

**THE LEGAL ROLE OF THE BILL OF LADING, SEA WAYBILL  
AND MULTIMODAL TRANSPORT DOCUMENT IN  
FINANCING INTERNATIONAL SALES CONTRACTS**

by

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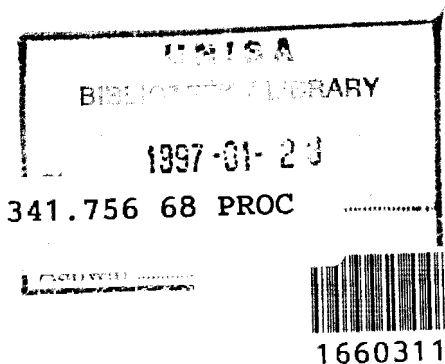
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## SUMMARY

The legal nature of the bill of lading as a negotiable document of title has allowed it to provide the basis of a system in which bankers provide credit for the financing of international sales contracts on the strength of the security afforded by the goods represented in the bill. The sea waybill has appeared as a substitute for the bill of lading and, despite its nature as a non-negotiable document, it can be employed in a manner which allows it to provide collateral security to banks. Multimodal transport documents which may be issued in negotiable or non-negotiable form assume the same legal role as the bill of lading or sea waybill respectively. The inclusion of specific articles in the 1993 Revision of the UCP relating to non-negotiable sea waybills and multimodal transport documents affirms their acceptability to banks financing international sales contracts under documentary letters of credit.

### Key terms

Transport documents; Bill of lading; Sea waybill; Multimodal transport document; Negotiable document; Non-negotiable document; Financing international sales contracts; Documentary letter of credit; Document of title; Collateral security.



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## ABBREVIATIONS

ACL	Atlantic Container Lines
BIMCO	Baltic and International Maritime Council
CENSA	Council of European and Japanese National Shipowners' Associations
CFR	Cost and Freight
CIF	Cost, Insurance and Freight
CIP	Carriage and Insurance Paid To
CISG	United Nations Convention on Contracts for the International Sale of Goods
CKR	Cargo Key Receipt
CMI	Comité Maritime International
CMR	Convention on the Contract for the International Carriage of Goods by Road
COGSA	Carriage of Goods by Sea Act
COTIF/CIM	International Convention concerning the International Transport by Rail
CPT	Carriage Paid To
CTO	Combined Transport Operator
DAF	Delivered at Frontier
DDP	Delivered Duty Paid
DDU	Delivered Duty Unpaid
DEQ	Delivered Ex Quay
DES	Delivered Ex Ship
DFR	Data Freight Receipt
DISH	Data Interchange for Shipping
ECE	Economic Commission for Europe
EDI	Electronic Data Interchange
EDIFACT	Electronic Data Interchange for Administration, Commerce and Transport
EDP	Electronic Data Processing
ESCAP	Economic and Social Commission for Asia and The Pacific
EXW	Ex Works
FAS	Free Alongside Ship
FBL	FIATA Multimodal Transport Bill of Lading
FCA	Free Carrier
FCR	FIATA's Freight Forwarders Certificate of Receipt
FCT	FIATA's Freight Forwarders Certificate of Transport
FIATA	International Federation of Freight Forwarders Associations
FOB	Free on Board
GAFTA	Grain and Feed Trade Association
GCBS	General Council of British Shipping



IBA	International Bauxite Association
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IFF	Institute of Freight Forwarders
INCOTERMS	International Rules for the Interpretation of Trade Terms
ISO	International Organisation for Standardisation
MT	Multimodal Transport
MTO	Multimodal Transport Operator
NODISP	No Disposal
NVO-MTO	Non-vessel Operating Multimodal Transport Operator
NVOCC	Non-vessel Operating Common Carrier
P&I	Protection and Indemnity
P&O	Peninsular and Oriental
P&OCL	Peninsular and Oriental Containers Limited Waybill
SAAFF	South African Association of Freight Forwarders
SDR	Special Drawing Right
SeaDocs	SeaDocs Registry Limited
SITPRO	Simplification of International Trade Procedures Board
SWEPRO	Swedish Trade Procedures Council
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TCM	Transport Combiné de Marchandise
UCP	Uniform Customs and Practice for Documentary Credits
UNCID	Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
UNTEDD	Trade Data Elements Directory
VO-MTO	Vessel Operating Multimodal Transport Operator

## INTRODUCTION

International sales contracts are fundamental to the transacting of international trade. The sales contract entered into between international traders initiates the conclusion of a series of interdependent contracts, all of which serve to facilitate the fulfilment of the original sale. The international transport contract is one of those contracts and the transport documents, which evidence their conclusion, are of particular importance. Transport documentation serves the procedural needs of international trade and, *inter alia*, the financing of that trade.<sup>1</sup> The bill of lading, covering goods carried by sea, has traditionally been the most important transport document and has played an unparalleled role in facilitating the financing of international sales contracts and in resolving the inevitable conflict of interests which arises between the buyer and the seller in international trade.

In an international sales transaction both the buyer and the seller must have a clear understanding of their respective rights and obligations.<sup>2</sup> Towards this end a number of trade terms, each of which provides for a specific trading pattern, have evolved in international trade.<sup>3</sup> The trade terms are incorporated into the sales contract and specify the obligations of the buyer and the seller in relation to the carriage of the goods, and the division of the risk of loss or damage to the goods between them.<sup>4</sup> In a move to standardise the content of the various trade terms, the International Chamber of Commerce (ICC)<sup>5</sup> produced the *International Rules for the Interpretation of Trade Terms (INCOTERMS)*.<sup>6</sup> In the past when the carriage of goods by sea was the dominant transport

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<sup>1</sup> Wheble, B. Combined Transport - a Banking View. *European Transport Law*, 1975, vol. 10, p. 648.

<sup>2</sup> Van Houtte, H. *The Law of International Trade*, Sweet & Maxwell, 1995, p. 121.

<sup>3</sup> Schmitthoff, C. *Schmitthoff's Export Trade: The Law and Practice of International Trade*, Stevens, 9th edition, 1990, p. 9.

<sup>4</sup> Van Houtte, *The Law of International Trade*, p. 154.

<sup>5</sup> Hereinafter ICC.

<sup>6</sup> *INCOTERMS* 1990 (hereinafter *INCOTERMS*), ICC Publication no. 460, is the most widely used set of international rules for the interpretation of trade terms in foreign trade. First published by the ICC 1936, it has subsequently been revised in 1953, 1967, 1976, 1980, and 1990. Two leading reasons for the 1990 revision were the need to adapt terms to the use of electronic data interchange, hereinafter EDI, and to take into consideration the changes in transportation techniques, particularly the unitisation of cargo in containers, multimodal transport and roll on-roll off traffic with road vehicles and railway wagons in "short-sea" maritime transport. ICC Publication no. 460, p. 6.

contract the most widely used trade terms were the CIF (Cost, Insurance and Freight) and the FOB (Free on Board) terms. The bill of lading was of fundamental importance to sales contracts on CIF terms.<sup>7</sup> When the CIF sale was the leading instrument in international buying and selling the bill of lading reigned supreme. The wording in *INCOTERMS* 1990 relating to the type of transport documents which must be submitted under a CIF contract shows the changing status of the bill of lading in international trade. *INCOTERMS* 1980 specified that the seller must provide a “clean negotiable bill of lading”. In contrast *INCOTERMS* 1990 now requires that the seller provide the buyer with a transport document which may be a “negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document”.

The developments in the shipping industry since the 1950s have initiated a revolution in the international carriage of goods. Goods are increasingly being carried in containers which may easily be carried by, and transferred between, different modes of transport.<sup>8</sup> In consequence, new trading patterns and types of transport contract and new transport documents have been introduced. Traditional port-to-port sea carriage is more frequently becoming only a part of a larger door-to-door multimodal transport contract. *INCOTERMS* 1990 has adopted the FCA (Free Carrier) term, which is appropriate for use in both the unimodal and the multimodal transportation of goods, and is likely to become the most frequently used term in international trade. Under the FCA contract the buyer may require any unimodal transport document or a multimodal transport document. Banks have taken note of the changes that have occurred in the transport industry and, where documentary letters of credit are used to finance international sales contracts, banking practice has accommodated the use of the new transport documents by making appropriate amendments to the *Uniform Customs and Practice for Documentary Credit* (UCP).<sup>9</sup>

Relevant to the predictability of the content and enforcement of the rights and obligations arising under the sales contract is the determination of the law which will govern the various aspects of

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<sup>7</sup> *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W).

<sup>8</sup> McLachlan, C. The New Hague Sales Convention and the Limits of the Choice of Law Process. *The Law Quarterly Review*, 1986, no. 102, p. 251.

<sup>9</sup> Hereinafter the UCP.

the contract.<sup>10</sup> Generally, the parties include a choice-of-law clause in their sales contract. When such a choice has not been made, conflict-of-laws rules are employed to indicate the governing law. It is increasingly being recognised that it is more satisfactory to subject international trade transactions to an appropriate and predictable system of substantive law which is independent of any system of domestic substantive law.<sup>11</sup> The United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>12</sup> provides a set of uniform rules to which the parties may choose to subject their international sales contract.

In relation to contracts for the international carriage of goods by sea, mandatory international conventions provide the substantive law which governs, *inter alia*, the bill of lading. The Brussels International Convention for the Unification of Certain Rules Relating to Bills of Lading,<sup>13</sup> referred to as the Hague Rules, is the source of the Rules subject to which most of the world's cargo is carried. The Rules created uniformity in the content of bills of lading and introduced a minimum standard of carrier liability and mandatory compensation. In 1968 the Brussels Protocol,<sup>14</sup> known as the Hague-Visby Rules, made a number of amendments to the Rules. A second Brussels Protocol was adopted in 1979.<sup>15</sup> More radical reforms to the Hague and Hague-

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<sup>10</sup> Marasinghe, L. *Contract of Sale in International Trade Law*, Butterworths, 1992, p. 8.

<sup>11</sup> McLachlan, *The Law Quarterly Review*, 1986, no. 102, p. 591.

<sup>12</sup> The United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) was signed in Vienna on 11 April 1980 and came into force on 1 January 1988. As of September 1994 the Convention applies in 40 different states. For many years the United Nations Commission on International Trade Law (hereinafter UNCITRAL) had worked to unite the two 1964 Hague Conventions relating to the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods, both of which achieved only 6 ratifications. The result was the UN Vienna Conference of 10 March 1980, which led to the adoption of the UN Convention on Contracts for the International Sale of Goods. The wider acceptance of the CISG is explained by the fact that more countries were involved in its drafting and because the CISG attempts to reconcile the principles governing contracts of sale in different legal traditions. Van Houtte, *The Law of International Trade*, p. 124.

<sup>13</sup> *Convention Internationale Pour L'Unification de Certaines Règles en Matière de Connaissance Signée à Bruxelles*, Le 25 Août 1924, UST 931 (for the official French text) 120 LNTS 155.

<sup>14</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments), Brussels, February 23, 1968.

<sup>15</sup> The Protocol to the Visby protocol. While the Hague Rules have more than 70 Contracting Parties, including those which are Contracting Parties through the Visby Protocol, the two Brussels Protocols have only achieved limited success and have failed to have the impact envisaged. Report by the UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, UNCTAD, Geneva, United Nations, 1991. TD/B/C.4/315/Rev.1. pp. 11 & 13.

Visby Rules resulted in the adoption in 1978 of the United Nations Convention on the Carriage of Goods by Sea,<sup>16</sup> referred to as the Hamburg Rules.<sup>17</sup>

Legal instruments, including transport documents like bills of lading, will be acceptable in the financial market place if they are perceived by those who use them to be fair and certain in their application. What contributes to the acceptability of bills of lading by bankers, and so to their use in financing international sales contracts, is the certainty of their enforceability as well as the relative fairness of the division of liability for the risks of carriage. International treaty law, particularly in the form of the Hague and Hague-Visby Rules, has made important contributions to both the certainty and the fairness of the bill of lading by specifying uniform requirements for the contents of bills of lading, and by creating a framework for establishing liability in which the conflicting interests of shippers, carriers and insurers are accommodated.<sup>18</sup>

The history of the bill of lading indicates how the changing needs of international commerce have influenced the role played by this document at various stages of its development. Prior to the 14th century when it was the practice of merchants to travel with their goods, a clerk was required to enter a record of all goods received in a book or register.<sup>19</sup> The original role of the bill of lading was that of a receipt for goods shipped on board. After the 14th century the merchants no longer wished to travel with their wares. This change was accommodated by providing them with a copy of the clerk's register. The copy in addition to providing a receipt for the shipped goods appears to have contained the terms according to which the goods were to be carried. It also indicated to whom the goods were consigned and hence who was entitled to claim their delivery. A copy of the register, signed by the master, was an appropriate way to indicate who had title to the goods

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<sup>16</sup> Final Act of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 31 March 1978, 17 I.L.M. 608-31.

<sup>17</sup> Both the Hague and the Hague-Visby Rules apply to contracts for the carriage of goods by sea. The essential criterion for their application requires that the contract of carriage is "covered by a bill of lading or similar document of title", Article 10 Hague Rules and article I (b) Hague-Visby Rules. The Hamburg Rules differ in that they apply to all contracts of carriage by sea regardless of whether or not a bill of lading has been issued, Ramberg, J. The Vanishing Bill of Lading and the "Hamburg Rules Carrier". *American Journal of Comparative Law*, vol. 27, 1979, p. 391. This allows these Rules to apply directly to non-negotiable sea carriage documents such as sea waybills.

<sup>18</sup> Kozolchik, B. Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective. *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 183. ICC Publication no 460, pp. 163 & 241.

<sup>19</sup> Mc Laughlin, C. B. The Evolution of the Ocean Bill of Lading. *Yale Law Review*, vol. 35, 1926, p. 550.

and to bind the shipowner and consignee to the conditions of shipment. The copy of the ship's register marked the beginning of the "bill" of lading as a document in the form in which it is known today. In time traders found it necessary to issue bills of lading in triplicate<sup>20</sup> and statements to the effect that "one bill having been accomplished, the others stand void" appeared in the bill. These statements implied that it was the custom to deliver the goods to the person presenting the bill.<sup>21</sup> The appearance of the consignee's name on the bill, together with the understanding that the goods would only be delivered to someone presenting one of the original three bills, effectively made the bill of lading a document of title.<sup>22</sup> By the 16th century the bill of lading, in a reasonably standard form, was a well known commercial document in the nature of a document of title. Thus the bill of lading has come to serve three legal functions, it is a receipt given by the carrier to acknowledge that goods of a specified type, quantity and condition have been received or shipped by him; it provides evidence of the contract of carriage and acts as a document of title to the goods.<sup>23</sup>

The commercial reason for the evolution of the bill of lading is found in the length of time required for the carriage of goods by sea.

It is to the advantage of neither seller nor buyer that the goods, the subject matter of the contract, should remain *en de hors* commerce while they are in the course of shipment. It is to the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale, and until he has received actual payment of the price he normally desires to be able if he wishes, to obtain credit upon the security of the transaction. The buyer, on the other hand normally desires to be able to deal with the goods for resale or finance, as soon as possible. The principle document which has enabled the CIF contract to attain its desired purpose is the bill of lading. During the period of transit and voyage the bill of lading is, by the law merchant, recognised as the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. Property in the goods passes by such endorsement whenever it is the intention of the parties that the property should

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<sup>20</sup> This tradition has endured and what was expedient in the past has become a defect in the employment of bills of lading in modern commerce as it threatens the very security that the bill of lading is intended to provide to its holder.

<sup>21</sup> Bennett, W. P. *The History and Present Position of The Bill of Lading as a Document of Title to Goods*, Cambridge University Press, 1914, p. 10.

<sup>22</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 167.

<sup>23</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 561. Ivamy, E. R. H. *Payne and Ivamy's Carriage of Goods by Sea*, Butterworths, 1979, p. 62. Astle, W. E. *The Hamburg Rules*, Fairplay, 1981, p. 13.

pass, just as in similar circumstances the property would pass by actual delivery of the goods. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. He is thus in the same commercial position as if the goods were in his physical possession.<sup>24</sup>

It is the role of the bill of lading as a document of title that enables it to play the central part it does in international trade. As the bill of lading is a symbol of the goods and its possession gives the holder control over the goods, it is able to fulfill a number of important functions.<sup>25</sup> Firstly, it allows the person in possession of the bill of lading to control the goods during transit and to claim delivery of the goods at the port of destination. Secondly, it facilitates the sale of the goods while in transit because the transfer of the bill of lading effects a transfer of ownership in the goods. Finally, it is possible for the holder of the bill to use it as security to raise the finance necessary to effect an international sale of goods.<sup>26</sup> Because the bill of lading has these attributes it has been able to provide the basis of the documentary letter of credit as a means of financing international sales contracts.

Documentary letters of credit are the most frequently used method of payment in international sales contracts.<sup>27</sup> In the system of documentary letters of credit a bank is employed as an intermediary between the buyer and the seller. The bank assists the settlement of financial obligations by providing credit to the buyer, on terms acceptable to the seller, and by receiving, examining and holding the commercial documents, pending payment by the buyer. The bill of lading facilitated this process by providing the bank with a document of title, which conferred on the bank control of the goods through a pledge, so serving as collateral security for the advance

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<sup>24</sup> Halsbury's *Laws of England* referred to in *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W). Schmitthoff, *Schmitthoff's Export Trade*, p. 590. *Lickbarrow v Mason* (1787) 2 TR 63; *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976(4) SA 464(A); *Standard Bank of SA Ltd v Efroiken & Newman* 1924 AD 171.

<sup>25</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 590. *Sanders v Maclean* (1883) 11 QBD 327; *Horst v Biddell* [1912] AC 18.

<sup>26</sup> Wilson, J. F. *Carriage of Goods by Sea*, 2nd edition, Pitman, 1993, pp. 143 and 147. Ivamy, *Payne and Ivamy's Carriage ...*, p. 72. Schmitthoff, *Schmitthoff's Export Trade*, p. 590. *London & South Africa Bank v Donald Currie & Co* (1875) 5 Buch 29; *Birkbeck & Rose-Innes v Hill* 1915 CPD 687; *Barlows Tractor & Machinery Co v Oceanair (Transvaal) Ltd* 1978 (3) SA 175 (W).

<sup>27</sup> Van Houtte, *The Law of International Trade*, p. 258.

of credit to the buyer.<sup>28</sup>

A set of universally recognised rules to govern the use of documentary credits in international commerce has been provided by the UCP<sup>29</sup> which has over the years gained wide acceptance. The UCP lays down the requirements for, *inter alia*, the issuing of the credit and the obligations of the bank in regard to the examination of documents, and for various other matters relating to documentation. It also contains specific provisions with which the different transport documents must comply in order to gain acceptance by the banks under the documentary credit. Prior to the 1993 Revision of the UCP the bill of lading was the most important transport document provided for. One of the primary reasons for the 1993 Revision was to take new transport documents into account.<sup>30</sup> The bill of lading no longer enjoys the prominence it once had in financing international sales contracts. Other documents have also found acceptance in the financing of international trade.

Over the past two to three decades significant developments have taken place in the area of transport documentation. The introduction of containers and the general improvements in transport technology and efficiency have resulted in a situation in which the use of bills of lading has posed certain problems. Increasingly, goods are arriving at their destination before the bill of lading and the parties have resorted to the use of letters of indemnity in substitution for the unavailable bill of lading to secure the release of goods from the carrier. This practice is most unsatisfactory as it undermines the whole purpose of employing transferable bills of lading in international trade by threatening the security interests of all the parties involved.<sup>31</sup>

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<sup>28</sup> Gutteridge, H. C. & Magrah, M. *The Law of Banker's Commercial Credits*, 5th edition, Europa, 1976, p. 70.

<sup>29</sup> The provisions of the UCP provide a practical guide to bankers, lawyers, importers, exporters, transport executives and insurers. The 1983 Revision of the UCP (ICC Publication no. 400) was adopted by banking associations and banks in more than 160 countries. The 1993 Revision (ICC Publication no. 500), alternatively referred to as the UCP 500, came into operation on the 1 January 1994. Van Houtte, *The Law of International Trade*, p. 266.

<sup>30</sup> Ellinger, E. P. *The Uniform Customs and Practice for Documentary Credits - the 1993 Revision*. *Lloyd's Maritime and Commercial Law Quarterly*, 1994, p. 381.

<sup>31</sup> Ramberg, J. *The Multimodal Transport Document*, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, The International Commercial Law Series, Centre for Commercial Law Studies, edited by C. M. Schmitthoff & R. M. Goode, 1988, vol. 1, p. 3.



A more acceptable solution has been the introduction of the non-negotiable sea waybill.<sup>32</sup> The sea waybill is a receipt for the goods shipped and is evidence of the terms of the contract of carriage. Sea waybills are not negotiable or transferable documents of title.<sup>33</sup> While the use of non-negotiable sea waybills has many advantages the lack of negotiability has cast doubts on the ability of sea waybills to provide banks, financing international sales contracts, with acceptable collateral security. This problem has been overcome by naming the bank as consignee on the sea waybill and introducing special clauses ensuring the bank's control over the goods.<sup>34</sup> Banks are now willing to accept non-negotiable sea waybills in an international sale financed by a documentary letter of credit. Their acceptability is evidenced by the inclusion of an article in the 1993 Revision of the UCP governing sea waybills.<sup>35</sup> The general acceptability of sea waybills has been enhanced by the *Comité Maritime International (CMI)*<sup>36</sup> Uniform Rules for Sea Waybills, adopted in 1990, which have introduced a measure of uniformity in the employment of sea waybills in the international carriage of goods by sea.

For many years it was the fact that the bill of lading functioned as a document of title which made it fundamental to the transacting of international trade. As a result of the developments in the transport industry and the consequent use of new forms of transport document, primarily the non-negotiable sea waybill, the scope and hence the value of the bill of lading are becoming increasingly limited. It is the character of the bill of lading as a document of title which made its application fundamental in international trade but which has become the feature which now limits its usefulness.<sup>37</sup> The non-negotiable sea waybill, which was created to circumvent many of the

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<sup>32</sup> Wilson, *Carriage of Goods by Sea*, p. 163.

<sup>33</sup> Wilson, *Carriage of Goods by Sea*, pp. 162 & 163. Goode, R. M. *Proprietary Rights and Insolvency in Sales Transactions*, Sweet & Maxwell, 1985, p. 72.

<sup>34</sup> Ramberg, in *International Carriage of Goods: Some Legal Problems and Possible Solutions*, p. 9. Debattista, C. Banks and the Carriage of Goods by Sea: Secure Transport Documents and the UCP 500. *Butterworths Journal of International Banking and Finance Law*, vol. 9, no. 7, 1994, p. 334.

<sup>35</sup> Article 24.

<sup>36</sup> Hereinafter CMI.

<sup>37</sup> Lloyd, A. The bill of lading: do we really need it? *Lloyd's Maritime and Commercial Law Quarterly*, 1989, p. 49. In the words of Lloyd, "The fact that it is a document of title - the quality that once gave it its unique place in international commerce - hangs now like an albatross around its neck".

problems associated with the use of the bill of lading, particularly the late arrival of documents at the port of destination, is becoming a more widely used transport document in the carriage of goods by sea.

Another important consequence of containerisation and improved transport technology has been the introduction of multimodal transport contracts and the use of multimodal transport documents. Multimodal transport contracts provide for the international carriage of goods by more than one mode of transport from a place of dispatch in one country to a destination in another. When multimodal transport first appeared it was referred to as combined transport. The ICC Uniform Rules for a Combined Transport Document were adopted in 1973 and amended in 1975.<sup>38</sup> In terms of these Rules the Combined Transport Operator entered a Combined Transport Contract under the terms of a Combined Transport Document. Many standard form combined transport documents were based on these Rules. As a result of work done by the United Nations Conference on Trade and Development (UNCTAD)<sup>39</sup> the United Nations Convention on International Multimodal Transport of Goods was adopted in 1980.<sup>40</sup> The object of the convention is to provide mandatory international law rules to govern the multimodal transportation of goods. Because the Convention has as yet failed to enter into force and because the ICC Uniform Rules had become outdated, the UNCTAD/ICC Rules for Multimodal Transport Documents 1992<sup>41</sup> were formulated.<sup>42</sup> These Rules are available for voluntary incorporation by the parties into their multimodal transport contracts.

Multimodal Transport Contracts, as provided for by the Multimodal Transport Convention and the UNCTAD/ICC Rules, but not limited to contracts governed by either of these regimes, are undertaken by Multimodal Transport Operators (MTOs)<sup>43</sup> who accept responsibility for the safety

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<sup>38</sup> ICC Publication no. 273, 1973 & ICC Publication no. 298, 1975 (Reprinted 1985).

<sup>39</sup> Hereinafter UNCTAD.

<sup>40</sup> UN Doc. TD/MT/Conf/17 (1980).

<sup>41</sup> ICC Publication no. 481.

<sup>42</sup> The standard form combined transport documents based on the CMI Rules have been amended accordingly.

<sup>43</sup> Hereinafter MTOs.

of the goods for the entire period of transit<sup>44</sup>. The multimodal transport operator issues a multimodal transport document to the shipper which is a receipt for the goods he has taken in his charge and is evidence of the terms and conditions of the multimodal transport contract. The multimodal transport document can be issued in a negotiable form, in which case it is employed in the same manner and fulfils the same legal role in international trade as does the bill of lading, notwithstanding the uncertainty of the legal status of the multimodal transport document as a document of title.<sup>45</sup> Alternatively, it can be issued in non-negotiable form and function according to the sea waybill system. Furthermore, many standard form multimodal transport documents can be issued as unimodal transport documents. Multimodal transport documents, whether negotiable or non-negotiable, can play a role in the financing of international sales contracts,

Not only have new transport documents like the sea waybill and the multimodal transport document appeared but new methods of creating the documents and communicating the information they contain are being developed. Documents have been simplified and standardised, produced and transmitted electronically. The documentary sea waybill can be replaced by a sea waybill which only exists as information stored in a computer.<sup>46</sup> Attempts have been made to negotiate bills of lading electronically. Electronic Data Interchange (EDI)<sup>47</sup> aims at eliminating documentation and creating a procedure which will facilitate the paperless movement of cargo.<sup>48</sup> If EDI is to be successful it will need to provide for the legal functions currently fulfilled by the bill of lading, and other negotiable transport documents, in financing international trade.<sup>49</sup>

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<sup>44</sup> De Wit, R. *Multimodal Transport*, Lloyd's of London, 1995, p.3.

