> Chapter 3, pp. 96-7.

<sup>37</sup> Freight forwarder bills of lading are beyond the scope of this thesis, but see Nossal S., "The Legal Status of Freight Forwarder's Bills of Lading" (1995) 25 H.K.L.J. 78.

<sup>38</sup> [1995] 2 Lloyd's Rep. 144.

#### 4. Received Bills of Lading as Documents of Title

Some commentators hold that received for shipment bills of lading are not documents of title<sup>39</sup>, while others consider that the matter is still unclear<sup>40</sup>. The lack of a definitive answer to the question of whether a received bill is truly a document of title is caused by the lack of any clear authority on the subject, and the lack of any clear definition of a document of title in general<sup>41</sup>. Such case law that exists on the subject is hardly authoritative, and does not directly address the question, but the comments *obiter* are quite instructive.

In *The Marlborough Hill*<sup>42</sup> a cargo of goods was accepted in New York for shipment to Sydney. Received bills of lading were issued. Indorsees of these bills arrested the ship, alleging non-delivery of the goods. The actual issue before the Privy Council was whether the received bill was a bill of lading within the Admiralty Court Act 1861. The court held that it was a bill of lading for those purposes, but they did not discuss specifically whether the received bill was a document of title. However, Lord Phillimore did state, *obiter*, that if the document were a bill of lading, it would be a negotiable instrument<sup>43</sup>. As was seen in Chapter 4, this terminology is very misleading. The case does little to prove the document of title status of the received bill. It was considered and distinguished by the King's Bench six months later in *Diamond Alkali v. Bourgeois*<sup>44</sup>.

*Diamond Alkali* concerned a sale of goods to be shipped CIF from America to Sweden. The seller tendered a received bill, which the buyer rejected. The court held that the buyer was entitled to reject the document as it was not a bill of lading in the context of

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<sup>39</sup> eg. Palmer *op. cit.*, p. 563.

<sup>40</sup> eg. Baughen *op. cit.*, p. 146.

<sup>41</sup> See section 1, Chapter 4.

<sup>42</sup> [1921] 1 A.C. 444.

<sup>43</sup> *ibid.*, p. 452. It is interesting to note that Lord Phillimore felt, at the 1921 Hague Conference of the International Law Association Maritime Law Committee, that the Privy Council had done its best to set up the received bill as a negotiable instrument in allowing an indorsee to sue the carrier – Sturley M.F. (Ed.), *The Legislative History of the Carriage of Goods by Sea and the Travaux Préparatoires of the Hague Rules* (1990), Vol. I, p. 223.

<sup>44</sup> [1921] 3 K.B. 443.

the CIF contract<sup>45</sup>. McCardie J briefly reviewed the history of the bill of lading, and concluded that the bill of lading sprang from the ship's book of lading, emphasising the importance of actual shipment<sup>46</sup>. McCardie J also pointed out that the custom recognised by the jury of merchants in *Lickbarrow v. Mason* only related to bills of lading expressing goods to have been *shipped*. He discussed the decision in *The Marlborough Hill*, but felt he was not bound by it, as the actual decision in that case was that the document was a bill of lading within the Admiralty Court Act 1861. The Privy Council comments about the received bill were mostly *obiter* and they did not consider the position of tendering received bills under CIF contracts.

McCardie's language in *Diamond Alkali* was that of construction:

"If then a vendor under an ordinary cif contract is bound to tender a bill of lading, the question next arising is: what is meant by a bill of lading within such a contract?"<sup>47</sup>

In other words, what document is required by the sale contract, and did the document actually tendered meet that requirement. The fact that the courts considered construction of the sale contract most important is illustrated by *United Baltic Corp. v. Burgett & Newsom*<sup>48</sup>. There, a consignment of peas was purchased CIF Shanghai. A bill of lading acknowledging receipt was issued on 31 January, but the peas were not in fact shipped until 4 February, ie. a received bill had been issued. Bankes LJ in the Court of Appeal held that this was a usual, though not universal, bill of lading issued in this trade, and in his opinion "taking the contract in the language in which the parties expressed it, the bills of lading were a compliance with that contract."<sup>49</sup> As a matter of construction then, a received bill was acceptable under this particular CIF contract.

Whether a particular bill of lading is acceptable under an FOB contract is also a

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<sup>45</sup> cf. *Canadian & Dominion Sugar Co. Ltd v. Canadian National (West Indies) Steamships Ltd* [1947] A.C. 46, where a received bill was accepted under a CIF contract. The difference may lie in the fact the goods had been loaded and the ship was at sea when the bill was presented, but there was no discussion in the judgment regarding its acceptance.

<sup>46</sup> *ibid.*, p. 449.

<sup>47</sup> *ibid.*, p. 448.

<sup>48</sup> (1922) 8 Ll. L. Rep. 190.

<sup>49</sup> *ibid.*, p. 192.

matter of construction. In *Yelo v. Machado & Co Ltd*<sup>50</sup> a consignment of mandarins was purchased fob Spanish port. The letter of credit opened in favour of the seller required the tender of shipped bills on or before 14 December. Received bills were issued dated 12 December. Sellers J held, albeit *obiter*, that those bills were not good tender. The plaintiffs argued that there was a custom to issue received bills in this trade, but Sellers J held that the evidence was not sufficient, as it would need to supplant the express requirement of a 'shipped' bill in an FOB contract. The date of shipment was vital in this particular contract, as in most FOB contracts, and a received bill is of itself no evidence of the date of shipment, and is therefore unlikely to be acceptable to the buyer.

*Diamond Alkali, United Baltic and Yelo* all concerned whether a particular bill was a good tender under a sale contract. They do not consider at all whether the received bill of lading is a document of title in the same way as a traditional bill of lading. ie. does its transfer affect constructive possession, property and/or contractual rights. That was considered in *Ishag v. Allied Bank*<sup>51</sup>. Following some complicated arrangements for shipment, a bill of lading was issued in January by the carrier's agents. The goods were eventually shipped in February and a second bill of lading was issued by the agents. The court held that the holders of the second bill had failed to prove that the first received bill was not a document of title. Lloyd J was quite satisfied that the received bill was a document of title in this case<sup>52</sup>. The holders of the first bill of lading transferred were entitled to possession of goods, although the question of whether the bill was a document of title or not actually affect the result. Lloyd J stated he relied on *The Marlborough Hill*, but otherwise failed to explain exactly why the received bill was a document of title. As seen above, *The Marlborough Hill* is hardly clear on the subject either, so *Ishag* should not be taken as clear authority that a received bill is a document of title.

Case law does not provide any clear answers to the problem of the document of

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<sup>50</sup> [1952] 1 Lloyd's Rep. 183.

<sup>51</sup> [1981] 1 Lloyd's Rep. 92.

<sup>52</sup> *ibid.*, p. 98.

title status of the received bill so it is necessary to consider other sources. The Factors Act 1889, s. 1(4) defined statutory documents of title, which included bills of lading, but the definition made no distinction between shipped or received bills. However, as *Carver* noted, if a document is only within the statutory definition and not the Common Law definition the transfer of it may give the transferee a better title in the goods under the statutory exceptions to the *nemo dat* rule. The transfer will not operate to transfer constructive possession of the goods.

According to Debattista<sup>53</sup> the argument that the received bill of lading was not transferable, ie. not a document of title, was already weak before the passing of COGSA 1992. Debattista suggested that the matter was now settled by s. 1(2)(b), COGSA 1992 which states that all references to bills of lading in the Act also refer to received bills. The lawful holder of the bill has transferred to him all rights of suit under s. 2(1). By s. 5(2) a lawful holder can be a person in possession of the bill following an indorsement of the bill. Since all references in the Act can apply to received bills, the implication is that the received bill is indorseable, can be transferred and is therefore a document of title. Debattista was concerned with the right of delivery, and his interpretation of COGSA 1992 meant that the holder of a received bill had a contractual right to delivery. There is no doubt that all contractual rights are transferred under COGSA 1992, for both shipped and received bills, however, as mentioned before, COGSA 1992 does not deal with all aspects of bills of lading and therefore it does not assist in determining whether the transfer of a received bill can transfer constructive possession or property in the goods.

Art. I(b) Hague Visby Rules stated that contracts of carriage, covered by the Rules, are contracts covered by a bill of lading or a "similar document of title"<sup>54</sup>. The meaning of similar document of title was not given in the Rules. However, Art. III, r. 7 allows a

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<sup>53</sup> *op.cit.*, para. 3-12.

<sup>54</sup> The French text of Art. I(b) of the Hague Rules translated 'similar document' as 'tout autre document similaire formant titre pour le transport des marchandises par mer'. This does seem wider than the English version, according to Berlingeri F., "The Hague-Visby Rules and Action in Tort" (1991) 107 L.Q.R. 18, at p. 19.

shipper to demand a shipped bill of lading if he has previously taken up a *document of title* to the goods<sup>55</sup>. The document of title in this context could only refer to a received bill of lading<sup>56</sup>, and it implies that the similar document of title in Art. I(b) included the received bill of lading, *inter alia*<sup>57</sup>.

The question of whether a received bill is in fact covered by the Hague Visby Rules by virtue of Art. I(b) has never been considered by the English courts, but the Court of Appeal of Northern Ireland considered that 'similar document of title' doubtless included a received bill of lading<sup>58</sup>. Hannesson concluded that which ever view is taken of the meaning of 'similar document of title' it will necessarily include a received bill<sup>59</sup>.

Art. 1.7 of the Hamburg Rules avoided the same problems as the Hague Visby Rules by defining a bill of lading as a "document which evidences a contract of carriage by sea and the *taking over* or loading of the goods"<sup>60</sup>. This clearly includes a received bill.

While it would seem to be the case that received bills are treated as documents of title for the purpose of international carriage by sea conventions, they are not acceptable to banks under UCP500. Art. 23(a)(ii) requires a marine bill to indicate that goods have been loaded on board a ship<sup>61</sup>.

The definition of document of title was discussed in section 1 of Chapter 4, and in the conclusion of that Chapter. A bill of lading is a document of title if it is transferable, and if its transfer transfers with it the ability to obtain delivery from the carrier, then the obligation on the carrier is to deliver to the new holder. A received bill, being virtually identical to the traditional bill on its face, is clearly transferable, if it is made out to 'order or assigns'. It also contains the 'accomplishment' sentence, indicating that delivery will be

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<sup>55</sup> Art. 15.2, Hamburg Rules contains a similar provision.

<sup>56</sup> Hannesson, *op.cit.*, p. 179.

<sup>57</sup> See Hannesson, *op.cit.*, Chapter 13. What else might be included will be referred to again in Chapters 7 and 8.

<sup>58</sup> *Hugh Burns v. Burns & Laird* (1944) 77 Ll. L. Rep. 377, at p. 383.

<sup>59</sup> Hannesson, *op.cit.*, p. 203.

<sup>60</sup> Emphasis added.

<sup>61</sup> For multimodal transport documents however, Art. 26 allows the document to indicate that goods have been despatched, taken in charge or loaded on board, which would permit received for shipment documents.

made to the holder of an original bill. This suggests that the received bill of lading is a document of title on its face, but the question remains: what is its legal basis?

The traditional bill of lading obtained its document of title status through custom and the recognition of that custom by the courts. Certain documents were also created as documents of title in Factors Act 1889<sup>62</sup>. Writing in 1921, Negus discussed the creation of negotiable instruments<sup>63</sup> by usage. It used to be the case, in the Nineteenth Century, that negotiability could not be added to a document by mere wording or usage<sup>64</sup>. However, this position changed over the Nineteenth Century and usage may now make a document negotiable. Such usage need not be ancient as long as it is general<sup>65</sup>. It is always open to the courts to recognise the custom of treating a particular document as a document of title<sup>66</sup>. That new documents of title can be created by custom should come as no surprise, bearing in mind the roots of the bill of lading in the Law Merchant. In the words of Negus:

"The law merchant is not, like a crystal, fixed, dead, unalterable, but, rather, is it like tree, rooted in the customs of merchants of today as much as of those of bygone centuries, ever putting out fresh foliage, discarding that which is dead, and daily growing in bulk and strength."<sup>67</sup>

The maritime industry seems to use the received bill as a document of title, using it to transfer possessory, proprietary and contractual rights. Whether or not a custom, properly so called, exists is a matter that has yet to reach the courts. Indeed, since the application of COGSA 1992 to received bills, the availability of a contractual remedy would make it less likely that a case will arise concerning the transfer of constructive possession or property by transfer of a received bill. In the meantime, it is probably safe to conclude that the received bill of lading is a document of title<sup>68</sup>. Even those commentators who currently deny the received bill document of title status acknowledge that it is still

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<sup>62</sup> Whilst COGSA 1992 did formally give received bills a measure of transferability, transferring the carriage contract with the bill, this was not sufficient of itself to give document of title status to the received.

<sup>63</sup> *ie. transferable bills of lading.*

<sup>64</sup> Negus R.E., "The Negotiability of Bills of Lading" (1921) 37 L.Q.R. 442.

<sup>65</sup> *ibid.*, p. 444.

<sup>66</sup> *Kum v. Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439.

<sup>67</sup> Negus, *ibid.*

<sup>68</sup> Bools, *op.cit.*, p. 187; Todd, *op.cit.*, p. 119.

open to the courts to recognise it as such<sup>69</sup>. After all, if parties intend constructive possession and property to pass with a received bill, in time a custom will become established to that effect.

## 5. Conclusions

Received bills of lading are used in the industry in place of traditional bills, which suggests that carriers, sellers and buyers treat received bills exactly the same as traditional bills, regardless of the technicalities of its status. It is perhaps unlikely that we shall ever see a definitive case that decides whether or not the received bill is the equivalent to the traditional bill. In the absence of such a case the received bill of lading should be treated as equivalent to a traditional bill, save that it does not acknowledge receipt upon a particular ship. It does acknowledge receipt and an obligation to deliver and therefore has all the ingredients of a bill of lading generally. Whether it is good tender under a sale contract or letter of credit depends on construction of the relevant sale agreement, rather than on the nature of the document itself.

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<sup>69</sup> Benjamin, *op.cit.*, para. 18-045; Palmer, *op.cit.*, p. 363.



## CHAPTER 7

### NON-TRANSFERABLE BILLS OF LADING

Benjamin described "straight (or non-negotiable) bills; sea waybills" as documents

"which make the goods deliverable to a named consignee and either contain no words importing transferability or contain words negating transferability"<sup>1</sup>.

The documents referred to in this Chapter make the goods deliverable to an identified person, and no one else. The common factor between these documents is that they are non-transferable - they cannot be indorsed and may not be transferred to a person other than the original consignee<sup>2</sup>. They appear under a variety of different names. Common names in use include non-negotiable bills of lading, straight bills of lading, straight consigned bills of lading<sup>3</sup>, named or nominate bills of lading<sup>4</sup>, non-negotiable receipts<sup>5</sup> and sea waybills<sup>6</sup>. The number of names for non-transferable bills reflects the difficulty of finding a suitable term in English Law for them<sup>7</sup>. Not only are there a number of names for these documents, but there are also a number of types. This Chapter will deal only with two types of non-transferable bills which will be termed non-order bills of lading<sup>8</sup> and sea waybills. These terms will be defined in the next Section, and the remainder of the Chapter will look at the functions of these documents as compared with the traditional bill. As will be seen, even though they share a common legal basis of non-transferability, they are distinct documents that perform different functions.

#### **1. Definition and Development**

A non-order bill of lading is, for the purposes of this Chapter, defined as any

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<sup>1</sup> *op.cit.*, para. 18-014.

<sup>2</sup> Except with the co-operation of the consignor, see below.

<sup>3</sup> Palmer, *op.cit.*, p. 559.

<sup>4</sup> de Wit, *op.cit.*, para. 6.3.

<sup>5</sup> *ibid.*

<sup>6</sup> Even sea waybills have a variety of different names - see Debattista, *op.cit.*, para. 2-21, fn 9.

<sup>7</sup> Benjamin, *op.cit.*, para. 18-014.

<sup>8</sup> See Debattista, *op.cit.*, para. 2-29.

traditional bill of lading without the phrase "to order" appearing on it. The cargo under this type of document is consigned to the consignee only. This type of non-transferable bill is certainly the oldest of all non-transferable bills. The Sixteenth Century bills of *The Mary Martyn*<sup>9</sup>, *Sampson*<sup>10</sup> and *Jane*<sup>11</sup> bills are all of this type. Quite why it developed is however unclear. These early non-order bills may only fall into this category because "or order" was accidentally missed out, but equally the shipper might have wished to ship only to the named consignee and not permit an onward sale or transfer of the bill by the consignee. Nowadays non-order bills can arise when the parties use a traditional bill, such as the CONLINEBILL<sup>12</sup>, and omit "or order" from the consignee box, for whatever reason. Because the form of the traditional bill is present in a non-order bill, the presence of the accomplishment statement means that presentation of the non-order bill is required at the port of discharge. This is in contrast to the sea waybill, as will be seen in Section 4 below.

The sea waybill is in many ways the maritime equivalent<sup>13</sup> of land waybills and "international consignment notes"<sup>14</sup> in use in the road, rail and air transport industries. Indeed, one commentator stated that the sea waybill was modelled on the air waybill<sup>15</sup>, with its faster method of documenting shipments, reflecting the speed of the transport. The waybill was developed in land transport in the Seventeenth and Eighteenth Centuries<sup>16</sup>. According to Grönfors<sup>17</sup>, the main difference between a bill of lading and a waybill is that their historical starting points are different. Whereas the bill of lading started as a promise from the carrier to his customer, the land waybill began life as a notice from the sender to his receiver, without the carrier being involved. The traditional land waybill was in the form of a letter from the sender to his receiver describing what had been sent and whom it

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<sup>9</sup> Appendix 2.

<sup>10</sup> Appendix 2.

<sup>11</sup> Appendix 3.

<sup>12</sup> Appendix 4.

<sup>13</sup> de Wit, *op.cit.*, para. 6.6; Halsburys, *op.cit.*, para. 1585, fn. 1; Hannesson, *op.cit.*, p. 142.

<sup>14</sup> Hannesson, *op.cit.*, p. 154.

<sup>15</sup> Kozolchyk, *op.cit.*, para. 3.3.1.

<sup>16</sup> Grönfors K., *Cargo Key Receipt and Transport Document Replacement* (1982), p. 52.

<sup>17</sup> *ibid.*

had been sent with<sup>18</sup>. It was only later on that the carrier began to get involved with the issue of the waybill, first by checking what the consignor had said in the waybill, and then by issuing it himself.

Although non-transferable documents in land transport industries have been used for centuries, the sea waybill on the other hand, seems to have been developed in the Sixties and Seventies<sup>19</sup>. The reason for its development seems to have been the increase in cargo being transported by container. Containerised cargo is unlikely to be sold during transit, and the speed of modern container ships which meant the ship frequently arrived at the discharge port before a traditional bill<sup>20</sup>. A document to deal with these modern circumstances was required, and the fact that a sea waybill was not a document of title and does not need to be presented to obtain delivery was important to its increase in use. These aspects will be considered further in Section 4 below.

The UN Economic Commission for Europe defined a sea waybill as a

"Non-negotiable document which evidences a contract of the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods to the consignee named in the document."<sup>21</sup>

English Law now has the benefit of the definition of a sea waybill contained in COGSA 1992, which defined it as any document which is not a bill of lading but:

"(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and  
(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract."<sup>22</sup>

Both of these definitions reflect the functions of a sea waybill - receipt, evidence of contract and identification of the person to whom delivery will be made. The reference to sea waybills not being bills of lading in COGSA 1992 was presumably to emphasise the fact that sea waybills are not, unlike bill of lading, documents of title. The Law

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<sup>18</sup> Grönfors, *op. cit.*, p. 53. See Appendix 5.

<sup>19</sup> Hannesson, *op. cit.*, p. 142; D'Arcy L., Murray B., Cleave C., *Schmitthoff's Export Trade* (10th edn.)(2000)(*"Schmitthoff"*), para. 15-033.

<sup>20</sup> See Chap. 4, pp. 47-8.

<sup>21</sup> E/ECE/Trade/W.P.4/Inf.6/ p. 3.

<sup>22</sup> s. 1(3).

Commission likened the waybill to the US straight bill<sup>23</sup>, as neither requires presentation at the port of discharge, and this is in fact the main difference between a sea waybill and a non-order bill of lading.

The two types of documents looked at in the Chapter, the non-order bill and sea waybill, are very similar. Indeed, it is generally assumed that non-order bills and sea waybills have the same 'intrinsic legal nature'<sup>24</sup>, as they are both, on their faces, non-transferable. Differences remain, however, and this Chapter will now investigate those differences against the background of the functions of the traditional bill of lading.

## 2. Receipt

The non-order bill of lading, waybill and straight bill are all receipts - they all identify the cargo either received by the carrier or actually loaded onto a ship. That is to say that all may be received for shipment or shipped documents. Sea waybills in particular are most likely to be received for shipment because of their involvement with the container trade, although shipped sea waybills are possible<sup>25</sup>. In some cases it is necessary to have a received for shipment sea waybill to be converted to a shipped one, eg. to satisfy the Export Credit Guarantee Department<sup>26</sup>. As was seen in Chapter 2, the real question in relation to the receipt function is what sort of evidence do statements of quantity, condition and leading marks etc. provide? Central to the answer to this question is whether the Hague and Hague Visby Rules apply to non-transferable documents.

Most commentators<sup>27</sup> hold the opinion that non-transferable documents do not attract the application of the Rules because they are not documents of title<sup>28</sup>. This is based on s.1(4) COGSA 1971 which states that the Rules do not apply to any contract of carriage of goods by sea, unless the contract provides for the issue of a "bill of lading or similar

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<sup>23</sup> Law Com. No. 196, para. 5.6. US straight bills will be discussed further in Section 5 below.

<sup>24</sup> Palmer & McKendrick, *op.cit.*, p. 560.

<sup>25</sup> Schmitthoff, *op.cit.*, para. 15-033; Hannesson, *op.cit.*, p. 145.

<sup>26</sup> Yate, *op.cit.*, para. 1.1.1.7.

<sup>27</sup> *Halsbury's Laws*, *op.cit.*, para.1585; Debattista, *op.cit.*, para. 2-32; Yates, *op.cit.*, para. 1.7.3.1.4.

<sup>28</sup> See further Section 4 below on the extent to which non-transferable documents are not documents of title.

document of title"<sup>29</sup>. Neither bill of lading nor similar document of title is defined in that Act or the Rules, but under s. 1(2) COGSA 1992 non-transferable bills are not bills of lading within that Act. The Law Commission clearly felt that the 'straight' bill, as they called it, was not a document of title at common law and therefore did not fall within the meaning of bill of lading in the 1971 Act.<sup>30</sup> They subscribed to the view that for the purposes of the Hague Visby Rules and the 1971 Act a bill of lading must be a document of title, and where a document is not a document of title, it is not a bill of lading for those purposes<sup>31</sup>.

Tetley advanced an argument that the Rules do apply to sea waybills<sup>32</sup>. Relying on the French notion of 'ordre publique', Tetley argued that the Hague Visby Rules were intended to apply to all contracts of carriage of goods by sea, except those which came within Art. VI<sup>33</sup>. Whilst it is an interesting argument, the majority of writers take the opposing view<sup>34</sup>. Having said that, this line of argument leads towards a discussion as to whether there is a difference between non-order bills and waybills. This will be addressed more fully in pages 14 and 15 below. The Law Commission wished to treat 'straight' bills of lading and sea waybills alike because they are alike 'in all material respects'<sup>35</sup>. In their opinion, the Hague Visby Rules applied to neither.

There is, however, support for another alternative view. Tetley's alternative view is that all non-transferable documents were covered by Hague Visby, unless excepted by Art. VI, whereas a second alternative view is that non-order bills of lading are distinct from sea waybills, in that the former attract the application of the Hague Visby Rules, while the

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<sup>29</sup> Art I(b) of the Hague Visby Rules contains similar wording.

<sup>30</sup> Law Com. No. 196, para. 4.10.

<sup>31</sup> *ibid.*

<sup>32</sup> Tetley, "Waybills: The Modern Contract of Carriage of Goods by Sea. Part I" (1983) 14 J.M.L.C. 465.

<sup>33</sup> Art. VI permits non-negotiable receipts issued in respect of 'particular goods' to avoid the application of the Rules.

<sup>34</sup> cf. In Clive's Note of Consent of Partial Consent to Law Com. No. 196, n. 1, he stated that he thought it was arguable that non-order bill was a bill of lading for the purposes of the Hague Visby Rules. Unfortunately, he did not give any details.

<sup>35</sup> Law Com. No. 196, para. 4.12.

latter do not<sup>36</sup>. *Schmitthoff*<sup>37</sup> thought that the Hague Visby Rules applied to non-order bills of lading if the conditions for the application of COGSA 1971 were met, ie if it was a similar document of title. *Schmitthoff*, however, does not explain how a non-order bill may be classed as a similar document of title. The issue of a sea waybill would not attract the application of the Hague Visby Rules unless they were expressly incorporated.

Debattista considered the Law Commission's desire to treat non-order bills identically to sea waybills<sup>38</sup>. In respect of the application of the Hague Visby Rules, Debattista thought that neither document would be covered, and this was a deliberate consequence of the Law Commission's opinion<sup>39</sup>. Whatever the other problems assimilation of the two documents would cause, to treat them differently in respect of the application of the Hague Visby Rules would be odd. The only real difference between the two documents is that the non-order bill requires production to obtain delivery. This fact, which at its basest level is just a variation in contractual terms, should not affect the mandatory application, or otherwise, of the Hague Visby Rules - either both documents should be covered, or neither. It seems prudent then to adopt the traditional view that all non-transferable documents are not automatically covered by the Rules, because they are not 'documents of title', ie. not transferable.

Although, according to the traditional view, the Hague Visby Rules do not apply automatically to non-order bills and sea waybills, they may in fact still apply. When the UK implemented the Hague Visby Rules with COGSA 1971, provision was made for the Rules to apply to sea waybills. S. 1(6) states that the Rules would have the force of law in relation to any receipt which is a non-negotiable document marked as such if the contract expressly provides for the Rules to govern, as if the receipt were a bill of lading. Both sea waybills and non-order bills are likely to be covered by this section as neither are transferable and are therefore "non-negotiable", to use the traditional terms. However,

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<sup>36</sup> *Schmitthoff, op.cit.*, para. 15-033.