<sup>45</sup> Van Houtte, *The Law of International Trade*, p. 270. Debattista, C. *Sale of Goods Carried by Sea*, Butterworths, 1990, p. 228.

<sup>46</sup> Lloyd, *Lloyd's Maritime and Commercial Law Quarterly*, 1989, p. 50.

<sup>47</sup> Hereinafter EDI.

<sup>48</sup> Wilson, *Carriage of Goods by Sea*, p. 169.

<sup>49</sup> In conjunction with developments in this area, there is a need to replace the present documentary letter of credit process with a system of electronic credits. This is the object of the ICC Project E100 presently being undertaken.

# CHAPTER 1

## THE CONTRACT OF SALE IN INTERNATIONAL TRADE

### 1 The parties, contracts and documents involved

Contracts for the international sale of goods constitute the foundation of international trade. The two parties responsible for the conclusion of such contracts are the buyer and the seller. It is the fact that these parties are located in two distinct and separate jurisdictions<sup>1</sup> with their places of business in different states which necessitates the movement of goods and/or payment for such goods across international borders.<sup>2</sup>

Because the parties involved in a transaction for the international sale of goods operate at a distance and are often strangers to one another, the risks involved in such a contract are considerable.<sup>3</sup> Among the problems faced by the parties are the seller's lack of familiarity with the financial standing of the buyer, and difficulties faced by the buyer in inspecting the goods before purchase and delivery,<sup>4</sup> and hence before payment is made. International sales transactions necessarily require the involvement of third parties to protect the buyer and seller and to facilitate the performance of obligations.<sup>5</sup> The original and third parties are linked by a number of different contracts,<sup>6</sup> which would include a contract for the carriage of goods and a contract of insurance. Where payment for an international sales transaction is made in the form of a banker's documentary credit, a series of additional contracts between the banks and the buyer and the seller are concluded. International trade requires a "fine net of procedures and documentation" involving buyers and sellers, forwarders, carriers, banks, insurers and national authorities. In fact

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<sup>1</sup> Marasinghe, *Contract of Sale* ...,p. 1.

<sup>2</sup> Lando, O. The Conflict of Laws of Contracts. *Hague Recueil*, 1984, p. 286.

<sup>3</sup> Folsom, R. H. Gordon, M. W. & Spanogle, J. A. *International Business Transactions*, 3rd edition, West Publishing Company, 1988, p. 45.

<sup>4</sup> Ndulo, M. The United Nations Convention on Contracts of the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area. *Lesotho Law Journal*, vol. 3, no. 2, 1987, p. 131.

<sup>5</sup> Folsom, Gordon & Spanogle, *International Business Transactions*, p. 45.

<sup>6</sup> Booysen, H. The International Sale of Goods. *South African Yearbook of International Law*, vol. 17, 1991-1992, p. 71.

it has been estimated that up to 50 different parties may be involved.<sup>7</sup> The contract for the international sale of goods is the primary legal agreement in international trade and all the other contracts fulfil a secondary and supporting role.<sup>8</sup> Hence “the domino-like effect of contracts involved in an export transaction”.<sup>9</sup>

The documents evidencing the different contracts play a fundamental role in facilitating international trade. It has been stated that:

International trade and transport are typically conducted by means of documentary transactions. The documents are the means to cement the transaction. They constitute the medium by which commercial information and legal rights are transmitted.<sup>10</sup>

In many export transactions the tender of shipping documents to the buyer plays an important role in the performance of the sales contract. Usually the shipping documents consist, *inter alia*, of the bill of lading, the marine insurance policy and the commercial invoice, each of which represents elements of the contracts of carriage, insurance and sale.<sup>11</sup> Traditionally the document which lies at the centre of the “network of contracts”, which constitutes the export transaction, is the bill of lading.<sup>12</sup>

A bill of lading is a document issued by, or on behalf of, a carrier of goods by sea to a sender, known as the shipper or consignor, with whom he has contracted for the carriage of goods destined for delivery to a receiver, known as the consignee. At its inception the contract of carriage involves two parties, the carrier and the consignor. The consignee acquires rights and incurs liabilities under the contract of carriage at a later stage. The bill of lading has three

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<sup>7</sup> Thomsen, H. B. & Wheble, B. Trade Facilitation and Legal Problems of Trade Data Interchange. *International Business Law*, 1985, p. 313.

<sup>8</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 7.

<sup>9</sup> Debattista, *Sale of Goods ...*, p. 1.

<sup>10</sup> Kindred, H. M. When Bits Replace Bills, What Shall the Law Byte on? in *New Directions in Maritime Law 1984*, edited by D. J. Sharpe & W. W. Spicer, Carswell Stevens, 1985, p. 208.

<sup>11</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 57. *North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd* 1932 NPD 1. The invoice is the document which specifies the goods, which are the subject of the sales contract, and the price which the buyer has undertaken to pay for them.

<sup>12</sup> Debattista, *Sale of Goods ...*, p. 3.

functions: it is a record that the goods as described on the bill have been received or actually shipped by the carrier, it is evidence of a contract of carriage and it is a document of title.<sup>13</sup> The commercial value of the bill of lading is derived from these three functions.

## 2 Special terms in international sales contracts

### 2.1 International trade terms

In an international sales contract, where a contract of carriage by sea is envisaged, the goods will be shipped from a port away from the watchful eye of the buyer; they will cover long distances in the custody of a carrier; and the transaction will be irreversible in the sense that physically returning the goods to the seller is often impracticable. International trade has been able to overcome the difficulties caused by distance because, among other things, the trading community and the law have developed a number of standard contracts or trade terms which provide for the specific needs of international commerce.<sup>14</sup> These trade terms, which are in universal use, have developed from international mercantile custom and have largely succeeded in simplifying and standardising the international sale of goods.<sup>15</sup> Different trading patterns, each with specific legal consequences,<sup>16</sup> have been recognised.

When these terms are incorporated into an international sales contract the obligations of the buyer and seller and the conditions that constitute performance of the contract by both parties are specified.<sup>17</sup> The trade terms also determine the point at which the risk of loss is passed from the seller to the buyer, as well as serving as a means of quoting the price to be paid by the buyer.<sup>18</sup>

Trade terms are subject to different interpretations and their meaning may be modified by the

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<sup>13</sup> Benjamin, J. P. *Benjamin's Sale of Goods*, 3rd edition, The Common Law Library, Sweet & Maxwell, 1987, p. 892.

<sup>14</sup> Debattista, *Sale of Goods ...*, p. 1.

<sup>15</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 9.

<sup>16</sup> Marasinghe, *Contract of Sale ...*, p. 115.

<sup>17</sup> Marasinghe, *Contract of Sale ...*, p. 1.

<sup>18</sup> Gilmore, G. & Black, C. L. *The Law of Admiralty*, 2nd edition, The Foundation Press, Inc 1975, p. 106.

agreement between parties or by the customs of a particular trade or usage in practice at a specific port.<sup>19</sup> The adoption of a standard set of export trade terms, such as *INCOTERMS* 1990,<sup>20</sup> is the most effective way of establishing the meaning of trade terms with certainty.

## 2.2 *INCOTERMS* 1990

*INCOTERMS* 1990 has grouped trade terms into four essentially different categories. The “E” term, EXW (Ex Works), of which there is only one, provides that the seller, at his premises, makes the goods available to the buyer. The “F” terms, FCA (Free Carrier), FAS (Free Alongside Ship), and FOB (Free on Board), require the seller to deliver the goods to a carrier appointed by the buyer. Under the “C” terms, CFR (Cost and Freight), CIF (Cost, Insurance and Freight), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), the seller is obliged to conclude a contract of carriage, but does not incur the risk of loss of, or damage to, the goods or additional costs arising from events occurring after shipment and dispatch. The “D” terms, DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay), DDU (Delivered Duty Unpaid), and DDP (Delivered Duty Paid), provide that the seller must bear all costs, and risks, necessary to transport the goods to the country of destination.<sup>21</sup> Under all of these terms the respective obligations of the buyer and seller have been grouped under 10 headings. The obligations under each heading reflect the position of both the buyer and the seller in relation to the same subject matter.<sup>22</sup>

Under both the “C” terms and the “F” terms the seller fulfils the obligations of the sales contract in the country of shipment or dispatch. Consequently, sales contracts concluded on the basis of

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<sup>19</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 9. An exporter may give certainty to the meaning of trade terms by inserting a clause in the contract stating that all aspects of the contract will be governed by the law of a specified country, or he may state explicitly what he intends a particular trade term to mean.

<sup>20</sup> ICC Publication no. 460, p. 6.

<sup>21</sup> ICC Publication no. 460, p. 7. Trade terms which are appropriate for use when any mode of transport, including multimodal transport, is anticipated are: EXW, FCA, CPT, CIP, DAF, DDU, DDP. The FCA term is the appropriate trade term for use in sales contracts when goods are to be carried by air and rail transport. For sales contracts which require the carriage of goods by sea and inland waterway transport, the following terms can be used: FAS, FOB, CFR, CIF, DES, DEQ. ICC Publication no. 460, p. 16.

<sup>22</sup> ICC Publication no. 460, p. 8.

these terms are shipment contracts. According to the “D” terms the seller is responsible for the arrival of the goods at an agreed place, or point of destination, and contracts concluded on these terms are arrival contracts.<sup>72</sup>

When sales contracts are concluded on any of the above trade terms,<sup>73</sup> the obligations of the parties are of both a physical and a documentary character. The seller in fulfilment of the sales contract is, *inter alia*, obliged to deliver the commercial documents, which include the appropriate transport document stipulated in the contract, to the buyer. Contracts of sale concluded subject to any of the above trade terms can be financed under a documentary letter of credit.

### 2.3 Contracts of sale on CIF and FOB terms

Traditionally, the CIF and FOB contracts of sale, have been the most widely used.<sup>74</sup> The CIF contract of sale<sup>75</sup> has for much of this century been the most important instrument in international trade.<sup>76</sup> Its terms provide that the seller's obligations are fulfilled by, among other things, shipping goods specified in the contract to the named destination, or by purchasing documents for such goods already in transit, and tendering the shipping documents to the buyer.<sup>77</sup> The main characteristic of a CIF contract lies in the tender of documents and not the actual physical handing over of goods to fulfill the obligation of delivery.<sup>78</sup> In the past it was the bill of lading that made

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<sup>72</sup> ICC Publication no. 460, pp. 11 & 14.

<sup>73</sup> With the exception of the EXW term, under which the seller has no obligation in relation to the delivery of the goods, and consequently no obligation to provide the buyer with transport documentation.

<sup>74</sup> Grime, R. *Shipping Law*, 2nd edition, Sweet & Maxwell, 1991, p. 157.

<sup>75</sup> The seller, under a CIF contract, arranges for the transportation and insurance of the goods, so obtaining the bill of lading and insurance certificate, which together with the invoice, constitute the important shipping documents. The seller sells the goods at a price which includes the “cost, insurance and freight” to a determined destination. The buyer is liable for the invoice price of the goods and the cost of insuring and transporting them to their destination.

<sup>76</sup> Debattista, *Sale of Goods ...*, p. 2.

<sup>77</sup> *Chao v British Traders & Shippers Ltd* [1954] 1 Lloyd's Rep 16.

<sup>78</sup> Dillon, C. Bills of Lading. *Modern Business Law*, vol. 4, 1982, p. 132. Sassoon, D. M. & Merren, H. O. *CIF and FOB Contracts, British Shipping Laws*, 3rd edition, Stevens & Sons, 1984, p. 4. *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198; *Horst v Biddell* [1912] AC 18.



this possible and hence which formed the cornerstone of the CIF contract.<sup>30</sup>

It was required in Rule A-7 of *INCOTERMS* 1980 that in a CIF sale the seller must provide the buyer with a “clean negotiable bill of lading for the agreed port of destination”.<sup>31</sup> Rule A-8 of *INCOTERMS* 1990 uses language that shows the changing practice in the use of sea transport documents and requires that the seller provide the buyer with “the usual transport document for the agreed port of destination”. The non-negotiable sea waybill, together with the bill of lading, is cited as an example of a “usual transport document”.<sup>32</sup> The 1990 Revision of *INCOTERMS* provides that the CIF term can only be used for sea and inland waterway transport. Where the ship’s rail serves no practical purpose, such as in the case of roll-on-roll-off or container traffic, other terms are more appropriate.<sup>33</sup>

Contracts for the sale of goods on FOB terms have been in existence for over 150 years and are still in relatively frequent use, particularly in the oil and other bulk trades where entire shiploads are the subject of the sale.<sup>34</sup> The essential features of an FOB contract require that the seller pay the cost and carry the responsibility of loading the goods “free on board”, making him fully liable for the cost and safety of the goods until they have passed the ship’s rail.<sup>35</sup>

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<sup>30</sup> Marasinghe, *Contract of Sale ...*, p. 269. *Garavelli & Figli v Gollach & Gomperts (Pty)Ltd* 1959 (1) SA 816 (W); *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171; *London & South African Bank v Donald Currie & Co* (1875) 5 Buch 29.

<sup>31</sup> *INCOTERMS* 1980.

<sup>32</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, p. 183. ICC Publication no 460, p. 54. When a negotiable transport document is required, because the parties wish to sell the goods in transit, the seller will be obliged to provide a bill of lading and the CIF or CFR terms will need to be employed. If the buyer does not intend to sell the goods in transit, and is willing to accept a sea waybill in place of a bill of lading, the CPT and CIP terms may be used. ICC Publication no. 460, p. 15.

<sup>33</sup> ICC *INCOTERMS* 1990, p. 51.

<sup>34</sup> Sassoon & Merren, *CIF and FOB Contracts*, pp. 326 & 328. The FOB term, like the CIF term, has developed out of the customs and usages of merchants but unlike the CIF term, which has undergone little fundamental change, the FOB term has been modelled to provide for different interests at different times. A definition that applies to one type of FOB contract will not necessarily be applicable to another. No general agreement exists as to the precise division of responsibilities under the FOB contract. The English courts have acknowledged the changing nature of the FOB contract and in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 it was referred to as a “flexible instrument”.

<sup>35</sup> Sassoon & Merren, *CIF and FOB Contracts*, p. 331. Dillon, *Modern Business Law*, vol. 4, 1982, p. 133.

Both CIF and FOB contracts have as a consequence the fact that risk is passed to the buyer at the point of shipment and that the seller does not carry the risk of loss or damage to the goods during transit.<sup>36</sup> While the risk is passed at the time of shipment the title to the goods is generally passed only once the bill of lading has been delivered to the buyer.<sup>37</sup> Should the buyer fail to pay on delivery of the documents, the transfer of title to him may be deferred until payment is made.<sup>38</sup>

#### 2.4 Contracts of sale on FCA terms

With the rise of the container and other unitisation devices there has been a change from the customary “port-to-port” sea transport to a new “door-to-door” transport concept. The effect of the advances in transport technology on traditional trading patterns has been far-reaching and many of the existing trade terms cannot be applied to the transportation of goods under new forms of transport contract. One of the problems raised is the documentary aspect of the CIF term and the inability to satisfy the bill of lading requirements. When goods are placed in a container, or similar unitisation device by the shipper, it is difficult to obtain a clean bill of lading as required by a contract under CIF terms.<sup>39</sup> The 1990 revision of *INCOTERMS* has adopted the term FCA, as an overriding term, to apply to all types of transport irrespective of the mode and combination of modes. The term is appropriate for use for transport by a single mode as well as for multimodal transport. Under the FCA term the seller fulfils his obligation to deliver when he has, among other things, handed the goods into the charge of the carrier,<sup>40</sup> named by the buyer at the named place.

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<sup>36</sup> Todd, P. *Modern Bills of Lading*, 2nd edition, Blackwell Law, 1990, p. 30. The buyer’s remedies for such loss or damage do not lie against the seller, but against the carrier or insurer. The buyer’s rights against the carrier and insurer are embodied in the shipping documents, namely the bill of lading and the insurance policy, which transfer rights of action against the carrier and insurer to the buyer.

<sup>37</sup> *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60.

<sup>38</sup> Goode, *Proprietary Rights and Insolvency ...*, p. 62.

<sup>39</sup> Sassoon & Merren, *CIF and FOB Contracts*, p. 22.

<sup>40</sup> The buyer instructs the seller as to whom the goods should be delivered for carriage. The carrier, and the transport document issued, are of great importance to parties to an international sales contract. Consequently, the preamble to the FCA term defines a carrier as “any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes”. The term refers to an enterprise which actually performs the carriage but also includes an enterprise which undertakes to perform or procure the performance of the carriage. The definition further provides that, “If the buyer instructs the seller to deliver the cargo to a person, e.g. a freight forwarder who is not a “carrier”, the seller is deemed to have fulfilled his obligation to deliver the goods when they are in the custody of that person”. ICC Publication no. 460, pp. 10, 11 & 24. See 1 of chapter 5. The carrier, as defined under the FCA term, is a multimodal transport operator who is distinguished by the fact that he undertakes responsibility for the entire carriage. When a sales contract between a buyer and a seller

In the traditional forms of export contract the ship's rail is the critical point. Where container or multimodal transport is used the critical point is the place at which the carrier takes the goods into his charge.<sup>41</sup> The risk is passed when the goods are delivered into the custody of the carrier.<sup>42</sup> The point at which it may be said that the goods are in the custody of the carrier will depend on the mode of transport being used.<sup>43</sup> The point at which title to the goods is transferred will depend on the agreement between the parties.<sup>44</sup>

### 3 The governing law

#### 3.1 The conflict-of-laws and the new *Lex Mercatoria*

In international trade, where more than one system of law is involved, it is important to determine, from the potentially applicable legal systems, which law governs which aspects of the contract.<sup>45</sup> In the absence of a specific choice of law clause by the parties the traditional approach in determining which legal system governs an international sales contract is to use private international law or conflict-of-laws rules. The application of these rules lead to a situation in which domestic law will govern the international contract, regardless of its shortcomings in providing for the needs of international contracts. Conflict-of-laws rules do not lead to the certainty and predictability required in international transactions<sup>46</sup> nor are they appropriate for solving problems which arise in the dynamic field of international trade.<sup>47</sup>

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includes an FCA term, the provisions of the United Nations Convention on International Multimodal Transport of Goods (see 3 in chapter 5) or the UNCTAD/ICC Rules for Multimodal Transport Documents (see 4 in chapter 5) are appropriate to govern the contract of carriage subsequently concluded by the buyer or seller with the carrier/multimodal transport operator.

<sup>41</sup> Shah, M. J. International Conventions applicable to FOB and CIF Sales and to Multimodal Transport of Goods. *European Transport Law*, 1981, p. 80. Schmitthoff, *Schmitthoff's Export Trade*, p. 612.

<sup>42</sup> ICC *INCOTERMS* 1990, p. 28.

<sup>43</sup> ICC *INCOTERMS* 1990, p. 26.

<sup>44</sup> Van Houtte, *The Law of International Trade*, p. 154.

<sup>45</sup> Marasinghe, *Contract of Sale ...*, p. 8.

<sup>46</sup> Booyesen, *South African Yearbook of International Law*, vol. 17, 1991-1992, p. 72.

<sup>47</sup> Baxter, I. F. G. International Conflict of Laws and International Business. *International and Comparative Law Quarterly*, no. 34, 1984, p. 538.

The view has been expressed that the time has come for the leading commercial countries to develop legal rules that are custom-made for international commerce.<sup>48</sup> It is already evident that the conflict-of-laws is in the grip of a revolution instigated by the reaction of the international trading community to the new realities of international trade.<sup>49</sup> A move towards the creation of a transnational or universal regime is indicated by the use of both trade-wide standard form contracts and international arbitration. It is being increasingly recognised that the law applied in international commercial arbitration is the new *lex mercatoria* which is disassociating itself from domestic legal systems<sup>50</sup> and which can be described as an autonomous legal system of a universal character.<sup>51</sup>

The international *lex mercatoria* embodies the legal norms which govern the activities of people involved in international trade. It comprises the international commercial customs, the general principles of law, or the norms common to different national legal systems; and those norms embodied in the CISG. The enforcement of these norms is largely regarded as a function of arbitration tribunals.<sup>52</sup> Unlike the purpose of the conflict-of-laws, which aims to resolve the conflicts arising from the involvement of different legal systems and jurisdictions, the purpose of the international *lex mercatoria* is to avoid such conflicts by providing substantive legal rules which will directly govern the relationship.<sup>53</sup>

The development of international substantive rules in certain vital areas of international trade, such as, in international contracts of sale and the international transportation of goods, is illustrative of a trend towards delocalisation of international contracts.<sup>54</sup> The international transport conventions which govern the carriage of goods by sea have to a large extent succeeded in

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<sup>48</sup> Baxter, *International and Comparative Law Quarterly*, no. 34, 1984, p. 541.

<sup>49</sup> McLachlan, *The Law Quarterly Review*, 1986, no. 102, p. 591.

<sup>50</sup> McLachlan, *The Law Quarterly Review*, 1986, no. 102, p. 597.

<sup>51</sup> Booysen, H. *International Transactions and the International Law Merchant*, Interlegal, 1995, p. 2.

<sup>52</sup> Booysen, *International Transactions ...*, p. 2.

<sup>53</sup> Booysen, *International Transactions ...*, p. 14.

<sup>54</sup> McLachlan, *The Law Quarterly Review*, 1986, no. 102, p. 597.

standardising the practices which govern, *inter alia*, the application of bills of lading.<sup>55</sup>

### 3.2 The United Nations Convention on Contracts for the International Sale of Goods

The United Nations Commission on International Trade Law (UNCITRAL)<sup>56</sup> has formulated the United Nations Convention on Contracts for the International Sale of Goods (CISG), sometimes referred to as the 1980 Vienna Convention. The Convention provides a uniform set of rules to govern international sales between parties whose places of business are situated in two contracting states.<sup>57</sup> Among its objectives is the removal of legal barriers in international trade and the promotion of trade through the adoption of uniform rules to govern contracts for the international sale of goods which take into consideration different social, economic and legal systems.<sup>58</sup> While the CISG provides the means of achieving a “world-wide unification of the law” in international sales contracts<sup>59</sup> and can already be regarded as providing the rules by which international sales contracts will be governed in future<sup>60</sup> the application of the convention is not mandatory and the parties can exclude its operation expressly or by implication.<sup>61</sup> An essential difference between the sales and transport contracts lies in the fact that the terms of the sales contract may be voluntarily agreed upon by the buyers and sellers, whereas the terms of the transport contract, as to liability and documentation, are subject to mandatory control by statute or international convention.<sup>62</sup>

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<sup>55</sup> The Hague Rules, the Hague-Visby Rules and the Hamburg Rules. See 3 and 4 in chapter 2.

<sup>56</sup> Hereinafter UNCITRAL.

<sup>57</sup> Article 1.

<sup>58</sup> Colas, B. In *Global Economic Co-operation, A Guide to Agreements and Organisations*, edited by B. Colas, United Nations University Press, 2nd edition, 1994, p. 375.

<sup>59</sup> Ndulo, *Lesotho Law Journal*, vol. 3, no. 2, 1987, p. 128.

<sup>60</sup> Kabik, M. Through the Looking-Glass: International Trade in the “Wonderland” of the United Nations Convention on Contracts for the International Sale of Goods. *International Tax and Business Lawyer*, 1992, p. 430.

<sup>61</sup> Article 6.

<sup>62</sup> Shah, *European Transport Law*, 1981, p. 70.

## 4 The international carriage of goods

### 4.1 The function of international transport

International transport is the mechanism which makes international trade possible; it is the physical basis without which international trade could not exist. Its importance is attested to by the fact that the greatest amount of work done in the area of harmonising international commercial law has been in the formulation of international transport conventions.<sup>63</sup> In addition to the physical function of moving the goods, international transport also fulfils a fundamental legal role in international trade.<sup>64</sup> The transport documents evidencing international contracts of carriage are important legal documents which serve a number of functions. One of the legal functions of transport documents is to provide collateral security; consequently, they are of fundamental importance in the financing of international sales contracts.

### 4.2 Traditional contracts for the carriage of goods by sea: bills of lading and charter parties

When a shipowner undertakes to carry goods by sea, or to provide a ship for this purpose, in return for payment of a sum of money known as freight, a contract of affreightment, or contract of carriage, is entered into.<sup>65</sup> Traditionally, the document constituting the contract of affreightment is either a charter party or a bill of lading, depending on the manner in which the ship has been employed.<sup>66</sup> A bill of lading is a contract in relation to the goods, whereas a charter party is a contract in relation to the ship.<sup>67</sup> The two types of contract have few points in common.<sup>68</sup>

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<sup>63</sup> Schmitthoff, C. M. & Goode, R. M. *International Carriage of Goods: Some Legal Problems and Possible Solutions*, *The International Commercial Law Series*, vol. 1. Centre for Commercial Law Studies, 1988, p. xxi.

<sup>64</sup> Booyesen, *International Transactions* ..., p. 242.

<sup>65</sup> Scrutton, T. E. *Charterparties and Bills of Lading*, 4th edition, Clowes, 1899, p. 1.

<sup>66</sup> Mocatta, A. A. Mustill, M. J. & Boyd, S. C. *Scrutton on Charterparties and Bills of Lading*, 18th edition, Sweet & Maxwell, 1974, p. 1.

<sup>67</sup> Tetley, W. *Marine Cargo Claims*, 3rd edition, International Shipping Publications, 1988, p. 941.