<sup>37</sup> *ibid.*

<sup>38</sup> Debattista, *op.cit.*, para. 2-32.

there is a proviso in the section that even if the Rules apply by virtue of this section, the second sentence of Art. III, r. 4, and Art. III, r. 7 does not apply. That is to say, the receipt never becomes conclusive evidence in the hands of a third party, nor can it be converted to a shipped receipt from a received for shipment receipt. The reasoning behind the omission of the second sentence of Art. III, r. 4 is that the receipt is non-transferable, and therefore there is no third party into whose hands the receipt comes<sup>40</sup>. This is true in respect of sea waybills, although it seems that these are nevertheless sometimes transferred to the consignee<sup>41</sup>, but it is more difficult to defend it in the case of non-order bills, as these are inevitably transferred to the consignee so that they may claim delivery. Should not the consignee, as a third party, benefit from the conclusive evidence provided for in the second sentence to Art. III, r. 4? Perhaps the real reason for this omission is the lack of reliance on statements in the bill by a consignee of a non-transferable document than the reliance shown by a third party banker or buyer of goods under a traditional bill of lading.

If the receipt incorporates the Hague Visby Rules in accordance with the provisions of s. 1(6), they are given the force of law. This means that they can not be overridden by mere contractual terms, in the same way that a contractual term cannot override a statute. The question arises, what terms should be applied if a non-negotiable receipt purports to incorporate only part of the Hague Visby Rules. In *The European Enterprise*<sup>42</sup> the consignment note incorporated the Hague Visby Rules, but specified a lower provision for limitation of liability. The goods were damaged and the plaintiff claimed that s. 1(6) gave the Rules the force of law and therefore any attempt to lower the levels of limitation was void by virtue Art. III, r. 8. The court decided that partial incorporation of the Rules did not comply with the requirement of s. 1(6). The parties had the freedom of contract to decide whether to incorporate the whole or only part of the Rules, and only incorporating the *whole* of the Rules would bring s. 1(6) into operation and

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<sup>39</sup> *ibid.*, n. 19.

<sup>40</sup> Law Com. No. 196, para. 4.8.

<sup>41</sup> See Hannesson, *op.cit.*, p. 148

give the *whole* of the Rules the force of law<sup>43</sup>. Steyn LJ also thought that the consignment note should have expressly provided that "the Rules are to govern the contract as if the receipt were a bill of lading"<sup>44</sup>. The absence of these words meant that s. 1(6) was not complied with. This decision has been criticised by Debattista<sup>45</sup> as doing nothing to encourage the use of the sea waybill because of the restrictive interpretation placed on s. 1(6), COGSA 1971. However, until the case is overruled, users of sea waybills would be wise to ensure that they comply with the requirements of s. 1(6), as interpreted by the Court in *The European Enterprise*.

If a contractual incorporation of the Rules, or any part of them, does not give them the force of law under COGSA, the parts incorporated still have contractual force. If there is a conflict between the written terms of the contract and the terms of a document incorporated into the contract, the courts will use the normal rules of contractual interpretation<sup>46</sup>. The House of Lords in *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*<sup>47</sup> stated that

"The contract must therefore be read as if the provisions of [the incorporated document] were written out therein and thereby gained such contractual force as a proper construction of the document admits."<sup>48</sup>

If there is a conflict between the two sets of terms, then any inconsistent terms in the Rules will be struck down. In the case of *Adamastos*, only Art. IV(1) and (2)(a) of the Hague Rules were left that were not inconsistent with the incorporating document. If parties are attempting to incorporate the Hague Visby Rules contractually into their sea waybill or non-order bill contracts they should check for inconsistencies and not rely on a simple incorporation clause, but instead expressly list the terms of the Rules they wish to incorporate.

Incorporating all or part of the Hague Visby Rules is not the only means by which

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<sup>42</sup> [1989] 2 Lloyd's Rep. 185.

<sup>43</sup> *ibid.* at p. 190.

<sup>44</sup> *ibid.* at p. 189.

<sup>45</sup> "Waybills and the Carriage of Goods by Sea Act 1971" [1989] L.M.C.L.Q. 403.

<sup>46</sup> Tetley, *op.cit.*, Part I, at p. 485-6.

<sup>47</sup> [1959] A.C. 133.



parties can use standard terms. The CMI Uniform Rules for Waybills 1990 may be contractually incorporated into the contract. These Rules apply when adopted by a contract of carriage which is not covered by a "bill of lading or similar document of title"<sup>49</sup>. This would cover sea waybills, and also non-order bills of lading, if they were deemed to be not bills of lading for these purposes. If they are deemed to be bills of lading, then the Hague Visby Rules would apply. In the event of the Hague Visby Rules being compulsorily applicable to the contract, they take precedence over the incorporated CMI Rules, in the event of a conflict<sup>50</sup>. Unlike the problems of incorporating Hague Visby, all that is necessary to incorporate the CMI Rules is a clause in the sea waybill that states:

"This Waybill is subject to the CMI Uniform Rules for Sea Waybills"<sup>51</sup>

Once incorporated, Rule 5(ii) states that statements in the sea waybill as to quantity and condition are *prima facie* evidence, as between the carrier and the shipper, but are conclusive evidence as between the carrier and consignee, provided the consignee has acted in good faith. It should be noted that this provision does not extend to leading marks. It is interesting to note that the Rule does not require the sea waybill to have been transferred to the consignee. Presumably, then the statements are conclusive evidence between carrier and consignee as soon as the document is issued.

In the absence of statutory application or contractual incorporation of the Hague-Visby Rules, or the CMI Rules, sea waybills and non-order bills are *prima facie* evidence only of the statements made in them. COGSA 1992 s. 4 does not apply to non-transferable bills to make them conclusive evidence as to quantity<sup>52</sup>. However, there is nothing to prevent the use of the ordinary law of estoppel, as put forward in *Silver v. Ocean*<sup>53</sup>: that is

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<sup>48</sup> *ibid.* at p. 152.

<sup>49</sup> CMI Uniform Rules for Sea Waybills Rule 1(i).

<sup>50</sup> *ibid.* Rule 8.

<sup>51</sup> Richardson J.W., *The Merchants Guide. A Guide to Liabilities and Documentary Problems* (1994), p. 27.

<sup>52</sup> It was the intention of the Law Commission to make this distinction between bills of lading and non-transferable documents because they perceived that the Hague Visby Rules did not apply to non-transferable documents and to have allowed s. 4 to apply to them would have constituted a 'radical change' - Law Com. No. 196, para. 4.12.

to say, that the person alleging the estoppel relied on the statement to his detriment. A consignee of a non-order bill of lading is more likely to rely on a statement in the bill than a waybill, as he will be sent the bill in order to obtain delivery.

Statutory application of the Hague Visby Rules to non-transferable bills only occurred in the UK in 1971, and only then if the parties incorporated the Rules properly. Contractual incorporation of the Hague Visby Rules, or the CMI Rules, or other suitable contractual terms, is the only way to avoid the basic position of the common law that the statements in non-transferable documents are *prima facie* evidence only. It is a defect in English Law that it is still reliant on the parties to include conclusive evidence terms in their contracts, whereas statements of receipt in traditional bills of lading are automatically covered by the Hague Visby Rules<sup>54</sup>.

### 3. Contract

Yates<sup>55</sup> and Richardson<sup>56</sup> and others have said the waybill is merely evidence of the contract. Tetley<sup>57</sup> described it as the contract of carriage. COGSA 1992, s. 1(3)(a) referred to waybills as a "receipt for goods as contains or evidences a contract for the carriage of goods by sea". As was seen in Chapter 3, COGSA 1992 did not answer the question of whether a traditional bill of lading is the contract or just evidence of it and the same is true of waybills and non-order bills of lading. It is suggested here that the same arguments in Chapter 3 as to the contractual position of bills of lading apply equally to non-transferable documents.

### 4. Document of Title

Some authorities simply state that non-transferable documents are not documents of

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<sup>53</sup> [1930] 1 K.B. 416 at 433. See also Humphreys G. and Higgs A., "Waybills: A Case of Common Law Laissez Faire in European Commerce" [1992] J.B.L. 453, at 471, and Tetley, "Waybills: The Modern Contract of Carriage of Goods by Sea. Part II" (1984) 15 J.M.L.C. 41, at 43.

<sup>54</sup> Humphreys and Higgs, *op. cit.*, pp. 470-1.

<sup>55</sup> Yates, *op. cit.*, para. 1.7.1.1.

<sup>56</sup> Richardson, *op. cit.*, p. 25.

title at all<sup>58</sup>. In contrast, de Wit says a non-order bill of lading can be a document of title. This difference in view can be resolved by looking at the various parts of the document of title function identified in Chapter 4. As will be seen, some elements of document of title status can be in some non-transferable bills. It is in this Section that the differences between sea waybills and non-order bills will be considered.

### **a) Possessory Rights**

This section will consider how far a non-transferable document can be a symbol of the goods.

#### **(i) Delivery against presentation**

The law regarding whether or not non-order bills need to be presented in order to get delivery is unclear. Some commentators say that non-order bills do not need to be presented<sup>59</sup>, but there is also considerable support for the opposite view<sup>60</sup>. In contrast, the law regarding sea waybills is clear - the carrier will deliver to the consignee named in the sea waybill on proof of identity only and the waybill itself does not need to be produced<sup>61</sup>. Why is the matter so unclear for non-order bills? The answer to this question lies in the format of the documents.

Non-order bills use the traditional bill of lading's format and simply omit the words 'or order' from the consignee box<sup>62</sup>. Because of this, the accomplishment statement<sup>63</sup> is present on non-order bills, but not on waybills<sup>64</sup>. The affect of this statement in traditional bills of lading was considered in Chapter 4: it can only mean that the bill of lading must be

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<sup>57</sup> Tetley, *op.cit.*, Part I, p. 467.

<sup>58</sup> eg. Benjamin, *op.cit.*, para. 18-044.

<sup>59</sup> Benjamin, *op.cit.*, paras. 18-014 and 18-044.

<sup>60</sup> Richardson, *op.cit.*, p. 25, de Wit, *op.cit.*, para. 6.2, Faber D., "Shipping Documents and EDI" [1992] Int. Yearbook of Law Computers and Technology, Vol. VI, p. 75.

<sup>61</sup> Yates, *op.cit.*, para. 1.7.1.5. Grönfors attributes this to the different historical starting point of the waybill from the bill of lading. As the waybill started life as a document issued by the shipper, it should come as no surprise that its presentation would not be required by the carrier before delivery. Grönfors, *op.cit.*, p. 53.

<sup>62</sup> Carriers and shipper's should be wary of pre-printed words on bills of lading, as they may override the intention to create a non-order bill. See *The Happy Ranger* [2002] 2 Lloyd's Rep. 357.

<sup>63</sup> See Chapter 4, p. 114.

<sup>64</sup> Palmer & McKendrick, *op.cit.*, p. 560.

presented in order to get delivery. Does this meaning still apply when the accomplishment statement is in a non-order bill? It is submitted that there is no reason why it should not<sup>65</sup>. In waybills, the contract is to deliver to the named consignee, but with non-order bills if the accomplishment statement is considered as part of the contract and is construed as requiring the carrier to deliver to the presenter of the carriage document, then presentation will be contractually required. The affect of the presence of the accomplishment statement was not considered by the Editors of *Benjamin* when they stated that presentation of the non-order bill was not required. Palmer, however, considered that it was at least arguable that the carrier had a right to demand presentation of a non-order bill before delivering the goods<sup>66</sup>.

There is no English case law on the presentation of non-order bills of lading. However, the matter was considered by the High Court of Singapore in *Olivine Electronics v. Seabridge Transport*<sup>67</sup>. The defendants had delivered the cargo without requiring presentation of the non-order bill, which had contained the accomplishment statement. The plaintiff shippers had not been paid for the goods and sued the defendants for breach of contract and/or conversion. The plaintiffs applied for summary judgment, but the defendants were granted leave to defend the action on condition that they provided security. The plaintiffs and defendants both appealed against that decision and the High Court of Singapore dismissed both appeals. The court referred to the dictum of Clarke J in *Sormovskiy 3068* that accomplishment could only mean presentation of the bill<sup>68</sup>. This meant that there was a potential conflict between the accomplishment statement and another provision in the bill which said '*if required* by the carrier one original bill must be surrendered'. The latter clause apparently leaves it to the carrier whether the bill needs to be surrendered, whereas the accomplishment statement suggests that the bill must be

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<sup>65</sup> Bools, *op.cit.*, p. 169.

<sup>66</sup> Palmer & McKendrick, *op.cit.*, p. 560. Debattista also holds that opinion, but unfortunately he confuses surrender with presentation, which, as was seen in Chapter 4, is not the same thing - Debattista, *op.cit.*, para. 2-32, n. 18.

<sup>67</sup> [1995] 3 S.L.R. 143. See also *APL v. Voss Peer* unreported judgment of the Singapore Court of Appeal 3 October 2002 ([http://www.onlinedmc.co.uk/apl\\_v\\_voss\\_peer.htm](http://www.onlinedmc.co.uk/apl_v_voss_peer.htm)).

presented to the carrier. If there was in fact a conflict between these two clauses, the court indicated it would construe the terms *contra proferentem*, ie. against the defendants who issued the bill.

A potential defence that there was a custom at the port of discharge that cargo was always delivered without presentation of the non-order bill had, according to the court, to be proved, and a mere statement in an affidavit was not sufficient proof. Although the defendants were allowed to defend the action, showing that the court felt they had some chance of success, the fact that the defence was conditional on providing security, and the comments of the court, show that the chances of success were in favour of the plaintiff. Unfortunately, the case never came before the court again, the defendants presumably having settled. The matter is, therefore, still unclear, but if presentation of an original non-order bill is not required, the accomplishment statement should be deleted, just to make sure.

Assuming that presentation of the non-order bill is required, this document, unlike the sea waybill, is a symbol of the goods. It is the key to the floating warehouse. A thief of a non-order bill may still obtain possession of the goods, as with a traditional bill, but as with a traditional bill, he does not get a good title. The use of a sea waybill may provide greater security in this respect as the person claiming delivery under a waybill has to prove their identity. The thief of a sea waybill would have to prove he was the consignee, rather than simply present the document, as with a non-order bill. What the non-order bill and waybill do have in common is that the right to delivery on presentation, or on identification, cannot be transferred by the consignee by mere indorsement of the non-order bill or waybill<sup>69</sup>. This will be discussed further in Section 4(c).

If the CMI Rules have been incorporated into a non-order bill, presentation will not be required, Rule 7, which overrides any contractual term, makes the goods deliverable to

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<sup>69</sup> *ibid.* p. 148.

the named consignee.

There is now also a contractual right of delivery given to the consignee of a non-order bill, or waybill – this contractual right is in the contract of carriage and rights of suit under that contract are transferred to the consignee by virtue of s. 2(1)(b), COGSA 1992<sup>70</sup>. S. 1(3)(b) refers to a waybill as a document which identifies the person to whom delivery of the goods is to be made 'in accordance with the contract' - ie. on presentation of the bill, or on identification. As the consignee of a waybill he is entitled to demand delivery of the goods<sup>71</sup>. This right given to the consignee of a non-order bill or waybill comes into existence as soon as the contract is formed, unlike consignees of traditional bills who only get a contractual right of delivery when they become lawful holders<sup>72</sup>. In this respect the consignee of a non-order bill is in a better position than the consignee of a traditional bill.

The contractual right of delivery raises a question in respect of the shipper's right to redirect the carrier. With both non-order bills and waybills, at common law the shipper has the right to redirect the carrier to deliver the goods to a different consignee at any time up to delivery of the goods, on giving notice to the carrier<sup>73</sup>, whereas the shipper's right under a traditional bill ends with its transfer to the consignee<sup>74</sup>. Where COGSA 1992 applies, the transfer of a traditional bill to a consignee or indorsee will extinguish the shipper's rights under the contract of carriage, including the right to redirect<sup>75</sup>. There is provision however, for the shipper under a non-order bill or sea waybill to retain his rights under the contract of carriage<sup>76</sup>. In this case, the shipper under a non-transferable bill could redirect the carrier to deliver to another consignee, even after the original consignee has obtained contractual rights under s. 2(1), COGSA 1992, in the absence of an express term in the contract

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<sup>69</sup> Debattista, *op.cit.*, para. 3-08.

<sup>70</sup> Bools, *op.cit.*, p. 169; Debattista, *op.cit.*, para. 2-25.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.* See also Chapter 4, p. 120 .

<sup>73</sup> Benjamin, *op.cit.*, para. 18-015.

<sup>74</sup> Carver, *op.cit.*, para. 1-014.

<sup>75</sup> s. 2(5).

<sup>76</sup> *ibid.* Final sentence.

denying the shipper the right to redirect<sup>77</sup>.

If a non-order bill has been issued, naming X as consignee, and the shipper redirects the carrier to deliver to Y, does the original non-order bill naming X still need to be produced? The carrier's duty is to deliver in accordance with the contract, which is to deliver to Y, but there is also a provision in the contract that the bill of lading is to be presented. It is submitted that the fact the consignee has been changed does not affect the presentation of the bill. This will obviously cause problems though if the bill has already been transferred to X. Although X no longer has any right to delivery under the contract, or by possession of the bill, but he still has the means to obtain possession. In such circumstances the shipper should try to get the bill back, if he cannot, the carrier should be instructed to require identification before delivery, not presentation of the original bill, therefore amending the original carriage contract<sup>78</sup>. Should Y produce the original bill naming X? If possible Y should, but if X will not release to him, will the carrier be liable for breach of contract if he delivers to Y without requiring presentation of the bill? If the contract between shipper and carrier has been validly amended then the answer should be no. If the carrier is concerned about his potential liability following the order to deliver against identification alone, he should require an indemnity before agreeing to the amendment.

Where the CMI Rules apply Rule 6(ii) states that the shipper has the option to transfer his right of control over the goods to the consignee at any time before delivery of the goods to the carrier. This transfer must be noted on the carriage document. The consignee then has the rights in Rule 6(i) to change the name of the consignee entitled to delivery, but he must indemnify the carrier for any loss caused. The shipper only has this right until delivery of the cargo to the carrier. This may be too early to be of practical use, as the shipper will not wish to transfer control of the cargo until he has been paid, and he

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<sup>77</sup> *Carver, op.cit.*, para. 1-019; *Debattista, op.cit.*, para. 3-09.

<sup>78</sup> Providing, of course, the contract of carriage and COGSA 1992 permits such instructions following a transfer of the bill.

may not be paid until after shipment.

## (ii) Constructive possession

Debattista raised the question of whether possession of a sea waybill could amount to constructive possession which passes once to the named consignee with the transfer of the bill and without the need for attornment<sup>79</sup>. Palmer was not impressed by that argument, citing that the shipper's right to redirect anytime up to delivery of the goods is inconsistent with the consignee having constructive possession because he held the non-transferable bill at this time<sup>80</sup>. Palmer did acknowledge though that it might be possible for the consignee of a non-order bill of lading to obtain constructive possession of the goods because of the requirement of presentation<sup>81</sup>.

Bools described the 3 presumptions which give a document the ability to transfer constructive possession. What he describes as 'symbolic' possession and what is termed constructive possession in this thesis is dealt with more fully in Chapter 4, Section 2b) . These presumptions may also apply to a non-order bill, though certainly not to a sea waybill<sup>82</sup>. The intention to deliver to the presenter of the non-order bill is present, but consideration must be given to the intention of the transferor and transferee to relinquish and acquire control over the goods respectively on transfer of the document? Whilst it is odd to think of transfers of ostensibly non-transferable documents, it must be said that if presentation of non-order bills is required, then transfer is also required, even if it is only once. It may be that an intention can be found in the transfer of a non-order bill to end the transferor's right to redirect the carrier and create the transferee's right to control the goods<sup>83</sup>. Palmer indicated that carriers appear to treat non-order bills in virtually the same way as traditional bills<sup>84</sup>, and since the right to redirect ends on transfer of a traditional bill

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<sup>79</sup> Debattista, *Sale of Goods Carried by Sea*, (1<sup>st</sup> edn.),p. 193. The second edition of this book contains no such argument, having been completely rewritten.

<sup>80</sup> Palmer & McKendrick, *op.cit.*, p. 560.

<sup>81</sup> *op.cit.*, p. 561.

<sup>82</sup> Bools, *op.cit.*, p. 168.

<sup>83</sup> *op.cit.*, p. 560.

<sup>84</sup> *ibid.*



it is at least arguable that Bools' second and third functions may be satisfied, and the non-order bill does indeed represent constructive possession of the goods- if only in the hands of the named consignee. The difference with a traditional bill is of course that a consignee of a traditional bill has the ability to transfer that constructive possession on - the consignee of a non-order bill does not.

Despite the contractual right to delivery being transferable under COGSA 1992 making the need to find constructive possession less important<sup>85</sup>, there are still issues relating to it. In order to be able to pledge a document, it must give a right to constructive possession<sup>86</sup>. It would not be possible therefore to pledge waybills, but it may be possible to pledge non-order bills<sup>87</sup>. The two documents are generally treated in the same way, but there is potential for distinguishing them. Having said that, sea waybills are already used in documentary credits<sup>88</sup> so parties are not necessarily restricted to non-order bills if they require finance. Protection for a banker providing finance for transactions using sea waybills will come from the use of 'no disposition' (NODISP) clauses<sup>89</sup> that remove a shipper's right to redirect the carrier.

Debattista may be correct in his proposition of constructive possession passing once; however, it is more likely to be correct for non-order bills than sea waybills. Sea waybills are not transferable, although it seems that they are transferred anyway, as there is little point in the shipper keeping them. A document that is not legally transferable will obviously not pass constructive possession of the goods with it. Any rights the consignee of a sea waybill has comes from ownership of the goods or COGSA 1992, rather than possession and transfer of the waybill.

## **b) Proprietary Rights**

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<sup>85</sup> Palmer & McKendrick, *op.cit.*, p. 562.

<sup>86</sup> See Chapter 4, p. 129.

<sup>87</sup> Palmer & McKendrick, *op.cit.*, p. 561.

<sup>88</sup> UCP500, Art. 23.

<sup>89</sup> See Section 4(b) below.

Non-order bills and waybills are generally used in situations where a sale of the goods is not contemplated, eg. in-house shipments, shipments of personal effects<sup>90</sup>. However, there may be occasions where there is a sale contract underlying the carriage contract represented by a non-transferable bill, eg. open account trading, or shipments worth less than \$500,000<sup>91</sup>. With this in mind, it should come as no surprise that non-order bills and sea waybills have no role to play in the transfer of property. It should not be assumed that just because a non-transferable bill is used that there is no underlying sale contract. Even if the shipper is shipping the goods to himself, he can decide to sell them and instruct the carrier to deliver to a different consignee. The original non-transferable bill has no part to play in this, as it merely records the original consignee.

Non-order bills and sea waybills are not within the custom found in *Lickbarrow v. Mason*, as they are not transferable on their face. They cannot be indorsed or transferred so as to affect the property in the goods. In the words of Steel J

"an "endorsement" of a non-negotiable bill must, by definition, be ineffective"<sup>92</sup>.

However, as was shown in Chapter 4, the indorsement and/or transfer of the traditional bill of lading is only a convenient mechanism for transferring property *under the sale contract*. There is nothing to prevent parties to a sale contract agreeing to use a sea waybill to cover the carriage and for the transfer of that non-order bill or sea waybill to trigger the transfer of the property from the shipper to the consignee. It would not be the transfer of the non-transferable bill *per se*, or indeed the indorsement if that was what was agreed, that would achieve the transfer of property, but the underlying sales contract. Intention of the parties is, as with traditional bills of lading, the most important factor as to when property in the goods is transferred. If enough transactions happened like this then a custom to that effect may develop and a seemingly non-transferable bill, which is nevertheless transferred

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<sup>90</sup> Yates, *op.cit.*, para. 1.7.1.3.

<sup>91</sup> *ibid.* Cargoes of a lesser value would have less need for the parties to raise finance, and reduce the need for the security of a traditional bill.

<sup>92</sup> *The Chitral* [2000] 1 Lloyd's Rep. 529, at 533.

anyway, would act as a document of title<sup>93</sup>, without the need for an express term in the sale agreement. The consignee would not be able to use the non-transferable bill to further transfer the goods to someone else, although again, if a second sale contract said property was to pass on the transfer of an already used and in many respects useless piece of paper, then that is when property will pass. The court will not enquire whether the parties have acted wisely, nor will they be concerned about the exact nature of the document that triggers the passing of property: they will only be concerned with what the parties intended<sup>94</sup>. Anything could trigger the passing of property, however, unless there is a *custom* to that effect, without explicit words in the sale contract the transfer or indorsement of a non-transferable bill will not transfer the property in the goods.

If the parties did agree to payment on presentation of a non-transferable bill, with property in the good to pass at that time, then the buyer would not be in a strong position, under the sea waybill at least<sup>95</sup>. The buyer would have paid for the goods, and have title to them, but possession of the sea waybill does not of itself give him a right to delivery of the goods from the carrier. It is the fact that he is named as consignee in the carriage contract that obliges the carrier to deliver to him, and as mentioned in the previous Section, this can be changed at any time up to delivery.

If the consignee is different to the shipper, whether part of a sale transaction or not, the consignee may wish to protect himself from the shipper redirecting the carrier as to the consignee by the use of a NODISP clause. The following NODISP clause was suggested by SWEPRO (Swedish Simpler Trade Procedures Board):-

"By acceptance of the Waybill the Shipper irrevocably renounces any right to vary the identity of the Consignee of these goods during transit."

The consignee of a sea waybill by this clause as the shipper is unable to redirect the carrier once the sea waybill has been delivered to the shipper. However, the shipper himself has no protection from then on if the buyer does not pay for the goods, or the bank rejects the

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<sup>93</sup> cf. *Kum v. Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 370.

<sup>94</sup> Sale of Goods Act 1979, s. 17(1).

documents for some reason, the carrier is still bound to deliver to the consignee, but the shipper can no longer redirect<sup>96</sup>. To circumvent this problem P & O Containers has proposed a CONTROL clause as follows:-

"Upon acceptance of this Waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the Carrier) the Shipper irrevocably renounces any right to vary the identity of the Consignee of these goods during transit"

This clause allows the Shipper to retain control until he has been paid<sup>97</sup>. This clause was proposed in respect of sea waybills, but there is no reason why it could not be applied to non-order bills. By use of this clause P & O hope to encourage the use of sea waybills in the sale of goods carried by sea, even though it is not customary and it does not allow the consignee to transfer title by means of transferring the sea waybill.

Because of the lack of custom, neither the non-order bill nor the sea waybill can be used in the transfer of property unless there are express terms to that effect in the sale contract.

The traditional bill of lading is not fully negotiable for the reasons outlined in Chapter 4 above. However, the traditional bill, by virtue of certain provisions of the Factors Act and the Sale of Goods Acts, does have an element of negotiability. Non-transferable bills may also have this element of negotiability. The fact that the named consignee of a sea waybill may obtain, in certain circumstances, a better title to the goods than the true owner is recognised by Halsbury<sup>98</sup>. As a sea waybill is both a 'warrant or order for the delivery of goods' and a 'document used in the ordinary course of business as proof of the .... control of goods' in Factors Act 1889, s. 1(4), the exceptions to the principle of *nemo dat quod non habet* in the Sale of Goods Act 1979 apply to sea waybills as they do to traditional bills. This reasoning must also apply to non-order bills. Any doubt that these documents are 'negotiable' for the purposes of the Factors Act comes from the

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<sup>95</sup> Debattista, *op. cit.*, para. 3-10, n. 16.

<sup>96</sup> Richardson, *op. cit.*, p. 26.

<sup>97</sup> *ibid.*

<sup>98</sup> *op. cit.*, para 1585.

fact that they are usually marked 'non-negotiable'<sup>99</sup>. However, the word 'negotiable' is being used in different senses, and as mentioned in Chapter 4<sup>100</sup>, it is a term best avoided. Non-order bills and sea waybills, like traditional bills, may in certain circumstances transfer a better title to the transferee than the transferor had.

### **c) Contractual Rights**

Consignees of traditional bills of lading were prevented by privity of contract from suing the carrier on the contract entered into by the shipper. The Bills of Lading Act 1855 rectified this situation for consignees of traditional bills, but it did not apply to sea waybills<sup>101</sup>, and may not have applied to non-order bills. A consignor could legally assign the contract to the consignee, but notice must be given to the carrier under s. 136, Law of Property Act 1925. In 1990 the CMI Uniform Rules for Waybills proposed a solution for this problem. Rule 3(i) stated that the shipper entered into the contract as agent for the consignee, allowing the consignee to sue on his own behalf without needing to rely on the consignor. Rule 3(ii) stated this Rule only applied to a country that did not already allow the consignee of a sea waybill to sue and be sued on the contract of carriage. Rule 3 has now been superseded in the UK by COGSA 1992.

By s. 2(1)(b), COGSA 1992 the person to whom delivery must be made under a sea waybill has transferred to him all rights of suit under the carriage contract as if he had been a party to the original contract. Liabilities are transferred to the consignee under s. 3(1) as with traditional bills of lading. The non-order bill is outside the definition of a bill of lading in the Act, but would fall within the definition of a sea waybill.

There are differences, however, between the regime for traditional bills of lading and the regime for sea waybills. Most importantly the original consignor does not lose his

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<sup>99</sup> Debattista, *op.cit.*, para. 3-27.

<sup>100</sup> At p. 110.

<sup>101</sup> See Tetley "Waybills: Modern Contracts of Carriage of Goods by Sea Part 1" (1983) 14 J.M.L.C. 465, p. 496 *et seq.*

rights under the contract with transfer of the sea waybill to the consignee<sup>102</sup>, unlike the consignor under a traditional bill who loses his rights under the contract<sup>103</sup>. As those rights include the right of redirection, the right of the consignee to sue the carrier under the carriage contract is ineffective if the consignor can still lawfully redirect the carrier. The use of a NODISP clause therefore becomes even more important to protect the buyer if a sale is involved. The Law Commission considered the point as to whether the carrier should have express protection in COGSA 1992 if they delivered the cargo in accordance with a redirection, but they declined to, preferring to allow the parties to contract for any defences that they wished in their contracts<sup>104</sup>. All parties, carriers, consignors and consignees, sellers and buyers, should all note the extra points to be taken into consideration when entering into contracts of carriage and sale covered by waybills and non-order bills.

## 5. US Straight Bills of Lading<sup>105</sup>

By way of comparison, mention must briefly be made of the US straight bill of lading. This non-transferable bill was first recognised by the Pomerene Act 1916, now contained in 49 U.S.C. 801<sup>106</sup> and was initially termed the straight bill of lading. To confuse matters, US law now refers to these documents as non-negotiable bills<sup>107</sup>. This is unfortunate for two reasons. Firstly, any use of the word 'negotiable' in respect of bills of lading should be avoided<sup>108</sup>, and secondly, non-order bills are sometimes referred to as non-negotiable bills<sup>109</sup> and they are very different from the statutorily created US non-negotiable bills. It is also unfortunate that the Law Commission chose to use the phrase

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<sup>102</sup> s. 2(5).

<sup>103</sup> *ibid.*

<sup>104</sup> Law Com. No. 196, para. 5.19.

<sup>105</sup> *op.cit.* para. 6.7.

<sup>106</sup> See Bools' Note on Jurisdiction and Terminology, *op.cit.*, at xvi.

<sup>107</sup> 49 U.S.C. s. 80103 (b).

<sup>108</sup> See Chapter 4, p. 7, and Sect. 3(a).

<sup>109</sup> eg. Mills, *op.cit.*, pp. 47-8.

"straight bill of lading" to describe non-order bills in its Report<sup>110</sup>. For the sake of clarity the older term straight bill will be used to describe the US bill. A straight bill of lading in US law is a bill of lading which states that the goods are deliverable to a consignee<sup>111</sup>.

The evidential quality of statements in straight bills has been a matter of statute since 1916 in the US. 49 U.S.C. 801 states that the owner of goods carried under a straight bill may estop the carrier from denying statements as to the condition of the goods or the date of shipment<sup>112</sup>, providing he relied on the description or date in good faith.

The matter of presentation of straight bills in US law is easily determined. Section 80110(a) imposes on the carrier a duty to deliver to the consignee named in the straight bill. Presentation is therefore not required. As it is regulated by statute, it does not matter if presentation is required in the document - the statutory provision will override it<sup>113</sup>. US law also creates an interesting situation. A non-order bill issued in the UK, which would have required presentation at a British port, when forwarded over the Atlantic to greet a cargo at a US port 'transubstantiates' from a non-order bill of lading that requires presentation into a sea waybill, which does not<sup>114</sup>.

De Wit described the straight bill as a 'hybrid' bill<sup>115</sup> as it has an element of transferability given to it by statute. US straight bills are transferable, but until notice is given to the carrier he is under no obligation to the transferee<sup>116</sup>. However, the fact that presentation is not required for delivery of the goods under a straight bill means that constructive possession of the goods through possession of the straight bill would be harder to find as with the English sea waybill.

The US straight bill does play a role in the transfer of property. By virtue of the Pomerene Act a person to whom a bill has been transferred, but not negotiated, acquired

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<sup>110</sup> Law Com. No. 196, para. 4.8 *et seq.*

<sup>111</sup> 49 U.S.C. s. 80103(b)(1).

<sup>112</sup> 49 U.S.C. s. 80113(a). See Bools, *op.cit.*, p. 140.

<sup>113</sup> Bools, *op.cit.*, p. 168.

<sup>114</sup> Grönfors, *op.cit.*, p. 10.

<sup>115</sup> *op.cit.*, para. 6.7.

<sup>116</sup> Bools, *op.cit.*, p. 169.

title to the goods as against the transferor, but subject to the terms of any agreement with the transferor<sup>117</sup>. The title transferred with a straight bill is less than that transferred with a negotiable bill<sup>118</sup>. This law has been rewritten and 49 U.S.C. s. 80106(a) now declares that

" The holder of a bill of lading may transfer the bill without negotiating it by delivery and agreement to transfer title to the bill or to the goods represented by it. Subject to the agreement, the person to whom the bill is transferred has title to the goods against the transferor."

This makes it clearer that it is the agreement between the transferor and transferee that transfers the title to the goods, rather than the delivery of the bill itself. Nonetheless, the straight bill clearly plays a role in the passing of property. The transferee of the straight bill is required to give notice of the transfer to the carrier under s. 80106(c), 49 U.S.C. The carrier will then owe the transferee those contractual obligations he had previously owed to the transferor immediately prior to the notification. In addition, under US law a straight bill may be transferred more than once<sup>119</sup>.

The US straight bill is very much a hybrid document, combining non-presentation at the discharge port with a transferability unknown to English non-transferable bills.

## 6. Conclusions

A sea waybill is not a document of title at all - it does not need to be presented and it plays no part in transferring property, if property is transferred at all. While it is technically possible for a waybill to play a part in the transfer of property, this relies on the provisions of the sale contract, not on the terms of the sea waybill. A consignee does have transferred to him rights of suit under the carriage contract, but this is by virtue of him being the original consignee, or becoming the consignee and the application of COGSA 1992, and not by virtue of the transfer of the sea waybill. Nothing is actually transferred with the waybill except the physical possession of the document.

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<sup>117</sup> Kozolchyk, *op.cit.*, p. 217, citing the Pomerene Act 49 U.S.C. 801, App. ss. 109 and 112.

<sup>118</sup> Kozolchyk, *op.cit.*, p. 171.

<sup>119</sup> Bools, *op.cit.*, p. 97.



Most of the above comments about the waybill also apply to the non-order bill. They are not generally regarded as documents of title, but they are required for presentation at the port of discharge. This gives them an element of transferability and symbolism, if only for one time and for one purpose. Does this make them documents of title and true bills of lading? It is tempting to say yes, as they are identical to traditional bills<sup>120</sup>, save that the shipper or consignee cannot use the document itself to transfer anything other than the ability to take possession of the goods once, and it is this difference that is crucial. It was the traditional bill's ability to involve a third party by mere indorsement or delivery, whether or not a passing of property was involved, that made it unique and useful in sale and finance contracts. It is the inability of the non-order bill to do this that means it is not a true bill of lading and therefore its title is a little misleading, however, providing its non-transferable nature is evident its different name will serve to distinguish it from the waybill. The difference with a traditional bill of lading is that a consignee may not transfer the non-order bill so as to transfer title to the goods without a suitably worded sale contract. Perhaps this finally defines the features of the traditional bill of lading - receipt, contract, production at the port of discharge and the ability to transfer property in the goods by virtue of the custom found in *Lickbarrow v. Mason*, without the need for express terms in the sale contract.

Sea waybills and non-order bills are useful because presentation of them is not required at the port of discharge, but it is their inability to easily transfer property under the sale contract and problems with security for banks that makes their widespread use in all trades impossible. What the industry is really looking for is a 'document' which does not require presentation, but which can be used within a sale and finance context in the same way as a traditional bill of lading. One possible solution is an electronic document, and the movement towards an electronic bill of lading will be considered in the next Chapter.

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<sup>120</sup> Subject to the points made about the Hague Visby Rules at p. 208 *et seq.*

## CHAPTER 8

### **ELECTRONIC BILLS OF LADING**

The purpose of this Chapter is to consider the development of Electronic Data Interchange (EDI) systems that could replace the traditional paper bill of lading and assess how the various attempts to produce such systems perform the three functions of the traditional bill, namely the receipt, contract and document of title. Finally, the Chapter will conclude with an assessment of whether an electronic bill of lading is merely another evolution in the form of the traditional bill, or whether it is a new species of bill<sup>1</sup>.

#### **1. Introduction – Problems with Traditional Bills of Lading**

##### **a) Too many functions**

It was shown in Chapter 1-4 that the bill of lading started life as a receipt and a contract of carriage, recording a simple obligation to deliver to a named person. As trade became more sophisticated and shippers wished to have some flexibility as to who the carrier delivered to, a custom arose whereby a bill of lading issued by a carrier could be transferred by the shipper to some third party, who could then present the bill and obtain delivery of the cargo. Moreover, the third party could also transfer the bill of lading and so allow another person to obtain delivery by producing the bill to the carrier. The transfer of the bill of lading for this purpose still relates to the carriage contract – the carrier's obligation is to deliver to the first person to produce an original bill of lading. Once the bill came to be transferred for this purpose, merchants soon realised its potential usefulness in their other contracts.

If a bill of lading could be transferred to give a third person the ability to obtain delivery of the cargo from the carrier, the shipper is more likely to be able to sell his cargo

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<sup>1</sup> Yiannopoulos A.N. (Ed.), *Ocean bills of lading: traditional forms, substitutes, and EDI systems* (1995), p. 4.

while it is still at sea. Although the buyer cannot see the cargo, he sees its description in the bill of lading and he obtains a means to collect the cargo from the carrier following the sale. From this position it is easy to see how a custom could develop that the transfer of the bill to a third party would also transfer the property in the cargo<sup>2</sup>. The bill of lading thus acquired a role in the contract of sale of goods.

As trade flourished and merchants sought to expand their operations they realised that some method of financing their business would be sensible. A seller does not want his capital investment in cargo locked up on board a ship until delivery to the buyer, and a buyer will not want to pay for the cargo until he is able to take delivery of it – neither party really wants the financial responsibility of the cargo while it is at sea. This is where the role of the bank as financier would come in. If the buyer opens a letter of credit<sup>3</sup> with a bank, that bank will pay the seller against production of various documents, including the bill of lading. On the arrival of the ship, the buyer will pay the bank, obtain the bill of lading and then use it to obtain the goods. The bank is willing to do this because while it holds the original bill of lading it has security for its credit – if the buyer does not pay, the bank will realise its security. The bill of lading is therefore crucial in a contract for the finance of international trade.

It would be an understatement to say that the bill of lading is a very useful document. In many ways it has become the victim of its own success in that its many uses sometimes conflict. Tosi described the situation as *un problème de surdimensionnement*<sup>4</sup> – a problem of overdimensionalism. This is not a new problem. In *Bovill v. Dixon*<sup>5</sup>, The Lord Justice-Clerk found that property in the goods could be transferred by indorsement of the bill of lading, but noted that:

"... the original object of a bill of lading is to record the receipt by the shipowner of the goods on board his vessel, and his obligation to deliver them to the owner, or the person named in the bill of lading, or to order. Hence the

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<sup>2</sup> *Lickbarrow v. Mason* (1794) – see the discussion in Chapter 4.

<sup>3</sup> See in general Chuah J.C.T., *Law of International Trade* (2<sup>nd</sup> edn.) (2001), para. 10-23 *et seq.*

<sup>4</sup> Tosi, in Yiannopoulos (Ed.), *op. cit.*, p. 142.

<sup>5</sup> 1854 16 D. 619.

difficulty of allowing that document to be converted into a mode of transferring the property."<sup>6</sup>

In other words, the original functions of the bill of lading, receipt and obligation to deliver<sup>7</sup>, made it difficult for the bill to become instrumental in transferring property to the goods. However, following the decision in *Lickbarrow v. Mason*, that is exactly what the bill became.

Wilson suggested that there was a feeling among shipowners that the present form of the bill of lading was an 'anachronism'<sup>8</sup>. The roles that the bill of lading plays in the contracts of carriage, sale and finance are not necessarily compatible with each other. If the original bill of lading is being used for one purpose, it might not be available for another, and this is one of the main problems in the presentation of the bill of lading.

#### **b) Problems in Presentation**

The requirement of production of the bill in order to obtain delivery is an ancient one, but modern trading conditions mean that it is sometimes impossible to achieve. Sometimes the ship makes quicker progress than the bill of lading and it reaches the discharge port first. Sometimes the cargo has been sold and the bill of lading transferred so many times that it will not make it down the chain to the final buyer in time for him to present it for delivery. This is often the case in the oil trade<sup>9</sup> where masters rarely see bills of lading before discharge. Ships cannot simply wait for the bill of lading to arrive and neither side will be willing to pay to warehouse the goods until it does arrive, so the practice has developed of delivering the cargo to the receiver against a Letter of Indemnity. This will indemnify the carrier for any liability incurred because he did not require

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<sup>6</sup> *ibid.*, at 630.

<sup>7</sup> As identified in Chapter 1.

<sup>8</sup> Wilson, *op.cit.*, p. 138.

<sup>9</sup> In *The Sagona* [1984] 1 Lloyd's Rep.194, the Master of the vessel had never, in 14 years in command of tankers, had a bill of lading presented to him at the port of discharge.

production of the bill. The Letter of Indemnity may be drafted when it becomes clear the bill will not arrive in time, or may be incorporated in advance in the charterparty<sup>10</sup>.

Letters of Indemnity are not without their problems<sup>11</sup>. They are expensive if they are countersigned by a bank, and in some cases unnecessary, ie. if the receiver is a large oil company<sup>12</sup>. Ventris has suggested<sup>13</sup> a standard clause for bills of lading, which could be literally stuck onto the back of the bill. This clause varies the traditional role of the bill of lading in obtaining delivery of the goods. The clause allows the master to deliver to the named consignee, or according to their orders, unless the carrier is notified that the bill has been indorsed, in which case the master will only deliver against the original bill or a countersigned letter of indemnity. Such a clause does not harm the bill's function as a document of title, but makes the procedures of delivery more clear. As a matter of contract, the carrier is entitled to deliver to the consignee, or to his order, without production of the bill or a letter of indemnity, thus saving time and money. This is a very practical solution to the problem of presentation to the carrier, but where multiple indorsements are the cause of the problem Ventris' solution is of little help as the original bill or a letter of indemnity would still be required. It has become common practice<sup>14</sup> to carry an original bill of lading on board an oil tanker, which the master delivers to the consignee at the port of discharge, who then 'produces' it to the master to obtain delivery of the goods. This practice would not guarantee a smooth delivery as the carriers could still refuse to deliver against such a bill<sup>15</sup>.

If the bill of lading also being used as security for financial contracts then it is inevitable that the bill of lading will not always be available to enable the receiver to get possession of the cargo. A bill of lading being transferred through successive buyers' banks for security purposes is obviously not going to be available for production at the discharge port.

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<sup>10</sup> As was the case in *The Houda* [1994] 2 Lloyd's Rep. 541.

<sup>11</sup> Ventris F.M., "The bill of lading in the tanker trade" [1981] L.M.C.L.Q. 497.

<sup>12</sup> *ibid.*, at 480.

<sup>13</sup> *ibid.*, at 482.

<sup>14</sup> Wilson, *op.cit.*, p. 174.

<sup>15</sup> *The Mobil Courage* [1987] 2 Lloyd's Rep. 655.

Technological advances in shipping, such as containerisation, have meant that carriage times have decreased, giving less time for the bill to reach the receiver at the discharge port. Cuyvers and Jensen have estimated that it takes a bill of lading 10 days to 3 weeks to arrive at its destination, whereas goods take only 3 to 20 days to arrive<sup>16</sup>. In addition to the decrease in carriage time, commentators have noted a “universal slowing up of postal services”<sup>17</sup>, and a combination of all these factors means that in certain trades, the bill of lading is never available at the discharge port. Despite the development of devices to enable a carrier to deliver the cargo without production of the bill, eg. the letter of indemnity, there is a growing feeling since the early 1980’s that these devices are not sufficient, and that the bill of lading is not performing its function as the means to claim delivery of the goods.

### c) Bureaucracy

International sale and carriage of goods by sea now involve the production and circulation of large amounts of paper. The UN estimated that paper administration costs represent 7% of the value of the goods<sup>18</sup>. In 1989 a report of the European Commission estimated that the cost of issuing and verifying conventional documents and the attendant delays constituted 10 to 15% of the total transport costs<sup>19</sup>. Grönfors said

“In spite of the very thin paper quality used, the documentation for all consignments on board a modern containership weighs well over 40 kgs, - no one has had the time to count the copies, only to weigh them ....”<sup>20</sup>

With such a volume of paperwork and attendant delays it is little wonder that Tosi described the situation as *la tyrannie du papier*<sup>21</sup>. Eliminating all paper documents,

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<sup>16</sup> Cuyvers & Jensen, “Assessing the impact of EDI: a cost accounting framework” (1993) 2 Journal of Transport Reviews, pp. 167-179.

<sup>17</sup> Wilson, *op.cit.*, p. 164.

<sup>18</sup> Nilson A., “Bolero and Electronic Negotiable Bill of Lading” [1996] BIMCO Review 4.

<sup>19</sup> Quoted in Yiannopoulos, *op.cit.*, p.18.

<sup>20</sup> Grönfors K., *Cargo Key Receipt and Transport Document Replacement* (1982) p. 11.

<sup>21</sup> Yiannopoulos, *op.cit.*, p. 142.

including the bill of lading, would seem to be an obvious course of action in both eliminating the tyranny of paper and perhaps assisting with the problem of presentation.

#### **(d) Fraud**

Aside from the obvious fraud based on several bills of lading being issued, the extent of the document of title status could be used to perpetrate a fraud. A fraudster, with no rights to the cargo, could take delivery of it without production of the bill, or even on production of a forged bill. A fraudster with a legitimate right to the cargo and lawful possession of the bill of lading might claim production of the cargo without surrender of the bill, and then sell or pledge the bill. As he had a legitimate right to begin with, delivery of the cargo to him exhausts the bill of lading as a document of title<sup>22</sup>, but an innocent third party would not be able to appreciate that from the face of the bill. The ability of the holder of an original bill to claim delivery even though he may not in fact be entitled to it is a problem not easily resolved while using the traditional bill. It is the very usefulness of the bill of lading as a document of title, in particular for claiming delivery, that makes it easier to perpetrate a fraud, and this may well be the bill's downfall.

One obvious way to overcome these problems is to create electronic documents that can be created and transferred in seconds, do not need presentation at the discharge port, weigh nothing and are in fact more secure from fraud than paper documents.

## **2. Requirements for Electronic Bills of Lading**

Before looking at *how* to replace a paper with an electronic document it is first necessary to look at *what* is being replaced. The traditional bill of lading, as was discussed in Chapters 1 to 4, is a receipt and an obligation to deliver. Its modern functions are: receipt for the shipment of goods; containing or evidencing the terms of the contract of carriage; transferable document of title, sometimes transferring title to or constructive

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<sup>22</sup> See Section 5 below.

possession of the goods, but always giving the current holder the ability to claim delivery of the goods from the carrier by merely producing an original bill of lading. It is, from a practical point of view, a piece of paper with writing on that also bears the signature of the carrier or his agent. The task is therefore to replace the physical signed, written document that performs various legal functions<sup>23</sup>. In replacing these properties and functions, the electronic bill of lading must address the problems highlighted above in the use of the traditional bill, without creating too many new problems<sup>24</sup>. An electronic bill of lading would have to be capable of quicker transmission and verification, reduce the amount and cost of documentation, reduce errors in the production of documentation and not be open to fraudulent use, or at least no more so than the existing paper-based system.

Todd identified a series of minimum requirements for an electronic bill<sup>25</sup>. He identified the most important requirement as the need for the carrier to be informed as to the identity of the ultimate receiver of the cargo. This relates to part of the function of a bill of lading as a document of title, and will therefore be dealt with in Section e) below. He also stated that an electronic bill of lading system should be open to anyone. A paper bill of lading can be given to anyone, but an electronic bill is a different matter, requiring the receiver to have at least a computer with a modem before it can be transferred to them. However, that is not the end of it – hardware and software systems must also be compatible, and in the absence of any custom for accepting electronic bills, parties would have to have agreed in advance to the use of them as a minimum. In order to take full and safe advantage of EDI, users should enter into preliminary data interchange agreements<sup>26</sup> covering a number of issues, such as liability for systems failures.

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<sup>23</sup> This Section will only deal with general issues relating to the functions performed by an electronic bill. Particular aspects of the functions will be considered in the context of the various projects described in Section 4 below.

<sup>24</sup> See below Section 5 for problems associated with electronic bills.

<sup>25</sup> Todd, in Norton, Reed & Walden (Eds.) *Cross Border Electronic Banking* (1995), p. 109.

<sup>26</sup> eg. EDI Association's Standard EDI Agreement, 2<sup>nd</sup> edn (1990).



## a) Signature

Unlike a bill of exchange<sup>27</sup>, there is no legal requirement in English law that a bill of lading must be signed, although it is 'customary' for them to be signed<sup>28</sup>, nor do the Hague Visby Rules require a signature<sup>29</sup>. Nevertheless, seemingly all bills of lading issued are in fact signed by someone. The signor need not be the master, as was traditional, but may be the carrier, his agent, or even the charterer's agent. The signature might not even be hand-written – it might be a facsimile or even a rubber stamp.

What is the function of a signature, whether mandatory or not? According to Johnson, a signature has four main functions:-

- “(1) To identify a piece as having originated from a particular person, bearing in mind that no two signatures are the same.
- (2) To show agreement of the person signing to the contents of the document being signed.
- (3) To show that the person signing realizes that the document is formal and that he intends to be bound by it.
- (4) To show that the document is an original.”<sup>30</sup>

Although not mandatory, bills of lading are nevertheless being signed for these reasons, and therefore the 'signature' to an electronic bill would need to perform these functions too.

Digital signatures are the electronic equivalent of a manual signature. They are best described by reference to their definition according to the International Standards Organisation:

“Data appended to, or a cryptographic transformation of a data unit that allows a recipient of the data unit to prove the source and integrity of the data unit and protect against forgery.”<sup>31</sup>

The 'signature' might be data appended to the end of a message, or a method of encryption that is unique to one person so that the message itself is the 'signature', proving who sent it, and indeed securing it against fraud at the same time. In English Law 'signature' has

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<sup>27</sup> Bills of Exchange Act 1882, s. 23 states that no one is liable on a bill of exchange unless they signed.

<sup>28</sup> Carr, in Yiannopoulos, *op.cit.*, p. 166.

<sup>29</sup> If the bill is to be used under a documentary credit, UCP500, Art. 23 states that it must be signed.

<sup>30</sup> Johnson C., "Electronic Data Interchange and Negotiable Instruments – a preliminary Review of some Legal Issues" [1992] *Int. Yearbook of Law Computers and Technology* 5, p. 10.

<sup>31</sup> ISO 7498-2, quoted in Johnson, *ibid.*

always had a wide definition, including signature by means of rubber stamp or initialling<sup>32</sup>, and so the use of digital signatures should not present a major problem in English Law. In any event, digital signatures have now been given formal legal recognition in the Electronic Communications Act 2000. S. 7 states that in any legal proceedings, a digital signature (electronic signature in the Act) incorporated into a particular electronic communication, and the certification by any person of such a signature, shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data. A digital signature should therefore be seen as being capable of performing most of the functions of a manual signature.