<sup>68</sup> Schmitthoff, *Schmitthoff's Export Trade* ..., p. 544. Charter parties are mostly governed by common law rules which allow the shipowner or charterer to modify his normal liability as carrier subject only to those limitations found in the general principles of the common law. Contracts of carriage evidenced by bills of lading are largely

When a shipowner employs his vessel as a general ship, bills of lading are normally issued for the goods to be shipped. Carriage of this nature becomes part of the liner trade in which vessels owned by various shipping companies regularly follow an advertised route.<sup>69</sup> A charter party, or contract for the hire of a ship, is entered into where the use of the whole ship is required, as in the case of undivided bulk cargoes. This type of charter party is likely to be for a tramp rather than liner vessel.<sup>70</sup> There are three types of charter party: voyage and time charters, both of which are contracts of affreightment, and a demise or bareboat charter where the charterer takes over control of the ship and is a contract of lease.<sup>71</sup> The charter party and bill of lading are not necessarily mutually exclusive and it is not uncommon to find both a charter party and a bill of lading being used in relation to a single shipment.<sup>72</sup> Where the use of a ship is hired under a voyage or time charter party, a bill of lading, which acts as a receipt for the cargo<sup>73</sup> and a document of title,<sup>74</sup> may be issued in respect of the goods carried. By incorporating the terms of the charter party into the bill of lading the bill becomes a charter party bill of lading.<sup>75</sup>

#### 4.2.1 Liner and tramp shipping

Two distinct types of cargo operation are evident. There are liners which follow fixed routes on

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regulated by statutory law which curbs the contractual freedom of the parties limiting particularly the shipowner from exempting himself from liability beyond the limits prescribed by the International Rules Governing Bills of Lading.

<sup>69</sup> Wilson, *Carriage of Goods by Sea*, p. 123.

<sup>70</sup> Todd, *Modern Bills of Lading*, p. 4.

<sup>71</sup> Gaskell, N. J. J., Debattista, C. & Swatton, R. J. *Chorley and Giles' Shipping Law*, 8th edition, Pitman, 1987, p. 174. *Frosso Shipping Corporation v Richmond Maritime Corporation (Ideomar SA Intervening)* 1985 (2) SA 476 (C).

<sup>72</sup> Gilmore & Black, *The Law of Admiralty*, p. 15.

<sup>73</sup> Glass, D. A. & Cashmore, C. *Introduction to the Law of Carriage of Goods*, Sweet & Maxwell, 1989, p. 166.

<sup>74</sup> Ivamy, *Payne and Ivamy's Carriage ...*, p. 62.

<sup>75</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 574. A bill of lading carries all the essential terms of the contract of carriage and the third party endorsee or holder of the bill can determine the terms from the document itself. Steamship bills of lading (abbreviated as S.S. Co's bill of lading) meet that requirement but a charter party bill does not. A charter party bill of lading is one which incorporates by reference some of the terms of the charter party so that they may have effect against the consignee or endorsee of the bill. A bill issued under a charter party which does not incorporate the terms of the charter party into the contract with the consignee or endorsee is strictly speaking not a charter party bill of lading.

preannounced schedules and carry general and containerised cargo, which consists mostly of manufactured and/or packaged products, and there are tramps.<sup>76</sup> The tramps carry bulk cargoes of basic commodities, often in ships specially designed to carry a particular type of bulk cargo, for shippers who generally use the whole ship. Each voyage follows a special arrangement between the shipowner and the shipper.<sup>77</sup> When this type of shipping is considered, the derogatory connotations of the word “tramp” are inappropriate and it must be remembered that while the packaged and containerised shipments carried by liners are important in international trade, “the world economy would wither away” if not for the bulk cargoes of fuel, food, ore and other raw materials carried by tramps when and where they were needed.<sup>78</sup> In the liner trade individual bills of lading are issued for separate parcels of cargo belonging to different owners. In the case of tramp shipping where a charter party is involved, one bill of lading may cover the entire bulk cargo which is generally the property of a single owner.<sup>79</sup>

#### **4.3 Modern contracts of carriage: sea waybills and multimodal transport documents**

Since the 1950s modern shipping practices have revolutionised the handling and movement of cargo. Pallets and containers have been used to “unitise” cargoes. The dimensions of containers have been standardised facilitating their use by different carriers and their transfer between different modes of transport. In recent years international contracts of carriage which permit the employment of more than one mode of transport are increasingly being used. The international carriage of goods is now conducted by the coordinated use of road, rail, air and sea transport and is referred to as combined, intermodal, door-to-door and multimodal transport. In practice containerisation and door-to-door transport operations have resulted in the introduction of new

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<sup>76</sup> Kendall, L. C. & Buckley J. J. *The Business of Shipping*, 6th edition, Cornell Maritime Press, 1994, p. 3. Gilmore & Black, *The Law of Admiralty*, p. 13.

<sup>77</sup> Kendall & Buckley, *The Business of Shipping*, p. 7.

<sup>78</sup> Gilmore & Black, *The Law of Admiralty*, p. 13.

<sup>79</sup> The distinction between steamship and charter party bills of lading was of importance when considering the roles played by the different bills of lading in financing international sales transactions. When banking practice was subject to the provisions of the 1983 Revision of the UCP, ICC Publication no. 400, banks were obliged to reject a charter party bill of lading as good tender under a letter of credit unless instructed to the contrary. The distinction between the two types of bill is no longer important as the 1993 Revision of the UCP, which is currently in use, now provides that where a credit calls for or permits a charter party bill of lading the banks will accept such a document provided it meets certain specified requirements, article 25.



types of service by traditional transport operators.<sup>80</sup> In turn, this has introduced new types of transport contracts and different bill of lading and documentary practices. Increasingly, goods in international trade are being carried under contracts embodied in sea waybills and multimodal transport documents.

UNCTAD, together with the Economic Commission for Europe (ECE),<sup>81</sup> the European Transport Ministers Conference and the European Commission, have been working towards the achievement of a common terminology for use in international contracts of carriage. In the process, some of the confusion that has previously surrounded the employment of terms like “combined transport”, “intermodal transport”, “multimodal transport” and “through transport” has been unravelled.<sup>82</sup>

“Unimodal transport” is “the transport of goods by one mode of transport by one or more carriers”. Where there is only one carrier he issues his own transport document which may, for example, be a bill of lading or sea waybill. If more than one carrier is involved, as is the case where carriage is from port-to-port and transshipment takes place at an intermediate port between the ports of loading and final discharge, one of the carriers may issue a “through bill of lading” to cover the entire transport. Depending on the terms noted on the back of the through bill of lading, the issuing carrier will take responsibility either for the entire port-to-port transport or for only that part actually performed by him.

Both “intermodal transport” and “multimodal transport” involve the transport of goods by a number of different modes of transport where one of the carriers organises the whole transport from a point of origin to a point of destination via one or more interface points. The type of transport document issued will be determined by the way in which responsibility for the entire transport is shared. Where the carrier who organises the transport only takes responsibility for that portion he himself performs, he undertakes “segmented transport” and may issue an “intermodal” or, where appropriate, “combined transport” bill of lading. If the carrier organising the transport

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<sup>80</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 251.

<sup>81</sup> Herein after ECE.

<sup>82</sup> Carl, H. Status and Progress of Commercial and Regulatory Aspects of Multimodal Transport, paper presented at the International Bauxite Association (IBA) 12th Biennial Conference, Paris, September 1995, p.1. This paper is the source of the definitions which follow.

accepts responsibility for the entire transport operation “multimodal transport” is involved and the carrier issues a “multimodal transport” document.

With the introduction of the UNCTAD/ICC Rules for Multimodal Transport Documents, which replace the ICC Rules for Combined Transport, the terminology is changing and what was previously known as a “combined transport document” now becomes a “multimodal transport document”. The term “combined transport” will be confined to the employment of road/rail combinations,<sup>83</sup> and the term “multimodal transport” will bear only the meaning given by both the United Nations Convention on International Multimodal Transport of Goods and the UNCTAD/ICC Rules. “Multimodal transport” is defined as,

the transport of goods by at least two modes of transport on one transport document issued by one operator who assumes responsibility for the goods from receipt to delivery.

“Combined transport” is,

the transport of goods in one and the same loading unit or vehicle by a combination of road, rail and inland waterway modes without accompanying liability by a single carrier.

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<sup>83</sup> In Europe “combined transport” has long been regarded as bimodal road/rail transport without any reference to the carrier’s liability.

## CHAPTER 2

### THE BILL OF LADING: ITS HISTORY AND STATUTORY REGULATION

#### 1 Early maritime law and the *Lex Mercatoria*

The Rhodian Sea Laws promulgated by the island of Rhodes in the Eastern Mediterranean are regarded as the earliest laws of maritime jurisdiction and believed by some to date back from 900 BC.<sup>1</sup> These laws were recognised as a means of ensuring consistent and predictable treatment of merchants and their vessels in the Mediterranean sea-faring world. The Rhodian Sea Laws showed a complexity and attention to detail which bore evidence to the sophistication of the commerce and trade of ancient Greece with Rhodes, the commercial centre, which was able to dictate terms of trade. Although the influence of the Rhodian Sea Law changed with the decline of Greece and the rise of the Roman Empire, a uniform law founded on the Rhodian Law prevailed and was regarded as fundamental to peaceful and profitable Mediterranean trade.<sup>2</sup>

The 11th century saw the growth of the great commercial cities of the Mediterranean. It was this period which saw the rise of the law merchant and to which the pattern of modern commercial shipping and its law can be traced.<sup>3</sup> The law merchant was a body of customs familiar to merchants and seamen and was administered in the port cities by special courts in which the custom of merchants was expounded by juries of merchants with knowledge of its contents.<sup>4</sup> The dispute-settling procedures and codifications of customary rules, to which mariners and their courts felt themselves bound, were integral to the development of the law merchant or *lex mercatoria*. The freedom, granted by local territorial authorities, to maritime tribunals to administer maritime customary law gave merchants the authority to resolve their own trade and

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<sup>1</sup> Paulsen, G. W. An Historical Overview of the Development of Uniformity in International Maritime Law. Admiralty Law Institute Symposium on American and International Maritime Law: Comparative Aspects of Current Importance, *Tulane Law Review*, vol. 57, 1983, p. 1068.

<sup>2</sup> Paulsen, *Tulane Law Review*, vol. 57, 1983, p. 1069.

<sup>3</sup> Gilmore & Black, *The Law of Admiralty*, p. 5.

<sup>4</sup> Bennett, *The History and Present Position ...*, p. 1.

shipping disputes,<sup>5</sup> which in turn promoted the development of the law merchant as a universal law accepted throughout Europe.

Until the appearance of modern states it would have been inconceivable to regard maritime law as deriving its origin from a territorial sovereign and the sea-codes of the time claimed not to enact the law of any territory but rather to state what was already held to be the law by the custom of the sea.<sup>6</sup> Two of the most notable Mediterranean sea-codes are the Tablets of Amalfi and the *Llibre del Consolat de mar* of Barcelona, known in English as *The Good Customs of the Sea*. Both of these codes enjoyed wide prestige and authority.<sup>7</sup>

As maritime activities extended northwards and westwards of the Mediterranean, maritime courts also appeared in the Atlantic and Baltic port towns and new codes, which took their names from the towns in which they were enacted, emerged. The Rules of Oleron, Visby and particularly the Hanseatic League also showed that merchants, unencumbered by political influences, are best able to regulate commerce to the benefit of all.<sup>8</sup>

As maritime commerce became increasingly important it attracted the attention of Continental legal scholars and subsequent treatises and commentaries were acknowledged as classic systematisations of the subject. Maritime law reached maturity under the civil law and still shows this influence even in its application by courts of common law countries.<sup>9</sup> As the great national states emerged in Europe, the international law of the sea was assimilated into national law or restated in codifications such as the *Ordonnance de la Marine* of Louis XIV. It became increasingly evident that governments were looking to control commerce and as governments moved in, the merchants were forced out.<sup>10</sup> With the advent of nationalism new laws promoting

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<sup>5</sup> Gilmore & Black, *The Law of Admiralty*, p. 5.

<sup>6</sup> Gilmore & Black, *The Law of Admiralty*, p. 6.

<sup>7</sup> Gilmore & Black, *The Law of Admiralty*, p. 5.

<sup>8</sup> Paulsen, *Tulane Law Review*, vol. 57, 1983, p. 1072.

<sup>9</sup> Gilmore & Black, *The Law of Admiralty*, p. 8.

<sup>10</sup> Paulsen, *Tulane Law Review*, vol. 57, 1983, p. 1073.

national interests were passed and the interests of the international maritime community that were so well served by the uniformity achieved by customary law were effectively eroded.<sup>11</sup>

## 2 The historical development of the bill of lading

### 2.1 Developments prior to the 14th century

Owing to the customary nature of the law merchant, information covering the early history of bills of lading is sparse. In consequence of the expeditious nature of the procedure of the law merchant, there is no reference to recorded pleas at the piepowder or fair Courts in either England or the Continent.<sup>12</sup>

As is inevitable in the course of trade, disputes arose between shippers and ships' masters regarding the exact goods delivered on board so that there was clearly a need for evidence of delivery. As early as 1063 statutes were passed by various cities requiring the master to take on board a clerk, sworn to an oath of secrecy, who would enter in a book or register a record of all goods received from the shipper.<sup>13</sup> The entries were made in the presence of the master, the shipper and one witness. It was provided in the statute that the register should be evidence of the receipt of the goods. The clerk was not the agent of either the shipper or the captain but was rather a public officer whose employment was intended to safeguard the interests of both. In about 1350 a statute was passed which provided that if the register were in the possession of anyone other than the clerk,

nothing that it contained should be believed, and that if the clerk stated false matters therein he should lose his right hand, be marked on the forehead with a branding iron, and all his goods be confiscated, whether the false entry was made by him or by another.<sup>14</sup>

Of such importance were the clerk's duties that the master was not permitted to load anything on board except in his presence, nor was any sailor authorised to remove anything from the ship

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<sup>11</sup> Collins, D. M. Admiralty - International Uniformity and the Carriage of Goods by Sea. *Tulane Law Review*, vol. 60, 1985, p. 165.

<sup>12</sup> Bennett, *The History and Present Position ...*, p. 3.

<sup>13</sup> Mc Laughlin, *Yale Law Review*, vol. 35, 1926, p. 550.

<sup>14</sup> Mc Laughlin, *Yale Law Review*, vol. 35, 1926, p. 551.

without his knowledge.

Desjardins in his *Droit Commercial Maritime* refers to a document dating back to 1255, *Le Fuero Real*, in which it is also stated that owners of ships should cause to be enrolled in a register all the articles placed on board ship as well as their nature and quantity.<sup>15</sup> The *Customs of the Sea*, which dates back to the 14th century, also refers to a register book to be kept by the ship's clerk. It is provided that as soon as the ship has set sail the merchants must inform the ship's clerk of anything they have which has not been entered in writing. It is stated that the ship's owner will not be responsible for damage done to goods which are not entered on the register.<sup>16</sup> In addition, every covenant entered into between the merchant and the ship's owner must be fulfilled if entered in the ship's book.<sup>17</sup>

It is in such passages as these that the emergence of the rudimentary bill of lading can be seen. The original intention of this writing was to serve as a record of the goods shipped. It also appears to have been a contract containing the terms on which the goods were to be carried as well as a writing in the nature of a document of title, because it evidences the merchant's right to claim the goods entered in his name at the end of the voyage.<sup>18</sup>

## 2.2 The 14th to the 17th centuries

Until the 14th century it was the practice of merchants to travel with their goods, the particulars of which were entered into a single book or register which constituted part of the ship's papers.<sup>19</sup> Until this time the bill of lading as such did not exist; it took the form of a "book" rather than a "bill" of lading. A statute passed in the City of Ancona in 1397 required that every clerk provide a copy of his register to those with a right to demand it, regardless of any prohibition by the

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<sup>15</sup> Mitchelhill, A. *Bills of Lading - Law and Practice*, 2nd edition, Chapman & Hall, 1990, p. 1.

<sup>16</sup> According to the *Customs of The Sea* it was permissible to commit goods to the ship with or without a writing. In time oral evidence of shipment was replaced by the ship's register, which was regarded as providing stronger evidence, and which in turn gave way to the private contract entered into between merchant and master.

<sup>17</sup> Mitchelhill, *Bills of Lading* ..., p. 1.

<sup>18</sup> Bennett, *The History and Present Position* ..., p. 5.

<sup>19</sup> Astle, W. E. *Legal Developments in Maritime Commerce*, Fairplay, 1983, p. 61.

master or owner.<sup>20</sup> It was statutes of this nature that marked the beginning of the “bill” of lading as a document separate and independent of the “book” of lading. When in accordance with the statute the shipper received an excerpt from the book the document he received was akin to the modern bill of lading.<sup>21</sup>

The reasons for the creation of such a provision were probably twofold. Firstly, the “book” of lading was the sole record of cargo loaded on board. In the event of the loss of the ship this important evidence of the receipt of goods would be destroyed. Consequently, the statute required delivery of copies of the register to the shipper as well as the deposit of copies at the port of departure. In this way proof of the goods loaded on board the vessel, their quantity and quality, would be contained in the copies and would not depend on the safety of the clerk or his books.<sup>22</sup> Secondly, a need for a separate document was felt when merchants no longer wished to travel with their goods but wanted simply to despatch them to a consignee. The person demanding delivery of the goods at the port of destination would require proof that he was entitled to do so. A copy of the register, signed by the master, would provide the best indication of title and would bind the shipowner and consignee to the conditions of shipment.<sup>23</sup> Furthermore, the view has been expressed that it was because of the notarial and fiduciary role vested in the ship's master that the bill of lading could ultimately be transformed into a document of title.<sup>24</sup>

It is easy to understand the move away from the ship's book towards the practice of issuing bills of lading in triplicate. By 1539 there is clear reference to bills drawn in a set of three and Maylnes was referring to a custom when he stated:

Of these bills of lading, there is commonly three bills of one tenor made of the whole ship's lading, or of many particular parcels of goods, if there be many laders; and the mark of the goods must therein be expressed, and of whom received, and to whom to be delivered. These bills of lading are commonly to be had in print in all places and

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<sup>20</sup> Mc Laughlin, *Yale Law Review*, vol. 35, 1926, p. 128, (referring to 5 Pardessus, *Collection de Lois Maritimes* (1839) 116).

<sup>21</sup> Mc Laughlin, *Yale Law Review*, vol. 35, 1926, p. 551.

<sup>22</sup> Mc Laughlin, *Yale Law Review*, vol. 35, 1926, p. 551.

<sup>23</sup> Bennett, *The History and Present Position ...*, p. 6.

<sup>24</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 167.

in several languages. One of them is enclosed in the letters written by the same ship, another bill is sent overland to the factor or party to whom the goods are consigned, the third remaineth with the merchant, for his testimony against the master, if there were any occasion or loose dealing; but especially it is kept for to serve in case of loss, to recover the value of the goods of the assurors that have undertaken to bear the adventure with you.<sup>25</sup>

The writings of Maylnes also make it clear that prior to the 17th century, bills of lading were not issued separately from charter parties. The bills of lading were drawn up to declare the nature of the cargo and to bind the ship's master to deliver it in accordance with the charter party.<sup>26</sup> It was, however, only when the shippers ceased to travel with their merchandise that the bill of lading could become a document of title which was separate from the charter party.<sup>27</sup> In order to exist as an independent legal document the bill of lading had to detach itself from both the book of lading and the charter party contract.

The existence of the bill of lading as a well known commercial document, in a reasonably stereotyped form everywhere, is evident for a long period prior to 1530.<sup>28</sup> Confirmation of this is provided by the case of *Chapman v Peers* (1534)<sup>29</sup> in which it was firmly stated that it had long been the practice of merchants and the rule of law that the master or owner of the ship assumed no liability for goods not entered in the book of lading. Towards the end of the 16th century the bill of lading was widely used. A document of that time, *Le guidon de la mer*, defines the bill of lading as "the acknowledgement which the master of the ship makes of the number and quality of the goods loaded on board."<sup>30</sup>

### 2.3 Important legal developments in the history of the bill of lading

The earliest extant copy of a bill of lading is probably that in the case of *The Thomas* in 1538,

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<sup>25</sup> Kozolchyk (referring to Maylnes, *Lex Mercatoria* (3rd ed 1686) p. 97), *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 165. Holdsworth, W. *A History of English Law*, vol. viii, Methuen, Sweet & Maxwell, 1966, p. 256.

<sup>26</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 165.

<sup>27</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 167.

<sup>28</sup> Bennett, *The History and Present Position ...*, p. 8.

<sup>29</sup> *Chapman v Peers* (1534) Select Pleas in the Court of Admiralty, vol. I, p. 44.

<sup>30</sup> Bennett, *The History and Present Position ...*, p. 8.



where a copy of the bill was preserved on the court's record. It was evident from the face of the bill that property in the goods could be assigned before delivery. This indicated a step in the process by which property in goods at sea could be passed by a contract, evidenced by the endorsement and delivery of the bill of lading to the transferee. Although provision was made for the assignment of the contract it was not yet known whether this was evidenced by the endorsement of the document of title.<sup>31</sup>

In the case of *The Brandaris* in 1546 the bill of lading ended with a statement that three bills of lading had been provided, "all of one tenor marked with myn owne marke the one performed the other to be of none effecte." This statement, commonly found in bills of lading at this time, appears to contemplate the transfer of the bill of lading as a document of title to the goods shipped. The words providing that if one bill should be performed the others should be of no effect implies that it was customary to deliver goods to the holder of the bill of lading.<sup>32</sup> Two important parts of the document of title equation, that is the statement of the consignee's name together with the requirement that the goods would only be delivered to the lawful holder of an original in the set of three bills, are thus found in practice.<sup>33</sup>

It is clear from the records of the Admiralty Court that by the early 16th century the bill of lading was, according to the practice of the European merchants, a document of title to goods at sea, the assignment or delivery of which conferred on another the right to demand the goods from the master of the ship at the port of destination.<sup>34</sup> The first recorded case where endorsement is mentioned in connection with the assignment of a bill of lading is *Snee v Prescott* (1793)<sup>35</sup> indicating that the practice was well established by the 18th century and that the negotiable bill

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<sup>31</sup> Bennett, *The History and Present Position ...*, p. 9.

<sup>32</sup> Bennett, *The History and Present Position ...*, p. 10.

<sup>33</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 167.

<sup>34</sup> Bennett, *The History and Present Position ...*, p. 12.

<sup>35</sup> *Snee v Prescott* [1743] 1 Atkyns 245.

of lading was in common use.<sup>36</sup> In *Lickbarrow v. Mason* (1794)<sup>37</sup> it was settled that by the custom of merchants a bill of lading was transferable by endorsement and capable of transferring title to the goods.<sup>38</sup> It is from the custom found in this case that the bill of lading derives its symbolic quality, and this custom makes the bill of lading negotiable and transferable by endorsement and delivery.<sup>39</sup> As a document of title the bill of lading includes the right to claim delivery of the goods at the port of destination as well as the right to control the goods in transit or while in custody awaiting transit or delivery.<sup>40</sup>

### 3 The development of modern maritime law and the law governing bills of lading

Statutory maritime law is something comparatively new. Until the beginning of this century the general maritime law, which still provides the substance of modern maritime law, was founded upon customary international law.

The application of domestic statutory maritime law (other than port regulations) to foreign merchant shipping is virtually a phenomenon of the 20th century, and the present strong growth of maritime regulation should be seen as a direct reaction to the chaotic diversity of national maritime legislation.<sup>41</sup>

Before the international regulation of the carriage of goods by sea, two opposite legal trends were evident.<sup>42</sup> In the one instance there was the almost absolute liability imposed on the common carrier. The carrier who had contracted under a bill of lading to transport goods incurred strict liability for the safety of the goods.<sup>43</sup> According to the common law and the general maritime law this meant that the carrier was the virtual insurer of the goods unless he could prove that the

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<sup>36</sup> Mitchelhill, *Bills of Lading* ..., p. 2.

<sup>37</sup> *Lickbarrow v Mason* (1787) 2 Term Rep 63 KB.

<sup>38</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 169.

<sup>39</sup> Dockray, M. *Cases and Materials on the Carriage of Goods by Sea*, Professional Books, 1987, p. 583.

<sup>40</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 171. Wilson, *Carriage of Goods by Sea*, p. 146. Ivamy, *Payne and Ivamy's Carriage* ..., p. 72.

<sup>41</sup> Wiswall, F. L. Uniformity in Maritime Law: The Domestic Impact of International Maritime Regulation. *Tulane Law Review*, vol. 57, 1983, p. 1208.

<sup>42</sup> Collins, *Tulane Law Review*, vol. 60, 1985, p. 166.

<sup>43</sup> Wilson, *Carriage of Goods by Sea*, p. 123.

damage was caused by one of three exceptions: an Act of God, public enemies and inherent vice<sup>44</sup> or if the goods had been made the subject of general average sacrifice.<sup>45</sup> Even if the carrier was able to establish that the damage was caused by one of the exceptions he was still liable if there was fault on his part. Under both the Common Law and the Civil Codes the shipowner incurred strict liability and until the late 19th century it appears that shipowners and shippers agreed that it was the responsibility of the shipowner to carry safely and deliver goods entrusted to him in the same good order and condition in which they were shipped.<sup>46</sup> An opposite legal trend was evident by the 19th century in the essentially unlimited freedom of contract which permitted the carriers to include wide exception clauses in their bills of lading.<sup>47</sup> Such provisions in bills of lading entitled carriers to contractually limit the strict liability imposed upon them by maritime law.<sup>48</sup>

The response of different nations to these divergent trends depended largely on the size and importance of the merchant fleet to their national economies. The United States, being a country which depended mainly on foreign carriers, showed sympathy for cargo interests and cases imposed public policy limits on the availability of exoneration clauses in bills of lading.<sup>49</sup> In contrast in England, where profitable shipping was of paramount national interest, the legal system was sympathetic to the use of extremely wide disclaimers by British carriers.<sup>50</sup> Most European and Commonwealth Countries followed the British example.<sup>51</sup> This conflict between the major maritime nations, which became more serious early in the 20th century, had among its consequences the fact that the general maritime law no longer provided a uniform system of risk

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<sup>44</sup> Miller, G. *Liability in International Air Transport*, Kluwer, 1977, p. 58.