Of Johnson's four functions of a signature, only the last one may cause difficulty for an electronic signature. As a series of electronic messages, an electronic 'document' cannot be an original, and therefore the appending of a digital signature cannot make it so. As will be seen below<sup>33</sup>, it is technically possible to programme a computer to send a digitally signed message in such a way that the sending computer has the data erased from its memory. There will therefore only be one message on one computer at any one time. Anything that the receiver wishes to add to the 'original' message sent could be added, but the addition will be appended to the 'original' in such a way that it shows it was added by the receiver. Subsequent recipients would then be able to tell which is the 'original' part of the message, and which parts have been added and by whom. However, this is still not entirely the same as having an original signed document, as the recipient cannot tell if the message has in fact already been sent to another person<sup>34</sup>. The question of the originality or uniqueness of an electronic bill of lading will be considered further in the Sub-section on Writing below, and in the Section on Document of Title below.

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<sup>32</sup> Walden in Norton et al, *op.cit.*, p. 44.

<sup>33</sup> Henrikson R., *The Legal Aspect of Paper-less International Trade and Transport* (1982), p. 123 *et seq.*

<sup>34</sup> Johnson, *op.cit.*, p. 11.

## b) Writing

There is no requirement for a bill of lading or a contract of carriage to be in writing in English Law, although where the Hague Visby Rules apply the shipper can demand<sup>35</sup> that a bill of lading be 'issued', which at the time the original Hague Rules were drafted meant a paper document. For many years before the Hague Rules, carriers chose to issue paper bills of lading anyway. There are various reasons for this, but the most obvious is that the writing was being used to record the terms of the obligation and the nature and condition of the goods. This would serve as a reminder to the carrier as to what he had agreed to do with the goods, and also as evidence of the condition of the goods in case of dispute. A contract of carriage of goods by sea, if the Contracts (Rights of Third Parties) Act 1999 is to apply, must be one contained or evidenced in a bill of lading, sea waybill or a "corresponding electronic transaction"<sup>36</sup>. The requirement there is for the contract to be in writing, or in electronic form.

If a bill of lading is called for under a documentary credit the presumption will be that it will be a paper document that is presented. However, with a growing number of documents being presented electronically the International Chamber of Commerce has issued a supplement to cover electronic documents, eUCP<sup>37</sup>, which comes into force on 1 April 2002. The supplement covers problems unique to electronic documents, such as liability following the corruption of a message by a virus. It also redefines various terms in UCP500 that clearly have only paper documents in mind, such as 'appears on its face'. The issue of this supplement will assist the acceptance of electronic documents and to overcome the maritime industry's natural reluctance to embrace new technology. A paper bill of lading is a tangible document capable of being held and transferred. Electronic messages stored on a computer cannot be physically held in the same way, and cannot be read without the aid of a computer. Where such a message can represent thousands or even

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<sup>35</sup> Art. III, r. 3.

<sup>36</sup> s. 6(6).

<sup>37</sup> This is a supplement to the uniform rules relating to documentary credits, known as UCP500.

millions of pounds, businesses are naturally reluctant to trust something they cannot see. They will need to be assured of the originality of the message – that there is only one such message, and that they ‘hold’ it to the exclusion of all others. UNCITRAL described this as the problem of the ‘singularity’ of the bill, and it will be discussed later at page 13.

Electronic messages stored on and transferred by computer can perform the functions of writing mentioned above. The question is, can the evidence of messages stored in a computer be brought before a court in the same way as a paper document, and what is the quality of that evidence? This issue will be dealt with under the next Section.

### **c) Receipt**

As a receipt, the traditional bill of lading evidences, amongst other things, the quantity, condition and leading marks of the goods, ie. a description of what has been loaded on the ship. Electronic bills are equally capable of describing the goods in the same way. The question is, can that evidence be brought before a court, and if it can, is that evidence *prima facie*, or conclusive evidence? The answer to the first question is quite simply, yes. Civil Evidence Act 1995, s. 1 allows hearsay evidence, such as computer records, to be admitted in evidence. Notice must be given to the other party that hearsay evidence is being brought<sup>38</sup>. By s. 8, where a statement contained in a document is admissible it may be proved by production of that document or a copy of it “authenticated in such manner as the court may approve”. “Document” is defined as

“anything in which information of any description is recorded, and “copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly”<sup>39</sup>.

This is clearly wide enough to cover computer records and electronic messages. However, if the parties want further security that computer records covering their transactions will be

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<sup>38</sup> s. 2.

<sup>39</sup> s. 13.

admissible in evidence they can agree in an interchange agreement not to take issue with the fact that evidence has been electronically produced, transmitted and stored<sup>40</sup>.

With regard to the second question as to the weight of the evidence in the electronic bill, it is suggested that the medium on which this information is stored is not important. In considering the weight of the evidence admitted the court may have regard to whether the statement was a contemporaneous one, whether any person involved had any motive to conceal or misrepresent matters, and whether the statement was made for a particular purpose<sup>41</sup>. As well as the weight a court will place on the statements in the electronic documents, they will also be *prima facie* or conclusive evidence according to the law or the intention of the parties, as discussed in Chapter 2 above.

#### **d) Contract of Carriage**

Traditional bills of lading have many terms printed on their backs. According to the traditional view of the bill's contractual function, these terms, and the terms on the front of the bill, are evidence of the terms of the contract of carriage. It was argued Chapter 3 that the bill of lading itself should be considered to be the actual contract containing all the terms of the contract, except in certain circumstances. When using an electronic bill it is unlikely that the terms of the contract, whether merely evidence or not, will be appended to the bill of lading message. UNCITRAL's Working Group on Electronic Data Interchange noted during the preparation of its Model Law on EDI that

"electronic means of communication are not equipped, or even intended, to transmit all the legal terms of the general conditions that were printed on the backs of paper documents traditionally used by trading partners."<sup>42</sup>

Electronic bills of lading will therefore have to contain some sort of incorporation clause<sup>43</sup> so that the terms of carriage were brought to the attention of the shipper, and subsequent

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<sup>40</sup> eg. Rule 2.2.2(3) of Bolero's Rulebook.

<sup>41</sup> s.4.

<sup>42</sup> [1996] A/CN.9/WG.IV/WP.69, para. 60.

<sup>43</sup> For example under the Bolero system. See p. 263 below.

holders. Such bills would then become effectively electronic shortform bills of lading. That said, the issue of whether such terms of the shortform bill are the contract or merely evidence of it remains the same, but with the added complication of the validity of the incorporation clause in certain circumstances.

One issue that arises from creating contracts using electronic messaging is the question of when and where the contract is formed. Under the general rules on contractual formation the contract is formed on acceptance of the offer. In the case of postal communication, acceptance takes place when the letter of acceptance is posted<sup>44</sup>. However, case law in respect of telexes, as an instantaneous mode of communication, is that the contract is made on receipt of the accepting telex<sup>45</sup>. It is unclear if electronic messages would be viewed in the same way, or even if it is desirable. The problem in an EDI context is that electronic messages received by computers are sometimes automatically acknowledged to the sender and it could be argued that there was no contract because one or both parties lacked the necessary consent to form a contract. This should not be a major problem for transferees in respect of the carriage contract where the existing contract is being transferred to them, but may be for systems that create new contracts of carriage for each successive transferee, eg. Bolero<sup>46</sup>. According to Bradgate<sup>47</sup>, it will be necessary to consider the intentions of the parties, sound business practice and possibly where the risk lies. Contract formation is another issue that needs to be dealt with in the preliminary interchange agreement.

#### **e) Document of Title**

As a document of title, the ability of the traditional bill of lading to transfer certain rights in respect of cargo at sea by transfer of the bill itself gives the bill its unique status.

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<sup>44</sup> *Byrne v. van Tienhoven* (1880) 5 C.P.D. 344.

<sup>45</sup> *Entores Ltd v. Miles Far East Corp.* [1955] 2 Q.B. 327.

<sup>46</sup> See p. 37 below.

<sup>47</sup> Bradgate R., in Walden *EDI and the Law* (1989), p. 45.

However, it is the ability of the traditional bill to be transferred, to be physically passed from one person to another that presents the greatest challenge to the electronic bill of lading. As a series of electronic messages, it is impossible for an electronic bill to be transferred in the same way as a traditional bill. The question is, can it be a 'document' for the purposes of being a document of title? As was seen in Chapter 4, a traditional bill of lading is a document of title in that it is used as the means to transfer certain rights to a third person. There is no doubt that electronic messages can be sent in such a way so as to transfer constructive possession, contractual rights and property in the goods, and therefore an electronic bill can be a document of title in the sense used in Chapter 4 above. The mechanism for doing so will be discussed in the context of specific projects in Section 4 below.

One aspect of the traditional bill as a document of title cannot be replicated by an electronic bill – it can never be physically presented at the port of discharge to obtain delivery of the cargo from the carrier. UNCITRAL's working group on EDI noted that the central problem of the use of electronic bills was to guarantee the singularity or uniqueness of the message that the carrier would rely on to inform him of who he should deliver to<sup>48</sup>. An original bill of lading is unique<sup>49</sup> and when the carrier sees it he can, in most cases, be sure he is delivering to the correct person. A series of electronic messages obviously cannot be 'presented' to the carrier in the same way. Any computer printout of those messages lacks any uniqueness required by the carrier as it might be one of a hundred printouts and therefore it would not be safe to deliver against production of one of these printouts. In any event, one of the criticisms of the traditional bill is that it needed to be produced to the carrier, so removing the need to produce anything should benefit the industry. If nothing is to be produced to the carrier, then some means must be found to inform the carrier, in a secure way, who he should deliver to. All of the projects discussed

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<sup>48</sup> [1996] A/CN.9/WG.IV/WP.69, p. 4.

<sup>49</sup> Albeit with other equally unique copies in existence.

in Section 3 below relied on properly authenticated electronic messages sent to the carrier to inform him of the identity of the lawful receiver<sup>50</sup>. To obtain delivery from the carrier, the receiver need only prove his identity. This then creates a fundamental difference between a traditional bill of lading and an electronic bill – in terms of delivery at least, the latter has more in common with a waybill.

### **3. Approaches to Electronic Bills of Lading**

Various methods can be used to speed up documentary processes in international trade without needing to create a fully electronic bill of lading. These methods have varying degrees of sophistication.

#### **a) Data Alignment**

Various bodies such as SITPRO in the UK have designed documents which are ‘data aligned’, based on the UN/ECE Layout Key. The various documents used in international trade incorporate much the same information in them, such as amount of cargo, date of shipment, destination etc. Data aligned documents<sup>51</sup> are based on the ‘master document’ principle<sup>52</sup>. As much information as possible is entered onto the master document and other documents are then produced from the master document, without the need for repetitive copying and checking. On each document so produced, the same information is in the same place, even though the documents themselves serve entirely different purposes. Systems such as these reduce problems with inaccurate inputting of information and the speeding up of verification procedures.

#### **b) Shortform Bills of Lading**

The shortform, or blank back, bill of lading was introduced by the Swedish Broström Group in 1975<sup>53</sup>. The reverse side of a shortform bill of lading is completely blank, with

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<sup>50</sup> Although in some cases this is described as a surrender, eg. under the Bolero system.

<sup>51</sup> eg. the CONLINEBILL.

<sup>52</sup> Branch, *Elements of Shipping* (7<sup>th</sup> edn.) (1996), p. 453.

<sup>53</sup> Grönfors, *op.cit.*, p. 12.



the carrier's standard terms of carriage being incorporated by a clause on the face of the bill. The advantage of a shortform bill is that as it consists of only a single side of paper it is quicker to photocopy than a traditional bill of lading, thus saving on administration time and costs. It is only a small saving though, and doubts have been cast of the validity of the incorporation clause in some jurisdictions<sup>54</sup>. Most shortform bills<sup>55</sup> are also received for shipment bills, which may not be acceptable in all circumstances, eg. under a documentary credit<sup>56</sup>.

### **c) Internet Bills of Lading**

Generally speaking, a traditional bill of lading is filled in by the shipper on the carrier's standard form and then presented to the carrier or his agent for signature. Carriers, such as Orient Overseas Container Line<sup>57</sup>, can put their standard bill of lading on their websites and allow shippers to download it, complete the details and then email it back to the carrier. The carrier would still need to print the bill of lading and sign it in the usual manner so that it can be transferred to the shipper and receiver. Some time saving is gained using this method, but the bill still needs to be transferred to the port of discharge and therefore problems of presentation remain.

### **d) Chip Bill of Lading**

Richardson suggested a chip bill of lading in 1989<sup>58</sup>. The idea involved creating a piece of programmable plastic, like a credit card. The carrier would input all the usual bill of lading information on to the card and authenticate it. The card would then be handed to the shipper's bank, which would insert it into their computer to electronically check the details against the letter of credit. If the details were accepted, the computer would de-

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<sup>54</sup> Wilson, *op.cit.*, p.168.

<sup>55</sup> See the BIMCO shortform bill in Appendix 5.

<sup>56</sup> Wilson, *ibid.*

<sup>57</sup> See <http://www.oocl.com>.

<sup>58</sup> Richardson, in Thomsen H.B. and Wheble B.S., *Trading with EDI: the Legal Issues* (1989), p 180.

programme the first card while at the same time programming a second card in a computer at a bank at the receiver's end. The second card would then presumably be used to obtain delivery from the carrier, as well as enabling the receiver to print as many copies as is required by inserting it into their computer. This suggestion was never taken up, presumably because of development costs and perceived technological difficulties, but it did at least remove the need to transfer a paper document. The information stored on the chip bill would be transmitted between computers, while still allowing it to exist as a document of title in a tangible form<sup>59</sup>. However, the retention of a tangible document may not be possible in practical terms, desirable, or necessary, as will be seen in Section 4.

#### **e) Electronic Non-Transferable Bills**

Non-transferable bills, as described in Chapter 7 above, are not generally transferable so as to transfer rights in the goods, nor are they required to be presented to the carrier in order to obtain delivery<sup>60</sup>. It is this latter element that makes them one paper solution to the problems of presenting bills of lading at the port of discharge. As early as 1979 the UN/ECE Working Party on the Facilitation of International Trade, known as WP4, recommended that all interested parties encourage the use of sea waybills<sup>61</sup>. In the words of one commentator "if you can use non-negotiable documentation, use it"<sup>62</sup>. Because waybills are not required to be presented, they lend themselves more readily to transmission by EDI, as only information is transmitted, rather than rights<sup>63</sup>. Waybills were therefore amongst the first documents to be computerised.

#### **(i) Data Freight Receipt**

The Atlantic Container Lines (ACL) introduced a 'document' called a Data Freight Receipt (DFR) in 1971. This was not a paper waybill but one that could be communicated

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<sup>59</sup> *ibid.*

<sup>60</sup> See Chapter 7 generally. As the non-order bill of lading still requires presentation at the port of discharge, the non-transferable documents referred to in this Section mostly refer to sea waybills.

<sup>61</sup> Recommendation No. 12 of 1979 on 'Measures to Facilitate Maritime Documents Procedures'.

<sup>62</sup> Todd in Norton, *op.cit.*, p. 105.

<sup>63</sup> *ibid.*

electronically. Following the input of information, such as the description of the cargo, into ACL's computer, a printout is obtained and is handed to the shipper<sup>64</sup>. The shipper then retains the printout. The information in the DFR is then transmitted to ACL's computer at the port of discharge. Before the ship arrives in port the computer automatically prints an arrival notice which is then sent to the consignee named in the DFR<sup>65</sup>. The consignee, having been informed of when the cargo is arriving, attends the port and on proving his identity to the carrier will take delivery of the cargo. Using this system, nothing is posted from the country of shipment to the country of discharge.

The DFR was 'non-negotiable'<sup>66</sup> and so was not suitable for all trades. ACL was in fact one of the world's largest container carriers and so the waybill and its electronic counterpart were suited to that trade, as sales rarely occur of containerised cargo at sea. In addition to being non-negotiable, the DFR was 'received for shipment' only and did not include the carrier's standard terms and conditions. It was, in short, a receipt and a notice of shipment<sup>67</sup>. While this may be sufficient in some circumstances, it was not sufficient if the shipper wished to finance the shipment through a bank.

## **(ii) Cargo Key Receipt**

Project NODISP was started in Sweden in 1976 under the management of Professor Grönfors. The purpose of the project was to design a computerised system for the transfer of documents that could be used in connection with documentary credits that satisfied the banks' need for security<sup>68</sup>. After initial research Grönfors aimed to add bank security functions to an existing computerised system<sup>69</sup> and this system would be called Cargo Key Receipt (CKR). ACL's Data Freight Receipt system was chosen as the basis for the new

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<sup>64</sup> Wilson, p. 171.

<sup>65</sup> Henrikson, *op.cit.*, p.99.

<sup>66</sup> Kozolchyk B., "The Paperless Letter of Credit and Related Documents of Tiles" (1992) 55 Law & Cont. Problems 39, p.86.

<sup>67</sup> *ibid.*

<sup>68</sup> Henrikson, *op.cit.*, p. 97.

<sup>69</sup> Grönfors, *op.cit.*, p. 35.

system as ACL itself had 5 years experience in running computerised procedures and the company had a 'positive attitude' towards the new project<sup>70</sup>.

Under the CKR system<sup>71</sup>, data would be inputted into the carrier's computer following delivery of the goods for shipment. If a Letter of Credit had been opened, the buyer's bank is named as the consignee. Providing the carrier has no comments to make regarding the condition of the cargo delivered for shipment a codeword, CLEAN, would be added to the data. If the contract of carriage between carrier and shipper says that the shipper renounces his right to control the goods and to redirect the carrier following delivery of the cargo to the carrier, and that those rights are assigned to the named consignee, the codeword NODISP would be added to the data. As extra security for the banks, the carrier would also acknowledge that he holds the cargo "in security and as collateral for the bank as named consignee"<sup>72</sup>, in case the bank's status as consignee was not sufficient to protect them in the event of the buyer's insolvency. A final codeword, SECURITY, would be added to the data to reflect this. A first print out of this data would be made and authenticated by the carrier – this would be the CKR. It is handed to the shipper, who would then present it at his bank in return for payment.

The data is transmitted to the ACL computer at the port of discharge and arrival notices are printed out for the buyer's bank and the buyer. A copy of the CKR would be attached to the arrival notices, which would contain the following clause:

"The goods will be delivered against the enclosed CARGO KEY RECEIPT duly assigned by the bank to the consignee".<sup>73</sup>

Once the buyer has paid his bank he would receive the duly assigned CKR and produce it to obtain delivery. The notion of delivery against production of a computer printout duly assigned by a bank is somewhat odd, given a system that is based on waybills, which do not require production, and a system which is intended to replace paper with electronic

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<sup>70</sup> *op.cit.*, p. 88.

<sup>71</sup> *op.cit.*, pp. 96-99.

<sup>72</sup> *op.cit.*, p. 87.

<sup>73</sup> *op.cit.*, p. 98.

documents. At the time though, electronic transmissions were in their infancy, and one commentator noted that this procedure might well have been introduced to encourage banks to support the project<sup>74</sup>.

Grönfors' system was perhaps ahead of its time. It was only ever used by ACL<sup>75</sup>, was limited therefore to their shipping routes, and never fully eliminated paper from the transaction. More importantly, it could not be used to sell cargo in transit<sup>76</sup> and therefore was not ideal for trades such as the carriage of oil where the cargo can be sold many times afloat. It seems then that the waybill, whether electronic or not, can solve many of the problems associated with the traditional bill of lading, such as delay and problems in presentation, but it is not an ultimate solution. Some method had to be devised to combine the advantages of EDI with the ability of the traditional bill of lading to facilitate the sale of goods at sea.

Henrikson thought that there were two angles of approach to the problem<sup>77</sup>. The first angle of approach was to replace the paper document with electronic messages, and then apply different legal techniques to replicate the functions of the original paper document. The second angle of approach retains the legal techniques of the paper document, but uses electronic procedures to imitate the physical properties of the paper document. Henrikson designed a project using the second angle of approach<sup>78</sup> as he thought that the first angle of approach would lead to legal uncertainty<sup>79</sup>, ie. parties could not be sure how courts would apply the law to the new electronic procedures.

Toh See Kiat identified<sup>80</sup> three approaches to designing electronic bills of lading, managerial, technical and functional. The managerial approach retains the traditional bill

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<sup>74</sup> Toh See Kiat, *Law of Telematic Data Interchange* (1992), p. 184

<sup>75</sup> Indeed, ACL no longer seem to use CKR. According their website, [www.aclcargo.com](http://www.aclcargo.com), shippers have a choice of DFR, telefaxed or email bills of lading.

<sup>76</sup> Grönfors acknowledged this by saying that in such situations it was best to issue a traditional bill of lading – *op.cit.* p. 67. The CKR was designed to meet the needs of a seller with a specific buyer in mind, rather than the possibility of a sale to unknown persons while the goods are at sea.

<sup>77</sup> Henrikson, *op.cit.*, pp. 32-3.

<sup>78</sup> See Section 3c) below.

<sup>79</sup> Henrikson, *op.cit.*, p. 120.

<sup>80</sup> Toh See Kiat, *op.cit.*, p. 161.

believing it cannot be replaced, and uses administrative techniques to help speed the process up<sup>81</sup>. The technical approach recreates the traditional bill by technical means – the system is not altered, merely replicated electronically. In contrast, the functional approach breaks free from the old procedures by designing electronic procedures which serve the same legal functions as the paper system they replace. The end goal is the same with a functional approach, but the means by which it is achieved is different from that used by traditional paper documents. The functional approach seems to be the most radical one, involving a complete rethink of the old system. Yet, as will be seen, this is the approach most likely to succeed, using 21<sup>st</sup> Century technology for 21<sup>st</sup> Century trade, instead of using 21<sup>st</sup> Century technology to recreate documentary procedures and trade practices that date back to at least the 16<sup>th</sup> Century.

#### **4. Electronic Bills of Lading Projects**

##### **a) SeaDocs**

The SeaDocs project was the first serious attempt to create an ‘electronic’ bill of lading, having been suggested by Per Gram following *The Sagona* case in 1978<sup>82</sup>. However, from the start it would never be a truly electronic bill, as the basis for the system was that a traditional bill would be issued by the carrier and then immediately lodged in a central registry. All further dealings with the bill would be made electronically through the central registry. Security was achieved through the use of ‘test keys’ to verify authenticity, and both buyer and seller would have to send identical messages to the registry before a transfer of the bill could be registered<sup>83</sup>. The impetus behind the registry idea was the problems in the oil transport industry in the 70’s and 80’s. With the huge increase in oil prices, a bill of lading covering a single cargo might be worth as much as US\$40 million<sup>84</sup>. With so much money at stake, the problems of presentation of the traditional bill were

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<sup>81</sup> eg. data alignment and shortform bills.

<sup>82</sup> Kozolchyk, *op.cit.*, p. 89, fn. 199.

<sup>83</sup> UNCITRAL WG4 Report (1996), para. 71.

made worse by the number of times oil cargoes might be sold in transit – a bill would rarely be available for presentation to the carrier so delivery would routinely be made against letters of indemnity. Letters of indemnity were and are expensive for oil cargoes, and P & I Club cover is lost where delivery is not made against presentation of the bill. It therefore came as no surprise that INTERTANKO, an association of independent tanker owners, and Manhattan Bank, were behind the idea of a central registry to hold original bills, with all communication after lodging being by electronic transmission. The proposal was that bills of lading would be lodged in a neutral central registry, open 24 hours a day, 7 days a week. If the parties wished to sell the cargo and transfer the bill, notice would be given to the registry, which would then hold the bill on behalf of the transferee. The carrier would be informed by the registry who the current recorded holder was and delivery would be made to that person, on production of identification. The registry would act as agent for all parties, on the basis of their adherence to a set of registration rules, to be incorporated in the contracts between the parties<sup>85</sup>.

The SeaDocs concept was simple – remove the bill of lading from circulation and have all messages regarding its transfer go through the registry electronically, with ‘secrecy being ensured by a system of codes and test-keys’<sup>86</sup>. Presentation of paper documents would not be required. However, the simple concept required a whole series of “special provisions in order to deal realistically with the interests of the various parties involved”<sup>87</sup>. Kathy Love identified many problems with the concept and how it would have worked in practice<sup>88</sup>. All of the parties involved in a transaction had to be a subscriber to the registry before a bill could be lodged, from banks and carriers to bareboat charterers and all sub-charterers, not to mention the shipper and consignee. Only ‘eligible’ sales

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<sup>84</sup> Love K., “SeaDocs: The Lessons Learned” [1992] 2 OGLTR 53, p. 54.

<sup>85</sup> *op.cit.*, p. 11.

<sup>86</sup> Gram P, “Delivery of Tanker Cargoes without Presentation of Bills of Lading. Registration of Bills of Lading as a Possible Solution” presented at ‘Carriage of Oil by Sea’ seminar, Dec. 1982, p. 10. For further details of how the codes worked in practice see Kozolchyk, *op.cit.*, p.89.

<sup>87</sup> Love, *ibid.*

<sup>88</sup> *ibid.*

could be registered, and the definition used meant that this only covered FOB sales. There were also problems regarding transactions that involved bank finance. Although banks could be registered as temporary holders, because the bill was locked away in the central registry it was not available for them to scrutinise against the letter of credit. SeaDocs reluctantly agreed to scrutinise the bills for the banks, but their services were subject to many exceptions and liability was limited to 150% of the market value of the goods at the time of any breach<sup>89</sup>. SeaDocs reserved the right to expel bills and users at any time without notice or explanation, and could unilaterally change the operating procedures of the registry. Concerns were also raised about the monopoly position held by the registry<sup>90</sup>, and concerns were raised by banks that the registry was under the exclusive control of one of their competitors<sup>91</sup>. The costs of the system and insurance premiums of the registry itself, and the luke warm reception of the P & I Clubs contributed to the concerns.

With a catalogue of such potentially fatal flaws it is surprising that the system went as far as a trial project, which was carried out in 1985. However, when Chase Manhattan called for people to invest in the project by becoming shareholders, no material support was forthcoming and in 1987 Chase withdrew support for the project and the registry was wound up<sup>92</sup>.

With regard to the functions of the traditional bill, the SeaDocs project did not affect the receipt and contractual functions. Because SeaDocs allowed for the issue of a traditional bill in the usual fashion it still performed as a receipt, containing all the usual statements, and it also contained or evidenced the contract of carriage. Had the project gone any further though, it may have encountered problems regarding the document of title function. The bill itself was locked away in the registry and so was not being physically transferred. Parties would have to have ensured that the transfer of possessory, contractual

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<sup>89</sup> Love, *op.cit.*, p. 55.

<sup>90</sup> Todd, in Norton et al, *op.cit.*, p. 107.

<sup>91</sup> UNCITRAL WG4 Report (1996), para. 72.

<sup>92</sup> Love, *op.cit.*, p. 56.



and proprietary rights were fully dealt with in the various contracts, as they could not rely on the law to imply a transfer or rights in the absence of the transfer of the bill itself. Todd saw it as a fatal flaw in the project that no provision was made for the transfer of contractual rights and liability to 'holders' of the bill<sup>93</sup>. The governing legislation at the time has now been replaced by COGSA 1992, however, contractual rights under this Act only pass to a person in 'possession' of a bill of lading<sup>94</sup>, and therefore even today, parties would still have to make their own provision in this respect.

The SeaDocs bill could not have been presented at the port of discharge, and so this element of the document of title function at least would be lost. However, as the bill still physically it in existence it is submitted that it is still a symbol of the goods. The goods themselves are locked away on a ship, and the symbol of them is locked away in a registry. It was apparently envisaged that notification of transactions to the registry would have the same effect as the physical transfer of the bill<sup>95</sup>. What effect these notifications would have had on the notion of constructive possession involving a SeaDocs bill is unclear due to the early demise of the project, and need not be considered further as further developments in the area have meant it is extremely unlikely that the project will ever be resurrected.

The major problem with SeaDocs, aside from those listed above, was that it did not completely replace the traditional bill, although it was in the minds of those in charge of the project that it was only the first stage of a truly electronic bill of lading<sup>96</sup>. SeaDocs was a hybrid system that combined a paper document with new technology. That new technology though was still not sufficient to cope with the complexity of the bill of lading at that time, and a simple electronic solution to the problems of the bill of lading proved not to be possible<sup>97</sup>.

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<sup>93</sup> Todd P., *Bills of Lading and Bankers' Documentary Credits* (2<sup>nd</sup> Ed.), para. 4.6.8.

<sup>94</sup> s. 5 (2)(a).

<sup>95</sup> Wilson, *op.cit.*, p. 170.

<sup>96</sup> See Merges R.P. and Reynolds G.H., "Toward a Computerised System for Negotiating Ocean Bills of Lading" [1986] JLC 23, at p. 37, n. 52.

<sup>97</sup> Love, *op.cit.*, p. 56.

## b) Reinskou's Method

Reinskou's method to replace existing paper bills of lading was written in 1980 as part of his final law degree in Norway<sup>98</sup>. He chose a functional approach to the problem – to ask how can electronic messages carry out the functions carried out today by the paper bill of lading<sup>99</sup>. At the heart of his method<sup>100</sup> was the proposal for the carrier to act as a registry, with transactions involving the bill being recorded by the carrier using the notification-confirmation system, ie. every message had to be confirmed before it could be acted upon. Following loading of the cargo, data would be inputted, including details of the cargo that would have been put into a traditional bill of lading, into the carrier's computer and the shipper would be registered as the 'true owner'<sup>101</sup>. Following a sale, the shipper would send an electronic message to the carrier's computer, notifying the carrier of the sale. The carrier's computer would then test whether the sender is in fact the shipper, and if he is the buyer is registered as the new 'owner' and a confirmation notice would be automatically sent to the buyer's computer. The confirmation notice would contain a description of the goods and the contents of the carriage contract. As well as sales situations, goods could also be pledged using this Reinskou's method<sup>102</sup>.

The original contract of carriage would bind the carrier to issue the confirmation notice on receipt of proper notification from the shipper. The carrier's confirmation notice to the buyer would be formulated as an independent contract and would govern the relationship between the carrier and the buyer. There is no Doctrine of Consideration in Norwegian Law, so this type of contract would not create further problems. To assist future buyers, the original contract of carriage should also state that each confirmation notice contains a clause that binds the carrier to send further confirmations in the same terms,

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<sup>98</sup> Reinskou K.H., "Bills of Lading and ADP, Description of a Computerized System for Carriage of Goods by Sea" [1981] *Journal of media Law and Practice* 160, at p.186.

<sup>99</sup> *op. cit.*, p. 161.

<sup>100</sup> *op. cit.*, pp.164-5.

<sup>101</sup> Reinskou's choice of term here is unfortunate as the shipper would not necessarily be the actual owner of the goods – he is merely the person entitled to give instructions to the carrier regarding the cargo.

<sup>102</sup> *op. cit.*, p. 171, and pp.176-8.

including that clause<sup>103</sup>. The original contract and subsequent confirmations would also reserve the carrier's rights to invoke the original defences against future buyer.

The carrier would deliver the cargo to the person who seems to be the lawful receiver, according to the last notification of sale. The original contract of carriage, and indeed subsequent confirmations, would contain a clause discharging the carrier if he delivers in good faith to such a person<sup>104</sup>, and he would not be obliged to deliver to anyone other than the person notified to him as the buyer<sup>105</sup>.

Security in the system would have been provided by a cryptosystem based on 'trapdoor one-way functions'<sup>106</sup>. Such security would authenticate messages, prove that they had been sent at all and keep the messages secret, which is important to prevent them from being intercepted and a fraudster from turning up at the discharge port to claim delivery. Henrikson noted that this meant Reinskou had adopted a technical approach to the evidential function of the documents while adopting a functional approach to the 'symbolic functions' of the documents<sup>107</sup>, ie. transferability of the electronic document is achieved by means of contractual promises, notification to the carrier and confirmation by him in the form of an independent contract.

Reinskou's system would not have relied on large numbers of interested parties using it, and if the cargo was sold to someone not using the system then a traditional bill could easily have been issued at that stage, providing the original contract of carriage bound a carrier to do so if requested<sup>108</sup>. Reinskou himself recognised that his method would require expenditure on the necessary computer hardware and software, and placed a heavy burden on the carrier. However, this could be countered by the carrier charging higher freight for carriage using this method<sup>109</sup>.

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<sup>103</sup> *op.cit.*, p. 166.

<sup>104</sup> *op.cit.*, p. 167.

<sup>105</sup> *op.cit.*, p. 168.

<sup>106</sup> *op.cit.*, pp. 180-1. This is in effect public key cryptography.

<sup>107</sup> Henrikson, *op.cit.*, p. 118.

<sup>108</sup> *op.cit.*, p. 185.

<sup>109</sup> *op.cit.*, p. 186.

The major problem with Reinskou's system was that it was not model law that could be incorporated into a contract. New contracts of carriage would have to be agreed between the various parties in advance<sup>110</sup> and there are obvious technological costs of the system. Another problem was the fact that the contracting parties might discharge the carrier on delivery in certain circumstances, but this would not protect the carrier from an action in tort by a non-contracting outsider<sup>111</sup>. Reinskou's method also failed to deal with the risk of 'miscommunication' of the electronic messages<sup>112</sup>. The receipt and contractual functions of the paper bill would have been taken care of, but the extent to which the method would replicate the document of title function is not known since the method was never tried in practice.

Henrikson criticised Reinskou's method on the basis that it used the functional approach. Such an approach would lead to different techniques applying to different documents, because of their differing functions. Laws in different countries would also need to be considered and the use of new legal techniques would lead to uncertainty as to the law, until such time as the courts had considered the new techniques<sup>113</sup>. Henrikson proposed a method based on his own technical angle of approach<sup>114</sup>.

#### **d) Henrikson's method**

Henrikson's method, in contrast to Reinskou's, was a purely technical one. In 1982 he proposed a system using public key cryptography which enabled the recipient of an electronic message to be in the same position as if he had received a paper document<sup>115</sup>. His basic proposal was to programme the computers of the parties involved with certain features<sup>116</sup>. These features were:

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<sup>110</sup> Toh See Kiat, *op.cit.*, p.186.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> Henrikson, *op.cit.*, p. 120.

<sup>114</sup> See p. 248 above.

<sup>115</sup> Henrikson's method was a general one that could apply to all documents, although he did discuss the special problems of the bill of lading, *op.cit.*, pp. 131 *et seq.*

<sup>116</sup> *Op.cit.*, pp. 123-131.

- 1) Messages created from data entered into a computer have a statement automatically added to them that they were generated by X.
- 2) If X wished to add a clause to a message received from another party, his computer will automatically add a statement saying that the addition was made by X.
- 3) The computer would erase stored data on the occurrence of a certain event, eg following receipt of an automatic acknowledgement from the receiving computer.

With these features, Henrikson claimed that an electronic 'negotiable instrument' would be created, whose authenticity could be confirmed, whose data could not be altered without trace, and which would be unique. The data contents in the receiver's computer were not unique in the technical sense; however, as the sending computer's data would be erased, the receiver's data would then be the only copy of the data left. Proof that one party held 'original' data in this way would not be by producing a printout, but by transmitting the data to the person to whom the evidence needed to be produced<sup>117</sup> - ie in the case of obtaining delivery of cargo from a ship, the receiver of the bill of lading data would send it to the carrier to prove his entitlement to delivery.

Henrikson assessed his proposal against the law relating to bills of lading and concluded that the existing Danish law would apply to an electronically signed bill of lading using his methods<sup>118</sup>. Like Reinskou, Henrikson recognised that his method would require standardisation of hardware and software and the facilities for international data communication. He also recognised that the Cargo Key Receipt system was less demanding in this respect<sup>119</sup>. Although this method was not one that involved a registry, Henrikson thought it would be a good idea for an 'independent approval and control authority' be established to ensure the users hardware and software was up to the required specifications, and also to administer the directory of public keys used in the cryptography system.

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<sup>117</sup> Henrikson, *op.cit.*, p. 128.

<sup>118</sup> Henrikson, *op.cit.*, p. 132.

<sup>119</sup> Henrikson, *op.cit.*, p. 130.

Because Henrikson's version of the electronic bill used electronic methods to recreate the functions of a paper bill it comes the closest to being a truly electronic bill of lading. The receipt and contract functions are of course performed. However, Henrikson did not deal with the transfer of proprietary or contractual rights, presumably because he did not consider them relevant, or that the laws relating to the transfer of paper bills would also apply to electronic documents, or that the parties would deal with such things in the contracts between them. The question of whether the electronic bill is a symbol of the goods, ie. that 'holding' the electronic document is the equivalent of the holding the goods, is a different matter. Henrikson's purpose was to create a 'unique' transferable document whose possession gave rights to the receiver, and he succeeded, at least to the extent that the receiver was required to send the electronic bill to the carrier to prove his entitlement to delivery – ie. to 'produce' the bill to the carrier in the same way as a paper bill.

Toh See Kiat's main criticism of the method was that it required a central authority, and was therefore a closed system, ie. not open to everyone. He also doubted that the existing laws would recognise the holding of data in a computer as the equivalent of holding a paper document. In effect, applying old law to new technology was not a good idea<sup>120</sup>. However, the maritime industry is notoriously conservative in its views on law, and a radical rethink of laws relating to the transfer of bills of lading, electronic or otherwise, would not happen overnight.

#### **d) CMI Rules for Electronic Bills of Lading**

After two theoretical suggestions and one short-lived pilot project, the CMI began to take an interest in 1986 in the subject of electronic bills with a view to putting forward a set of uniform rules. Initially the work was done under the subcommittee dealing with sea waybills, but in 1988 it was transferred to a new CMI subcommittee working under the

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<sup>120</sup> Toh See Kiat, *op.cit.*, p. 180.

title of "Electronic Transfer of Rights to Goods in Transit"<sup>121</sup>. Their work culminated in the CMI's Rules for Electronic Bills of Lading being adopted in 1990.

The CMI did consider resurrecting the central registry idea of SeaDocs, but quickly dismissed the idea for commercial and legal reasons – the industry's hostility to the idea had not thawed, and as the bailee, a carrier could attorn to subsequent bailors more easily than a central registry<sup>122</sup>. The basic scheme would therefore be based on the issue of an electronic bill of lading by the carrier, who would then act as his own registry, recording transactions involving bills issued by him<sup>123</sup>. After the goods have been delivered to the carrier, the carrier would issue an electronic receipt message to the shipper<sup>124</sup>. This message would include a description of the goods, including any reservations, a reference to the carrier's terms of carriage and a 'Private Key'. When the shipper confirms this message he would become the 'Holder' who is entitled to the right of control and transfer of the goods<sup>125</sup>. The Private Key would be the security code that the Holder uses to instruct the carrier. It would enable a carrier to know that the message sent to him is authentic. No specific form of Key is set out in the Rules – the parties must agree a suitable Key between themselves<sup>126</sup>.

The Holder would have various rights over the goods by virtue of Rule 7: to claim delivery of the goods from the carrier, to nominate another consignee, to transfer its rights to a third party, to give instructions to the carrier regarding the goods. Under Rule 7(b) transfer of rights would be effected by notification of the transfer to the carrier, authenticated by the Holder's Private Key. The carrier would confirm the notification to the Holder and transmit the information from the receipt message (minus Private Key) to the proposed new Holder. Upon confirmation by the new Holder the carrier would cancel the

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<sup>121</sup> Chandler G.F., "The Electronic Transmission of Bills of Lading" [1989] J.M.L.C. 571, at p. 574.

<sup>122</sup> Toh See Kiat, *op.cit.*, p. 212, n. 111.

<sup>123</sup> The full text of the Rules can be found on the CMI website - <http://www.comitemaritime.org/rules/rulesebla.html>.

<sup>124</sup> Rule 4(a).

<sup>125</sup> Rule 4(b).

<sup>126</sup> Rule 2(f).

old Private key and issue a new one. If the proposed new Holder does not confirm the carriers notification the transfer would be ineffective and the current Private Key remains valid. Under the CMI Rules, the receiver must confirm all communications before they can be acted on. The Private Key is unique to each successive Holder – it is not transferable<sup>127</sup>. The carrier would notify the Holder of the delivery date and the Holder would nominate a consignee to take delivery, verified by the Private Key. The carrier would then deliver to the consignee on production of identity<sup>128</sup>. Rule 7(d) would relieve the carrier of liability for misdelivery if he can show that he exercised 'reasonable care' in ascertaining that the party claiming to be the consignee was the consignee.

The Rules are entirely contractual in application – the parties must agree to use them<sup>129</sup> and will do so by incorporating them into their carriage contracts. The Rules were not meant to be a comprehensive guide to the use of electronic bills. They were designed to govern the electronic transfers of bills, and existing laws would deal with other issues involving the bill<sup>130</sup>. Rule 6 clearly states that the contract of carriage is still subject to any mandatory international convention or national law, as if a paper bill had been issued. The conduct of the parties would be governed by UNCID and the electronic messages themselves should conform to the UN/EDIFACT standards, unless otherwise agreed. Additionally, the document format should conform to the UN/ECE Layout Key, unless otherwise agreed<sup>131</sup>. Disputes as to what was transmitted can be resolved by an Electronic Monitoring System. This would allow computer records to be evidenced in the form of a Trade Data Log or Audit Trail<sup>132</sup>. At any time prior to delivery of the goods the Holder would have the right to demand a paper bill of lading<sup>133</sup>, and the issue of a paper bill of

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<sup>127</sup> Rule 8.

<sup>128</sup> Rule 8.

<sup>129</sup> Rule 1.

<sup>130</sup> Kelly R.B., "The CMI Charts a Course on the of Electronic Data Interchange" [1992] Tulane Maritime Lawyer 349, at p. 361.

<sup>131</sup> Although, as Toh See Kiat points out, *op. cit.*, p. 182, how can an electronic document comply with a format designed for a paper document.

<sup>132</sup> Rule 3.

<sup>133</sup> Rule 10.



lading would terminate the EDI procedure under the Rules. The CMI Rules also dealt with the issue of the replacement of 'writing' by making the parties agree not to raise a defence that the contract of carriage is not in writing<sup>134</sup>.

On the face of it the CMI Rules seem very similar to Reinskou's method. However, there is fundamental difference in that Reinskou aimed to recreate the effects of the bill by means of a contractual arrangement, whereas the CMI Rules used a technical technique (supported by contract) to do the same<sup>135</sup>. In Toh See Kiat's opinion, the CMI Rules used electronic messages to replicate paper procedures. In his words "the participants of this system act telematically but think paper bill of lading"<sup>136</sup>. The rights of control are with someone who still 'held' something, in this case the Private Key. However, the consignee designated by the Holder to take delivery of the cargo does not appear to have the rights of control transferred to him, and so if the carrier refuses to deliver to him, only the Holder would have a contractual right of action against the carrier<sup>137</sup>.

The CMI Rules were seen as the 'best attempt to implement negotiable electronic bills of lading'<sup>138</sup>, but they are not without their flaws. They were never designed to encompass all aspects of electronic bills, and a number of important deficiencies have been noted. Yiannopoulos noted that the Rules failed to provide a way to determine when and where the contract of carriage was formed, they failed to deal with liability for a systems breakdown, and also placed an excessive burden of responsibility on the carrier<sup>139</sup>. The requirement for all messages to be confirmed before being acted upon is no doubt a prudent one, but when computers are programmed to automatically respond to certain messages, this security aspect is largely illusory.

The security problem is one which some commentators find the most worrying. Although the electronic messages are authenticated by a Private Key, what keeps the

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<sup>134</sup> Rule 11.

<sup>135</sup> Toh See Kiat, *op.cit.*, p. 186.

<sup>136</sup> *op.cit.*, p. 181.

<sup>137</sup> Unless the consignee nominated has the right of control transferred to him under Rule 7.

<sup>138</sup> Yiannopoulos, *op.cit.*, p. 29.

<sup>139</sup> *ibid.*

Private Key secure? The Private Key is passed from ship to shore and back again on unsecure channels. If a fraudster intercepted the Key he may use it to instruct the carrier. In the view of Todd<sup>140</sup>, in order to avoid this risk the Private Key, or 'secret code' as he called it, must be encrypted in some way. Encryption needs some method of agreement between the parties as to how they will encrypt and decrypt messages. However, the CMI Rules were designed to be open to anyone to use, and therefore preplanning of encryption devices might be difficult. Todd recommended the use of a public key/private key encryption system<sup>141</sup>. This involves a pair of keys, related to each other mathematically, being issued to each party. The public key is made publicly known while the private key remains secret. A message, such as the CMI's Private Key is encrypted using the sender's private key and the receiver's public key. The message can then only be decrypted using the sender's public key, which everyone knows, AND the receiver's private key. This will not only reveal the message itself, but also confirm the identity of the sender. The private key never changes hands, unlike the CMI's Private Key, and therefore it can be kept secure. There must be a relationship between the public and private keys, but it should not be feasible to compute the private from the public key if security is to be maintained<sup>142</sup>. Thus the encrypted CMI Private Key may be sent on an unsecure channel, and it is only the Private Key itself that must be encrypted. The bill of lading data itself can be in plaintext as this is merely information, and it is the Private Key that authenticates the carrier's instructions. Using this technique, the security of a bill of lading produced under the CMI Rules is greatly increased. However, this would be at the cost of needing a central authority to certify the key pairs and maintain a central register of public keys<sup>143</sup>. The price it seems for having a secure system, is a less open one.

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<sup>140</sup> Todd, in Norton *op.cit.*, p. 113.

<sup>141</sup> *op.cit.*, p.114.

<sup>142</sup> Todd, *Bills of Lading and Banker's Documentary Credits* (2<sup>nd</sup> Ed.)(1993), p. 126, n. 133. See also the excellent explanation of the system in Singh, *The Code Book* (1999), pp. 272-279.

<sup>143</sup> Todd, *op.cit.*, p. 115.

How would an electronic bill under the CMI Rules deal with the functions of a traditional bill? The receipt function is dealt with by the Rules. Rule 4(b)(ii) states that the Receipt Message is to contain a description of the goods, with any representations 'as would be required if a paper bill were issued'. Whether such statements are *prima facie* or conclusive evidence would therefore depend on the application of the current law, and at present the Hague Visby Rules and s. 4 COGSA 1992 do not automatically apply to electronic bills. However, Rule 6 makes any international convention or national law applicable if it would have been compulsorily applicable if a paper bill has been issued.

Under Rule 5(a), it is agreed that whenever the carrier makes reference to its terms of carriage, then those terms form part of the contract of carriage. The CMI electronic bill of lading therefore does contain the terms of contract and is not merely evidence of them. The CMI Rules are however silent as to whether earlier oral or written terms may also be part of the contract.

The CMI Rules contain no provisions relating to the transfer of property, but that need not stop the parties from dealing with that aspect in their sale contracts<sup>144</sup>. No mention is made either of the transfer of contractual rights as such. Rule 7 allows for control over the goods and the ability to claim delivery of the goods to be transferred, but does not refer to the transfer of other contractual rights or liabilities. At present the transfer of contractual rights and liabilities under COGSA 1992 does not extend to electronic bills<sup>145</sup>, although s. 1(5) permits regulations to be made to extend the scope of the Act to such documents. If all contractual rights and liabilities are to be transferred to each successive Holder, the original contract of carriage should make provision for this in the meantime.

As Toh See Kiat pointed out, under the CMI Rules, the Holder is in fact holding something – the Private Key. This should mean that concepts of constructive possession

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<sup>144</sup> Todd, in Norton, *op.cit.*, p. 112.

<sup>145</sup> Subject to incorporation of them under Rule 6.

can be applied to a CMI electronic bill – the Private Key can be a symbol of the goods in the same way as a traditional bill. It cannot actually be transferred, as the carrier issues a new key to each successive Holder. However, there is only one Private Key in force at any time and it is therefore unique and it is this aspect that should allow the electronic bill to be seen as a symbol of the goods. What rights a holder of such an electronic symbol has, eg. on insolvency of the buyer, remains unclear until tested before the courts. One thing is certain, the electronic bill is not 'presented' to the carrier to obtain delivery of the cargo. Delivery is made to the consignee nominated by the Holder on production of identification. The carrier knows who to deliver to because all transfers and nominations of consignee are sent through his computer.

#### **e) Bolero**

In 1990 BIMCO set up a working party to consider electronic bills of lading, and in early 1991 they invited bids for consultancy on the project as they were having difficulty with the 'negotiability' of the bill of lading. A company called Marinade Ltd won the contract and with BIMCO they designed an electronic bill of lading system in 1991<sup>146</sup>. This system used UN/EDIFACT standard messages to communicate with a central server owned by BIMCO. This server would hold the records of holdership of the electronic bills. The system also used the legal construct of the CMI Rules on Electronic Bills, save that instead of the 'private key' proposed in the Rules, the BIMCO system would use digital signatures to authenticate messages.

The project was taken to the market together with BT Customer Systems, but the market was not yet ready for such a system and BIMCO ended the project at the end of 1992<sup>147</sup>. However, in 1993, the European Commission invited bids for pilot projects to prove the usefulness of digital signatures in a commercial context. With a consortium of IT

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<sup>146</sup> Details taken from an email sent to the writer by Ake Nilson, the founder of Marinade Ltd, [2002].

<sup>147</sup> *ibid.*

companies, led by Deloitte & Touche, Marinade Ltd put forward a project called Bolero<sup>148</sup>, developed from the BIMCO project, and won ECU1.83 million to implement a pilot project<sup>149</sup>. A pilot project was run with 26 users in North America, Europe and Hong Kong in 1995 and according to Marinade<sup>150</sup>, the world's first electronic bill of lading was sent on 30 June 1995. The view of the participants was favourable and was followed by a legal feasibility study of the various issues involved was undertaken on behalf of Bolero by Allen & Overy and Richards Butler. The study was published on Bolero's website in 1999<sup>151</sup> and the service was launched commercially on 27<sup>th</sup> September 1999.

Bolero is run by Bolero International Ltd, which in turn is owned joined by the Society for Worldwide Interbank Financial Telecommunication, SWIFT, and the Through Transport Club, TTClub. Aside from being able to have SWIFT, with all its experience, operating Bolero's messaging system, it should not suffer from the criticism that was levelled at Chase Manhattan during its SeaDocs Project. Here at least are two independent, international organisations, one a financial network and one a trade organisation and mutual insurer, in whom parties can place their trust in without fear of them gaining a superior business advantage. Bolero was designed to deal electronically with all types of documentary procedures, including invoicing and financing, as well as bills of lading.

The Bolero system does not create a single electronic document to replace the paper bill of lading – the Bolero Bill of Lading is made up of an electronic document acknowledging receipt of goods by the carrier (called the BBL text) together with its related Title Registry record<sup>152</sup>. The Title Registry is operated by Bolero International and provides the means to transfer Bolero Bills to third parties, and to record the status of the current active Bolero Bills<sup>153</sup>. General principles and definitions are to be found in the

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<sup>148</sup> “Bill of Lading for Europe”.

<sup>149</sup> See Marinade Ltd's website – [www.marinade.ltd.uk/present/pfut.htm?M](http://www.marinade.ltd.uk/present/pfut.htm?M) – slide 6.

<sup>150</sup> See [www.marinade.ltd.uk/present/pbol.htm?M](http://www.marinade.ltd.uk/present/pbol.htm?M) – slide 6.

<sup>151</sup> <http://www.bolero.net/downloads/legfeas.pdf> (The Legal Feasibility Study).

<sup>152</sup> <http://www.boleroassociation.org/downloads/rulebook1.pdf> (The Rulebook), pp. 3 and 4.

<sup>153</sup> *ibid.*, p. 7.

Bolero Rulebook<sup>154</sup>, while the procedures for creating and transferring documents within the system are to be found in the Operating Procedures, an Appendix to the Rulebook<sup>155</sup>. The Rulebook forms a multilateral contract between all users of the Bolero system<sup>156</sup>.

On shipment, the carrier will create a BBL text which must include a statement that the goods have been shipped, or received for shipment by the carrier, and also contain or evidence the terms of the contract or carriage<sup>157</sup>. On creation of the BBL text, the carrier must designate a Shipper<sup>158</sup>, and transmit the BBL text to the Title Registry. If the Shipper wishes to transfer the Bolero Bill to someone else, eg. a To Order Party, in the same way as he would indorse a paper bill of lading, he will send a message to the Title Registry, via the Core Messaging Platform (CMP), authenticated by digital signature. This message will comprise an instruction to the Title Registry designating a To Order Party, the BBL text<sup>159</sup>. On verification of the message, the Title Registry is informed of the transfer. The records are then updated and confirmation sent via the CMP, to the Shipper. The To Order Party is then notified of the designation. This message will also contain a notice of attornment<sup>160</sup> that the carrier now holds the cargo on behalf of the To Order Party, and a record of all previous indorsements. On receipt of confirmation from the To Order Party, the designation is successful and the system will notify the Shipper its the success<sup>161</sup>.