<sup>45</sup> Astle, *The Hamburg Rules*, p. 2.

<sup>46</sup> Astle, *The Hamburg Rules*, p. 3.

<sup>47</sup> Kendall & Buckley, *The Business of Shipping*, p. 227. Collins, *Tulane Law Review*, vol. 60, 1985, p. 166.

<sup>48</sup> Astle, *The Hamburg Rules*, p. 5.

<sup>49</sup> Collins, *Tulane Law Review*, vol. 60, 1985, p. 167.

<sup>50</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 180.

<sup>51</sup> Sturley, M. F. The History of COGSA and the Hague Rules. *Journal of Maritime Law and Commerce*, vol. 22, no. 1, January 1991, p. 5.

allocation.<sup>52</sup> Shipowners continued their liberal use of disclaimers to the extent that they exempted themselves from liability for every conceivable occurrence which could cause damage to goods, including their own negligence.<sup>53</sup> The disparate national reactions to the practice of carriers encouraged rampant forum shopping and undermined not only the negotiability of bills of lading but also the economic stability of the shipping industry as a whole.<sup>54</sup>

Furthermore, during the 19th century sailing ships gave way to steam, a development which added impetus to international trade. In this period the bill of lading, in addition to being the document specifying the goods carried and the terms and conditions of their carriage, became the medium through which credits financing overseas trade were arranged. Not only were they documents of title to goods but they were documents on which banks and finance houses advanced cash for the purchase of goods described in the bill of lading.<sup>55</sup> The CIF contract together with the terms contained in the bill of lading had become the “supreme instrument” of international buying and selling.<sup>56</sup>

By the end of the 19th century banking and cargo interests were becoming increasingly concerned about the shipowners' use of broad exemption clauses disclaiming liability for loss or damage to cargo. This practice was detracting from the value of the bill of lading and became a matter of serious concern for those involved with seaborne commerce.<sup>57</sup> Because parties were permitted to negotiate contract terms freely the legal relationship became unbalanced, since the bargaining position of carriers was far stronger than in today's highly competitive liner trade.<sup>58</sup> The fact that in most trading states powerful carriers were able to impose unfair contract terms on shippers,

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<sup>52</sup> Sturley, *Journal of Maritime Law and Commerce*, vol. 22, no. 1, January 1991, p. 6.

<sup>53</sup> Sorokin, S. *Goods in Transit*, Matthew Bender, 1993, par. 2.02. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 180.

<sup>54</sup> Collins, *Tulane Law Review*, vol. 60, 1985, p. 167.

<sup>55</sup> Astle, *Legal Developments in Maritime Commerce*, p. 63.

<sup>56</sup> Knauth, A. W. *Ocean Bills of Lading*, American Maritime Cases Inc. 1953, p. 117.

<sup>57</sup> Astle, *Legal Developments in Maritime Commerce*, p. 63.

<sup>58</sup> Ramberg, J. Freedom of Contract in Maritime Law. *Lloyd's Maritime and Commercial Law Quarterly*, May 1993, p. 179.

disadvantaged by their comparative commercial inferiority, led to joint resistance from shippers, bankers and underwriters. This resulted in the adoption of model bills of lading by some countries, and in the introduction of legislation by others, to limit the carrier's freedom to impose terms.<sup>59</sup> Minimum standards of liability established in legislation varied from country to country, creating conflict and leading to uncertainty in international trade.<sup>60</sup> In consequence of this type of legislation a bill of lading could be valid in one country and invalid in another.<sup>61</sup> Such a situation was internationally unacceptable and a solution which would have a practical effect on international trade had to be reached by international agreement.<sup>62</sup>

Legislation enacted by the United States Congress in the form of the Harter Act of 1893<sup>63</sup> was the first to attempt at a compromise between the competing interests of shippers and carriers.<sup>64</sup> By this time the world shipping situation was so chaotic, and the compromise represented in the Harter Act had found such general approval, that this legislation soon became the basis on which international negotiations, aimed at the unification of the substantive law relating to the carriage of goods by sea, were founded.<sup>65</sup> Legislation adopted by the British Dominions, which had placed the British Government under considerable pressure, was similar to that of the Harter Act.<sup>66</sup>

The first international conference for the creation of a uniform international system to regulate the liability of the carrier was held in the Hague in 1921. The Maritime Law Committee of the

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<sup>59</sup> Wilson, *Carriage of Goods by Sea*, p. 124. Kendall & Buckley, *The Business of Shipping*, p. 227.

<sup>60</sup> Zamora, S. Carrier Liability for Damage or Loss to Cargo in International Transport. *The American Journal of Comparative Law*, vol. 23, 1975, p. 403.

<sup>61</sup> Booyesen, *International Transactions ...*, p. 248.

<sup>62</sup> Wilson, *Carriage of Goods by Sea*, p. 124.

<sup>63</sup> 27 Stat 445 (1893) (codified as amended at 46 USC Sections 190-196).

<sup>64</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 182.

<sup>65</sup> Collins, *Tulane Law Review*, vol. 60, 1985, p. 167. An important principle established in the Harter Act which settled the problem of the carriers' liability, and which subsequently inspired both the Hague Rules and the Brussels International Convention, was the distinction it made between fault in the navigation and management of the vessel and fault in the care and custody of the cargo and in equipping the vessel.

<sup>66</sup> Examples are the Australian Carriage of Goods by Sea Act 1904, the New Zealand Shipping and Seamen Act 1908, and the Canadian Water Carriage Act 1910.

International Law Association met and drafted what has become known as the Hague Rules. It was intended that the rules be adopted voluntarily by the carriers in their bills of lading. This, however, never materialised.<sup>67</sup> At an international conference held in Brussels in 1924 the Hague Rules were fashioned into compulsory international law by the adoption of the Brussels International Convention for the Unification of Certain Rules Relating to Bills of Lading known, albeit mistakenly, as the Hague Rules.<sup>68</sup> These rules were well received by the international community and today most of the world's cargo is carried subject to their provisions.<sup>69</sup>

The Convention had as its object the unification of certain rules relating to bills of lading and the introduction of a minimum standard of protection for cargo owners. It was not the aim of the Rules to establish a comprehensive and self-sufficient system to govern the carriage of goods by sea; instead it intended to define the carrier's basic obligations and to limit to a prescribed maximum his freedom to make use of exceptions and limitation clauses in the contract of carriage.<sup>70</sup> The scope of the Hague Rules is limited to governing the legal relationship between the holder of the bill of lading and the carrier; it is not intended to cover fully the contract of carriage.<sup>71</sup>

The Hague Rules remained unchanged for over 40 years but as a result of practices which evolved during this time and because of its shortcomings, notably its limited scope and the limited protection afforded to cargo owners, its amendment proved desirable.<sup>72</sup> In 1968, at an international conference held in Visby in Sweden, a number of amendments were made to the Rules and subsequently incorporated into the Brussels Protocol of 1968 which is now known as

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<sup>67</sup> Booyesen, *International Transactions* ..., p. 248.

<sup>68</sup> Ford, P. & Mercadal, B. In *Global Economic Co-operation, A Guide to Agreements and Organisations*, edited by B. Colas, United Nations University Press, 2nd edition, 1994, p. 256.

<sup>69</sup> Booyesen, *International Transactions* ..., p. 248. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 190. More than 70 States have enacted statutes implementing the Hague Rules.

<sup>70</sup> Wilson, *Carriage of Goods by Sea*, p. 124.

<sup>71</sup> Ramberg, *Lloyd's Maritime and Commercial Law Quarterly*, May 1993, p. 179.

<sup>72</sup> Ford & Mercadal, in *Global Economic Co-operation*, p. 256.

the Hague-Visby Rules or the Amended Rules.<sup>73</sup> The Brussels Protocols of 1968 and 1979,<sup>74</sup> rather than substantially revising the Hague Rules, effected only a few changes to the original agreement. This is an indication of the extent to which the international maritime community hesitated to change an agreement the provisions of which had found application in the domestic laws of many states and which, consequently, led to a significant unification of law relating to bills of lading, and guaranteed the stability of international trade.<sup>75</sup> Many countries, most notably the United States, are not high contracting parties to the Hague-Visby Rules. In these instances any dispute concerning a bill of lading will be governed by either the common law or the unamended Hague Rules.<sup>76</sup>

Cargo-owning countries with developing economies prompted more radical reforms.<sup>77</sup> The 1978 revision took place at the instigation of the developing countries which sought to change rules perceived as favouring the interests of traditional powers. Others regarded the revision as coming at an opportune time for the establishment of a new general code for maritime transport which would bring maritime transport into alignment with the laws of other modes of transport.<sup>78</sup> A Convention, which initiated a review of the law and practice relating to bills of lading, was drafted by UNCTAD and UNCITRAL. A new code governing aspects of the contract of carriage by sea, generally favourable to shippers and having the advantage of addressing issues largely neglected by the previous conventions, was produced.

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<sup>73</sup> This Protocol amended 5 of the original 16 articles. One of these amendments is the incorporation of a "container clause" which allows the shipper to claim the accepted monetary compensation for each package inside a container or pallet, if listed on the bill of lading, Article iv. This improves the position under the Hague Rules where the relevant provision is interpreted in such a way that a pallet or container is regarded as one package only, regardless of how many packages it actually contains.

<sup>74</sup> In 1979 a Protocol to the Visby Protocol replaced the gold franc with Special Drawing Rights (SDRs).

<sup>75</sup> Ford & Mercaudal, in *Global Economic Co-operation*, p. 277.

<sup>76</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 173.

<sup>77</sup> Wilson, *Carriage of Goods by Sea*, p. 125.

<sup>78</sup> Ford & Mercaudal, in *Global Economic Co-operation*, p. 277.

The United Nations Convention on the Carriage of Goods by Sea 1978,<sup>79</sup> known as the Hamburg Rules, was adopted in 1978 at a United Nations Conference on the Carriage of Goods by Sea held at Hamburg. It is intended that the Hamburg Rules ultimately replace the Hague-Visby Rules.<sup>80</sup> The required number of ratifications and accessions having been obtained, the Hamburg Rules came into force on 1 November 1992. However, up to the present the number of states which have ratified the Hamburg Rules only represent a small part of international trade<sup>81</sup> and it has yet to be seen whether the Rules will obtain the status of world law, as the Hague and Hague-Visby Rules, have done.<sup>82</sup>

#### **4 The application of the Hague, the Hague-Visby and the Hamburg Rules**

##### **4.1 The Hague Rules**

The Hague Rules apply to contracts for the carriage of goods by sea in relation to the loading, handling, stowage, carriage, custody and discharge of such goods.<sup>83</sup> The contracts of carriage included are limited to those covered by a bill of lading or similar document of title,<sup>84</sup> when the bills of lading are issued in one of the contracting states.<sup>85</sup>

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<sup>79</sup> Final Act of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 31 March 1978, 17 I.L.M. 608-31.

<sup>80</sup> Booyesen, *International Transactions* ..., p. 249. According to Article 31 states which become party to the Hamburg Convention must denounce the Brussels Convention of 1924 if it is a party to the latter convention. None appear to have done so yet.

<sup>81</sup> By May 1996, 25 ratifications were noted. They include: Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Czechoslovakia, Egypt, Gambia, Georgia, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, Zambia. United Nations General Assembly, UNCITRAL, *Status of Conventions*, A/CN.9/428, 21 May 1996, pp. 4 & 5. The signatories represent roughly 5 per cent of world trade, none of the major maritime states having yet ratified the convention.

<sup>82</sup> Ramberg, *Lloyd's Maritime and Commercial Law Quarterly*, May 1993, p. 182. The overall international situation in regard to contracts of carriage by sea shows some degree of complexity. While the majority of states have only implemented the Hague Rules, 26 have adopted the Visby amendments and 25 have adopted the Hamburg Rules, while there are other states which have not implemented any of the above three conventions. The application of various conflict-of-laws principles further complicates the situation. Such legal complexity does not facilitate international trade and a greater degree of uniformity in this area would be beneficial. Wilson, *Carriage of Goods by Sea*, p. 125.

<sup>83</sup> Article 2. Article 1 defines goods as: "goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

<sup>84</sup> Article 1 (b).

<sup>85</sup> Article 10.



## 4.2 The Hague-Visby Rules

The application of the Hague and Hague-Visby Rules does not differ greatly. The Hague-Visby Rules apply

only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.<sup>86</sup>

It would appear that a bill of lading, or similar document of title is fundamental to the application of the Hague-Visby Rules. There is, however, a difference of opinion as to whether or not the Rules apply when a transport document other than a bill of lading is issued in regard to the contract of carriage. While some express the view that the Rules would not apply<sup>87</sup> others believe that they would apply to non-negotiable documents or sea waybills.<sup>88</sup>

## 4.3 The Hamburg Rules

The Hamburg Rules apply to contracts of carriage by sea defined as “any contract whereby the

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<sup>86</sup> Article I (b). Article X provides that The Rules apply to bills of lading relating to the carriage of goods between ports in two different states: if the bill of lading is issued in a contracting state; or the carriage is from a port in a contracting state; or the contract contained in the bill of lading provides for their application. Hence it is necessary for the carriage to be international for the Rules to find application.

<sup>87</sup> Booyesen, *International Transactions* ..., p. 250. Wilson, *Carriage of Goods by Sea*, p. 172. Schmitthoff, *Schmitthoff's Export Trade*, p. 564 also supports the view that where no bill of lading is issued and the carriage is covered by a non-negotiable liner waybill, data freight receipt or similar transport document acknowledging only the receipt of the goods the Rules will not apply unless they are made subject to the Act. A non-negotiable bill of lading, to which the Hague-Visby Rules do apply, must be distinguished from a transport document which is a non-negotiable receipt and to which the rules will only apply if so expressly stated in the document.

<sup>88</sup> Tetley argues that the Hague Rules and the Hague-Visby Rules do apply to waybills by virtue of the whole purpose of the Rules, which is to establish both a binding standard of care for carriers and limitation of their responsibility, as well as in terms of the contents of art. 6 which makes the Rules apply to waybills by setting out the circumstances in which they do not apply. In the light of the apparent contradiction between article 2 read with article 1(b) and article 6, he believes article 6, is preponderant. An exception may exist when non-negotiable receipts are issued in the coastal trade under certain national legislation. In the United Kingdom the matter was resolved by section 1 (6) (b) of the *Carriage of Goods by Sea Act 1971* which provides that the Rules will have the full force of law in relation to “any receipt which is a non-negotiable document marked as such, if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.” Similar provisions appear in the relevant national legislation in the United States, Canada and France. Tetley states that all sea waybills currently in use throughout the world incorporate the Hague Rules or the Hague-Visby Rules into the contract of carriage. Thus it is possible for parties to make a liner waybill or data freight receipt subject to the Rules. The terms of incorporation can, however, be ambiguous, making the application of the incorporated Rules doubtful. Tetley, *Marine Cargo Claims*, p. 946.

carrier undertakes against payment of freight to carry goods by sea from one port to another”.<sup>89</sup> The crucial difference between these Rules and the Hague-Visby Rules is that the latter are concerned with “contracts of carriage covered by a bill of lading or any similar document of title”,<sup>90</sup> whereas the Hamburg Rules apply to all contracts of carriage by sea regardless of whether or not a bill of lading has been issued.<sup>91</sup> The omission of the words indicating documents of title facilitates the application of the Rules to non-documents of title, such as sea waybills and cargo and forwarder’s receipts, provided that these waybills and receipts evidence the contract of carriage.<sup>92</sup> This is a significant development in view of the modern trend towards the issue of non-negotiable documents rather than bills of lading<sup>93</sup> and will allow these Rules to enjoy wider application than the Hague-Visby Rules.<sup>94</sup> By giving transport documents, other than bills of lading, certain important legal effects not granted by the Hague and Hague-Visby Rules, the Hamburg Rules gave both shippers and carriers greater security and this serves to promote the use of such documents.<sup>95</sup>

The Hamburg Rules regulate the carriage of all goods by sea, including live animals, where the

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<sup>89</sup> Article 1. 6.

<sup>90</sup> Article 1 (b).

<sup>91</sup> Ramberg, *American Journal of Comparative Law*, vol. 27, 1979, p. 391.

<sup>92</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 195.

<sup>93</sup> Booysen, *International Transactions*, p. 250.

<sup>94</sup> Article 1. 6. Article 2 provides that the Convention applies to contracts of carriage by sea between different states if the port of loading or discharge is in a contracting state, or if the bill of lading is issued in a contracting state or provides for its application. The voyages covered are similar to those provided for in article X of the Hague and Hague-Visby Rules but it is important to note that The Hamburg Rules govern both inward and outward bills; an important factor to be taken into account by shipowners who trade with countries in which the convention is effective. It is possible that a voyage could be mandatorily subject to two conflicting conventions. Wilson states that the forum in which the dispute is litigated would determine which set of rules would apply. Wilson, *Carriage of Goods by Sea*, p. 224. In an interview with Dr Hans Carl, UNCTAD, Chief, Multimodal Transport and Technological Development Section, Services Development and Trade Efficiency Division, conducted in May 1996, the view was expressed that the law of the State in which the bill of lading is issued will be the governing law.

Provision is also made for the express incorporation of the Rules into the bill of lading or other document evidencing the contract. Furthermore, whereas the Hague and the Hague-Visby Rules only apply from tackle to tackle, the Hamburg Rules operate throughout the entire period “during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge,” article 4. 1.

<sup>95</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 134.

goods are consolidated in a container, pallet or similar article of transport provided by the shipper.<sup>96</sup> The goods may be carried on deck,<sup>97</sup> and must be carried subject to a contract of carriage by sea, which may include carriage by some other means.<sup>98</sup> Where some form of multi-modal carriage is envisaged the Rules will apply only to the sea leg.<sup>99</sup> The Rules provide that there is a single “carrier” who is liable for the whole operation, whether or not he is also the “actual carrier” to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier.<sup>100</sup>

The Hamburg Rules represent the final step in the transformation of the original Hague Rules from a model bill of lading to a comprehensive code covering all aspects of the contract of carriage. A number of academic writers support the adoption of the Hamburg Rules, believing that the solution of regulating all contracts of carriage by sea is a good one and should be adopted<sup>101</sup> and that they are “particularly well equipped to achieve legal uniformity”.<sup>102</sup>

#### 4.4 National laws

##### 4.4.1 English law

In English law bills of lading and contracts of bailment were governed by the Bills of Lading Act 1855 and The Factors Act 1823.<sup>103</sup> The carriage of goods subject to bills of lading became internationally regulated by the Hague Rules as amended by the Visby Protocol of 1968. The Hague Rules were incorporated into the Carriage of Goods by Sea Act 1924, their operation

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<sup>96</sup> Article 1-5.

<sup>97</sup> Article 9.

<sup>98</sup> Articles 1-6.

<sup>99</sup> Wilson, *Carriage of Goods by Sea*, p. 209. This approach differs from that of the Hague and the Hague-Visby Rules, which are only concerned with the unimodal carriage of goods by sea and do not anticipate that the carriage of goods by sea may constitute only a part of a multimodal transport contract.

<sup>100</sup> Articles 1. 1 and 1. 2. Generally, the “carrier” is a forwarding agent, but a sea carrier could also take this responsibility. Todd, P. *Cases and Materials on Bills of Lading*, BSP Professional Books, 1987, p. 344.

<sup>101</sup> Tetley, *Marine Cargo Claims*, p. 1001.

<sup>102</sup> Collins, *Tulane Law Review*, vol. 60, 1985, p. 195.

<sup>103</sup> Knauth, *Ocean Bills of Lading*, p. 115.

being restricted to bills of lading issued in respect of outward voyages from the United Kingdom.<sup>104</sup> The Hague-Visby Rules are attached as a schedule to the Carriage of Goods by Sea Act 1971 and became effective in the United Kingdom on 23rd June 1977.<sup>105</sup> On 16th September 1992 the Carriage of Goods by Sea Act 1992 came into force; it governs all contracts of carriage concluded on or after that date. The Act repeals the Bills of Lading Act 1855 and the new provisions, in addition to bills of lading, cover sea waybills and ship's delivery orders.<sup>106</sup>

#### 4.4.2 The United States law

The Harter Act of 1893 established the liability of the common carrier to the shipper when the goods were transported under a uniform bill of lading. It applied to both foreign and domestic commerce in the United States. The Northern States began enacting a Uniform Bills of Lading Act in 1907 but the Gulf States did not follow their example. Congress intervened and the Federal Bills of Lading Act, which is known as the Pomerene Act and is still in force today,<sup>107</sup> was passed in 1916 to govern bills of lading in both foreign and interstate trade.<sup>108</sup> Although the Harter Act was a prime source of the Hague Rules, the Carriage of Goods by Sea Act (COGSA), an implementing statute bringing the American Law into line with the convention, was only enacted on 16 April 1936.<sup>109</sup> This Act did not fully supplant or repeal the Harter Act of 1893 which still applies where a carrier does not choose the coverage of COGSA to apply to the American coastwise and inland waterways trade, as well as to the period during which the carrier has

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<sup>104</sup> Wilson, *Carriage of Goods by Sea*, p. 173.

<sup>105</sup> Wilson, *Carriage of Goods by Sea*, p. 171.

<sup>106</sup> Wilson, *Carriage of Goods by Sea*, p. 155. The Act reflects the increasing use of shipping documents other than bills of lading. The inclusion of sea waybills brings the law relating to sea carriage, and title to sue, into line with *The Convention for the Unification of Certain Rules Relating to International Transportation by Air*, known as the Warsaw Convention, signed at Warsaw, 12 October 1929 and the *Convention on the Contract for the International Carriage of Goods by Road*, the CMR, of 1956 (the French title is the *Convention Relative au Contrat de Transport International de Marchandises par Route*) (399 UNTS 189) and the *International Convention Concerning the International Transport by Rail*, the COTIF/CIM, of 9 May 1980 (the French title is the *Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer*). Pople, J. Bills of Lading. *P&I International*, April 1996, p. 85.

<sup>107</sup> Gilmore & Black, *The Law of Admiralty*, p. 95.

<sup>108</sup> Knauth, *Ocean Bills of Lading*, p. 115.

<sup>109</sup> Kozolchik, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 186.

custody of the goods before loading onto the ship and after discharge.<sup>110</sup> The United States has not ratified the Hague-Visby Rules<sup>111</sup> or the Hamburg Rules.

#### 4.4.3 South African law

The Hague Rules were first given effect in South African law by chapter VIII of the Merchant Shipping Act 57 of 1951. These provisions have now been replaced by the Hague-Visby Rules, which find application through the Carriage of Goods by Sea Act 1 of 1986 to which the Rules are attached as a schedule. The Admiralty Jurisdiction Regulation Act 105 of 1983 establishes which South African Court will be competent to adjudicate questions concerning the carriage of goods by sea.<sup>112</sup> The law applied by a South African Court exercising its admiralty jurisdiction on matters relating to the carriage of goods by sea and bills of lading is English Law,<sup>113</sup> specifically English Law as at 1 November 1983, which is the date on which the Act came into force.<sup>114</sup> The English Bills of Lading Act 1855 would have to be applied by a South African Court exercising its admiralty jurisdiction in a dispute relating to bills of lading, even if the dispute is between parties who have no connection with England. The English Carriage of Goods by Sea Act 1971 adopting the Hague-Visby Rules differs in some respects from its South African counterpart but it will be applicable in so far as it is not in conflict with South African legislation. The Bills of Lading Act 1855, which no longer applies in English law, will still find application in South Africa. This situation will prevail until the South African law has been amended.<sup>115</sup>

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<sup>110</sup> Kendall & Buckley, *The Business of Shipping*, p. 230.

<sup>111</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 173. Sturley, M. F. *Benedict on Admiralty*, Matthew Bender, 1995, Chapter II paragraph 17 predicts that the United States may soon have a new COGSA comprising Visby and Hamburg elements together with new material that might pave the way for an international commercial compromise.

<sup>112</sup> Van Niekerk, J. P. An Introduction to the Carriage of Goods by Sea. *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 82.

<sup>113</sup> Section 6 (1).

<sup>114</sup> *Owner of MV Aegean Sun v Caisse Generale de Perequation Aif de Prix BP* 1982 (4) SA 625 (C); *Alahaji Mai Deribe & Sons v The Ship Golden Togo* 1986 (1) SA 505 (N). The provision in section 6 (1) providing for the application of English law, does not derogate from the provisions of any applicable South African law (section 6 (2)), nor will it supersede any agreement concerning the system of law to be applied to a dispute (section 6 (5)).

<sup>115</sup> Van Niekerk, *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 83. From a conversation with Prof. H. Staniland, Director of the Institute of Maritime Law at the University of Natal, in May 1996, it appears that a new Act is currently under discussion by the Maritime Law Association. It is anticipated that this Act will repeal the application of the Bills of Lading Act 1855 in South African law and will include provisions covering, *inter alia*, the bill of lading, the sea waybill and the electronic production of these documents.

## CHAPTER 3

### THE LEGAL NATURE AND ROLE OF THE BILL OF LADING

#### 1 The definition of a bill of lading

The Hague and Hague-Visby Rules do not define a bill of lading even though the liability incurred under these Rules depends upon its issuance. They do, however, specify requirements as to the contents and evidentiary effect of the bill of lading.<sup>1</sup> The legal nature of the bill of lading, and the role it plays in international commerce, has been clearly demarcated in case law. It has long been accepted that the bill of lading is, firstly, a formal receipt provided by the shipowner in which he acknowledges that goods of the stated type, quantity and condition have been shipped, or received for shipment, to a stated destination. Secondly, it is a memorandum of the contract of carriage which states the terms of the contract concluded prior to the signing of the bill of lading. Thirdly, it is a document of title to the goods.<sup>2</sup> These three traditional legal functions of the bill of lading are evident in the definition of a bill of lading given in the Hamburg Rules. The Hamburg Rules define a bill of lading as:

a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.<sup>3</sup>

#### 2 The bill of lading as a receipt

The original function of a bill of lading was that of a receipt; it constituted an admission by the ship's master, on behalf of his employer, that the consignor's goods had been placed on board the

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<sup>1</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 99.