A Shipper or a To Order Party may designate a Consignee<sup>162</sup> in the same manner as described above. The Consignee is the person to whom delivery will be made, providing he has also been designated as the Holder. The Holder is the person entitled to the physical

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<sup>154</sup> *ibid.*

<sup>155</sup> [http://www.boleroassociation.org/downloads/op\\_procs.pdf](http://www.boleroassociation.org/downloads/op_procs.pdf) (The Operating Procedures).

<sup>156</sup> Rulebook, para. 2.1.1(1).

<sup>157</sup> Operating Procedures, para. 3.1(1). 3.1(2) includes provision for the BBL text to represent a charterparty bill by not requiring it to evidence the carriage contract terms. This can only be used where the head charterer is designated as the Shipper and Holder.

<sup>158</sup> The various designations of the parties concerned with the transfer of a Bolero Bill of Lading are detailed in paras. 4.2.1 to 4.2.8 of the Operating Procedures.

<sup>159</sup> Operating Procedures, para. 4.4.3.1.

<sup>160</sup> Notice of possessory rights now available under Rule 3.4 of the Rulebook. See also para. 4.5.2.1 of the Operating Procedures.

<sup>161</sup> For the technical procedures and messages see Operating Procedures, para. 4.4.3.1 *et seq.*

<sup>162</sup> Operating Procedures, para. 4.2.4.

possession of a paper bill of lading, should one be issued<sup>163</sup>. Once a Consignee has been designated the Bolero Bill becomes non-transferable.<sup>164</sup> Unlike the CMI Rules, but like Henrikson's method, the Bolero Bill must be surrendered to the Carrier in order to obtain delivery. The Consignee sends an instruction to surrender the Bolero Bill to the Title Registry via the CMP, and they update their records to show that Bolero Bill is no longer active. The Consignee and Carrier are notified of the success of the surrender. No further actions can be taken in respect of the Bolero Bill, but neither the Operating Procedures nor the Rulebook specify precisely how delivery is to take place following surrender. Paragraph 4.4.6 of the Operating procedures suggest that the Carrier may, on receipt of notice of surrender confirm to the Consignee where and when the cargo will be available and what identification will be required.

The Bolero system is no doubt complicated – the Operating Procedures alone run to over 140 pages. However, the complexity gives the system greater flexibility to cover a wide variety of situations. A Bolero Bill can be transferable or non-transferable; it can be issued under a charterparty; it may record shipment of cargo or its receipt for shipment; it can be pledged or used in documentary credits; it may even be indorsed in blank. In short, it appears to cover all the varieties of paper bills of lading discussed on this Thesis. As with the other projects referred to in this Chapter, the question is, how far does the Bolero Bill perform the functions of the traditional bill?

#### **(i) Bolero Bill of Lading as a Receipt**

The BBL text will contain the statements as to the cargo. By Rule 3.1(3) of the Rulebook, any statement a carrier makes as to the leading marks, number, quantity, weight or apparent order and condition of the goods will be binding on the carrier as if it had been made in a paper bill. There should therefore be no change in the working of this function

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<sup>163</sup> Operating Procedures, para. 4.4.3.1. As with the CMI Rules, at anytime before delivery of the goods by the carrier, a Holder can demand the issue of a paper (Rule 3.7). The Bolero Bill ceases to be effective from the moment a paper bill has been issued.

<sup>164</sup> Operating Procedures, para. 4.4.3.2.

from a traditional bill. Electronic bills do not acquire the mandatory application of the Hague Visby Rules. However, as a matter of contract, Rule 3.9(1) of the Rulebook says an electronic message

"will take effect, for the purposes of the operation of any international convention or national law, as if it were a Transport Document which had been issued by the Carrier in paper form."

This is emphasised by Rule 3.2(4) which states that international conventions which would have been compulsorily applicable if a paper bill had been issued are deemed to be incorporated into the Bolero Bill.

By Rule 2.2.3 Users agree that the signed electronic message will be admissible before any court, and Users agree not to contest the validity of messages on the grounds that they are not on paper or signed in the normal way<sup>165</sup>. Messages should be admissible in evidence, but where there is a mandatory requirement for a particular document to be on paper and manually signed it is hard to see how an agreement between the parties to use electronic messages will circumvent this. A User may well have agreed not to challenge validity, but he may choose to do so anyway and risk an action for breach of contract in this respect. The court may choose to challenge the validity for itself and the Rulebook will therefore not prevail.

#### **(ii) Bolero Bill of Lading as a Contract of Carriage**

It was not envisaged that the Bolero Bill would contain all the carrier's standard terms in the manner of a traditional bill, although the carrier could do so if he desired. Rule 3.2 states that if all the terms are not set out in full then the carrier must express in the BBL text that external terms are incorporated into the BBL text, and indicate where such terms can be found or read "electronically or otherwise". The designers of the system encouraged the carriers to put their standard conditions onto a website so that they could be read electronically by the Holder of a Bolero Bill. It would be rather perverse if, after spending millions on developing an electronic bill the Users had to resort to reading a piece of paper

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<sup>165</sup> Rule 2.2.2(3).



to find the terms of the contract of carriage. The Bolero Bill is in effect a short form document and therefore may suffer from the same problem of the interpretation of the incorporation clause<sup>166</sup> in some jurisdictions. The Bolero system is governed by English Law, but the English courts do not have exclusive jurisdiction over disputes<sup>167</sup>.

Neither the Rulebook nor the Operating Procedures deal with the formation of the carriage contract, and therefore there is no answer to the question of whether the Bolero Bill is the contract or merely evidence of it. Rule 3.1(1) merely states that the BBL text shall 'contain or evidence' the terms of the contract of carriage. It is submitted therefore that the same arguments that were discussed in Chapter 3 in relation to traditional bills in the hands of the shipper also apply here. Where the Bolero Bill is held by someone other than the Shipper however, the Bill is the contract. Contractual rights and liabilities under the carriage contract are not actually transferred under the Bolero system. As part of the process of designating a new To Order Party, Bolero, as agent for the carrier, creates a new contract of carriage between the carrier and new To Order Party. Upon acceptance of the new party's designation, a new contract arises on the terms contained or evidenced in the BBL text<sup>168</sup>. For the avoidance of doubt, Rule 3.5.5 states that any User who holds the Bill in any capacity agrees that any claim against the carrier shall be subject to the terms found in the BBL text. Upon the novation of the new contract, the previous Holder's rights and liabilities under the contract are extinguished<sup>169</sup>. If the previous Holder was the Shipper though, his rights are extinguished, but not his liabilities, as is the case with transfers of contracts under COGSA 1992. If the previous Holder was the charterer, he loses neither his rights nor his liabilities<sup>170</sup>, as the charterparty and not the Bolero Bill govern these.

One potential problem for Bolero is that the system allows for a switch to a paper bill of lading at any time before delivery<sup>171</sup>. Rule 3.7(2) specifies that the paper bill must

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<sup>166</sup> See Wilson, *op. cit.*, p. 166.

<sup>167</sup> Rule 2.5(4).

<sup>168</sup> Rule 3.5.1(1).

<sup>169</sup> Rule 3.5.1(3).

<sup>170</sup> *ibid.*

<sup>171</sup> Rule 3.7, Rulebook; para. 4.4.7, Operating Procedures.

contain the data in the BBL text and also the record of the chain of Holders. However, the transferee of the paper bill may not be a member of Bolero and the question arises whether the transferee will have a right of suit against the carrier in those circumstances<sup>172</sup>.

**(iii) Bolero Bill as a Document of Title**

Unlike the other projects to create an electronic bill, Bolero specifically deals with the transfer of constructive possession. Rule 3.4.1 declares that the designation of a new Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder<sup>173</sup> shall effect the transfer of constructive possession. By Rule 3.4.1(2), upon designation the carrier, via Bolero as its agent, will acknowledge that from then on it holds the cargo to the order of the new Holder. This uses the common law notion of attornment to effect the transfer of constructive possession. The designers of Bolero recognised that possession needed to be transferred in order to protect the Holder's position, particularly in respect of the transferor's bankruptcy<sup>174</sup>. The authors of the Legal Feasibility Study felt that "possession by [carrier's] acknowledgement should be equivalent to possession by a physical bill of lading"<sup>175</sup>.

Although the Bolero Bill is surrendered to the carrier, via Bolero, this is not in fact delivery on production – nothing is physically produced to the carrier at the port to prove entitlement to delivery. The carrier is informed of the surrender by Bolero, who the final Holder was, and that the Bill is no longer active. The carrier and the final Holder will then liaise as to how delivery will be effected and to whom, as the Holder may still at this stage order the carrier to deliver to someone else.

Despite the lack of production, the Bolero Bill can still be seen to symbolise the goods it represents – only one person 'holds' the Bill at any one time<sup>176</sup> and only they have

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<sup>172</sup> Taylor S., "The Bills of Lading Electronic Registry Organisation: The Bolero Project" <http://www.elbornes.com/articles/bolero.htm>, at p. 8.

<sup>173</sup> See fn. 158 above.

<sup>174</sup> Legal Feasibility Study, pp. 12, 60, and 62-3.

<sup>175</sup> *ibid.*, p. 63.

<sup>176</sup> Although the system might allow several designations at once, such as a Shipper, a Pledge and a Consignee, it will not allow more than one To Order Party at any time – Operating Procedures, para. 4.2.5.

rights over the goods and can instruct the carrier in respect of them, as well as giving Title Registry instructions. The uniqueness of the bill of lading has therefore been preserved.

Unlike the traditional bill of lading, there is no transfer of contractual rights and liabilities under a Bolero Bill as a new contract comes into existence for each new party.

The transfer of property is also dealt with in the Bolero system. By Rule 3.10(1), if as a result of the parties intention or national law, the transfer of constructive possession and/or the novation of the contract of carriage will have the effect of transferring property in the goods. However, Rule 3.10(2) makes it clear that nothing in the Rulebook itself effects the transfer of property. The designation of a Holder will not therefore transfer property unless the parties intend it or by operation of law. To assist sales of cargoes, Users agree that the tender of messages through the Bolero system will not be rejected on the grounds that they are electronic.

According to the Legal Feasibility Study the Bolero Bill will not be a document of title because it is not a written physical document<sup>177</sup>. However, over time they thought it was possible that the Bolero Bill might acquire the attribute of ‘negotiability’<sup>178</sup> by the custom of merchants. This is an unfortunate choice of term, as was seen in Chapter 4, but it is suggested that the authors were referring to the custom of merchants that the transfer of a traditional bill will transfer property in the goods, and one day the same custom may affect transfer of electronic bills.

## **5. Overview of the Bolero System**

Bolero is a comprehensive system that covers more than just electronic bills. It is now in commercial operation, with new Users joining all the time. Even John Richardson, arch-supporter of the sea waybill acknowledged that if you need to have a document of title for trading while the goods are in transit, then “Bolero offers probably the best

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<sup>177</sup> Legal Feasibility Study, p. 61.

<sup>178</sup> *ibid.*

solution to conversion from paper to EDI”<sup>179</sup>. The Bolero system is not, however, without its concerns.

Any EDI system is likely to have set-up costs. Bolero is no exception, but since it is an internet-based system it will be less expensive<sup>180</sup> than closed network systems, such as ACL's. Additionally, systems such as Bolero are closed systems that require membership, and membership will have its costs. Even using an open system such as the CMI Rules will require a third party for certification of public/private keys and maintaining the register of public keys to ensure security. Non-registry systems will require detailed interchange agreements to be drafted and signed in advance by the parties.

The maritime industry has been slow to fully utilise the potential of EDI. Aside from ACL's system, none of the projects discussed in the Chapter prior to Bolero has achieved any form of success. Bolero is now showing signs of being accepted in the industry, although the liner trade has been slow become actively involved. The true test of Bolero will be in trades that involve long chains of sale and purchase contracts<sup>181</sup>.

There are also concerns<sup>182</sup> regarding the liability of Bolero for system failures. Bolero acknowledges its liability for failing to meet its service obligations under the Operation Service Contract, but liability for misdirected messages, delay in receiving messages, alteration of messages, failure to maintain the data logs or their confidentiality etc is limited to up to US\$100,000 for each loss<sup>183</sup>. Losses arising from a catastrophic failure of the system are limited to US\$1,000,000<sup>184</sup>. Maximum claims in any one year are limited to US\$10,000,000<sup>185</sup>. Such limits are relatively small when considering the value

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<sup>179</sup> Richardson J., “Paper or EDI?” [1997] March SeaFreight 15, at p. 17.

<sup>180</sup> Pejovic C., “Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions” [2001] J.B.L. 461, at p. 486. Bolero's website, [www.bolero.net](http://www.bolero.net), states that there are various price plans, and small users, if sponsored by a larger one, could join the system for a ‘few thousand dollars’ a year.

<sup>181</sup> Taylor, *op.cit.*, p. 5.

<sup>182</sup> Taylor, *op.cit.*, p. 6.

<sup>183</sup> See Sections 4.2-4.4, Operation Service Contract.

<sup>184</sup> Section 4.5, Operation Service Contract.

<sup>185</sup> *ibid.*

of a single cargo of oil, and so Users must either trust that Bolero's systems will not fail, or arrange suitable insurance to cover them for losses which will not be met by Bolero.

## 6. Conclusions

Of all the projects that have been discussed in this Chapter, only Bolero has achieved any measure of success. That system adopted the functional approach to electronic bills, and this appears to be the only approach that will achieve a workable system. It breaks free from the old system and creates a new 'document' for a new age. The Bolero Bill is a receipt, it contains or evidences the contract of carriage, and contains procedures to 'transfer' constructive possession and contractual rights, by means of attornment and novation. The transfer of a Bolero Bill will only transfer property in goods if the parties agree that in advance. The Bolero Bill does not need to be presented to the carrier, but it is surrendered and the carrier is informed of who the final User was. The Bolero Bill does therefore share some of the characteristics of a common law document of title, but it does not *transfer* anything in the same way as a traditional bill. The conclusion must be that an electronic bill, as exemplified by the Bolero Bill, is a new breed of shipping 'document', not least because it is even in its simplest form it is a series of messages and records. In the words of Yiannopoulos, the Bolero Bill is truly a new species of bill of lading<sup>186</sup>. Although there are concerns regarding the legal certainty of such new systems, the functional approach to electronic bills allows the bill to break free from the old procedures and use new technology to its full advantage, instead of using new technology merely to perpetuate the problems of the old procedures.

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<sup>186</sup> See p. 229 above.

## CHAPTER 9

### THE FUTURE OF THE TRADITIONAL BILL OF LADING

The traditional bill of lading has served the maritime industry well for many centuries. It has, however, been a victim of its own success. In particular, because of the ability of the holder of the bill to obtain delivery of the goods on presentation of it the bill has acquired functions in sale and finance contracts. The bill's many functions often conflict and the maritime industry has discovered that the traditional bill is no longer performing the functions required of it. The growth in the use of non-transferable bills and received bills shows that the industry now requires different documents for different purposes. The development of EDI and electronic bills may yet sound the death knell for the traditional bill. However, the technology required by even the simplest of electronic bills may still be beyond all sectors of the maritime industry, and all areas of the world. All of the systems discussed in Chapter 8 had or have the ability to revert to a paper bill if required by the parties. If parties wish to transfer an electronic bill to someone without the necessary technology or membership of the relevant system they can call for a paper bill of lading to be issued in a location of their choice. It is therefore likely that the two systems will continue to coexist for some time. This transition period will also give time for the amendments to national laws and international conventions that are still required to ensure that the law applicable to electronic bills is the same as for traditional bills<sup>1</sup>.

Yiannopoulos said that the decision to use bills of lading is a business one, rather than a legal one<sup>2</sup>. Even if the legal status of an electronic bill was perfectly understood and the law relating to it entirely certain, the use of it by certain business would depend on whether the electronic bill serves their business requirements – if it does not they will continue to use the traditional paper bill of lading. The character and customs of the

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<sup>1</sup> eg. the CMI's Draft Outline Instrument recognised in Chapter 2 that parties may agree to communicate electronically, and any legal requirement for writing will be satisfied by the parties' arrangements.

<sup>2</sup> Yiannopoulos, *op.cit.*, p. 41.

maritime industry were and are the *raison d'être* of the bill of lading – they helped create the document in use today. If the industry changes its business practices and the traditional bill of lading no longer performs the functions required of it, it will be replaced by 'documents' that have been developed to perform the functions that are required today.

The electronic bill of lading is just the latest phase in the development of the bill of lading. No doubt it will change again in the future as and when required, because that is the nature of the bill of lading.

## APPENDIX 1

### Early Bills of Lading

1. Leemans, *Foreign Trade in the Old Babylonian Period* (1960), p. 22. [2028BC]
2. Muffs, *Studies in the Aramaic Legal Papyri from Elephantine* (1973), p. 56. [494BC]



“10 talents of different kinds of wool of  
ordinary quality,  
wool .....  
put in a boat to Tilmun,  
Ur-gur,  
the captain of a large boat,  
has received.  
In the month of the feast of Ninazu,  
14th day  
of the year Ibbi-Sîn I.  
Nanna-andul, scribe.”

[dated to 2028BC according to Oates, p. 199]

(3) ... yhbt 'l ydnś [rn...] (exact amount) ... (9) wtyb lbbn bgw nhnh nbl bwr ... (11) ...  
nhnh nntn dy[n qdm rb m t wrbny] (12) byt mlk wqdm spry wsr ... (13) [whn l nntn kl  
bwr zy] (14) lk bmnyn ... (15) nhnh nhwb lk ksp ... (16) ... w nt šlt bprsn zy byt mlk ...  
(17) ... nt šlt lm hd d ttml b bwr ...

(3) "... You have consigned to us barley ... (exact amount) ... (9) and our heart is satisfied  
therewith. We shall deliver the grain ... (11) ... We will render an acco[unt before the  
company commander and the authorities of the] Government House and the clerks of the  
treasury ... (13) ... [And if we do not deliver all the grain that is] yours in full (15) we shall  
be liable (to you) silver ... (16) ... and you have a right to our wages from the Government  
House ... (17) ... you have the right to seize our wages until you are indemnified in full for  
the grain."

(494BC)

## APPENDIX 2

### Fourteenth, Fifteenth and Sixteenth Century Bills of Lading

1. Blancard, reprinted in Care & Herbert, *A Source Book for Medieval Economic History* (1936), pp. 159-160. [1248]
2. Bensa, *The Early History of Bills of Lading* (1925), p. 8. [1390]
3. Bensa, *ibid.*, p. 8. [1397]
4. *The Thomas, Select Pleas of the Court of Admiralty Vol. I* (1897), pp. 61-2. [1538]
5. *The Mary Martyn, ibid.*, p. 89. [1539]
6. *The Marye, ibid.*, pp. 112-3. [1541]
7. *The John Evangelyst, ibid.*, p. 126. [1544]
8. *The Andrewe, ibid.*, pp. 126-7. [1544]
9. Anon 'bark', *ibid.*, p. 127. [1544]
10. *The Brandaris, ibid.*, p. 127-8. [1546]
11. *The White Angle, Select Pleas Vol. II*, pp. 59-60. [1549]
12. *The George of Legh, ibid.*, p. 61. [1554]
13. *The Job, ibid.*, p. 62. [1557]
14. *The Sampson, ibid.*, p. 63-4. [1570]

"April twenty-fourth in the year of the Incarnation of the Lord 1248.

We, Eustace Cazal and Peter Amiel, carriers, confess and acknowledge to you, Falcon of Acre and John Confortance of Acre, that we have had and received from you twelve loads of brazil wood and nine of pepper and seventeen and a half of ginger for the purpose of taking the same from Toulouse to Provence, to the fairs of Provence to be held in the coming May, at a price or charge of four pounds and fifteen solidi in Vienne currency for each of the said loads. And we confess we have had this from you in money, renouncing, etc. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs and to wait upon you and do all the things which carriers are accustomed to do for merchants. Pledging all our goods.; renouncing the protection of all laws, etc.

Witnesses etc."

Blancard, land waybill? [1248]

“1390, the 25th day of June. Know all men that Anthony Ghileta shipped certain wax and certain hides in the name and on behalf of Symon Maraboths which things must be delivered at Pisa to Mr. Percival who shall deliver all his things to Marcellino de nigro his agent, and I Bartolomeus de Octavo shall deliver all his goods at Portovenere and for the better caution I affix my mark so.

A copy

Bartholomeus de Octavo mate of the ship Andrea Gavoll”

Translated. Bensa (1390)

“In the name of God, the 1st day of August 1397 at Bruges. Know all men who shall see these presents that I Marcellinus de Cherio do hereby acknowledge to have received from you Anthony Chornello of Majorca 730 bars of iron in Sluys. This iron I must deliver to Peter de Villalonga in the said place of Majorca.

Manfredinus de Cherio (mark)”

[On the back] bill of lading for iron shipped to Majorca.

Bensa (1397)

This bylle Indented made the xxij [22?] daye of October in the xxx [30<sup>th</sup>] year of Lorde Lyng Henry the viijth [VIII] Witnessith that I Robert Man Servaunt to Syr OswaldWylstrop knyght hath delyvered to John Halndry merchaunt of the Newe Castell and layd in his shyp called the *Thomas* of the Newe Castell xxvj [26] weye salt of the measure of Blythe to carye to London to Dyce Kye as shortly as wynde and wether wyll sarve after daye abovenamed and ther to delyver the sayd salt to my master his assigney or lawful attorney. Also the sayd John Halmdry shalbe dyscharged and his shyp of the sayd salt after that he come to London to Dyce Key within vj [6] lawfull workyng dayes and ther to be payde his fraight and condycon for caryeng of the sayd salt whiche is vj shillings and viij d the weye for xxvj wey takyng yn at the salt pannes of Blythe the daye above named. Also the master of the shyp called Thomas Gybson shall have a payre of hosse clothe to doo hys dylygence and hast the sayd voyage towards London. And in wytnesse of truth and thes premysses abovenamed to be fferme and stable. We the sayd John Halmdry and Robert Mann hath written our names with our owne handes the daye abovenamed before Myghell Bynkes of Yorke and the othe mor [?]

Select Pleas of the Admiralty Vol. 1 (1894) Selden Society

“Jesus. In Bilbowe the vijth day of November anno 1539 Mr Collette hathe ladyn by the grace of God in good saffettye I Thomas Holande in the good shyppes namyd the Mary Martyn wherein is master for thys present vyage Thomas Hege lxxj kintalls of yron in ends 44 . . . the which 71 kintalls to be consygned in London unto John Collet mercer And it goes for iij tone and xj kintalls he paying for the freight of every tonne accordyng to the charter party made in London In wytness of the truythe I the sayde master or the purser for me have firmyd iij bylls of one tenor the one complyed and fullfyled and the other to stand voyd By me Thomas Heygge”



“This byll Indented made the xxviiijth day of November in the yere of our lorde God a thousand fyve hundryd fortye and one betwen Edmond Anncell servaunt and factor of henry Harson citizen and skynner of London of the on partye and Noell Christian master and owner for this present viage under God of the goode shipe named the Marye of Penmarke Witnessyth that the saide Edmonde Anncell hath laden by the grace of God in the saide shipe to be consigned in London to his said master Henry Hardson or his assignes xlvj hogs heds of whales grece and on hogs hede of Cyvill oyle marked all with the mark in the margent and the by mark on the hogs hede of Cyvill oyle And so many thowsand oranges as makyth by account and custom of Galizia all with the forsaid xlvij [sic.] hogs heds whales grece and oyle xlvj ton masculle To paye for every ton in London accordynge to the charter party ther made betwen Henry Hardson above namyd and the said master Noell Christian with the averege in the said charter partie specifide And the saide Noell Christian confessith and grauntithe to have receved the saide oyle and merchandize above wrytten to be delyvered in London accordynge to the saide charter partye ther made Also agreide between the saide Edmond and the saide master that yf by chaunce in London or by the way in other place or porte the saide oranges be solde or mynystre out of the saide shipe that the foresaide xlvij hogs heds be bounde to paye the said somme xlvj ton accordynge to the charter partye made in London In witnes whereof the forsaide Edmond and the saide master hathe fyrmyd every of them thes Indenture the one this and the other the tother the daye and yeare fyrst above written

per me Edmond Ansell”

Select Pleas Vol. I pp. 112-3 (1541)

“The 10 of April 1544 in Cadiz

Hath ladyn by ye grace of God in ye baye of Cadiz by me thomas castell yn and upon a good shipe namyd the John Evangelyst in whome ys master under God for this present vyage Richard Symonds 35 butts wynes wich goith for fyeftey tons ladinge markyd with this marke as in the margent to be delyveryd God sending the goods shipe in savyte in the ryver of Temes or ells wher the sayd shipe shall make here right discharge unto my master Henry Richards or to his assigns he or any of them paying for the freight acording unto charter partty with average acoctomyd In witnes of trewith the master or ourser have fyrmymd to 2 bylls of one tenor the one complyed and then the other to stond as voyd and of none effecte And this Jesu send here in savyte

per me John Norton”

Select Pleas Vol. I p. 126 (1544)

“Anno 1544 the xiiijth day of Aprell in Cadiz

Laden by the grace of God in good savyte in the bay of Cadiz by Thomas Tonnebull  
John Fletcher and William Alcutt in and uppon a good shippe namyd the Andrewe of  
London master William Morant 112 bags of allam whiche goyth for tonne pype markyd  
with the marke in the margent to be delyveryd well condyshioned in the ryver of Themys as  
nyghe London as she may convenyentlye come to her right discharge to William Clyfton  
merchaunte or to his assignes payinge for the freyghte of every tonne 30 shillyngs stering  
and average accustomed In witnes of the trewth the purser hathe fyrmed iij bylls of this  
tenor the one complayd the others to be voyde and of none effecte And God send the good  
shippe in savyte

per me Thomas Turnbull”

Select Pleas Vol. I pp. 126-7 (1544) Note on p. 127 “Copy”

“Laude be to God 1544 the xiiijth daye of the monyth of Maye in Venyce

The bark whereof is capitayne Alexander de Maistre for the vyage of London And  
God save her

Master Venturyn de Varischo and his compyny ladyth ij butts saying therein to be  
reasens of Damask called cibibi [?] Damskim and xv chests of galls of Surrey signed of the  
forsayde marke to be consigned in London to Janmes Ragazon or his assigney and hathe  
payed his freight to the patron delyveryng the same sauf on lond as aperyth by the receyte  
of the patron remaynyng with the sayde Venturyn ducatts lj gr. xix cur. for the rest of the  
forsaid freight I Peter Marcudero Io de Master Nicholo purser of the saude bark wrote yt by  
thorder of the sayde patron.”

Select Pleas Vol. I p. 127 (1544)

“I Ingle Peterson Burgeis of Dordrecht master nexte god of the shipp named the Brandaris knowledge and confesse to have receyved of yow John de Fica Spaynyard resydyng in the towne of Bruges in Flaunders iiij x fardells of ffyshers yaren and iiij xvij bales of canfas marked with the marke set in the margyne whiche ys the marke of the said John do Camargo The wiche fardells and bailes I knowledge to have recyved of yow John de Fica Spaynyard drye and wel condicioned whiche I shall delyver God preserveringe me and my shipp within the haven of Sluse which is in the countie of Flaunders to John do Camargo Spaynyard or to hym that shall do for hym they payinge me for the ffreight accordyng as it ys specyfied in the charter partie Inwitness hereof I have gyven yow thre cognossemments all of one tenor marked with myn owne marke the one perfourmed the other to be of none effecte done at Seint Mallo the xvij daye of January anno 1546

per me Hubertum Sevyon fideliter translatum ex Hispanica lingua in  
Anglicanam per Willielmum Harrys de parochia Sancte Katherine  
juxta turrim Londoniensem interpretem callentem hujusmodi  
Hispanica lingua”

Select Pleas Vol. I pp. 127-8 (1546)

“In Burdeaulx the xxvijth of November in the yere of our Lorde God a thousand fyve hundred fortye and nyne personally apperid Henry le Bran maister under God of the shipp called the White Angle of Hamburg in Almain who confessed to have had and receyved in the porte or havon of this present town and cittie of Burdeaux for Mr Naudyn Revell merchaunt of Roon in Normandye the nombre and quantetie of one hundreth and fyftie tonnes of wyne full and ullagid, which wyne the sayede maister confessyth to have receyved for the sayede Naudyn Revell, the sayde Naudyn Revell beyng absent, howe be yt the same Petir Revell, his said factour, promysyng and acceptyng for hym Which sayde nombre of one hundreth and fyftie tonnes of wyne above specyfied the sayde Henry le Bran promysyth to render at the porte of Myddleburgh in Zellande (God ayng and preservyng hym from mysfortune) with the first good and conveable tyme at the fortune of the saide merchaunte Paying him his freight and avaries due and accustomed after the use of the sea there, according as it is mencyoned by an other chartre partie made in the name on an other merchaunte And albeit the sayed Henry de Bran declareth howe he hath received the sayed nombre of wyne above mencyoned in the name of an other merchaunte besides the saide Naudyn Revell he confeyth and promyseth that the same wyne be apperteyn to the saide Naudyn Revell and to none other And as aforesaide dothe promys to delyver the same unto hym as above is sayed at the discharge thereof in the sayde port of Middleborough in Zellande and to redelyver the same to the sayde Naudyn Revell or to whome shalbe for hym Paying hym the freight and avaries as ys abovesayed although the charter partie be made in the name of an other merchaunte And to performe this the syade Henry le Bran doth submyt and bynde his persone and goodes and his sayed shipp freight and apparreil of the same And it is agreed that in case the sayed merchaundize should be loste or spolyed through the defaulte of the sayed maister of the shipp or company of the same, the sayed maister shalbe bounde to make it good And likewise the sayed merchaunt dothe bynde the sayed merchaundize concerning the freight And to accomlishe this the sayed parties have submytted and do submyt them selfs to all the jurisdictions and rigors of all judges aswell on this side as beyonde the see And have renouncyd all custumes of townes and cuntryes and other renunciations by which agaynsaye or do to the contrary And so they have promysed and sworn upon the holye Evangelies of God with their handes Made and passid in the towne and cyttye of Burdeaux the daye moneth and yere abovesayed in the presence of Arnolde de Sargos and Gylliam de Gabasonelle dwellers in Burdeaux wytnesse hereunto callid and requyrid

Facta fideli et diligenti collacione concordat} Predargue  
presens translacio cum originale } notarye royall

Christopher Dowe notarius publicus Londinensis”

Select Pleas Vol. II pp. 59-60 (1549)

"Hathe be laden by grace of God in savite by me John Desallez merchant of London in a good crayer namyd the *George of Legh* beyng before the toune of Roan in Normandy of the bourthen of xxxv[35] tonne or thereaboutes of the which is master next under God for this present viage Thomas Karre for the accompt of the aforesaid merchant John Desallez xx [15] tonnes ij ponchions of wine and a barrell of apples all marke [the mark is at the foot] for to be consigned and well condicioned from this aforesaid tonne of Roan unto the citie of London exceptid the casualties and dangers of the sea. And I the aforesaid master doth promise for to deliver after the said arryvall unto the said merchant or to his factor or assigns the aforesaid 15 ton and ij ponchions of wyne and the barrell of aples [sic] he or they paying me for my freight xx [20 shillings] for a tonne of good and lawful money of England and average and primage accustomed. In witness hereafter we the said parties have caused two billes of ladyng of one tenour for to be made the one accomplished and the other of no valew and have unto this presents set our handes enterchaungeable the yere and day here following yhe vij day of May anno domini 1554

per me John Desallez (mark)"

Select Pleas of the Admiralty Vol. II (1897) Selden Society

I Cornelys Denys master under god of one hoye named the *Job* of the burthen of Iv [55] tonnes or there abouts doo confesse to have receyved aboard at the kayes of Roane of Peter de Flo merchaunte there residencte for and in the names of Mr Thomas Walker and Richarde Saltonstall That is to saye xxxvj [35] peces of prunes, sixe bales of canvas, thre demye bales of paper, two bales of threde, and one vassell of almandes together with one barrel and a half of vergus [?] and drye peares, all well and duellie condicioned marked with the marke in the margent there restethe one demye bale of paper marked with this marke [the mark] All the wiche merchaundizes I promyse to cary and conducte with the first good wether convenient which yt shall pleas god to geve us juste unto the kayes of London or Antwerpe according as the wether may serve us excepte the perills and fortunes of the seas And the same mrchandize to delyver to the foresaid Walker [and] Saltonstall or ther deputie together with thre vidimus of sayfconduyte of the kinge of Fraunce and of the kinge of Spaine paying me for my freight according to the agrementt mad eby them in Antwerpe And for testymony of truthe I have made thre conoscyments of one like tenor the one accomplysed the other to be utterly voyde and have and have hereunder made my synge the sixth [19<sup>th</sup>] of February 1557

[The Sign]

Select Pleas of the Admiralty Vol. II (1891) Selden Society



I *John Johnson Blocke of Amsterdame* master under God of my shippe called the *Sampson* nowe lyinge redie in the have *Lisborne* for to saile and take course with the first good winde that God shall send to *Antwarpe in Brabante* doo acknowlidge by theis to have receaved of you *Andrewe Stuer* merchaunt the some of *fowre hundreth duckets in Spanish ryalls packed in twoo smale bagges* marked with this outstandinge marke which *iiij [400?] duckettes* I doo promise to delyver (yf God graunte me viage in saftie) to *Andwarpe* aforesaide unto the honest *Bonaventura Bodecker* or unto him that shall have his commission *to be delyvered and consigned unto the honest Bonaventura Bodecker* merchaunte dwellinge at *Andwarpe* payinge me for my paine and travell one and a *halfe for the houndreth* And for even so to accomlishe the same and the delyver as aforesaide I doo binde my selfe and all my goodes and my saide shippe with all his appurtenaunces. In witnis of the truethe I have made hereof *three billes of ladinge* subsigned with myne owne name or by my purser in my behalfe, *all of one tenor* thone accomplished the other to be of no value Done in *Lisborne* the *fiftenth* daie of December anno 1570 Subscribed *Jan Janzon Blocke*

Select Pleas of the Admiralty Vol. II (1897) Selden Society

## APPENDIX 3

### Seventeenth, Eighteenth and Nineteenth Century Bills of Lading

1. *The Consent*, P.R.O. ref. HCA 24/73. [1609]
2. *The Jane*, P.R.O. ref. HCA 24/93, r. 120. [1637]
3. Crutcher, "The Ocean Bill of Lading - a Study in Fossilisation" [1971] Tul. L. R. 697, at 701. [1713]
4. Beawes, *Lex Mercatoria Rediva* (1773), p. 105. [1773]
5. *Lickbarrow v. Mason* IV Brown 39, at 40. [1786]
6. *Grant v. Norway* (1851) 10 CB 665, at 669. [1846]
7. Pearce, *The Merchant's Clerk* (1898), p. 67. [1876]
8. Liverpool Conference Model Bill. [1882]

“Praise be to God, 2 July 1609 in Venice, laden by the grace of God in good safety and well-conditioned, by me, Richard Dike, here in the port of Venice, in and upon the good ship called to “Consent” of London, master Hugh Bullock; For my account proper, no. 1, chest, two cases and a small box of looking glasses; more for account to whom they belong: one great chest and one trunk of books &c, being all marked as in the margin and numbered from no. 1 to no. 8, being dry and well-conditioned, and are in like order and condition to be delivered in london or River of Thames, the danger of the seas only excepted, to Mr. J. Dike or to his assigns, he or they paying the freight of 30/1 &c, primage and average accustomed. In witness of truth the master or purser hath firmed to three bills of one tenour, the one being accomplished the other to be void and of noe effect, and so God send the good ship to her right port of discharge in safety. Amen.

(signed) Samuel Skelton”

P.R.O. ref. HCA 24/73, annexed to papers in *Dike v. Skelton*. (1609)

“I James Harris, dwelling at London, master, under God, of the ship called the “Jane” of the burthen of forty tons or thereabouts, being present before the quay of Rouen, with the first fit season which it shall please God to send, to go in a straight course to the said place of London, do acknowledge and confess to have received and laden aboard my ship, under the free hatches of the same, of you, Toby Goodridge, four bales of buckram, for the account of Mr. Nicholas Gould, all dry and well conditioned, and marked with the mark in the margin, with merchandise. I do promise and oblige myself to carry and conduct in my aforesaid ship, excepting the perils and adventures of the sea, to London, and to deliver them to the said Mr. Nicholas Gould, on paying me for the freight the sum of 24 livres tournois, with the averages according to the use and custom of the sea. For the performance whereof I bind my body and goods. together with the said ship, freight and apparel of the same. In witness of the truth I have subscribed three bills of lading of one tenour, the one being accomplished the others to be of no value. Done at the said place of Rouen 23 June 1637.

(signed) James Harris”

P.R.O. ref. HCA 24/93, r. 120 (1637)

SHIPPED by the Grace of God in good Order, and well conditioned by \_\_\_\_\_ in  
and upon the good Ship called the \_\_\_\_\_ whereof is Master under God for this  
present Voyage \_\_\_\_\_ and by God's Grace bound for \_\_\_\_\_ to say *Four*  
*h h of rum. Being on the proper acco.t & risk of Mr. Benj.n Bronsdon merchant in Boston*  
being marked & numbered as in the Margent, and are to be delivered in the like good order  
and well conditioned, at the aforesaid Port of \_\_\_\_\_ (the Danger of the Seas  
only excepted) unto \_\_\_\_\_ or to \_\_\_\_\_ assigns, he or they paying  
Freight for the said Goods \_\_\_\_\_ with Primage and Average accustomed. In  
Witness whereof the Master or Purser of the said Ship hath affirmed to three Bills of  
Lading, all of this tenor & date, the one of which three Bills being accomplished, the other  
two to stand void. And so God send the good Ship to her desired Port in Safety. *Amen*

Dated in  
*(Insides and Contents unknown)*  
*(Signature)*

“Shipped in good order by A.B. Merchants, in and upon the good ship called .... whereof C.D. is Master, now riding at Anchor in the River Thames, and bound for Alicant in Spain, ten Bales containing fifty pieces of Broad Cloth, marked and numbered as per Margin, and are to be delivered in the like good Order and Condition at Alicant aforesaid, (the Dangers of the Seas excepted) unto E.F. Merchant there, or to his assigns, he or they paying for the said Goods .... per Piece Freight, with Primage and Average accustomed. In witness whereof the Master of Purser of the said ship hath affirmed to three Bills of Lading of this Tenour and Date; one of which Bills being accomplished, the other two to stand void. And so God send the good Ship to her designed Port in safety. Amen.

Dated at London”

W. Beawes *Lex Mercatoria Rediva* (1773, 6th ed.)

Lickbarrow v. Mason Bill of lading

"Shipped by the grace of God, in good order and well-conditioned, by James Turing and Son, in and upon the good ship called the *Endeavour*, whereof is master, under God for this voyage, James Holmes, and now riding at anchor in the harbour of Middleburgh, and by God's grace bound for Liverpool; to say, 21 lasts, 29 and a fourth sacks horse beans, 20 lasts 34 sacks pigeon beans, together with 200 faggots, 130 matts, 12 deals, 2 stencheons, and 2 laths for dunnage, and being marked and numbered in the margin, and are to be delivered in the like good order and well-conditioned, at the aforesaid port of the Liverpool, (the dangers of the seas only excepted,) unto order or to assigns, he or they paying freight for the said goods 35s. sterling per last, with ten per cent primage, and 1s. sterling per last hat money, to be discharged in fourteen days, and if longer detained, to be paid two guineas a day in name of demurrage, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills of lading been accomplished, the other three to stand void, and so God send the good ship to her desired port in safety, Amen. Dated in Middleburgh, 22d July 1786."

Grant v. Norway Bill of lading

"Shipped by the grace of God, in good order and well conditioned, upon the goods ship "Belle", whereof is master for this present voyage Henry Tillman, and now riding at anchor in the Hooghley, and bound for London, twelve bales of silk, numbered as in the margin, to be delivered in the like good order at London, the act of God, the Queen's enemies, &c., excepted, unto order or assigns, he or they paying freight 5l. per ton, &c. In witness whereof the said master hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the other two to stand void. Dated this 17th day of April, 1846. Contents unknown."

(Signed) "H. TILLMAN"



In case of general average the same to be settled according to the Laws and Customs of England.

HH 142/3	2 cases of prints.
„ 144/5	2 bales T cloths.
„ 146/8	3 bales madapollarns.
„ 149	1 case hats.

SHIPPED in good order and well conditioned by Williams Marshall, & Co., in and upon the good Ship called the "Chili," whereof is Master for this present voyage Peter Harris, and now riding at Anchor in this port and bound for Valparaiso —

Two cases prints,  
Two bales grey T cloths,  
Three bales madapollarns,  
One case hats,

being marked and numbered as in the Margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port of Valparaiso (the Act of God, the Queen's Enemies, Fire, and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation, of whatever nature and kind soever excepted) unto Messrs. Herrera Hermanos, or to his or their assigns paying Freight for the said Goods in Liverpool with Primage and Average accustomed. IN WITNESS whereof the Master or Purser of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in Liverpool, 13th January, 1876.

(Sd.) PETER HARRIS.  
Weight and contents unknown.

Shipped, in apparent good order and condition, by  
in and upon the good *Steam* Ship called the now  
lying in the Port of and bound for with  
liberty to call at any ports, in any order, to sail without pilots,  
and to tow and assist vessels in distress, and to deviate for the  
purpose of saving life or property; also with liberty, in case the  
ship shall put into a port of refuge for repair, to tranship the goods  
to their destination by any other *steamer* (vessel); and with liberty  
to convey goods in lighters to and from the ship, at shipper's risk.  
Such lighterage to be at ship's expense, except that if the cargo is  
necessarily landed in lighters, the ship being unable to reach the  
port of destination, the cost of such lighterage shall fall on the  
cargo

being marked and numbered as per margin ; and to be delivered in the like good order and condition at the aforesaid port of

The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates and Thieves, arrest and restraint of Princes, Rulers and People, Collisions, Stranding, and other accidents of navigation, excepted, even when occasioned by the negligence, default, or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners.

Ship not answerable for losses through *Explosion, bursting of Boilers, breakage of Shafts, or any latent defect in the Machinery or Hull*, not resulting from want of due diligence by the Owners of the Ship, or any of them, or by the Ship's Husband or Manager ; nor for Decay, Putrefaction, Rust, Sweat, change of Character, Drainage, or Leakage, arising from the nature of the Goods shipped or the insufficiency of the packages ; nor for any damage or loss occasioned by the prolongation of the voyage ; nor for obliteration or absence of Marks, Numbers, Addresses, or Descriptions of Goods shipped.

unto                    or to his or their Assigns, Freight, Primage and Charges for the said goods, as per margin, to be paid on delivery by                    . Freight to be paid in cash, without discount, at the rate of exchange for Bankers' bills at sight, current on the day of the ship's entry inwards at the Custom-house. General Average payable according to York-Antwerp Rules.

In Witness whereof, the Master or Agent of the said Ship hath affirmed to Three Bills of Lading, all of this tenor and date (drawn as first, second, and third), the first of which Bills being accomplished, the others to stand void.

1.—Quality-marks, if any, to be of the same size as and contiguous to the leading marks ; and if inserted in the Shipping Notes accepted by the Mate, the Master is bound to sign Bills of Lading conformable thereto.

2.—Ship not liable for breakage of Glass, Earthenware, or China.

3.—Not accountable for Goods of any description which are above the value of £100 per package, unless the value be herein expressed and a special agreement made ; nor for Gold, Silver, Bullion, Specie, Documents, Jewellery, Pictures, Embroideries, or Works of Art, Silks, Furs, China, Watches, or Clocks, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement be made.

4.—Shippers accountable for any loss or damage to Ship or Cargo caused by inflammable, explosive, or dangerous Goods, shipped without full disclosure of their nature, whether such Shipper shall have been aware of it or not, and whether such Shipper be principal or agent ; such goods may be thrown overboard or destroyed by the Master or Owner of the Ship at any time without compensation.

5.—All fines or damages which the Ship or Cargo may incur or suffer by

reason of incorrect or insufficient marking of packages or description of their contents, shall be paid by the Shipper or Consignee, and the Ship shall have a lien on the goods of such Shipper or Consignee for the amount thereof.

6.—Goods delivered to the Ship, whilst on quay awaiting shipment, to be at Shipper's risk, as regards all the perils excepted in this Bill of Lading.

7.—Goods once shipped cannot be taken away by the Shipper except upon payment of full freight, together with the expenses of landing them, and compensation for any damages sustained by the Owners through such taking away.

8.—In case the Ship shall be prevented from reaching her destination by quarantine, blockade, ice, or the hostile act of any Power, the Master or Owners may discharge the goods into any Depôt or Lazaretto, or at any near available port; all expenses thereby incurred upon the goods to be borne by the owners or receivers thereof.

9.—Ship to have a lien on all goods for payment of freight and charges, including back freight, demurrage, forwarding charges, and charges for carriage to port of shipment, whether payable in advance or not.

10.—If the Ship is able to carry the goods to their destination, but the goods, by reason of damage sustained or of their own nature, are not fit to be carried all the way, and if such goods have received an enhancement of value by reason of their partial carriage, the Ship shall be entitled to a pro ratâ freight in proportion to the distance performed, which freight is in no case to exceed the amount of such enhancement of value. Pro ratâ freight is admissible in no other case than that dealt with in the preceding sentence, unless there be an acceptance of the goods by the Shipper or Owner of the goods.

11.—When the goods are fit to be carried to their destination, but the Ship is unable to carry them, the Shipowner may earn full freight by sending the goods to their destination at his own expense within reasonable time in another bottom: this right is not affected by an abandonment of the Ship by her crew, or to the Underwriters: and the Ship is to be, for this purpose, deemed unable to carry the goods to their destination, if she either cannot be repaired at all, or cannot be repaired except at an expense exceeding her value when repaired.

12.—Full freight is due on damaged goods.

13.—No freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

14.—To the extent of the value of the lien, Freight which by the terms of the Bill of Lading is made payable by the Consignee cannot be demanded from the Shipper after the Master has parted with his lien on the Goods.

15.—The Goods, if not taken by the Consignee immediately on landing, or within such further time as is provided by the regulations of the port of discharge, may be stored by the Master, at the expense and risk of the Owner of the goods. The Master shall be entitled to recover from the Shipper the difference between the amount of freight stipulated in the Bill of Lading and the proceeds of the goods, should the Consignee neglect or refuse to receive the same.

16.—In the event of claims for short delivery, when the Ship reaches her destination the price to be the market price at the port of destination on the day of the Ship's reporting at the Custom-house, less all charges saved.

NOTICE.—In accepting this Bill of Lading, the Owner of the goods and the Shipper expressly accept and agree to all its stipulations and conditions, whether written or printed.

Dated in \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_ 188

Weight, Quality, and Contents unknown.

*(The words printed in italics are to be omitted in the case of Sailing Ships.)*

## APPENDIX 4

### Twentieth Century Bills of Lading

1. Stephens, *The Law Relating to Bills of Lading* (1908), Old Form, p. 68. [1908]
2. Stephens, *ibid.*, Modern Form, pp. 68-9. [1908]
3. Main Thompson, *Outline of the Law Relating to Bills of Lading* (1925), p. 247. [1925]
4. Chamber of Shipping General Home Trade Bill of Lading (BRITCONT). [1928]
5. BIMCO Liner Bill of Lading (CONLINEBILL). [1978]

“ I.W. } Shipped, by the grace of God, in good order, by  
}AB, merchant, in and upon the goods ship called  
No. 1 or 20. }the *John and Jane*, whereof CD is master, now  
riding at anchor in the river of Thames, and bound  
for Barcelona in Spain, 20 bales, containing 100  
pieces of broadcloth, marked and numbered as per  
margin; and are to be delivered in the like good  
order and condition at Barcelona aforesaid (the  
dangers of the seas excepted) unto EF, merchant  
there, or to his assigns, he or they paying for the  
said goods - per piece freight, with primage and  
average accustomed. In Witness whereof the master  
or purser of the said ship hath affirmed to three  
bills of lading of this tenor and date, one of which  
bills being accomplished, the other two to stand  
void. And so God send the goods ship to her designed  
port in safety.

Dated at London, the .... day of .....

Stephens (1908)

“SHIPPED, in good order and well conditioned, by .....  
in and upon the good Ship called the .....  
whereof is Master for this present Voyage .....  
and now riding at Anchor on the ..... and  
bound for .....  
being marked and numbered as in the margin, and are to be delivered in the like good  
Order and well conditioned at the aforesaid Port of

.....  
(the act of God, the King’s Enemies, Fire, and all and every other Dangers and Accidents  
of the Seas, Rivers, and Navigation of whatever nature and kind excepted) unto [A & Co.]

.....  
or to their assigns, they paying ..... Freight for the  
said goods.

IN WITNESS whereof, the Master or Purser of the said Ship hath affirmed to .....  
Bills of Lading, all of this tenor and date, the one of which ..... Bills being accomplished,  
the other ..... to stand void.

Dated in .....”

Stephens (1908)



# LONDON to HALIFAX, N.S.—“Local.”

Shipped in apparent good order and condition by \_\_\_\_\_ at the port of LONDON, on board the \_\_\_\_\_ the goods or packages of merchandise stated to be marked, numbered and described in this Bill of Lading (measure, brand, contents, quality and value unknown), to be conveyed and delivered to \_\_\_\_\_ or assigns, at HALIFAX, N.S. (or as near thereto as she may safely get), Freight, Charges and Primage payable at \_\_\_\_\_.

AND IT IS MUTUALLY AGREED AS FOLLOWS:—

1. **THE RULES—CARRIAGE OF GOODS BY SEA ACT, 1924:—**The Carriage of Goods by Sea Act, 1924, and the Rules scheduled thereto, shall apply to this bill of lading, and this bill of lading shall have effect subject to the provisions of the said Rules as applied by the said Act. The Carrier shall also be entitled to claim and shall have the full benefit of all limitations of and exemptions from liability conferred on the Carrier and/or the ship by Public Law.
2. **PAYMENT OF FREIGHT:—**
  - (a) Freight and/or charges, if prepaid, are deemed to have been earned on shipment and shall be paid in full in exchange for bill of lading, ship or goods lost or not lost.
  - (b) If freight and/or charges be not prepaid, the same shall be paid before delivery, at the rate of exchange of 4.8665 dollars to the £ sterling.
3. **LIEN:—**The Carrier shall have a lien upon the goods, and the right to sell the same by public auction or otherwise, at his discretion, for freight, dead freight, demurrage, detention, charges, expenses, fines, and losses of any kind.
4. **STOWAGE:—**The goods may be stowed in poop, forecastle, deck house, shelter deck, or any covered-in space commonly used in the trade for the carriage of goods, and such goods shall be deemed for all purposes to be stowed under deck.
5. **VOYAGE:—**The Carrier shall have the following liberties, any warranty or rule of law to the contrary notwithstanding.
  - (a) To sail with or without pilots, and/or tugs, to adjust compasses, to be drydocked at any time, at any place, for any purpose, with or without cargo on board, to tow or to be towed, and to assist vessels in all situations.
  - (b) To proceed to and use any port or ports or place or places in any rotation for any purposes whatsoever, whether in or out of, or beyond, the customary or advertised route, and all such ports or places shall be deemed to be included in the intended voyage, and to sail before or after advertised sailing dates.
  - (c) To carry Livestock and/or goods of any description on deck.
6. **METHODS OF CONVEYANCE:—**
  - (a) The Carrier shall be at liberty to lighter or otherwise carry the goods to or from the ship and/or to tranship.
  - (b) In case of accident or should the ship put into a port of refuge or from any cause not commence or proceed in the ordinary course of her voyage, the Carrier shall be at liberty to discharge into craft and/or land the goods or any part thereof and/or store afloat or ashore and/or tranship and/or forward to destination.
  - (c) In case of quarantine, or if entry into the port or place of discharge or transhipment or staying thereat would render the ship liable to quarantine there or at any other port or place, or if the ship is prevented from entering the port or place or is likely to be delayed thereat owing to blockade, interdict, war, strikes, lockouts, disturbances, ice, storms, or any other cause whatsoever beyond the Carrier's control, the Carrier shall be at liberty to proceed to the nearest convenient port and there land the goods and/or store, afloat or ashore, and/or transport and/or forward same to their destination by land or water at the sole risk of the consignees and/or owners of the goods, who shall pay all extra freight, charges and expenses incurred.

[P.T.O.]