<sup>2</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 561, Ivamy, *Payne and Ivamy's ...*, p. 62. Astle, *The Hamburg Rules*, p. 13. Wilson, *Carriage of Goods by Sea*, pp. 126-158. The character of the bill of lading as a document of title was recognised as early as 1794 in *Lickbarrow v Mason*, (1787) 2 TR 63; *London & South African Bank v Donald Currie & Co* (1875) 5 Buch 29; *North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd* 1932 NPD 1; *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A). *Intercontinental Export Co (Pty) Ltd v MV Dien Danielsen* 1983 (4) 275 (N).

<sup>3</sup> Article 1.

ship for transport to the agreed destination.<sup>4</sup> Even when used in this capacity the bill of lading would have included statements as to the quantity and description of the goods shipped and the condition in which they were received by the carrier. Where documents are received in exchange for goods, such representations as to the nature of the goods received by the issuer of the document have important commercial effects. Where goods are short delivered or damaged on discharge, the statements on the bill of lading constitute the basis of the receiver's cargo claim.<sup>5</sup> In addition, if the goods had been sold subject to CIF terms it would be required that payment be made against the delivery of the documents and if the description of the goods in the bill of lading did not correspond to that in the sales invoice, the buyer would be able to reject the documents and to refuse payment.<sup>6</sup>

It is important to the shipper and consignee that the carrier makes accurate and unambiguous statements as to the quantity and condition of the goods shipped. While it is usual for the shipper himself to enter the details of the goods shipped on the bill of lading, the carrier's agent would be able to insert clauses such as "weight, quantity and condition unknown" or "shipper's count" before signing the bill and so protecting his principal and compromising the value of the bill of lading.<sup>7</sup> The Hague, Hague-Visby and Hamburg Rules contain provisions specifying the contents, procedures, rights and liabilities of parties in relation to bills of lading to prevent abuse by any of the parties.

## **2.1 The Hague, Hague-Visby and Hamburg Rules**

The Hague and Hague-Visby Rules state that the bill of lading is issued by the carrier, his master or agent, on the demand of the shipper, once he has received the goods and taken them in his charge.<sup>8</sup> It is provided that, among other things, the bill of lading show the leading marks

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<sup>4</sup> Grime, *Shipping Law*, p. 121. *Roos v Rennie* (1859) 3 S 253; *Standard Bank of SA Ltd v Efroiken & Newman* 1924 AD 171; *Hughes & Rogers v White Ryan & Co* (1900) 17 SC 236.

<sup>5</sup> Wilson, *Carriage of Goods by Sea*, p. 126.

<sup>6</sup> Wilson, *Carriage of Goods by Sea*, p 127. See 6. 6. of chapter 5.

<sup>7</sup> Wilson, *Carriage of Goods by Sea*, p. 127. The 1993 Revision of the UCP in article 31(ii) provides that, unless otherwise stipulated in the credit, transport documents bearing such clauses will be accepted by banks.

<sup>8</sup> Article III 3 Hague & Hague-Visby Rules.

necessary to identify the goods, the number of packages or pieces, or their quantity or weight, and the apparent order and condition of the goods.<sup>9</sup> While the carrier, his master or agent is obliged to issue a bill of lading, if specifically requested to do so by the shipper, he is not obliged to show on the bill of lading any marks, number, quantity or weight which he has reasonable grounds to suspect do not accurately represent the goods he has actually received or which he has no reasonable means of checking.<sup>10</sup> In return, the shipper is deemed to have guaranteed to the carrier the accuracy of the information he has provided for incorporation into the bill and is required to indemnify the carrier against any loss incurred as a result of inaccuracies in the particulars provided.<sup>11</sup>

The provisions of the Hamburg Rules covering the issue and receipt function of the bill of lading largely follow the pattern established by the Hague and Hague-Visby Rules but there are important variations in matter of detail.<sup>12</sup> The position of shippers and consignees is strengthened by more detailed and stricter provisions.<sup>13</sup> In the Hamburg Rules, like the Hague and Hague-Visby Rules, it is provided that a bill of lading must be issued upon the shipper's demand.<sup>14</sup> It is also required that the apparent condition of the goods be acknowledged.<sup>15</sup> As in the Hague and Hague-Visby Rules, the shipper is required to indemnify the carrier against any loss resulting from inaccuracies in the particulars he has supplied.<sup>16</sup> While the carrier is excused from acknowledging particulars which he knows or has reasonable grounds for suspecting are inaccurate, or which he has no reasonable means of checking, the Hamburg Rules require that the carrier "insert in the bill

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<sup>9</sup> Article III 3 (a), (b), & (c) Hague & Hague-Visby Rules.

<sup>10</sup> Article III 3 Hague & Hague-Visby Rules.

<sup>11</sup> Article III 5 Hague & Hague-Visby Rules.

<sup>12</sup> Wilson, *Carriage of Goods by Sea*, p. 218.

<sup>13</sup> In Articles 15 to 17. UNCTAD, *The Economic and Commercial Implications ...*, p. 125.

<sup>14</sup> Article 14. 1. Among the information required to be stated in the bill of lading is the general nature of the goods, the leading marks necessary for their identification, if applicable an express statement as to the dangerous nature of the goods, the number of packages or pieces, and their weight or quantity otherwise expressed, all such particulars as furnished by the shipper. Article 15. 1 (a).

<sup>15</sup> Article 15. 1 (b).

<sup>16</sup> Article 17. 1.



of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking”.<sup>17</sup>

### 2.1.1 The bill of lading as *prima facie* evidence of the receipt of goods

According to the Hague Rules and the common law, particulars in the bill of lading are *prima facie* evidence of the receipt of the goods by the carrier as described in the bill of lading. A carrier who is unable to deliver the quantity of goods stated in the bill of lading or who delivers damaged goods, stated to have been shipped in good condition, will not be liable to the shipper if he is able to prove that he only received the smaller quantity of goods, which he has delivered, or that the goods were already damaged at the time of shipment.<sup>18</sup> This only applies between the carrier and the shipper. As regards an endorsee of the bill, the carrier may be estopped from denying the truth of the statements in the bill of lading.<sup>19</sup>

An important contribution made by the Visby Amendments to the merchantability of the bill of lading concerned the giving of conclusive effect to the particulars in the bill of lading once it had been transferred to a third party acting in good faith.<sup>20</sup> In terms of the Hague-Visby Rules the statements in the bill of lading would constitute *prima facie* evidence of the receipt by the carrier of the goods as described, and conclusive evidence against him once the bill had been transferred to a third party acting in good faith.<sup>21</sup> Regarding the situation between the carrier and the shipper, the position is the same as that under the common law and Hague Rules. The position under the Hague-Visby Rules now differs in relation to the third party transferee and evidence will not be

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<sup>17</sup> Article 16. 1.

<sup>18</sup> Benjamin, *Benjamin's Sale of Goods*, p. 896. *Plywoods Ltd v Thesen's Steamship Co Ltd* 1955 (4) SA 491 (C).

<sup>19</sup> Benjamin, *Benjamin's Sale of Goods*, p. 895. The carrier will only be liable on the basis of such an estoppel if the statements were made either by himself or by someone with his authority. Where the master of a ship, without authority, signs a bill of lading for goods which have not been loaded on board, as was the case in *Grant v Norway* (1581) 10 CB 665 the carrier will not be liable either in contract to the shipper or by estoppel to an endorsee. In English Law section 3 of the Bills of Lading Act 1855 (UK), 18 & 19 Vict, c 111, altered the common law position by making the person who signed the bill of lading personally liable to the consignees or endorsees for value, for the accuracy of statements in the bill of lading. Marasinghe, *Contract of Sale ...*, p. 280.

<sup>20</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 193. Article III 4.

<sup>21</sup> Wilson, *Carriage of Goods by Sea*, p. 128.

admissible against such a party acting in good faith.

Under the Hamburg Rules the particulars in the bill of lading constitute *prima facie* evidence against the carrier of the taking over or, where a “shipped” bill of lading is issued, the loading by the carrier of the goods as described in the bill of lading. They will only become conclusive in favour of a *bona fide* transferee of the bill if he has acted in reliance on the description of the goods in the bill of lading.<sup>22</sup>

### 2.1.2 Conclusive evidence clauses

If a bill of lading contains a clause purporting that the statements as to the quantity and condition of goods shipped “shall be conclusive evidence” against the carrier of the facts stated, no evidence rebutting such statements will be permitted even if a claim is brought by the shipper and the carrier can, for example, prove that no goods were shipped.<sup>23</sup> Such a statement binds both parties, neither of whom can go back on the statements in the bill, except where fraud can be proved.<sup>24</sup> Conclusive evidence clauses are, however, not frequently used.

## 2.2 Bills of lading signed without authority

Where a bill of lading has been signed without authority and no goods have been shipped, the view has been expressed that the carrier may still be able to escape liability. This is based on the argument that the Hague-Visby Rules only make the bill of lading evidence of the receipt of the goods by the carrier “who enters into a contract of carriage with the shipper”, and that the mere issue of a bill of lading where no goods are shipped does not create a contract of carriage.<sup>25</sup> In an opposing opinion the amendment of the Hague-Visby Rules giving conclusive effect to a bill of lading transferred to a third party acting in good faith has overcome such problems as those

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<sup>22</sup> Article 16.3 (a).

<sup>23</sup> Wilson, *Carriage of Goods by Sea*, p. 128.

<sup>24</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p.182. *Lishman v Christie & Co* (1887) 19 QBD 333.

<sup>25</sup> Benjamin, *Benjamin's Sale of Goods*, p. 897. In this case the common law rule that the master has no authority to sign a bill of lading for goods which have not been loaded on board and hence that the master will be personally responsible in terms of section 3 of the Bills of Lading Act 1855 will still apply.

typified in *Grant v Norway*,<sup>26</sup> where the master who signed a bill of lading where no goods were received, did so *ultra vires* or without authority. It has been contended that this amendment did away with the *ultra vires* doctrine, thereby increasing the certainty of the bill of lading,<sup>27</sup> in that the carrier now becomes liable to the third party transferee acting in good faith. Support exists for the opinion that the principle in *Grant v Norway*<sup>28</sup> is excluded where the Hague-Visby Rules apply.<sup>29</sup>

### 2.3 Received for shipment bills

The intention is that the bill of lading should indicate what goods have been shipped. It is common practice that a “received for shipment” bill is issued when the goods arrive at the port before they are loaded on board.<sup>30</sup> A “received” bill of lading traditionally has no value as a receipt since it does not declare that the goods have passed the ship’s rail, which is a crucial moment in establishing the interests of the buyer and the seller in international trade where sea transport documents are used.<sup>31</sup> Under both CIF and FOB contracts “shipped” bills of lading are required to constitute a valid tender.<sup>32</sup> The new transport articles in the 1993 Revision of the UCP which relate to sea transport documents still require the tender of “shipped” bills of lading, sea waybills and charter parties.<sup>33</sup>

The reason for the failure to recognise a “received” for shipment bill is that a bill of lading is only acceptable to banks and commerce once the goods are loaded on board and the bill indicates this

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<sup>26</sup> 1851 10 CB 665.

<sup>27</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 194.

<sup>28</sup> 1851 10 CB 665.

<sup>29</sup> Todd, *Modern Bills of Lading*, p. 208. Wilson, *Carriage of Goods by Sea*, p. 132. *The Nea Tyhi* [1982] 1 Lloyd’s Rep 606.

<sup>30</sup> In the absence of express agreement between the parties a “received for shipment” bill is only equivalent to a “shipped” bill of lading if it is usual in a particular trade. If there is no contractual term and no contrary trade practice the buyer is entitled to a “shipped” bill.

<sup>31</sup> Grime, *Shipping Law*, p. 150. Schmitthoff, *Schmitthoff’s Export Trade*, p. 37.

<sup>32</sup> *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443; *Yelo v Machado & Co Ltd* [1952] 1 Lloyd’s Rep 183.

<sup>33</sup> Articles 23 a (ii), 24 a (ii) and 25 a (iv).

fact.<sup>34</sup> An “on board” statement creates a direct link between the goods and the vessel which facilitates the holder’s recovery of the goods or insurance proceeds as well as the arrest of the vessel in case of loss or damage to cargo.<sup>35</sup> The Hague Rules,<sup>36</sup> the Hague-Visby Rules<sup>37</sup> and the Hamburg Rules<sup>38</sup> make provision for a “received for shipment” bill to be converted into a “shipped bill” when the goods are loaded on board ship, so making them credible receipts which are acceptable to banks financing international sales contracts on the basis of the bill of lading.<sup>39</sup>

#### **2.4 Receipt as to leading marks**

The master can refuse to record leading marks on the bill of lading if the goods or their “cases or coverings” are not marked in such a way that they will “ordinarily remain legible until the end of the voyage”.<sup>40</sup> If inaccurate information relating to the marks is included in the bill of lading and an endorsee for value in consequence lodges a claim against the carrier, the carrier, although liable to the endorsee, has a remedy against the shipper.<sup>41</sup> The shipowner is only under an obligation to acknowledge any leading marks attached to the goods which are essential to the identity of the goods.<sup>42</sup>

#### **2.5 Receipt as to weight and quantity**

The shipper can demand that the carrier issue a bill of lading which shows “either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper”.<sup>43</sup> The carrier is not obliged to issue a bill or acknowledge the quantity of cargo shipped,

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<sup>34</sup> Tetley, *Marine Cargo Claims*, p. 929.

<sup>35</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April, 1992, p. 177.

<sup>36</sup> Article III 7.

<sup>37</sup> Article III 7.

<sup>38</sup> Article 15. 2.

<sup>39</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 163. Article 23 a ii UCP.

<sup>40</sup> Article III 3 (a) Hague-Visby Rules.

<sup>41</sup> Ivamy, *Payne and Ivamy's Carriage ...*, p. 71.

<sup>42</sup> Article III 3 (a) Hague-Visby Rules.

<sup>43</sup> Article III 3 (b) Hague-Visby Rules. *Oricon v Intergraan* [1967] 2 Lloyd's Rep 82.

unless so requested by the shipper. The master is only bound to show either the number of packages or pieces or the weight, he is not obliged to show both. If the number is stated, the phrase "weight unknown" may correctly be inserted, and will have full effect.<sup>44</sup> The inclusion in the bill of lading of a clause stating "weight, quantity ... unknown" basically destroys its value as a receipt.<sup>45</sup> It remains evident that some goods have been shipped which amount to the figures mentioned by the shipper in the bill of lading, but in respect of which the carrier makes no admission as to their quantity or weight.<sup>46</sup> As a result the burden of proving what was actually shipped is shifted back to the shipper.<sup>47</sup>

## 2.6 Receipt as to condition

If the bill of lading contains an unqualified statement that goods have been received in apparent good order and condition it is a clean bill.<sup>48</sup> The statement refers only to their apparent condition in so far as the carrier or his agent is able to determine by a reasonable outward inspection,<sup>49</sup> since he will have no means of judging their internal condition.<sup>50</sup> Where the goods have been described in the bill as having been "shipped in good order and condition" between the consignor and the carrier the bill does not provide conclusive evidence against the carrier of the condition of the goods. The consignor, although not having to prove that the goods were not shipped in a damaged condition, will have to establish that the damage that did occur was the result of a cause for which the carrier is liable.<sup>51</sup> The shipowner's agent will note on the bill of lading any damage observed and will be obliged to deliver the goods at their destination in the same condition in

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<sup>44</sup> *Ivamy, Payne and Ivamy's Carriage ...*, p. 66. *Pendle & Rivet v Ellerman Lines* (1927) 33 Com Cas 70. Courts in the United States have taken the view that while carriers are entitled to acknowledge either the quantity or weight of the cargo shipped if they acknowledge both they should be liable for both, *Spanish American Skin Co v MS Ferngulf* [1957] AMC 611.

<sup>45</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 180.

<sup>46</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 180.

<sup>47</sup> *New Chinese Antimony Company v Ocean S.S. Co* [1917] 2 KB 664.

<sup>48</sup> *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542.

<sup>49</sup> Wilson, *Carriage of Goods by Sea*, p. 132. *The Peter der Grosse* (1875) 1 PD 414.

<sup>50</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 180.

<sup>51</sup> *Arndt & Cohen v DA Dampschiffs Gesellschaft* (1906) 23 SC 324.

which he received them, subject to contractual exceptions.<sup>52</sup> If the statement as to condition is qualified there is unlikely to be any room for dispute. If the buyer or the bank financing the sale was entitled to expect a “clean bill”,<sup>53</sup> statements on the bill qualifying the quantity, description or condition of the goods would allow rejection of the documents and the withholding of payment. Furthermore, such statements could affect the negotiability of the bill of lading in the possession of the consignee.<sup>54</sup>

### 2.6.1 Indemnities

In certain instances, particularly where the shipment is being financed by a banker’s documentary credit which requires the shipper to produce a “clean bill of lading”, the shipper will be anxious to avoid any endorsement on the bill of lading.<sup>55</sup> In such circumstances the carrier may be induced to ignore defects in the condition of the goods in exchange for an express promise of indemnity from the shipper, in terms of which the shipper undertakes to compensate the shipowner for any losses suffered as a result of an action brought by the recipient of the goods. The protection afforded the shipowner by such an indemnity is illusory and will not provide a defence against a claim brought by a third party on the clean bill, nor is it enforceable against the shipper as its object is to defraud the consignee or his bank.<sup>56</sup>

In international trade the use of letters of indemnity is not uncommon and on condition that no fraud is committed there would be no legal obstacle to their enforcement.<sup>57</sup> Such letters of indemnity may even be of value should there be a *bona fide* dispute as to the condition or packing of the goods. A letter of indemnity may also be of value where the carrier receives goods in circumstances where he has no reasonable opportunity to inspect them. It is only when the carrier

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<sup>52</sup> Wilson, *Carriage of Goods by Sea*, p. 132.

<sup>53</sup> *British Imex Industries Ltd v Midlands Bank Ltd* [1958] 1 QB 542. See 6. 4 in chapter 6.

<sup>54</sup> Wilson, *Carriage of Goods by Sea*, p. 127.

<sup>55</sup> Wilson, *Carriage of Goods by Sea*, p. 133.

<sup>56</sup> Staniland, H. Can an Indemnity Issued in Consideration for a Misrepresentation in a Bill of Lading be Enforced in the Admiralty Court? *South African Law Journal*, vol. 105, no. 2, May 1988, p. 322. Wilson, *Carriage of Goods by Sea*, p. 136. *Brown, Jenkinson & Co Ltd v Percy Dalton* [1957] 2 QB 621.

<sup>57</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 594. Wilson, *Carriage of Goods by Sea*, p. 136.

is cognisant of the falsity of the declaration that the letter of indemnity would be ineffective.<sup>58</sup>

## 2.7 Receipt as to quality

In a number of cases “quality” has been interpreted as referring to the inherent character of the cargo whereas the word “condition” is regarded as relating to the outward appearance.<sup>59</sup> Generally, the master does not bind the shipowners by a description of the quality of the goods in the bill of lading.<sup>60</sup> The master of the ship is expected to notice the condition but not the quality of the goods.<sup>61</sup>

## 2.8 Mate’s receipts

A shipper, after delivering goods to a shipowner, receives a document called a mate’s receipt<sup>62</sup> or, in the United States, a dock receipt.<sup>63</sup> When non-containerised goods are at the docks for loading on board ship a tally clerk inspects them and notes the relevant information.<sup>64</sup> Once loading is completed, the officer in charge of loading signs the mate’s receipt. Any qualifications contained on the mate’s receipt will later be entered on the bill of lading, so determining whether it will be a clean, claused or “dirty” bill.<sup>65</sup> It is the master’s duty to deliver the signed bills of lading to the shipper in exchange for the mate’s receipt.<sup>66</sup>

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<sup>58</sup> Wilson, *Carriage of Goods by Sea*, p. 136.

<sup>59</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 181.

<sup>60</sup> Ivamy, *Payne and Ivamy's Carriage ...*, p. 71.

<sup>61</sup> Marasinghe, *Contract of Sale ...*, p. 282. *Compania Vascongada v Churchill* [1906] 1 KB 237.

<sup>62</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 541.

<sup>63</sup> Kendall & Buckley, *The Business of Shipping*, p. 234.

<sup>64</sup> Their date of loading, identification marks, as well as details of the number of packages, their weight or measurement, and any defect or comment about the condition in which the goods are received. *Harris & Son Ltd v China Mutual Steam Navigation Co Ltd* [1959] 2 Lloyd's Rep 500.

<sup>65</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 542.

<sup>66</sup> Sassoon & Merren, *CIF and FOB Contracts ...*, p. 108. The bill of lading is issued “on shipment.” In *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36 it was stated that “on shipment” is “an expression of some latitude” which does not necessarily require that the bill of lading be signed “contemporaneously with the actual placing of the goods on board.” They may be signed after loading is completed, and in some cases only after the ship has sailed.

The mate's receipt is an acknowledgement that the shipowner has received the goods in the stated condition and that they are in his possession and at his risk.<sup>67</sup> It constitutes *prima facie* evidence of ownership of the goods and the shipowner may assume that the holder of the receipt or the person named in it is the owner of the goods and is entitled to receive the bill of lading in exchange for the mate's receipt.<sup>68</sup> The mate's receipt has no further legal relevance.<sup>69</sup> It is not a document of title and its transfer does not pass possession of the goods. Consequently, the shipowner is within his rights if he issues a bill of lading without insisting on the return of the mate's receipt.<sup>70</sup> Generally, a carrier who provides a bill of lading without requiring the mate's receipt will protect himself by taking a letter of indemnity from the person to whom the bill is issued.<sup>71</sup> In exceptional circumstances a local custom to the effect that a mate's receipt may be a document of title could exist, but if the words "not negotiable" were added its character as a document of title would be destroyed.<sup>72</sup> In the more modern practice in which the shipper delivers his goods to a forwarding agent who arranges for shipment, mate's receipts may be dispensed with.<sup>73</sup>

### 3 The bill of lading as evidence of the contract of carriage

The backs of most standard bill of lading forms show printed details of the contractual terms or contain a reference to the "long form" bill in which they appear in full. As far as the shipper is concerned it is accepted that these terms do not constitute the contract of carriage but only

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<sup>67</sup> Todd, *Modern Bills of Lading*, p. 13. Schmitthoff, *Schmitthoff's Export Trade*, p. 542.

<sup>68</sup> Purvis, R. N. & Darvas, R. *The Law and Practice of Commercial Letters of Credit, Shipping Documents, and Termination of Disputes in International Trade*, Butterworths, 1975, p.78. Schmitthoff, *Schmitthoff's Export Trade*, p. 542. *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429.

<sup>69</sup> Todd, *Modern Bills of Lading*, p. 13.

<sup>70</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 542. Gutteridge & Megrah, *The Law of Banker's ...*, p. 171.

<sup>71</sup> Sassoon & Merren, *CIF and FOB Contracts ...*, p. 108.

<sup>72</sup> *Kum v Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep 439.

<sup>73</sup> Sassoon & Merren, *CIF and FOB Contracts ...*, p. 108. *Heskell v Continental Express Ltd* [1950] 1 All ER 1033.



provide evidence of it.<sup>74</sup> Generally, the actual contract of carriage is concluded some time before the bill is issued.<sup>75</sup> It may be made when the goods are shipped, when they are received and accepted for shipment or by previous agreement between the shipper and the carrier, and the bill of lading is generally only issued after the ship has sailed.<sup>76</sup> The bill of lading will, in most cases, be subject to the shipowner's standard bill of lading terms.<sup>77</sup> Other terms can be inferred from, among other things, the carrier's sailing announcements and negotiations with loading brokers before the shipping of the goods.<sup>78</sup> Because the actual contract of carriage is made some time before the issue of the bill of lading, should the goods be lost or damaged before the bill of lading is issued, the shipper will nonetheless have a remedy for breach of contract founded on the terms of the existing contract of carriage.<sup>79</sup> It is necessary that these terms be in force from the inception of the contract, otherwise the bill of lading would not be evidence of the contract but a variation of it.<sup>80</sup>

The bill of lading is technically a statement by the carrier of his view of the terms of the contract of carriage.<sup>81</sup> If, in the opinion of the shipper, the printed terms of the bill of lading issued do not comply with those of the earlier oral agreement, he may submit evidence to establish the exact terms of the agreement, as by accepting the bill of lading he has not necessarily bound himself to all its stipulations.<sup>82</sup>

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<sup>74</sup> Wilson, *Carriage of Goods by Sea*, p. 139. *Crooks v Allen* (1879) 5 QBD 38; *Sewell v Burdick* (1884) 10 App Cas 74; *North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd* 1932 NLR 1; *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A).

<sup>75</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 161. *The Ardennes* [1951] 1 KB 55.

<sup>76</sup> Benjamin, *Benjamin's Sale of Goods*, p. 898.

<sup>77</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 161. Schmitthoff, *Schmitthoff's Export Trade*, p. 346.

<sup>78</sup> Wilson, *Carriage of Goods by Sea*, p. 139.

<sup>79</sup> Wilson, *Carriage of Goods by Sea*, p. 139.

<sup>80</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 187. Todd, *Modern Bills of Lading*, p. 14. *Pyrene v Scindia Navigation Co* [1956] 2 QB 402.

<sup>81</sup> Todd, *Modern Bills of Lading*, p. 90.

<sup>82</sup> Wilson, *Carriage of Goods by Sea*, p. 140. *Crooks v Allen* (1879) 5 QBD 38. In *The Ardennes* [1951] 1 KB 55 oral evidence was admissible to establish the original terms of the contract, leaving no doubt as to the status of the bill of lading as constituting evidence of the terms of the contract of carriage.