**7. METHODS OF DELIVERY :—**

- (a) Delivery of the goods shall be taken by the consignees from the ship's tackle immediately the ship is ready to discharge, or, at the option of the Carrier, the goods may be discharged and stored afloat or ashore at the sole expense and risk of the consignees, but subject to Carrier's lien.
- (b) The Carrier shall be at liberty to discharge day and night, holidays included, as fast as ship can deliver, regardless of weather conditions, and the Carrier shall be under no liability to notify the Consignees of the arrival of goods; any custom of the port to the contrary notwithstanding.
- (c) Any loss or expense caused owing to Customs, Consular or other regulations not being complied with, or to Customs permit and/or other necessary papers not being lodged within twenty-four hours after ship's entry at the Customs, or when required, will be charged to consignees and/or owners of the goods, who shall indemnify the Carrier, and the Carrier shall be at liberty to return the goods to the port of shipment at the sole risk and expense of the owners of the goods.

**8. SURRENDER OF BILL OF LADING :—** Subject to the Law in force at the port or place of discharge, the Bill of Lading, duly endorsed, must be surrendered in exchange for Delivery Order or the goods.

**9. GENERAL AVERAGE :—** General Average shall be payable according to York Antwerp Rules, 1890, and Antwerp Rule, 1903,\* and shall be adjusted at any port or place selected by the Carrier.

**10. BEFORE LOADING AND AFTER DISCHARGE :—** The rights and immunities as set forth in Article IV. of the Rules scheduled to and as applied by the Carriage of Goods by Sea Act, 1924, shall extend and apply to loss or detention of or damage to goods in the actual custody of the Carrier, or his servants, prior to loading on and subsequent to the discharge from the ship on which the goods are carried by sea as fully as if the same were set forth verbatim herein, provided always that neither the Carrier nor the ship shall under any circumstances be liable for loss or detention of or damage to goods arising from any cause whatsoever when the goods are not in the actual custody of the Carrier or his servants.

In accepting this Bill of Lading the Shipper, Consignee, Owner of the goods, and the holder of the Bill of Lading expressly agree to all its terms, conditions and exceptions, whether written, printed, stamped or incorporated.

*IN WITNESS WHEREOF* bills of lading, all of this tenor and date, one of which being accomplished the others to stand void, have been signed by the Agents of the said Carrier.

FURNESS, WITBY & CO., LTD.

Dated in LONDON this            day of            192 .            Per            AS AGENTS.

[\* It is probable that provision will shortly be made for General Average to be made payable according to York/Antwerp Rules, 1924.]

CHAMBER OF SHIPPING GENERAL HOME TRADE BILL OF LADING 1928.  
 (For use with Chamber of Shipping General Home Trade Charter, 1928).

Shipped at \_\_\_\_\_ in apparent good order and condition  
 by \_\_\_\_\_  
 of \_\_\_\_\_ in and upon the good \_\_\_\_\_  
 called the \_\_\_\_\_ whereof \_\_\_\_\_ is Master  
 for this present Voyage, and bound for \_\_\_\_\_

with liberty to sail without pilots, to call at any port or ports, in any order for fuel, supplies or any purpose whatsoever, to tow and be towed, to assist vessels in distress, to make trial trips after notice, and adjust compasses, all as part of the contract voyage.

which are to be delivered in the like apparent good order and condition at the said port of \_\_\_\_\_ unto \_\_\_\_\_

or \_\_\_\_\_ Assigns, he or they paying freight for the same as per charter-party dated \_\_\_\_\_ 19 \_\_\_\_\_, all the terms, conditions, clauses and exceptions contained in which charter-party are herewith incorporated, including the liberties contained in clauses 8 and 14.

In relation to and in connection with the carriage of goods by sea from any port in Great Britain or Northern Ireland this Bill of Lading is to have effect subject to the provisions of the Rules contained in the Schedule to the Carriage of Goods by Sea Act, 1924, as applied by that Act. In relation to and in connection with the carriage of goods by sea from any port not in Great Britain or Northern Ireland the shipowners in all matters arising under this Bill of Lading shall be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Article IV of the Schedule thereto (see back) as being agreed terms of this contract. This Bill of Lading shall be deemed to be a contract for the carriage of goods by sea to which the said Section and the said Article apply.

In the case of goods loaded at a port in Holland the contract contained in this Bill of Lading shall be subject to Article 470 of the Maritime Code of the Netherlands and if and to the extent that any term of this Bill of Lading is contrary thereto such term shall *pro tanto* be null and void. Subject to Article 470 all the terms and exceptions contained in the charter-party above mentioned are herewith incorporated.

General Average (if any) shall be settled according to the York-Antwerp Rules, 1974.

Salvage shall be for the Shipowners' benefit.

Cargo which is stated herein as being carried on deck and is so carried is carried at the risk of the owner of the cargo.

If the cargo to which this Bill of Lading relates has been shipped in bulk with other cargo under the charter-party, the Vessel shall be under no obligation to deliver the said cargo separately, or (if the Vessel does deliver all or any part of the cargo separately) to make good any shortage of any individual parcel which may be found when the cargo is discharged.

IN WITNESS WHEREOF the Master or Agents of the said vessel hath signed

Bills of Lading, all of this tenor and date, drawn as a set consecutively numbered, any one of which being accomplished the others shall be void.

If the goods covered by this Bill of Lading are a shipment in bulk insert here the following words:  
 "a parcel of.....in bulk of..... tons being the weight ascertained or accepted by..... under the custom of the trade, weight shipped unknown."  
 If the weight of the bulk Cargo is Shippers weight then instead of the above words after "tons" insert "shippers weight, weight shipped unknown."

**LINER BILL OF LADING**

B/L No.

Reference No.

Shipper

Consignee

Notify address

Pre-carriage by\*                      Place of receipt by pre-carrier\*

Vessel                                      Port of loading

Port of discharge                      Place of delivery by on-carrier\*

Marks and Nos.	Number and kind of packages; description of goods	Gross weight	Measurement
----------------	---	--------------	-------------

Particulars furnished by the Merchant

Freight details, charges etc.

Daily demurrage rate (additional Clause A)

**SHIPPED** on board in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, for carriage to the Port of Discharge or so near thereunto as the Vessel may safely get and lie always afloat, to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns, they paying freight as indicated to the left plus other charges incurred in accordance with the provisions contained in this Bill of Lading. In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant.

One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.

IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

Freight payable at

Place and date of issue

Number of original Bs/L

Signature

\* Applicable only when document used as a Through Bill of Lading

# LINER BILL OF LADING

(Liner terms approved by The Baltic and International Maritime Conference)

Code Name: "CONLINEBILL"

Amended January 1st, 1950, August 1st, 1952, January 1st, 1973, July 1st, 1974, August 1st, 1976, January 1st, 1978.

## 1. Definition.

Wherever the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.

## 2. General Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply. *Trades where Hague-Visby Rules apply.*

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - The Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

## 3. Jurisdiction.

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

## 4. Period of Responsibility.

Carrier or his Agent shall not be liable for loss damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

## 5. The Scope of Voyage.

As the vessel is engaged in liner service the intended voyage shall not be limited to the direct route but shall be deemed to include any proceeding or returning to or stopping or slowing down at or off any ports or places for any reasonable purpose connected with the service including maintenance of vessel and crew.

## 6. Substitution of Vessel, Transhipment and Forwarding.

Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reshipe and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only.

The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

## 7. Lightering.

Lightering in or off ports of loading or ports of discharge to be for the account of the Merchant.

## 8. Loading, Discharging and Delivery

of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed. Loading, storing and delivery shall be for the Merchant's account. Loading and discharging may commence without previous notice.

The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and - but only if required by the Carrier - also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and deadfreight is to be paid.

The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and - but only if required by the Carrier - also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under Clause 16.

The Merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above.

If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.

The Merchant shall accept his reasonable proportion of unidentified loose cargo.

## 9. Live Animals and Deck Cargo

shall be carried subject to the Hague Rules as referred to in Clause 2 hereof with the exception that notwithstanding anything contained in Clause 19 the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo.

## 10. Options.

The port of discharge for optional cargo must be declared to the vessel's Agents at the first of the optional ports not later than 48 hours before the

vessel's arrival there. In the absence of such declaration the Carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercised for the total quantity under this Bill of Lading only.

## 11. Freight and Charges.

(a) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The Carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred.

Interest at 5 per cent., shall run from the date when freight and charges are due.

(b) The Merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing onboard and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by extra handling of the cargo for any of the aforementioned reasons.

(c) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount of freight, weight of cargo or tonnage of the vessel shall be paid by the Merchant.

(d) The Merchant shall be liable for all fines and/or losses which the Carrier, vessel or cargo may incur through non-observance of Custom House and/or import or export regulations.

(e) The Carrier is entitled in case of incorrect declaration of contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

## 12. Lien.

The Carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

## 13. Delay.

The Carrier shall not be responsible for any loss sustained by the Merchant through delay of the goods unless caused by the Carrier's personal gross negligence.

## 14. General Average and Salvage.

General Average to be adjusted at any port or place at Carrier's option and to be settled according to the York-Antwerp Rules 1974. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by salute, contract or otherwise, the Merchant shall contribute with the Carrier in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

**15. Both-to-Blame Collision Clause.** (This clause to remain in effect even if unenforceable in the Courts of the United States of America).

If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the vessel, the Merchant will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her Owner in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owner of the said goods paid or payable by the other or non-carrying vessel or her Owner to the owner of said cargo and set-off, or recouped or recovered by the other or non-carrying vessel or her Owner as part of his claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

## 16. Government directions, War, Epidemics, Ice, Strikes, etc.

(a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.

(b) Should it appear that the performance of the transport would expose the vessel or any goods onboard to risk of seizure or damage or delay, resulting from war, wartime operations, blockades, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.

(c) Should it appear that epidemics, quarantine, ice - labour troubles, labour obstructions, strikes, lock-outs, any of which onboard or on shore - difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or the discharging in the usual manner and without delay, the Master may discharge

the cargo at port of loading or any other safe and convenient port.

(d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfillment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.

(e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.

(f) The Merchant shall be informed if possible.

## 17. Identity of Carrier.

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness, if, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.

It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.

## 18. Exemptions and Immunities of all servants and agents of the Carrier.

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading.

The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such servant or agent of the Carrier for any such loss, damage or delay or otherwise.

## 19. Optional Stowage, Utilization.

(a) Goods may be stowed by the Carrier as received or, at Carrier's option, by means of containers, or similar articles of transport used to consolidate goods.

(b) Containers, trailers and transportable tanks, whether stowed by the Carrier or received by him in a stowed condition from the Merchant, may be carried on or under deck without notice to the Merchant.

(c) The Carrier's liability for cargo stowed as aforesaid shall be governed by the Hague Rules as defined above notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to general average and shall receive compensation in general average.

## ADDITIONAL CLAUSES

(To be added if required in the contemplated trade).

### A. Demurrage.

The Carrier shall be paid demurrage at the daily rate per ton of the vessel's gross register tonnage as indicated on Page 2 if the vessel is not loaded or discharged with the dispatch set out in Clause 8, any delay in waiting for berth at or off port to count. Provided that if the delay is due to causes beyond the control of the Merchant, 24 hours shall be deducted from the time on demurrage.

Each Merchant shall be liable towards the Carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question.

No Merchant shall be liable in demurrage for any delay arisen only in connection with goods belonging to other Merchants.

The demurrage in respect of each parcel shall not exceed its freight.

(This Clause shall only apply if the Demurrage Box on Page 2 is filled in).

### B. U.S. Trade, Period of Responsibility.

In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

## APPENDIX 5

### Other Documents

1. BIMCO Bill of lading for use with Charterparties (CONGENBILL) [1994]
2. Grönfors, in Schmitthoff & Goode, *International Carriage of Goods: Some Legal Problems and Possible Solutions* (1988) [Seventeenth Century]
3. BIMCO Seawaybill (GENWAYBILL) [Twentieth Century]
4. General Council of British Shipping Sea Waybill [1979]
5. BIMCO Blank Back Form of Liner Bill of Lading [1968]
6. Bolero Bill of Lading [1999]

**BILL OF LADING**

B/L No.

TO BE USED WITH CHARTER-PARTIES

Reference No.

Shipper

Consignee

Notify address

Vessel Port of loading

Port of discharge

Shipper's description of goods Gross weight

(of which on deck at Shipper's risk; the Carrier not being responsible for loss or damage howsoever arising)

Freight payable as per CHARTER-PARTY dated .....

**FREIGHT ADVANCE.**  
Received on account of freight: .....

Time used for loading ..... days ..... hours.

**SHIPPED** at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods specified above.

Weight, measure, quality, quantity, condition, contents and value unknown.

IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated below all of this tenor and date, any one of which being accomplished the others shall be void.

**FOR CONDITIONS OF CARRIAGE SEE OVERLEAF**

Freight payable at	Place and date of issue
Number of original Bs/L	Signature

## **BILL OF LADING**

TO BE USED WITH CHARTER-PARTIES  
CODE NAME: "CONGENBILL"  
EDITION 1994  
ADOPTED BY  
THE BALTIC AND INTERNATIONAL MARITIME COUNCIL (BIMCO)

### **Conditions of Carriage**

(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

(2) **General Paramount Clause.**

(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

(b) *Trades where Hague-Visby Rules apply.*

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - the Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading.

(c) The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals.

(3) **General Average.**

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party.

Cargo's contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew. The Charterers, Shippers and Consignees expressly renounce the Belgian Commercial Code, Part II, Art. 148.

(4) **New Jason Clause.**

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or the owners of the cargo shall contribute with the Carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Carrier, or his agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the goods to the Carrier before delivery.

(5) **Both-to-Blame Collision Clause.**

If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or the Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

For particulars of cargo, freight, destination, etc., see overleaf.



### Seventeenth Century Waybill

Dear Sir. Today I have delivered one drum of tar, weighing 20 pounds, to the coach man X in town A and ordered him to carry it to town B, where you can have it delivered to you by asking his agent Y for it as soon as the goods have arrived. Your humble servant.

p. 29. Gronfors in Schmitthof + Goode's "Paperless trading"

CODE NAME: "GENWAYBILL"

Shipper

**NON-NEGOTIABLE  
GENERAL SEA WAYBILL  
FOR USE IN SHORT-SEA  
DRY CARGO TRADE**

Reference No. \_\_\_\_\_

Consignee (not to order)

Notify address

Vessel Port of loading

Port of discharge

Description of cargo	Marks and Nos.	Number and kind of packages	Gross weight	Measurement
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Particulars declared by the Shipper

(of which \_\_\_\_\_ on deck at Shipper's risk; the Carrier not being responsible for loss or damage howsoever arising)

Issued pursuant to Voyage Charter Party indicated hereunder	<p><b>SHIPPED</b> on board the cargo specified above, according to Shipper's declaration in apparent good order and condition - unless otherwise stated herein - weight, measure, marks, numbers, quality, contents and value unknown, for delivery at the port of discharge or so near thereto as the Vessel may safely get, always afloat.</p> <p>The cargo shipped under this Waybill will be delivered to the Party named as Consignee or its authorised agent, on production of proof of identity without any documentary formalities. The Carrier to exercise due care ensuring that delivery is made to the proper party. However, in case of incorrect delivery, no responsibility will be accepted unless due to fault or neglect on the part of the Carrier.</p> <p><b>FOR CONDITIONS OF CARRIAGE SEE OVERLEAF.</b></p>				
	<p>Charter Party (Code name, place and date of issue)</p> <p>Freight payable in accordance therewith.</p>	<table border="1"> <tr> <td>Freight payable at</td> <td>Place and date of issue</td> </tr> <tr> <td></td> <td>Signature</td> </tr> </table>	Freight payable at	Place and date of issue	
Freight payable at	Place and date of issue				
	Signature				

THE BALTIC AND INTERNATIONAL MARITIME COUNCIL (BIMCO)  
NON-NEGOTIABLE  
GENERAL SEA WAYBILL  
FOR USE IN SHORT-SEA DRY CARGO TRADE  
CODE NAME: "GENWAYBILL"

## Conditions of Carriage.

(1) All the terms, conditions, liberties, clauses and exceptions of the Voyage Charter Party, as dated overleaf, shall be deemed to be incorporated in this Waybill and shall govern the transportation of the cargo described on the front page of this Waybill. In addition, the provisions set out below shall apply to this Waybill.

### Paramount Clause

This Waybill is a non-negotiable document. It is not a bill of lading and no bill of lading will be issued. However, it is agreed that the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Waybill. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply in exactly the same way.

### Trades where Hague-Visby Rules apply.

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall also apply to this Waybill.

(c) The Carrier shall in no case be responsible for loss of or damage to cargo howsoever arising prior to loading into and after discharge from the Vessel or while the goods are in the charge of another Carrier nor in respect of deck cargo.

(d) It is agreed that whenever the Brussels Convention and the Brussels Protocol or statutes incorporating same use the words "Bill of Lading" they shall be read and interpreted as meaning "Waybill".

### (3) General Average

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1974 or any modification thereof at the place (if any) agreed in the Voyage Charter Party, as dated overleaf, otherwise in London.

Cargo's contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew. The Charterers, Shippers and Consignees expressly renounce the Netherlands Commercial Code, Art. 700, and the Belgium Commercial Code, Part II, Art. 148.

If the adjustment of General Average or the liability for any collision in which the Vessel is involved while performing the carriage under the terms of the Voyage Charter Party, as dated overleaf, which govern the transportation of the cargo described on the front page of this Waybill, fails to be determined in accordance with the law and practice of the United States of America, the following clauses shall apply:

### New Jason Clause

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which, the Carrier is not responsible, by Statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. Salvaging vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salvaging vessel or vessels belonged to strangers. Such deposit as the Carrier, or his agent, may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Carrier before delivery.

### Both-to-Blame Collision Clause

If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Mariner, Pilot or the Servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of the said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel or the Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

For particulars of cargo, freight, destination, etc., see overleaf.

Shipper \_\_\_\_\_

Consignee \_\_\_\_\_

**NON-NEGOTIABLE  
SEA WAYBILL**

UK Customs Assigned No. SWB No.   

Shipper's Reference

F/Agent's Reference

Name of Carrier \_\_\_\_\_

Notify Party and Address (leave blank if stated above)



The contract evidenced by this Waybill is subject to the exceptions, limitations, conditions and liberties (including those relating to pre-carriage and on-carriage) set out in the Carrier's Standard Conditions of Carriage applicable to the voyage covered by this Waybill and operative on its date of issue; if the carriage is one where had a Bill of Lading been issued the provisions of the Hague Rules contained in the International Convention for unification of certain rules relating to Bills of Lading dated Brussels, 25th August, 1924, as amended by the Protocol signed at Brussels on the 23rd February, 1968 (the Hague Visby Rules) would have been compulsorily applicable under Article X, the said Standard Conditions contain or shall be deemed to contain a Clause giving effect to the Hague Visby Rules. Otherwise the said Standard Conditions contain or shall be deemed to contain a Clause giving effect to the provisions of the Hague Rules. In neither case shall the proviso to the first sentence of Article V of the Hague Rules or the Hague Visby Rules apply. The Carrier hereby agrees: (i) that to the extent of any inconsistency the said clause shall prevail over the said Standard Conditions in respect of any period to which the Hague Rules or the Hague Visby Rules by their terms apply, and (ii) that for the purpose of the terms of this Contract of Carriage this Waybill falls within the definition of Article 1(b) of the Hague Rules and the Hague Visby Rules.

The Shipper accepts the said Standard Conditions on his own behalf and on behalf of the Consignee and the owner of the goods and warrants that he has authority to do so. The Consignee by presenting this Waybill and/or requesting delivery of the goods further undertakes all liabilities of the Shipper hereunder, such undertaking being additional and without prejudice to the Shipper's own liability. The benefit of the contract, evidenced by this Waybill shall thereby be transferred to the Consignee or other persons presenting this Waybill.

Notwithstanding anything contained in the said Standard Conditions, the term Carrier in this Waybill shall mean the Carrier named on the front thereof.

A copy of the Carrier's said Standard Conditions applicable hereto may be inspected or will be supplied on request at the office of the Carrier or the Carrier's Principal Agents.

Pre-carriage by \_\_\_\_\_ | Place of Receipt by Pre-Carrier\* \_\_\_\_\_

Vessel \_\_\_\_\_ | Port of Loading \_\_\_\_\_

Port of Discharge \_\_\_\_\_ | Place of Delivery by On-Carrier\* \_\_\_\_\_

Marks and Nos;	Container No.	Number and kind of packages;	Description of Goods	Gross Weight	Measurement
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**AVAILABLE EX STOCK**

**FROM SYSTEMFORMS LTD**

**PHONE 01-505 6125**

**SEE ATTACHED LIST FOR PRICES AND DETAILS**

Freight Details; Charges etc.

**RECEIVED FOR CARRIAGE** as above in apparent good order and condition, unless otherwise stated hereon, the goods described in the above particulars.

Ocean Freight Payable at \_\_\_\_\_

Place and Date of Issue \_\_\_\_\_

Signature for Carrier; Carrier's Principal Place of Business \_\_\_\_\_

**BIMCO BLANK BACK FORM OF  
LINER BILL OF LADING**

Skipper

Reference No.

Consignee

Notify address

Pre-carriage by\*

Place of receipt by pre-carrier\*

Vessel

Port of loading

Port of discharge

Place of delivery by on-carrier\*

Marks and Nos.

Number and kind of packages; description of goods

Gross weight

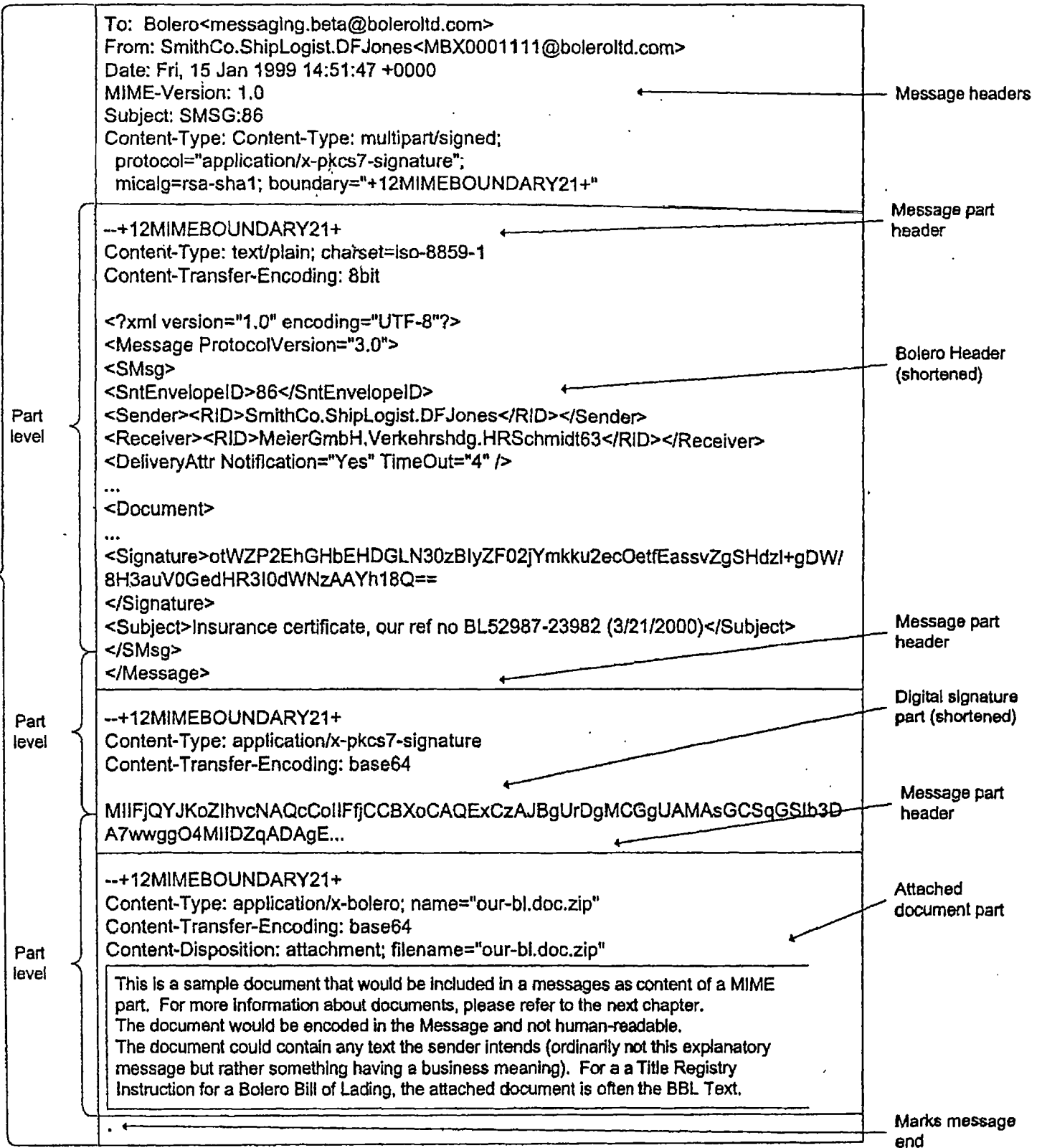
Measurement

Particulars furnished by the Merchant

<p>Freight details, charges etc.</p>	<p>RECEIVED the goods as specified above according to Shipper's declaration in apparent good order and condition - unless otherwise stated herein - weight, measure, marks, numbers, quality, contents and value unknown.</p> <p>The contract evidenced by this Bill of Lading is subject to the exceptions, limitations, conditions and liberties (including those relating to pre-carriage and on-carriage) set out in the Carrier's Standard Conditions of Carriage applicable to the voyage covered by this Bill of Lading and operative on its date of issue. If the Carrier does not have Standard Conditions of Carriage, this Bill of Lading is subject to the exceptions, limitations, conditions and liberties set out in the "Conlinebill" Liner Bill of Lading operative on its date of issue.</p> <p>The "Conlinebill" Liner Bill of Lading and the Carrier's Standard Conditions of Carriage incorporate or are deemed to incorporate the Hague Rules contained in the Brussels Convention dated 25th August 1924 and any compulsorily applicable national enactment of either the Hague Rules as such or as amended by the Hague-Visby Rules contained in the Brussels Protocol dated 23rd February 1968.</p> <p>A copy of the Carrier's Standard Conditions of Carriage applicable hereto may be inspected or will be supplied on request at the office of the Carrier or the Carrier's Principal agents.</p> <p>IN WITNESS whereof the number of original Bills of Lading stated below have been signed, all of this tenor and date, one of which being accomplished, the others to be void.</p>	
<p>Daily demurrage rate (if agreed)</p>	<p>Freight payable at</p>	<p>Place and date of issue</p>
	<p>Number of original Bs/L</p>	<p>Signature</p>

\* Applicable only when document used as a Through Bill of Lading

(BIMCO), Copenhagen.



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