In the hands of the shipper the bill of lading will provide *prima facie* evidence of the terms of the contract of carriage, although challenging its accuracy may be a difficult burden to discharge.<sup>83</sup> However, once the bill is transferred to a third party it becomes the contract between the shipowner and transferee of the bill and its contents cannot be challenged<sup>84</sup> as it becomes conclusive evidence of the terms of the contract of carriage.<sup>85</sup>

A bill of lading differs from a charter party.<sup>86</sup> Where the shipper is also the charterer of the vessel, the bill of lading functions as a receipt and document of title, whereas the charter party contains the terms of the contract of carriage. Once the bill of lading is endorsed to a third party it will become the contract of carriage between the endorsee and the carrier and its terms will prevail over those of the charter party, unless the charter party terms have been incorporated by reference into the bill of lading.<sup>87</sup>

#### 4 The bill of lading as a document of title

It is the role of the bill of lading as a document of title that enables it to play the central part it does in international trade transactions.<sup>88</sup> While the bill of lading is the most valuable and flexible of all contractual documents relating to the carriage of goods by sea,<sup>89</sup> there appears to be little agreement between the leading authorities as to an exact definition of a document of title.<sup>90</sup> Attempting to find unanimity on such a definition is likely to prove both unsuccessful and unnecessary<sup>91</sup> in view of the fact that commercial lawyers have coped admirably without one for

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<sup>83</sup> Wilson, *Carriage of Goods by Sea*, p. 140.

<sup>84</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 161. *Leduc v Ward* (1888) 20 QBD 475.

<sup>85</sup> Wilson, *Carriage of Goods by Sea*, p. 141. Benjamin, *Benjamin's Sale of Goods*, p. 899.

<sup>86</sup> Todd, *Modern Bills of Lading*, p. 92.

<sup>87</sup> Benjamin, *Benjamin's Sale of Goods*, p. 900.

<sup>88</sup> Debattista, *Sale of Goods ...*, p. 15.

<sup>89</sup> Grime, *Shipping Law*, p. 122.

<sup>90</sup> Benjamin, *Benjamin's Sale of Goods*, p. 891.

<sup>91</sup> Debattista, *Sale of Goods ...*, p. 17.

so many years. However, the resolution of a number of practical problems depends on whether or not a particular shipping document is a document of title and agreement as to which documents possess this “magical quality” must be reached despite the difficulty of analysing the exact constituents of that quality.<sup>92</sup> The essence of the bill of lading as a document of title can be found in an analysis of the important attributes which allow it to play a part in the sale of goods in transit and the raising of financial credit.

#### 4.1 Delivery of the goods

One of the functions of the bill of lading as a document of title is to allow the holder of the bill to claim delivery of the goods from the shipowner or carrier at the port of destination.<sup>93</sup> The bill of lading represents the consignment of goods and entitles the holder to constructive possession of the goods.<sup>94</sup> It is a unique characteristic of the bill of lading that delivery of the goods is only to be made against the surrender of the document.<sup>95</sup> This serves to protect the holder of the bill, since in terms of the contract of carriage the carrier may only deliver the goods against presentation of the bill of lading. Once he has delivered goods to the presenter of the bill of lading it also serves to discharge the carrier’s obligations under the contract of carriage.<sup>96</sup>

Delivery of the goods does involve some difficulty for the carrier in that while he is aware of the identity of the shipper he may not, particularly in cases where goods have been sold in transit, be

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<sup>92</sup> Debattista, *Sale of Goods* ..., p. 17.

<sup>93</sup> Ivamy, *Payne and Ivamy’s Carriage* ..., p. 72. Todd, *Modern Bills of Lading*, p. 1. Wilson, *Carriage of Goods by Sea*, p. 143 & 147. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 170. *Sanders v Maclean* (1883) 11 QBD 327; *Knight Ltd v Lensveld* 1923 CPD 444; *London & South African Bank v Donald Currie & Co* (1875) 5 Buch 29; *Birkbeck & Rose-Innes v Hill* 1915 CPD 687; *Hamilton Ross & Co v Donald Currie & Co* (1875) 5 Buch 20; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959(1) SA 816(W).

<sup>94</sup> Todd, *Modern Bills of Lading*, p. 3. Benjamin, *Benjamin’s Sale of Goods*, p. 902.

<sup>95</sup> Wilson, *Carriage of Goods by Sea*, p. 158. *Standard Bank of SA Ltd v Efroiken & Newman* 1924 AD 171. In the United States the Pomerene Act does not impose a duty on the carrier to take up the bill of lading. The carrier is free to rely on the consignee’s representation that he possesses the bill. If this representation is false and the carrier has made delivery, he will be liable to the shipper for conversion. This liability arises from the bill of lading contract and not the Pomerene Act. Sorkin par. 2. 10. 3. *Pere Marquette Ry v JF French Co* 254 US 538, 41 S Ct 195, 65 L Ed 391 (1921); *Tyler Refrigeration Corporation v IML Freight, Inc* 427 NE 2nd 718 (Ct of App Ind 1981).

<sup>96</sup> Gilmore & Black, *The Law of Admiralty*, p. 96. Wilson, *Carriage of Goods by Sea*, p. 158.

aware of the identity of the person entitled to claim delivery at the port of discharge.<sup>97</sup> He may incur substantial liability for misdelivery of the goods.<sup>98</sup> The carrier is only bound to deliver the goods on production of the bill and he will be liable to the holder if he wrongfully delivers to anyone else.<sup>99</sup> The carrier's problems are exacerbated by the fact that bills of lading are traditionally issued in sets of three to six originals, each of which is a document of title and capable of controlling the goods,<sup>100</sup> and that delivery of the goods can be claimed by the presentation of a single original from the set.<sup>101</sup> The carrier need only receive one bill in the set and he is not expected to query the whereabouts of the other parts of the bill.<sup>102</sup>

The shipowner or carrier is not expected to inquire into the legitimacy of title of the holder of the bill. If the various parts of the bill of lading are in the hands of different persons<sup>103</sup> the shipowner may deliver the cargo to the first person presenting a bill,<sup>104</sup> on condition that he has no notice of any other claims to the goods or any knowledge of circumstances which may raise a reasonable

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<sup>97</sup> Benjamin, *Benjamin's Sale of Goods*, p. 892. Generally, the bill of lading will indicate to whom the goods are to be delivered by the manner in which the bill is drawn up, that is whether it is a bearer, order or straight consigned bill, and by the endorsements evident on the bill.

<sup>98</sup> Wilson, *Carriage of Goods by Sea*, p. 158. In common law jurisdictions the carrier will be liable in tort for conversion and, where a bill of lading is applicable, for breach of contract. In civil law jurisdictions he will be liable for breach of contract.

<sup>99</sup> Benjamin, *Benjamin's Sale of Goods*, p. 902.

<sup>100</sup> Lloyd, *Lloyd's Maritime and Commercial Law Quarterly*, 1989, p. 57. *Sanders v Maclean* (1883) 11 QBD 327.

<sup>101</sup> Wilson, *Carriage of Goods by Sea*, p. 158. *Glyn Mills Currie & Co v The East & West India Dock Co* (1882) 7 App Cas 591; *Sanders v Maclean* (1883) 11 QBD 327. A set of three bills of lading was issued. While the goods were in transit, one bill was endorsed to the bank as security for a loan. The goods arrived at their destination and were deposited in a warehouse. The consignees obtained delivery on paying the freight due and presenting the second unendorsed original bill. In an action brought by the bank, to which the first original bill had been endorsed, the House of Lords held that the warehouseman was not liable for misdelivery as his actions were *bona fide* on the presentation of the unendorsed bill, in the light of his lack of notice of the bank's claim. If the warehouseman had been aware of the bank's claim and still made delivery on the presentation of the bill, he would have acted at his peril.

<sup>102</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591. The carrier is entitled to deliver the goods against a single unendorsed original bill or against a single validly endorsed bill. Wilson, *Carriage of Goods by Sea*, p. 159.

<sup>103</sup> Unless payment is to be made under a letter of credit the various parts of the set are forwarded to the consignee by subsequent airmails. It is important that at least one part of the set shall reach him before the arrival of the goods so that he can take delivery against surrender of the bill.

<sup>104</sup> Usually, the carrier is protected by a statement in the bill that "one of which being accomplished, the other shall stand void." Goode, *Proprietary Rights and Insolvency*, p. 69. Wilson, *Carriage of Goods by Sea*, p. 159.

suspicion that the person claiming the goods is not entitled to do so.<sup>105</sup> He will only be responsible for wrongful delivery of the goods against the bill if he is aware of a defect in the title of the holder.<sup>106</sup>

While the bill of lading determines to whom the goods should be delivered, “there is nothing final or irrevocable in its nature”,<sup>107</sup> nor is there any “magic in an original bill of lading”.<sup>108</sup> It has been recognised that a substitute bill of lading can and does have the same effect as an amended original bill and does in fact supersede the original bill.<sup>109</sup> In *Numill Marketing CC v Sitra Wood Products Pte Ltd* the judge stated that he could see no reason why, in principle, delivery could not be effected by duly amended and endorsed copies of the bills of lading, provided that the shipper and the carrier are in agreement. *In casu* it was held that the original bills of lading had been superseded and proper symbolic delivery had been made, effecting a transfer of ownership in the goods, when the replacement original and the amended copies of the bill of lading had been handed to the new purchasers.<sup>110</sup>

If the carrier delivers the goods to a person without the presentation of the bill of lading, he does so at his own peril as this may amount to a fundamental breach of the contract of carriage<sup>111</sup> and he could lose the protection of all exceptions and limitation of liability clauses.<sup>112</sup> He may only

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<sup>105</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 544.

<sup>106</sup> *Glyn Mills Currie & Co v The East & West India Dock Co* (1882) 7 App Cas 591.

<sup>107</sup> *Mitchel v Ede* (1840) 11 A&E 888.

<sup>108</sup> *Numill Marketing CC v Sitra Wood Products Pte Ltd* 1994 (3) SA 460 (C).

<sup>109</sup> *Pride Shipping Corporation v Chung Hwa Pulp Corporation (The "Oinoussin Pride")* [1991] 1 Lloyd's Rep 126.

<sup>110</sup> *Numill Marketing CC v Sitra Wood Products Pte Ltd* 1994 (3) SA 460 (C).

<sup>111</sup> Colinvaux, R. *Carver - Carriage by Sea*, 12th edition, Stevens, 1971, p. 884. *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] AC 576.

<sup>112</sup> Wilson, *Carriage of Goods by Sea*, p. 159. International P&I Clubs have excluded this liability from their members' insurance cover because delivery without the presentation of a bill of lading is considered to be a wilful taking of risk. Højer, J. *Sea Waybills vs Bills of Lading*, lecture presented at ESCAP/UNCTAD/BIMCO Seminar on Chartering and Ship Finance, Bangkok, 30 October - 3 November 1995, p. 4. Insurance of the liability of carriers to cargo owners, crew members and other third parties is called “Protection & Indemnity” cover or “P&I” insurance, and is usually covered by shipowners' “Clubs”. Report by the UNCTAD Secretariate on Bills of Lading, TD/B/C.4/ISL/6, 14 December 1970, p. 3.

deliver the goods to the named consignee on production of the bill of lading and where this consignee is not in fact entitled to the goods, he delivers at his own risk.<sup>113</sup> Where a bill of lading is produced but there is uncertainty as to the consignee's identity the carrier may deliver the goods against a letter of indemnity or guarantee provided by the bank.<sup>114</sup> An indemnity given by the consignee to the carrier to induce him to deliver the goods without the production of the bill of lading may be valid and enforceable by the carrier in certain jurisdictions. The *Sze Hai Tong Bank v Rambler Cycle Co Ltd* is illustrative of the difficulties which may arise in such circumstances.<sup>115</sup>

When the transaction is to be financed by means of a letter of credit the seller is required to attach the full set of original bills of lading to the other documents for submission to the advising or nominated bank and that bank forwards the documents by airmail to the issuing bank.<sup>116</sup> The bills of lading will be sent with the necessary endorsements to the bank designated as the paying bank, which in turn will pass the bill of lading to the purchaser to enable him to obtain delivery of the goods. Because problems could arise where one of the original set of the bill of lading falls into the wrong hands, as only one original in the set needs to be presented to the carrier to obtain delivery of the goods, the issuing bank protects itself by requiring the full set of original bills of lading, so ensuring that it acquires all the copies which control the goods.<sup>117</sup>

Any historical justification for the practice of issuing original bills of lading in sets may have long

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<sup>113</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 544.

<sup>114</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591.

<sup>115</sup> [1959] AC 576. Goods were discharged and released to the consignee by the carrier's agents without the production of a bill of lading, after having received a form of indemnity from the appellant bank. It was alleged that this was a common procedure at the port in question. The Privy Council held that by knowingly delivering goods without the production of the bill, a basic obligation of the contract had been breached and as a result the carrier was deprived of the protection of the cesser clause.

<sup>116</sup> Kendall & Buckley, *The Business of Shipping*, p. 239. Schmitthoff, *Schmitthoff's Export Trade*, p. 544. UCP 500 article 23 a iv. Generally, the original bill of lading would be endorsed to the order of the bank, so transferring title to the goods to the bank. After the seller has submitted all the originals to the bank one copy would be sent by airmail, the second by steam ship mail or another airmail carrier and the third would remain in the sender's file in the event of the loss in transit of the other two copies.

<sup>117</sup> UCP Article 23 a iv. If the bank in the *Glynn Mills* case had insisted on the receipt of the full set of bills when it agreed to provide security to the consignees, the problem of the consignees claiming the goods on the presentation of one of the original bills would not have arisen. *Donald H Scott & Co v Barclays Bank Ltd* [1923] KB 1.

since disappeared and the continuation of this practice, because of ingrained tradition, has been condemned for unnecessarily exposing the parties to risk.<sup>118</sup> The issue of more than one original bill of lading is a serious malpractice which facilitates maritime fraud, as is evidenced by the number of frauds performed using bills of lading.<sup>119</sup> *Glyn Mills v East and West India Dock Co* is an example of such an abuse.<sup>120</sup>

#### 4.2 Control of the goods while in transit

The shipper, as holder of the bill of lading retains the power of disposal and is entitled to alter his instructions to the carrier. The shipper can direct the carrier to deliver the goods to a new purchaser by deleting the name of the consignee and substituting another.<sup>121</sup> He can alternatively, with the agreement of the carrier, cancel the original and issue an appropriately endorsed copy and deliver it to the new purchaser.<sup>122</sup> An original bill of lading can be amended or replaced providing that the shipper's rights under the contract have not yet been transferred to the consignee.<sup>123</sup> To establish who is legally in possession of the goods covered by the bill of lading, the bill of lading is taken into consideration and not, for example, any agreement made by the seller and buyer as to when possession will be regarded as having passed between them.<sup>124</sup>

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<sup>118</sup> Goode, *Proprietary Rights and Insolvency*, p. 69.

<sup>119</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 63.

<sup>120</sup> (1882) 7 App Cas 591, 605.

<sup>121</sup> Benjamin, *Benjamin's Sale of Goods*, p. 893. *Ishag v Allied Bank International, Fuchs & Kotalmibora* [1981] 1 Lloyd's Rep 92; *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep 548.

<sup>122</sup> *Numill Marketing CC v Sitra Wood Products (Pty) Ltd* 1994 (3) SA 460 (C).

<sup>123</sup> Benjamin, *Benjamin's Sale of Goods*, p. 893. This is the position in common law jurisdictions where the shipper may vary his delivery instructions until the moment that the bill is negotiated. *Mitchel v Ede* (1840) 11 A&E 888. In civil law jurisdictions the actual holder of the bill of lading, whether the shipper, consignee or endorsee, is entitled to give the carrier instructions. Tetley, *Marine Cargo Claims*, p. 988.

<sup>124</sup> *Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd Intervening); Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C). In a contract between the buyer and seller, the goods were deemed, for the purpose of passing risk, to be delivered to the buyer when they had passed the ship's rail. This was not regarded as meaning that possession of the goods had been conferred on the buyer. The sales contract included a clause reserving the seller's right of ownership of the goods until the purchase price was paid in full. The buyer had already paid 90 per cent of the purchase price and the question was whether he had acquired a "right, title or interest" in the cargo which could be attached by his creditors. It was said that it is the bill of lading which must be taken into consideration when trying to establish who is legally in possession of the goods. In this case the bill was in the possession of the carrier. It was stated that the buyer's "right, title and interest" was something incorporeal and as such was distinct from the corporeal to which the right relates. It was considered that a creditor of the buyer had no right to attach the cargo, despite

The right of the shipper to redirect the goods to someone other than the originally named consignee is an example of the “right of disposition” or the “right to modify the contract of carriage” conferred on a consignor by the modern transport conventions governing the international carriage of goods.<sup>125</sup> Provided that the shipper is not in breach of any contractual terms he may exercise his right of disposition over the goods.

### 4.3 Transferring ownership of goods in transit

It has been said that the principal purpose of the bill of lading is to enable the person who is entitled to the goods represented by the bill to dispose of them while they are still in transit.<sup>126</sup> Because possession of the bill is regarded as amounting to possession of the goods, transferring the bill usually has the same legal consequences as delivery of the goods themselves.<sup>127</sup> On transferring the bill the right to possession of the goods passes to the transferee. Until the goods have been delivered, delivery of a duly endorsed bill of lading serves as a physical delivery of goods from transferor to transferee.<sup>128</sup> A bill of lading may be transferred from holder to holder and at each transfer the proprietary rights in the goods contained in the bill, or those rights which parties intend to pass, are passed from one holder to the next.<sup>129</sup> By transferring the bill the right to demand the goods, being one of the proprietary rights represented by the bill, is also transferred.<sup>130</sup>

#### 4.3.1 The intention with which the bill of lading is transferred

While the transfer of the bill of lading serves as a symbolic transfer of the possession of the goods,

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the fact that the buyer had already paid 90 per cent of the purchase price, as ownership of the goods had not yet passed to the buyer and he had not yet acquired any “right, title or interest” in the goods.

<sup>125</sup> Benjamin, *Benjamin's Sale of Goods*, p. 893.

<sup>126</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 561.

<sup>127</sup> Ivamy, *Payne and Ivamy's Carriage ...*, p. 72.

<sup>128</sup> Colinvaux, *Carver - Carriage by Sea*, p. 886.

<sup>129</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 572. Marasinghe, *Contract of Sale ...*, p. 269. *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W).

<sup>130</sup> Todd, *Modern Bills of Lading*, p. 1.



it does not necessarily transfer the property in the goods. The transfer of the bill of lading will only pass those rights in the goods that the parties intended to pass.<sup>131</sup> If the consignee or endorsee of the bill is only the shipper's agent at the port of destination, the transfer of the bill would only be intended to pass the right to claim the delivery of the goods, but not the property in them.<sup>132</sup> Where the consignee or endorsee is a banker who has advanced money on the security of the goods represented in the bill, the intention of transferring the bill is likely to be to create a charge or pledge of the goods in the banker's favour, but not to transfer property in the goods.<sup>133</sup> The transferee will have only a "special property" or security interest in the goods and the general property will not be affected by the transfer of the bill.<sup>134</sup> When a seller of goods, in terms of a CIF sale, transfers the bill of lading to the buyer, it is the intention of the parties which will determine whether the property passes or remains with the seller on transfer of the bill.<sup>135</sup> If the seller, when shipping goods, has the bill made to his order, on his own behalf, he reserves to himself the right to dispose of the property in the goods.<sup>136</sup> He may wish to retain ownership as security for payment of the purchase price.<sup>137</sup>

#### 4.3.2 The bill must be transferable

A bill of lading can be made out in one of three ways. The way in which it is made out determines whether or not the goods may be sold or transferred during transit and identifies the person to whom goods are to be delivered.<sup>138</sup>

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<sup>131</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 590. Wilson, *Carriage of Goods by Sea*, p. 145. Marasinghe, *Contract of Sale* ..., p. 272.

<sup>132</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591.

<sup>133</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591. Wilson, *Carriage of Goods by Sea*, p. 146. *Sewell v Burdick* (1884) 10 App Cas 74. See 4. 5 following.

<sup>134</sup> Benjamin, *Benjamin's Sale of Goods*, p. 910.

<sup>135</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591.

<sup>136</sup> Colinvaux, *Carver - Carriage by Sea*, p. 891. *Lendlease Finance (Pty)Ltd v Corporacion De Mercadeo Agricola* 1976 (4) SA 464 (A); *London & South African Bank v Donald Currie & Co* (1875) 5 Buch 29.

<sup>137</sup> Wilson, *Carriage of Goods by Sea*, p. 145. Benjamin, *Benjamin's Sale of Goods*, p. 910.

<sup>138</sup> Benjamin, *Benjamin's Sale of Goods*, p. 892.

#### **4.3.2.1 Bearer bills**

A bearer bill is one where the goods are shipped under a bill of lading which does not name the person to whom the goods are to be delivered, but simply makes them deliverable to the holder or person in possession, that is the bearer, of the bill.<sup>139</sup> Such a bill is a transferable document of title as the bearer of the bill of lading can sell the goods and transfer the proprietary rights in these goods by simply delivering the bill to the buyer.<sup>140</sup> Such bills are seldom used in practice.<sup>141</sup>

#### **4.3.2.2 Order bills**

An order bill may provide for delivery of the goods to a named consignee or to his “order or assigns”, in which case it is said that the bill is made out to the order of the consignee, as it appears from the face of the bill that it is the consignee who is authorised to order that the goods be delivered to another by transferring them. Alternatively, an order bill can simply make the goods deliverable “to order or assigns” without naming the consignee. In this instance it is only the shipper who is entitled to transfer the bill and so to determine the transferee to whom the carrier must deliver the goods; such bills are said to be made out to the shipper’s order. Where the words “order or assigns” are used, any similar words implying transferability will have the same effect.<sup>142</sup> By insertion of the word “order” the bill is given the legal and commercially important characteristic of becoming a transferable document of title.<sup>143</sup>

#### **4.3.2.3 Straight consigned bills**

In contrast with the order bill, a straight or non-negotiable bill is one in which the goods are deliverable to a named consignee only.<sup>144</sup> Such a bill either lacks words importing transferability, by the deletion of the words “or order” after the name of the consignee, or contains words like

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<sup>139</sup> Benjamin, *Benjamin's Sale of Goods*, p. 893.

<sup>140</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 188.

<sup>141</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 572.

<sup>142</sup> Benjamin, *Benjamin's Sale of Goods*, p. 893.

<sup>143</sup> Kendall & Buckley, *The Business of Shipping*, p. 236.

<sup>144</sup> Kendall & Buckley, *The Business of Shipping*, p. 238. Benjamin, *Benjamin's Sale of Goods*, p. 895.

“not transferable” or somewhat inaccurately “not negotiable”, which negate transferability.<sup>145</sup> A bill of this nature is not transferable as the goods can only be delivered to the named consignee and it is not possible to transfer title to the property to another.<sup>146</sup> The shipper can transfer title in the goods to the consignee by delivering the bill of lading to him but the consignee cannot transfer the property in the goods by delivering the bill to a third party.<sup>147</sup> The consignee gains possession of the goods on presentation of a copy of the bill.<sup>148</sup> Even though a bill of lading is not made negotiable it still functions as a document of title because the named consignee is only entitled to delivery of the goods from the shipowner if he is able to produce the bill of lading.<sup>149</sup>

A non-negotiable transport document may take the form of a non-negotiable bill of lading or straight consigned bill or it may simply be a non-negotiable receipt issued by the carrier in which he acknowledges that he has received the goods in his charge or that he has shipped them.<sup>150</sup> Sea waybills, liner waybills and data freight receipts are examples of transport documents which are simply non-negotiable receipts,<sup>151</sup> these documents are not transferable documents of title.<sup>152</sup>

The United States straight bill of lading, sometimes referred to as a sea waybill,<sup>153</sup> is a hybrid governed by the Pomerene Act. In the United States a straight bill of lading, although not

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<sup>145</sup> Benjamin, *Benjamin's Sale of Goods*, p. 895.

<sup>146</sup> Purvis & Darvas, *The Law and Practice of ...*, p. 87. *Henderson & Co v Comptoir d'Excompte de Paris* (1873) LR 5 PC 253. Kendall & Buckley, *The Business of Shipping*, p. 238. Because the straight or non-negotiable bill of lading does not allow the transfer of title it cannot be used to provide a bank with collateral security in a transaction financed by a letter of credit. Kendall & Buckley, *The Business of Shipping*, p. 240.

<sup>147</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 573.

<sup>148</sup> Kendall & Buckley, *The Business of Shipping*, p. 238.

<sup>149</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 593.

<sup>150</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 579. If the transport document is a non-negotiable bill of lading the Hague or the Hague-Visby Rules apply. If it is merely a receipt the Rules may not apply.

<sup>151</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 579.

<sup>152</sup> Tetley, *Marine Cargo Claims*, p. 995.

<sup>153</sup> Sorkin, *Goods in Transit*, par. 2.08.

negotiable,<sup>154</sup> is a transferable document.<sup>155</sup> It also functions as a document of title under United States law because the title to the goods can be transferred by delivery of the document subject to any agreement with the transferor.<sup>156</sup> Where a straight bill of lading is used a carrier must make delivery only to the person lawfully entitled to the possession of the goods or to the named consignee.<sup>157</sup> The carrier is required to make delivery on demand of the named consignee in possession of a straight bill but is not required to secure the surrender of the bill before making delivery.<sup>158</sup> If he makes a wrongful delivery without requiring the production and surrender of the straight bill, he carries the risk of having to indemnify the shipper for loss.<sup>159</sup> Straight bills of lading are not used as frequently as order bills to finance the purchase or sale of goods, because they do not afford good security.<sup>160</sup>

#### 4.3.3 The transfer or negotiation of bills of lading

Bills of lading making goods deliverable “to order” or “to order or assigns” are negotiable instruments or transferable documents of title, such words being essential to the documents’

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<sup>154</sup> Section 6 Pomerene Act. See 4. 3. 3 and 4. 3. 4 following.

<sup>155</sup> Section 29 Pomerene Act.

<sup>156</sup> Section 32 Pomerene Act. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 217. Tetley, *Marine Cargo Claims*, p. 996. *GAC Commercial Corporation v Wilson* 271 F Supp 242 (SDNY 1967); *George F Hinrichs, Inc v Standard Trust & Sav Bank*, 279 F 382 (2 Cir 1922). Such transfer of title is subject to existing equities and endorsement confers no additional rights. Section 29 Pomerene Act.

<sup>157</sup> Sorkin, *Goods in Transit*, par. 2.08.

<sup>158</sup> Sorkin, *Goods in Transit*, par. 2.08. Gilmore & Black, *The Law of Admiralty*, p. 96. The demand for delivery must be accompanied by an offer to pay the carrier’s charges and the execution of a delivery receipt.

<sup>159</sup> Sorkin, *Goods in Transit*, par. 2.08. *Interstate Window Glass Co v NY etc R Co*, 104 Conn. 342, 133 A 102 (1926). A person to whom a straight bill has been transferred acquires the right to notify the carrier of the transfer to himself of the bill and so to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before notification, Section 32 Pomerene Act.

<sup>160</sup> Sorkin, *Goods in Transit*, par. 2.08. *GAC Commercial Corporation v Wilson*, 271 F Supp 242 (SDNY 1967). The United States Pomerene Act straight bill of lading causes difficulties in jurisdictions where the concept of a document of title is synonymous with a negotiable bill of lading. In these jurisdictions a carrier delivering goods to a consignee of a straight bill of lading without receiving the bill of lading from the consignee risks liability to subsequent transferees of the bill. Because the Pomerene Act applies to bills of lading issued in the United States, consignees abroad are justified in regarding the right to possession conferred by the Pomerene Act’s straight bill as enforceable by mere identity. Alternatively where a carrier issues a non-negotiable bill in a foreign port covering goods destined to a consignee in the United States he may be held liable in the United States for refusing to deliver the goods to the consignee who does not surrender the bill of lading. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, pp. 217 & 218.

negotiability or transferability.<sup>161</sup> The order or assignment is usually made by indorsing the bill of lading.<sup>162</sup> Documents are transferred or negotiated by delivery or delivery and endorsement of the bill of lading.<sup>163</sup> A shipper or consignee may endorse a bill of lading by writing his name on the back of the bill, so effecting a “general endorsement” or an “endorsement in blank”, or he may name a person, or his order, to whom the goods must be delivered, so constituting a “special endorsement” or an “endorsement in full”.<sup>164</sup>

Mercantile custom provides that endorsement and delivery of the bill of lading, while the goods are in transit, transfers such property as is intended by the parties to the endorsement.<sup>165</sup> From the time of *Lickbarrow v Mason*<sup>166</sup> the courts have been willing to accept that the transfer of the bill of lading transfers the property in the goods if the transfer was made with that intention.<sup>167</sup>

English common law refused to go as far as saying that it also transferred contractual rights and liabilities.<sup>168</sup> English law has a strict rule of “privity of contract” which provides that only the

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<sup>161</sup> Ridley, J. *The Law of the Carriage of Goods by Land, Sea and Air*, 6th edition, Shaw & Sons, 1982, p. 110. Scrutton, *Charterparties and Bills of Lading*, p. 132. Colinvaux, *Carver - Carriage by Sea*, p. 887. Kendall & Buckley, *The Business of Shipping*, p. 236. *Henderson v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253.

<sup>162</sup> Colinvaux, *Carver - Carriage by Sea*, p. 888.

<sup>163</sup> Benjamin, *Benjamin's Sale of Goods*, p. 902. Scrutton, *Charterparties and Bills of Lading*, p. 132. A bearer bill, as well as an order bill which makes the goods deliverable to a named consignee or order, is transferred by delivery. When a person to whom goods are delivered under an order bill wishes to transfer it to another, the transfer is effected by endorsement by the transferor and delivery of the bill to the transferee. A carrier who has issued an order bill only discharges his obligations by delivering the goods to the holder of the bill; the bill itself is indispensable. Benjamin, *Benjamin's Sale of Goods*, p. 903. Gilmore & Black, *The Law of Admiralty*, p. 96.

<sup>164</sup> Scrutton, *Charterparties and Bills of Lading*, p. 133. Where the endorsement is in blank, so converting an order into a bearer instrument, or the bill is a bearer bill, the bill of lading is transferred by mere delivery. The holder of such a bill can convert the bearer bill into an order bill by entering a special indorsement, in which case transfer of property in the goods is effected by the indorsement and delivery of the bill. Where the bill carries a special indorsement the indorsee wishing to transfer it must again make an order and indorse the bill. Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 188. Colinvaux, *Carver - Carriage by Sea*, p. 888.

<sup>165</sup> Scrutton, *Charterparties and Bills of Lading*, p. 133.

<sup>166</sup> (1787) 2 Term Rep 63 KB.

<sup>167</sup> Todd, *Modern Bills of Lading*, p. 169. Benjamin, *Benjamin's Sale of Goods*, p. 902.

<sup>168</sup> Todd, *Modern Bills of Lading*, p. 169.

parties to a contract can acquire rights under it.<sup>169</sup> If the bill of lading was to develop into a negotiable document it was necessary that as well as transferring constructive possession of the goods it should also transfer the contractual rights and liabilities contained in the contract of carriage when the bill of lading was transferred.<sup>170</sup> In English Law this could only be achieved by statute. Consequently, the Bills of Lading Act was passed on 14 August 1855 to amend the law relating to bills of lading and to bring the common law into line with the custom of merchants.<sup>171</sup> Section 1 of the Act provided that the consignee and endorsee of the bill of lading, to whom property in the goods shipped had been transferred, should enjoy all the rights and duties of the original shipper under the contract evidenced in the bill of lading.<sup>172</sup> This section constitutes a

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<sup>169</sup> Grime, *Shipping Law*, p. 124.

<sup>170</sup> Todd, *Modern Bills of Lading*, p. 169.

<sup>171</sup> Mitchelhill, *Bills of Lading ...*, p. 2. Marasinghe, *Contract of Sale ...*, p. 270. Scrutton, *Charterparties and Bills of Lading*, p. 134. Holdsworth, *A History of English Law*, p. 96. In the United States the Bills of Lading Act (1916) known as the Pomerene Act, Act of August 29, 1916, Ch. 415, 39 Stat. 538, 49 U.S.C. 81-124, was passed with the primary intention of making order bills of lading negotiable instruments. The Act only applies to interstate shipments and international shipments originating inside the United States. The negotiability of bills of lading issued in foreign countries for shipment to the United States would be determined by the law of the country in which the bill is issued. Gilmore & Black, *The Law of Admiralty*, p. 95. In terms of this Act the carrier does not have a duty to take up the bill of lading but may choose to rely on the consignee's representation that he is in possession of the bill. If a carrier delivers goods under an order bill and does not take up the bill, the carrier could become liable to a good faith purchaser of the bill of lading for value irrespective of when the purchase was made. Sorkin, *Goods in Transit*, pars. 2.04 [1], 2.04[3], 2.10[3]. Kendall & Buckley, *The Business of Shipping*, p. 237.

<sup>172</sup> Scrutton, *Charterparties and Bills of Lading*, p. 134. Holdsworth, *A History of English Law*, p. 96. By linking the transfer of contractual rights and liabilities to the passing of property in the goods the Act did not provide a solution to all problems and there were a number of situations to which section 1 could not be applied. When goods are shipped in bulk and covered by several bills of lading, ownership of a part of the bulk cargo cannot be transferred by the endorsement of any of the bills of lading. This is so because it is provided in section 16 of the Sale of Goods Act 1979 that ownership in unascertained goods cannot be passed until the goods are ascertained. If one of the bills of lading had been endorsed, the endorsee could only acquire ownership of his part of the cargo once it had arrived at its destination and been delivered to him. In such circumstances section 1 does not apply (This section has been replaced by section 2 of the Sale of Goods (Amendment) Act 1995). In *Enichem Anic Spa v Ampelos Shipping Co (The Delfini)* [1990] 1 Lloyd's Rep 252 it was stated that in such a situation it was not necessary for property in the goods to pass simultaneously with endorsement, provided that when it was passed a causal link to the endorsement could be established on ascertainment of the goods. Other problems continued to exist. When a bulk cargo was lost in transit the contract of carriage would not provide the endorsee a remedy because he had not acquired property in the goods "upon or by reason of such ... endorsement". Where a bulk cargo was covered by a single bill of lading and portions of the cargo were sold and delivered against shipper's delivery orders, the section could not apply. The section would not apply where the cargo was delivered against a letter of indemnity because of the late arrival of the bill of lading. Finally, when a bill was endorsed with the intention of creating a pledge, the endorsee did not acquire rights under the contract of carriage because there was no intention that the endorsement would transfer the title to the goods to him. For many years English law attempted to circumvent these problems by the use of a number of statutory and judicial devices which enabled receivers of cargo, in most cargo disputes, to acquire title to sue the carrier. The inadequacies of the section 1 approach have been addressed by the Carriage of Goods by Sea Act 1924. Wilson, *Carriage of Goods by Sea*, pp. 147, 148 & 149.

statutory exception to the privity of contract doctrine.<sup>173</sup> On 16 September 1992 the Carriage of Goods by Sea Act 1992 came into force, repealing the Bills of Lading Act 1855.<sup>174</sup> The new legislation includes two important departures from the existing law. Firstly, title to sue is no longer linked to property in the goods.<sup>175</sup> The lawful holder of the bill has title to sue under the contract of carriage as if he were an original party to it. Secondly, rights under a contract of carriage can be transferred independently of any transfer of liabilities.<sup>176</sup>

In South African law the doctrine of privity of contract does not find application and the rights and liabilities associated with the contract of carriage, and represented in the bill of lading, are transferred to another by endorsement and delivery of the bill of lading.<sup>177</sup>

#### **4.3.4 The bill of lading as a negotiable instrument**

Bills of lading can only fulfil their principal function of enabling a trader to dispose of goods no longer in his possession if they are negotiable.<sup>178</sup> The holder of a negotiable bill of lading is entitled to deal with the goods in transit and to claim their delivery on arrival at their port of destination by presenting the bill. He may, while they are still in transit, transfer title to them or pledge them, by delivery of the bill with the required intention and necessary endorsement.<sup>179</sup> It is important to keep in mind the distinction between the function of the bill of lading as a document of title and

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<sup>173</sup> Todd, *Modern Bills of Lading*, p. 170.

<sup>174</sup> Wilson, *Carriage of Goods by Sea*, p. 155.

<sup>175</sup> The lawful holder of the bill of lading is the person in possession of the bill in good faith, who is identified as either the consignee or the endorsee on the bill, or a person who would have been the consignee or endorsee if he had taken possession of the bill before it ceased to be a document of title. Section 2 (1) and 5 (2).

<sup>176</sup> Section 3. The holder of the bill becomes subject to liabilities under the contract of carriage only once he demands or takes delivery of goods from the carrier, or initiates a claim for loss or damage. Wilson, *Carriage of Goods by Sea*, p. 147.

<sup>177</sup> Malan, F. R. & Faul, W. Some Aspects of Bills of Lading. *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 327. *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976(4) SA 464(A).

<sup>178</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 571.

<sup>179</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 329.

its quality as a negotiable instrument.<sup>180</sup> The practical value of the bill of lading as a means of facilitating the expeditious transfer of goods in transit and enabling banks to rely on it as security for the financing of the sales contract lies in the customary combination of its negotiable character and its function as a document of title.<sup>181</sup>

The characteristic features of negotiable instruments are firstly that the rights embodied in the instrument are transferable by delivery if payable to bearer, or by endorsement and delivery if payable to order.<sup>182</sup> Secondly, a *bona fide* transferee, who takes the instrument in good faith and for value, acquires a good and complete title to the instrument and the rights it embodies<sup>183</sup> even if the transferor had a defective title or no title to it at all.<sup>184</sup> Finally, the holder of the instrument can sue on it in his own name.<sup>185</sup> All true negotiable instruments, bills of exchange, cheques and promissory notes are concerned with the payment of money by a debtor, often a bank, who agrees to pay the person presenting the document on condition that he has acquired the document properly.<sup>186</sup> Certain other documents may have much the same significance; a bill of lading is one such document.<sup>187</sup>

The bill of lading, being a document of title, shares one of the characteristics of negotiable instruments, namely that the negotiable instrument symbolises an intangible claim to payment of an amount of money specified in the instrument, and the bill of lading confers on its holder a claim

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<sup>180</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 593. The bill of lading as a document of title has its origin in the custom of merchants and was first recognised by the courts in *Lickbarrow v Mason* (1787) 2 Term Rep 63 KB while the character of the bill of lading as a "quasi-negotiable" instrument is founded both in mercantile custom and in statute, in English law on the Bills of Lading Act 1855, and in American law on the Pomerene Act 1916.

<sup>181</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 593.

<sup>182</sup> Cowen, D. V & Gering, L. *Cowen on the Law of Negotiable Instruments in South Africa*, 5th edition, 1985, p. 3. Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 329.

<sup>183</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 329.

<sup>184</sup> Cowen & Gering, *Cowen on the Law ...*, p. 3.

<sup>185</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 329. Benjamin, *Benjamin's Sale of Goods*, p. 1310.

<sup>186</sup> Grime, *Shipping Law*, p. 124. Gilmore & Black, *The Law of Admiralty*, p. 95.

<sup>187</sup> Grime, *Shipping Law*, p. 124.



to the goods symbolised in the bill.<sup>188</sup> Both of these instruments are transferable. The claim to money represented by the negotiable instrument can be transferred by delivery, together with any endorsement necessary, of the instrument. Likewise, the title to the goods symbolised by the bill of lading, as well as the contractual rights embodied in it, can be transferred by delivery, with necessary endorsements, of the bill.<sup>189</sup> A bill of exchange is negotiable unless its negotiability has been expressly excluded; a bill of lading, however, is only negotiable if it is made negotiable.<sup>190</sup>

When used in relation to bills of lading the meaning of the term “negotiable” is confined to “transferable” as the bill of lading does not display all the characteristics of a truly negotiable instrument.<sup>191</sup> A bill of lading is only negotiable in the sense that it is transferable because the transferee cannot acquire a better title to the instrument than that of his transferor.<sup>192</sup> A holder of a bill of lading, even where the bill is obtained *bona fide* and for value, cannot acquire a right his predecessor in title does not possess.<sup>193</sup> The mere possession of the bill of lading does not confer title on the holder or enable him to transfer the rights embodied in the document; the bill must have been negotiated by a person who had a right to dispose of it.<sup>194</sup> The privileged status conferred upon the good faith purchaser, or holder in due course, of a negotiable instrument<sup>195</sup> does not extend to a good faith purchaser of a bill of lading where the person transferring title has

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<sup>188</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 328. Benjamin, *Benjamin's Sale of Goods*, p. 907.

<sup>189</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 328.

<sup>190</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 572.

<sup>191</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 188. Wilson, *Carriage of Goods by Sea*, p. 145. Benjamin, *Benjamin's Sale of Goods*, p. 907. Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 328. *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439. Throughout this work the description of bills of lading as “negotiable” and “transferable” has been used interchangeably. While acknowledging that the correct use of terminology would be to refer to the bill of lading as a “transferable” document, the general practice appearing in the literature is to refer to the bill of lading as a “negotiable” document.

<sup>192</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 329.

<sup>193</sup> Gaskell, Debattista & Swatton, *Chorley and Giles' Shipping Law*, p. 188. Benjamin, *Benjamin's Sale of Goods*, p. 907. Schmitthoff, *Schmitthoff's Export Trade*, p. 573.

<sup>194</sup> Colinvaux, *Carver - Carriage by Sea*, p. 888.

<sup>195</sup> Gilmore & Black, *The Law of Admiralty*, p. 94.

no right to do so.<sup>196</sup> Because a bill of lading is not a truly negotiable instrument it is best described as a “quasi-negotiable” instrument.<sup>197</sup>

In international trade negotiable bills of lading are required for certain transactions while non-negotiable bills are preferred for others. Negotiable bills of lading are commonly used in the commodity trade where bills relating to goods in transit are bought and sold in a series or string of contracts. Many of the intermediate owners have no intention of taking delivery and only the last purchaser in the string will take delivery of the goods. Negotiable bills of lading are also required to play a role in financing the sales transaction where the buyer intends to pledge them as collateral security to a bank. Contracts between exporters and importers may also stipulate that negotiable bills of lading must be provided. Where the consignee himself will take delivery of the goods and does not intend to deal further with the bill of lading, a non-negotiable bill is sufficient.<sup>198</sup>

#### **4.3.5 Transfer of ownership in bulk cargo**

A buyer of goods whose shipment has been arranged by the seller is entitled to a bill of lading which identifies the goods and distinguishes them from the rest of the cargo.<sup>199</sup> To function fully as a document of title the bill of lading should identify specific goods. Where bulk commodities are carried, it is not uncommon for traders to accept bills of lading which cover only an unidentified part of the ship’s cargo. Generally, a transferee of such a bill of lading does not acquire ownership or constructive possession of any part of the cargo until identification has taken place.<sup>200</sup> When goods are shipped in bulk and are not specifically identifiable, property in the goods cannot be passed simply by delivery of the bill, and transferring the bill only has the effect of passing the contractual right to claim delivery of unascertained goods at the port of

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<sup>196</sup> This aspect of the bill of lading is made clear in *Gurney v Behrend* (1854) 3E & BL 622 where it is stated that the bill of lading only represents the goods and that the transfer of the symbol does no more than transfer that which is represented in the bill.

<sup>197</sup> Grime, *Shipping Law*, p. 124.

<sup>198</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 573.

<sup>199</sup> *Re Reinhold & Co* (1896) 12 TLR 422.

<sup>200</sup> Goode, *Proprietary Rights and Insolvency*, p. 58.

discharge.<sup>201</sup> If the carrier, or the seller, becomes insolvent before part of the cargo has been appropriated, the holder of the bill of lading would simply be an unsecured creditor.<sup>202</sup>

#### 4.3.5.1 Delivery orders

Delivery orders are common currency in the bulk cargo trade.<sup>203</sup> When a consignment is shipped under one bill of lading, as is often the case with bulk cargoes, it can be split into smaller parcels and sold to different buyers by issuing delivery orders which relate to a specific part of the whole consignment.<sup>204</sup> The contract would normally provide that the seller would perform his obligations by providing the buyer with a delivery order for part of the cargo rather than a bill of lading.<sup>205</sup> A delivery order is addressed to a person in possession of the goods ordering him to deliver them to the holder. Delivery orders may be directed to the seller's agent, or to the carrier. In the latter case they are called "ship's delivery orders". These documents are issued by or on behalf of the shipowners while the goods are either in their possession or under their control and contain an undertaking that the goods will be delivered to the buyers or bearers on presentation of the documents.<sup>206</sup>

Where a delivery order is directed to an agent of the seller, the agent is directed to deliver that part of the goods specified to the holder of the order. Such a delivery order does not give the

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<sup>201</sup> Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 328.

<sup>202</sup> Goode, *Proprietary Rights and Insolvency*, p. 58. This was the situation in English law according to section 16 of the Sale of Goods Act 1979, prior to the entry into force of the Sale of Goods (Amendment) Act 1995. Section 2 of the new Act allows a pre-paying buyer to acquire an undivided proprietary share in a bulk cargo before the portion is identified. It is presumed that the parties intended to transfer title to an undivided share in the bulk to the buyer providing that the bulk has been identified and part of the price paid. If there is evidence of a contrary intention that the title was intended to pass at a later date the presumption gives way. Ulph, J. The Sale of Goods (Amendment) Act: Co-ownership and the rogue seller. *Lloyd's Maritime and Commercial Law Quarterly*, February 1996, pp. 93 & 98. In *Ex Parte Terminus Compania Naviera SA & Grinrod Marine (Pty) Ltd: In Re The Areti L*, 1986 (2) SA 446 (CPD) bunkers provided by a charterer had become mixed with the shipowner's bunkers which were already on the vessel. It was held that, in the absence of a contrary intention, the bunkers were owned jointly by the charterer and the shipowner and that a creditor of the charterer was entitled to attach them.

<sup>203</sup> Todd, *Modern Bills of Lading*, p. 71.

<sup>204</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 581. Purvis & Darvas, *The Law and Practice of ...*, p. 78.

<sup>205</sup> Sassoon & Merren, *CIF and FOB Contracts ...*, p. 109.

<sup>206</sup> *Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep 146.

buyer a direct right against the carrier.<sup>207</sup> When a contract provides that such a delivery order would be acceptable as good tender under a CIF contract, the contract is not a true CIF contract but an “ex ship” or “arrival” contract.<sup>208</sup> Where a contract provides for payment on presentation of a delivery order directed to a seller’s agent, the handing over of the order does not function as symbolic delivery and does not transfer the title to the goods, which remains with the seller.<sup>209</sup>

In contrast, a ship’s delivery order is addressed to the carrier and instructs him to deliver the specified goods to the holder. Ship’s delivery orders are of greater legal value than those addressed to an agent of the seller as they confer a right of action against the carrier.<sup>210</sup> In addition they can be tendered in place of a bill of lading under a CIF contract, if the contract so stipulates, and such tender would amount to performance of the contract.<sup>211</sup> However, neither form of delivery order carries the same legal value as a bill of lading,<sup>212</sup> since it does not function as a transferable or negotiable instrument.<sup>213</sup>

#### **4.3.6 Shipped and received for shipment bills as documents of title**

A “shipped” or “on board” bill of lading is one which indicates that the goods have been loaded on board the vessel. A date of shipment must appear on the bill of lading.<sup>214</sup> A “received” bill only provides that goods have been received by the carrier for shipment, it gives no evidence of actual

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<sup>207</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 581. Todd, *Modern Bills of Lading*, p. 71.

<sup>208</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 581. Todd, *Modern Bills of Lading*, p. 71.

<sup>209</sup> *Comptoir D'Achat et De Vente etc v Luis De Ridder Ltd* [1949] AC 292.

<sup>210</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 581. Todd, *Modern Bills of Lading*, p. 71. In English law The Carriage of Goods by Sea Act 1924 provides that the person entitled to delivery under a ship’s delivery order has title to sue irrespective of whether or not they are owners of the goods covered by the document. Section 2 (1) and (4). Wilson, *Carriage of Goods by Sea*, p. 155.

<sup>211</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 581.

<sup>212</sup> *Colin & Shields v Weddel & Co Ltd* [1952] 2 All ER 337.

<sup>213</sup> Purvis & Darvas, *The Law and Practice of ...*, p. 78.

<sup>214</sup> According to commercial practice the date on the bill of lading is either the latest date possible under the letter of credit or the date of departure of the vessel.

shipment.<sup>215</sup> A buyer under a CIF contract may find such a document unsatisfactory as it does not provide “continuous documentary cover”, nor does it inform him of the date of shipment.<sup>216</sup>

The view has been expressed that the custom recognised in *Lickbarrow v Mason*,<sup>217</sup> in terms of which bills of lading are regarded as documents of title, applies only to shipped bills of lading and it is uncertain whether or not a received for shipment bill is a document of title.<sup>218</sup> In *Ishag v Allied Bank International*<sup>219</sup> a document which stated that goods were to be shipped was accepted as a document of title.<sup>220</sup> In the *Diamond Alkali Export Corp v Fl Bourgeois*<sup>221</sup> case it was decided that the “received” bill was not a good tender under a CIF contract and the buyer need not accept it, unless the contrary is expressly agreed upon by the parties.<sup>222</sup> The idea that “received for shipment” bills of lading are not documents of title has been settled in English law by The Carriage of Goods by Sea Act 1924, which provides that it is immaterial whether the bill of lading is a “shipped” or a “received for shipment” bill.<sup>223</sup> The Hamburg Rules also provide that a bill of lading may evidence the “taking over” or “loading” of the goods.<sup>224</sup> In terms of these two statutes the bill of lading’s status as a document of title will not be compromised by the issue of a “received for shipment” bill.

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<sup>215</sup> Benjamin, *Benjamin’s Sale of Goods*, p. 895. Schmitthoff, *Schmitthoff’s Export Trade*, p. 569. Shipped and received for shipment bills can be distinguished for the reason that once the goods are shipped it is difficult for the shipper or consignee to deal with them physically and it is this fact which led to the need to recognise shipped bills of lading as documents of title. With a received for shipment bill the goods may still be dealt with before they are shipped and consequently there is less need to regard such bills as a documents of title. Benjamin, *Benjamin’s Sale of Goods*, pp. 904 & 906.

<sup>216</sup> Benjamin, *Benjamin’s Sale of Goods*, p. 895.

<sup>217</sup> (1787) 2 Term Rep 63 KB.

<sup>218</sup> Benjamin, *Benjamin’s Sale of Goods*, p. 904. Debattista disputes that the case decided that the bill of lading is only a document of title if it states that the goods have been shipped. Debattista, *Sale of Goods ...*, p. 220.

<sup>219</sup> [1981] 1 Lloyd’s Rep 92.

<sup>220</sup> Benjamin, *Benjamin’s Sale of Goods*, p. 906.

<sup>221</sup> [1921] 3 KB 443.

<sup>222</sup> Schmitthoff, *Schmitthoff’s Export Trade*, p. 570.

<sup>223</sup> Wilson, *Carriage of Goods by Sea*, p. 155. Debattista, *Sale of Goods ...*, p. 223.

<sup>224</sup> Article 1.

#### 4.4 How the bill of lading ceases to be a document of title

Documents of title to goods are inherently transitory. The bill of lading continues in force as a document of title, by which symbolic delivery of the goods may be made, as long as complete delivery of the possession of the goods has not been made to a person with a right to claim them under the bill.<sup>225</sup> The bill of lading will retain its character as a document of title at least until the contract of carriage by sea is discharged by delivery of the goods against the bill.<sup>226</sup> The arrival of the goods at the port of destination does not necessarily indicate that the contract of carriage has been performed. The contract of carriage, and the bill of lading, will remain in force even though the goods are deposited in a warehouse as long as the carrier's lien for freight subsists,<sup>227</sup> or where there is no such lien, if the goods have been warehoused to the order of the carrier and not to the order of the consignee.<sup>228</sup> The termination of the primary obligations of the carrier under the contract of carriage does not mean that the bills of lading are exhausted as documents of title where the goods are delivered to someone other than the named consignee.<sup>229</sup> The bill of lading only ceases to be a document of title when the goods are delivered to the person it indicates as being entitled to possession of the goods.<sup>230</sup>

#### 4.5 Security

It is standard practice in international trade for banks to take security over bills of lading to secure the advance made to finance an international sales transaction.<sup>231</sup> The development of bills of lading as transferable documents of title has enabled their use as security in international trade

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<sup>225</sup> Colinvaux, *Carver - Carriage by Sea*, p. 917. *Meyerstein v Barber* (1867) LR 2 CP 661.

<sup>226</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 591.

<sup>227</sup> *Barber v Meyerstein* (1890) LR 4 HL 317.

<sup>228</sup> Benjamin, *Benjamin's Sale of Goods*, p. 904. *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep 81.

<sup>229</sup> *The Future Express* [1992] 2 Lloyd's Rep 79.

<sup>230</sup> Benjamin, *Benjamin's Sale of Goods*, p. 904. Debattista, *Sale of Goods ...*, p. 41. *Hayman & Son v M'Lintock* 1907 SC 936.

<sup>231</sup> Gretton, G. L. Pledge, Bills of Lading, Trusts and Property Law. *The Juridical Review*, 1990, p. 25. Malan & Faul, *South African Mercantile Law Journal*, vol. 1, no. 3, 1989, p. 328. *Barlows Tractor & Machinery Co v Oceanair (Transvaal) Ltd* 1978 (3) SA 175 (W).

transactions.<sup>232</sup> For many years it has been common to pledge bills of lading to raise finance.<sup>233</sup> Where payment in an international sales contract is by way of a letter of credit the security provided to banks by the documents has historically been regarded as an important aspect of this arrangement.<sup>234</sup> With reference to credits using time drafts, *Guaranty Trust Co of New York v Hannay*<sup>235</sup> states that the seller receives his money prior to the purchaser making payment; the exchange house which has made the advance will have the security of a pledge of the attached documents and the goods they represent until the bill of exchange presented by the exchange house has been accepted. If the debtor should default the bank can assume control of the goods through the bill and so recover its loss.<sup>236</sup>

A bill of lading represents possession and not ownership of the goods and a holder of a bill of lading is not necessarily the owner of the goods.<sup>237</sup> If the holder of the bill of lading transfers it, the intention with which the transfer is made is important. If the intention of the transfer was to create a pledge, ownership in the goods does not pass.<sup>238</sup> A pledge involves the transfer of the possession of goods, by way of security, in terms of which the pledgor retains ownership of the goods and the pledgee acquires only a right to possession.<sup>239</sup> The pledgee obtains a special property in the goods and not the general property, which remains with the pledgor.<sup>240</sup> Alternatively, it can be said that the debtor retains ownership and the pledgee creditor acquires a subsidiary real right less than ownership.<sup>241</sup> The limited interest acquired by the pledgee was

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<sup>232</sup> Todd, *Modern Bills of Lading*, p. 8.

<sup>233</sup> Gutteridge & Magrah, *The Law of Bankers ...*, p. 5. Todd, *Modern Bills of Lading*, p. 8.

<sup>234</sup> Jack, R. *Documentary Credits*, 2nd edition, Butterworths, 1993, p. 250.

<sup>235</sup> [1918] 2 KB 623.

<sup>236</sup> Wilson, *Carriage of Goods by Sea*, p. 147.

<sup>237</sup> Gretton, *The Juridical Review*, 1990, p. 27.

<sup>238</sup> Gretton, *The Juridical Review*, 1990, p. 27. Schmitthoff, *Schmitthoff's Export Trade*, p. 591. Wilson, *Carriage of Goods by Sea*, p. 146. See 4. 3. 1 of chapter 3.

<sup>239</sup> Jack, *Documentary Credits*, p. 251. Gretton, *The Juridical Review*, 1990, p. 24.

<sup>240</sup> Todd, *Modern Bills of Lading*, p. 176.

<sup>241</sup> Gretton, *The Juridical Review*, 1990, p. 24.

referred to in *Sewell v Burdick*<sup>242</sup> where it was held that bankers who had taken bills of lading as security for a loan were not required to pay the freight. The pledgee of a bill of lading has the right to demand the delivery of the goods to him, but upon delivery the pledgee becomes liable to the shipowner under the contract contained in the bill of lading.<sup>243</sup>

In order to create a pledge the pledgee must be placed in actual physical possession of the goods.<sup>244</sup> The transfer of the bill of lading with the intention of pledging the goods, to which the bill is title, is an exception to this rule because the transfer of the bill on its own is sufficient to make the pledge effective.<sup>245</sup>

A bank becomes a pledgee when it receives bills of lading made out to the order of the shipper and blank endorsed,<sup>246</sup> made out to the order of the paying bank<sup>247</sup> or endorsed to the order of the bank.<sup>248</sup> Where bills are drawn in favour of the buyer or other consignee, the bank still obtains a pledge. However, unless it can ensure endorsement of the bill to itself it may not be able to exercise its rights of sale, as the bank's rights to the goods will not be evident on the bills themselves.<sup>249</sup> A straight or non-negotiable bill of lading, because it does not allow transfer of title, cannot be used to create a pledge and so used as security in a documentary credit transaction.<sup>250</sup>

When the bank accepts documents as conforming to the credit, the property in the goods

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<sup>242</sup> (1884) 10 App Cas 74.

<sup>243</sup> *Allen v Coltart* (1883) LR 11 QBD 782.

<sup>244</sup> Jack, *Documentary Credits*, p. 251.

<sup>245</sup> *Official Assignee of Madras v Mercantile Bank of India*, [1935] AC 53. Kendall & Buckley, *The Business of Shipping*, p. 237.

<sup>246</sup> Jack, *Documentary Credits*, p. 251.

<sup>247</sup> Gutteridge & Magrah, *The Law of Bankers ...*, p. 169.

<sup>248</sup> *Barlows Tractor & Machinery Co v Oceanair (Transvaal) Ltd* 1978 (3) SA 175 (W); *Mercantile Bank of India Ltd v Davis* 1947 (2) SA 723 (C).

<sup>249</sup> Jack, *Documentary Credits*, p. 252.

<sup>250</sup> Kendall & Buckley, *The Business of Shipping*, p. 240.



previously retained by the seller passes to the buyer and the seller will no longer look to the documents but finds his security in the promise of the bank to make payment.<sup>251</sup> While ownership of the goods will pass to the buyer the bank retains its possessory title of pledgee against the buyer. Until the buyer has discharged his debt to the bank, the bank retains its possessory title.<sup>252</sup> The special interest acquired by the pledgee includes the right to sell the goods. If the buyer does not fulfil his obligations the bank may exercise that right and sell the goods or documents as if it were the owner.<sup>253</sup>

If the credit provides for immediate payment the bank is able to retain possession of the documents until it has received payment. Where a time draft is involved the bank will have released the documents to the buyer before having received payment, so parting with its security. A bank can protect itself by arranging other securities from the buyer such as debentures, charges, guarantees or trust receipts.<sup>254</sup>

When the transport documents used were invariably negotiable bills of lading and documents of title the banks had no difficulty in protecting themselves. The increasing use of other forms of transport document, particularly the sea waybill which is not a negotiable document of title, was initially regarded as having weakened the bank's security. Transport documents which do not represent the goods do not facilitate the creation of a pledge. For the same reason a lien on the

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<sup>251</sup> Jack, *Documentary Credits*, p. 252.

<sup>252</sup> *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849.

<sup>253</sup> Jack, *Documentary Credits*, p. 251. Gutteridge & Magrah, *The Law of Bankers ...*, p. 5. *Rosenberg v International Banking Corporation*, (1923) 14 LI LRep 347. In *The Future Express* [1992] 2 Lloyd's Rep 79 a contract indicated an intention that the bank become a pledgee of the goods, on receipt of the bills of lading. The property in, and possession of the goods passed before the bank, as named consignee, obtained possession of the bills of lading, delivery having been made by the carrier without the production of a bill of lading. The bank was aware that the goods had long since been discharged and dispersed before the bills of lading came into its possession. It was held that it cannot, in the light of these facts, be intended that the subsequent transfer of the bills to the bank should confer constructive possession of the goods. Notwithstanding that it was the original intention that the bank become pledgee under the circumstances no pledge was in fact created, and the bank never acquired any security interest in the goods.

<sup>254</sup> Jack, *Documentary Credits*, p. 254. Trust receipts are found in English law. Under such a receipt the bank releases the bill of lading to the buyer on the understanding that by taking possession of the goods he holds them in trust for the bank and will sell them on the bank's behalf. By passing on the documents the bank does not abandon its rights as pledgee. If the transport document is not a bill of lading, or other negotiable transport document which would be treated in the same way as a bill of lading, the trust receipt cannot be used. *Sassoon & Merren, CIF and FOB Contracts ...*, p. 141. Gutteridge & Magrah, *The Law of Bankers ...*, p. 6.

documents does not serve to secure the goods. In these instances banks either need to enter other security arrangements which do not depend on the security provided by the transport documents<sup>255</sup> or need to introduce procedures that will allow the transport documents to provide satisfactory security. It has been possible to adapt the use of non-negotiable sea waybills to ensure that they do provide the bank with adequate security over the goods. This has been achieved by naming the bank as consignee on the sea waybill and by incorporating clauses which effectively place the bank in control of the goods<sup>256</sup>. Banks are now willing to receive these documents under letter of credit transactions. Evidence of their acceptability is provided by the inclusion of a separate article in the 1993 Revision of the UCP to specify conditions for their acceptability under a documentary letter of credit transaction.<sup>257</sup> Regardless of the financial arrangements made and the nature of the transport documents required, it is the financial reliability of the parties, in particular the buyer, which is the bank's most important consideration.<sup>258</sup>

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<sup>255</sup> Jack, *Documentary Credits*, p. 250.

<sup>256</sup> Debattista, *Butterworths Journal of International Banking and Finance Law*, vol. 9, no. 7, 1994, p. 334. See 2 of chapter 4.

<sup>257</sup> Article 24.

<sup>258</sup> Tetley, *Marine Cargo Claims*, p. 999.

## CHAPTER 4

### THE LEGAL NATURE AND ROLE OF THE SEA WAYBILL

#### 1 The origin of the sea waybill

The sea waybill has emerged as an alternative sea transport document to the bill of lading. Its appearance has been a reaction to the problems associated with the employment of bills of lading in the face of the advances in transport technology.<sup>1</sup> In recent years the unique characteristic of the bill of lading, which only allows for the delivery of goods on presentation of the document, has given rise to serious practical problems.<sup>2</sup> Prior to the developments in the shipping industry over the past 20 years, the shipping documents would generally reach the consignee before the cargo arrived at its destination. Containerisation, faster ships, fewer ports of call and improved terminal facilities have reduced transit time. The processing and posting of documentation has not kept pace.<sup>3</sup> Several factors have contributed to the delays experienced with documentation and the failure of the bill of lading to arrive at the port of destination before the arrival of the ship and the goods, most notably in the case of short sea routes. Another source of severe time constraints is the practice of issuing the bill of lading only once the cargo has been loaded on board the ship, making it the last document to be issued in the export transaction while it is the first required in the import transaction.<sup>4</sup> Where payment is to be made under a confirmed letter of credit the processing of the documents frequently takes longer than the completion of the voyage. This is particularly true in the case of bulk cargo, which is subject to resale by traders who speculate on the futures market with no intention of taking physical delivery.<sup>5</sup> In the case of general cargo the

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<sup>1</sup> Ridley, *The Law of the Carriage* ..., p. 112.

<sup>2</sup> Wilson, *Carriage of Goods by Sea*, p. 160.

<sup>3</sup> Todd, *Modern Bills of Lading*, p. 244.

<sup>4</sup> Goode, *Proprietary Rights and Insolvency*, p. 65.

<sup>5</sup> Goode, *Proprietary Rights and Insolvency*, p. 65. Todd, *Modern Bills of Lading*, p. 245. It is possible that a single cargo may be sold and resold 40 times before the ship reaches its destination, many transactions taking place before the commodity is shipped or even produced. It is not uncommon for the documentation to take months or even years to catch up. In *Hansen-Tangens (A/S) Rederi III v Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194 the bill of lading was delayed where payment was to be made under a letter of credit. The shipowners delivered the cargo without the production of the bill of lading, clearly a common practice in the oil trade. The master of the vessel, with some 14 years experience, when asked how often an original bill of lading had been presented to him before

paperwork may be delayed by a multiplicity of bills of lading, since the cargo in a single vessel may be covered by as many as 2000 bills of lading.<sup>6</sup>

The delay in the arrival of the bill of lading at the port of destination may have serious implications, particularly for the carrier.<sup>7</sup> The carrier will not know the identity of the holder of the bill or the reason for the bill's delayed arrival and will be unable to make an assessment as to the time of its availability. If he is unable to deliver the cargo he may lose the next charter or delay the vessel's schedule.<sup>8</sup> The delay also means that the consignee will not be able to collect his goods and that he will incur heavy charges for demurrage and storage at the port of discharge. The cargo owner may face losses if the goods are perishable or subject to fluctuating market prices.<sup>9</sup> A string of claims by various parties in the chain could be initiated. Finally, the delay could lead to the slowing down of the turn around time of ships and serious port congestion, so affecting the profitability of the shipping industry.<sup>10</sup> Furthermore, the success of the underlying sales contract could be jeopardised.

Traders have resorted to the use of letters of indemnity as a temporary substitute for the absent bill of lading.<sup>11</sup> In agreeing to deliver goods without the production of a bill of lading the carrier is exposing himself to a considerable risk because he is liable to the true owner for the full value

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discharge, replied that he had never seen one. An increasingly common practice, particularly in the bulk oil trade, is for a shipper to give one original bill of lading to the master with the instruction to deliver it to a named person at the port of discharge and on the handing back of the original, to deliver the cargo. There is doubt as to the desirability and legal validity of this practice. Wilson, *Carriage of Goods by Sea*, p. 170.

<sup>6</sup> Goode, *Proprietary Rights and Insolvency*, p. 65.

<sup>7</sup> Todd, *Modern Bills of Lading*, p. 245.

<sup>8</sup> Wilson, *Carriage of Goods by Sea*, p. 160.

<sup>9</sup> Wilson, *Carriage of Goods by Sea*, p. 161.

<sup>10</sup> Goode, *Proprietary Rights and Insolvency*, p. 65. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 211.

<sup>11</sup> Goode, *Proprietary Rights and Insolvency*, p. 66. The indemnity may be one given by the seller in a chain to the buyer or bank to whom it is necessary to present the shipping documents in order to obtain payment or an indemnity required by a carrier before he will release the goods to the last buyer who claims delivery. See 2. 6. 1 of chapter 3.

of wrongly delivered cargo.<sup>12</sup> Such action constitutes wilful misconduct and a deliberate breach of contractual obligations. If delivery is made, even in good faith, to the wrong party the carrier may lose the protection provided by the contract of carriage. He may also lose the protection of the liability insurance provided by his P&I Club.<sup>13</sup> Yet, contracts of sale and pursuant letters of credit, not uncommonly include express provisions allowing the seller to tender an approved letter of indemnity to the buyer or bank in place of a bill of lading.<sup>14</sup> The tender of letters of indemnity or bank guarantees to secure the release of cargo is another malpractice under the bill of lading system.<sup>15</sup>

The use of the sea waybill in place of a bill of lading has provided a solution to the problems associated with the failure of the speed of document processing to keep pace with technological developments in the transport industry. The development of the sea waybill is one of the results of the container revolution and the emergence of fast container ships.<sup>16</sup> Increasing use is being made of this document and it has been estimated that as much as 85 percent of the trans-Atlantic trade in containerised cargo could be carried under sea waybills.<sup>17</sup>

Waybills were first developed for use in land and air transport in which negotiable documents of title were not needed by the consignee, who had little opportunity to sell the goods in transit

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<sup>12</sup> Todd, *Modern Bills of Lading*, p. 244. Goode, *Proprietary Rights and Insolvency*, p. 67. P&I Clubs do not provide insurance cover against such risks.

<sup>13</sup> Wilson, *Carriage of Goods by Sea*, p. 161.

<sup>14</sup> Wilson, *Carriage of Goods by Sea*, p. 161. The Grain and Feed Trade Association's GAFTA 100 form employed in the grain trade provides that

In the event of the shipping documents not being available on arrival of the vessel at destination, sellers may provide other documents or an indemnity entitling the buyers to obtain delivery of the goods and payment shall be made by buyers in exchange for same.

<sup>15</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 64.

<sup>16</sup> Tetley, *Marine Cargo Claims*, p. 941. Wilson, *Carriage of Goods by Sea*, p. 163.

<sup>17</sup> Højer, lecture presented at ESCAP/UNCTAD/BIMCO Seminar on Chartering and Ship Finance, Bangkok, 30 October - 3 November 1995, p. 5. The sea waybill is of particular value on short sea routes. Where vessels carrying goods cover relatively long distances the bills of lading are more easily able to reach their destination on time. In South Africa bills of lading generally arrive before the vessel carrying the goods. Sea waybills are, however, used to cover the carriage of goods by sea to and from South Africa but the reason for their use is not to avoid the problems associated with the late arrival of bills of lading. This information was gained in an interview with Alan J. Cowell, the Executive Director of the South African Association of Freight Forwarders, in June 1996.

because the journeys involved were so brief.<sup>18</sup> The sea waybill is basically similar to the air, road and rail consignment notes, also referred to as waybills. Carriage by land and air does not normally involve a bill of lading<sup>19</sup> as bills of lading are only required where the documents travel faster than the goods and a negotiable instrument which facilitates the sale of goods in transit is needed.<sup>20</sup>

## 2 The legal role of the sea waybill

The waybill, alternatively called a sea or ocean waybill,<sup>21</sup> liner waybill, data freight receipt,<sup>22</sup> cargo key receipt,<sup>23</sup> and similar to a straight bill in the United States,<sup>24</sup> is a document issued by the

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<sup>18</sup> Wilson, *Carriage of Goods by Sea*, p. 163.

<sup>19</sup> In the United States bills of lading are also issued for transport other than maritime transport.

<sup>20</sup> Todd, *Modern Bills of Lading*, p. 252. Glass & Cashmore, *Introduction to the Law ...*, p. 219. Article 15 (3) of the Warsaw Convention provides that nothing in the convention prevents the issue of a negotiable air waybill. This means that the air waybill may be a transferable document of title. The national law which governs the conclusion of the contract and the custom of merchants determines whether or not it is such a document. It would appear that the business community is not inclined to recognise the air waybill as a document of ownership. The road and rail consignment notes allow the consignor and consignee a limited power of disposal over the goods in transit, but they are not regarded as negotiable documents of title. Booyesen, *International Transactions*, p. 281.

<sup>21</sup> The sea waybill is a result of work done by Sweden's Trade Procedures Council (hereinafter SWEPRO) in consultation with the CMI. Kozolchik, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 219.

<sup>22</sup> A sea waybill entitled a Data Freight Receipt (hereinafter DFR) was introduced by Atlantic Container Lines (hereinafter ACL) in 1971. The DFR eliminated the need for paper documentation by transmitting information relating to the issue of a DFR by computer to ACL's office at the consignee's location. Banks have expressed concern that the DFR does not provide an adequate security interest in the documents representing the goods. Kozolchik, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 220.

<sup>23</sup> Ramberg, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, p. 8. The Cargo Key Receipt (hereinafter CKR) was a result of the work of Prof Grönfors done in cooperation with SWEPRO and Swedish shipping companies. The CKR was intended to overcome certain of the DFR's limitations, particularly its inability to provide collateral security in documentary credit transactions. It did so by introducing a "no disposal" (hereinafter NODISP) clause in terms of which the shipper waived his right of disposal of the goods while in transit. The CKR named the third party creditor as consignee and the buyer as notify party. A closed system which precluded the negotiation of either the CKR or of a master bill of lading containing a NODISP clause was created. Banks in the United States were unwilling to accept the CKR. Kozolchik believes that the reason for this is that the CKR threatens two fundamental institutions of letter of credit law: the principle of examining all the documents tendered by the seller at the same time and the bank's perfected security interest in the bill of lading and the goods themselves. Kozolchik, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, pp. 221, 222 & 223.

<sup>24</sup> Grönfors, K. The Paperless Transfer of Transport Information and Legal Functions, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, The International Commercial Law Series, Centre for Commercial Law Studies, edited by C. M. Schmitthoff & R. M. Goode, 1988, vol. 1, p. 30.

carrier and has been defined as

a non-negotiable document which evidences a contract for the carriage of goods by sea and the taking over or landing of the goods by the carrier, and by which the carrier undertakes to deliver the goods to the consignee named in the document.<sup>25</sup>

Sea waybills, like bills of lading, constitute a receipt and provide evidence of the contract of carriage, its terms being incorporated by reference.<sup>26</sup> In contrast to bills of lading, sea waybills are not negotiable documents of title representing the goods.<sup>27</sup> The right to control the goods in transit and the right to claim their delivery at the port of destination are independent of the sea waybill.<sup>28</sup> The sea waybill is simply a non-negotiable receipt which a consignee does not need to present to obtain delivery of the goods.<sup>29</sup> Delivery is to a named consignee and to obtain delivery the consignee simply needs to provide proof of identity.<sup>30</sup> Only the carrier and the shipper are original parties to the contract of carriage evidenced by the sea waybill. The consignee, although named in the document, is not a party to the transport contract and so does not acquire any rights

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<sup>25</sup> Tetley, *Marine Cargo Claims*, p. 942 quoting the definition given by the ECE.

<sup>26</sup> Goode, *Proprietary Rights and Insolvency*, p. 72. Grime, *Shipping Law*, p. 125. Todd, *Modern Bills of Lading*, p. 252. Wilson, *Carriage of Goods by Sea*, p. 162. In this respect the waybill is similar to the short form bill of lading, which does not carry the printed terms of the contract of carriage on the reverse side of the bill, but simply a clause incorporating the carrier's standard terms and conditions.

<sup>27</sup> Wilson, *Carriage of Goods by Sea*, p. 163. Todd, *Modern Bills of Lading*, p. 252. Tetley, *Marine Cargo Claims*, p. 941. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 8. Debattista is, however, of the opinion that the sea waybill is a document of title at common law in the sense that the right to claim delivery of goods shipped under a sea waybill can pass from seller to buyer without a formal assignment and without notification to the carrier. Furthermore, a bank which opens a letter of credit under which a sea waybill is to be tendered could insist that it be named as shipper and consignee and so it would be able to realise its security over the goods by claiming their delivery from the carrier. Debattista, *Sale of Goods ...*, pp. 210 & 211.

<sup>28</sup> Grönfors, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, p. 31.

<sup>29</sup> Todd, *P. Cases and Materials ...*, p. 334. Tetley, *Marine Cargo Claims*, p. 942. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 8.

<sup>30</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 216. Tetley, *Marine Cargo Claims*, p. 942. Wilson, *Carriage of Goods by Sea*, p. 163. Establishing the identity of the consignee may be a problem for the carrier who must insure that the person demanding the goods is in fact the named consignee. When the consignee is a legal entity the difficulty lies in deciding whether the person claiming the goods is authorised to receive them. Generally, the practice of notifying the person named as consignee of the arrival of the goods provides sufficient security. It appears that carriers employing the sea waybill system do not incur significant losses because of the wrongful delivery of the goods at their destination. UNCTAD, *The Economic and Commercial Implications ...*, p. 65.

or incur any liabilities under that contract.<sup>31</sup>

As the sea waybill is not a document of title, it can be carried on the ship itself or the information it contains can be reproduced and transmitted electronically, so avoiding the delays associated with the movement of paper documents. Where goods are carried under a sea waybill the carrier can release the cargo immediately upon arrival of the ship, thereby reducing the time and cost of unloading and processing the cargo.<sup>32</sup> In addition, the sea waybill's lack of negotiability makes it a safer commercial document which is less likely to be lost, stolen or subject to fraud.<sup>33</sup>

Negotiability of title to the goods and the transfer of rights under the contract of carriage are not required in every commercial transaction. In the majority of cases of general cargo and containerised liner shipments a bill of lading is not necessary.<sup>34</sup> General cargo and manufactured goods are seldom sold in transit and cargo of mixed ownership in containers packed by freight forwarders is never subject to such sale. A bill of lading is not required when the question of payment is irrelevant, for example the in-house movement of goods between different branches of a multi-national company, the shipment of household goods or personal effects, and open account trading between long standing and trusted overseas buyers where security is not needed.<sup>35</sup> Only a small percentage of the container trade needs negotiable documents, and an even smaller

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<sup>31</sup> International Chamber of Shipping (hereinafter ICS) Document ICS/39, 16/86, 2 October, 1986, p. 2. The problem of creating a link between the carrier and the consignee can be met in a number of ways. The sea waybill may contain a warranty by the shipper that he is acting not only on his own behalf but also as an agent of the consignee. It is possible that an implied contract may be construed upon the terms of the carrier's contract of carriage. The shipper may assign his rights under the contract of carriage to the consignee. The consignee may also acquire direct rights against the carrier by "attornment," that is when the carrier, either on the instructions of the shipper or on his own initiative, gives an undertaking to the consignee that the goods will be held at the consignee's account. ICS/39, 16/86, 2 October, 1986, pp. 3,4, & 5. The English Carriage of Goods by Sea Act 1992, provides in section 2 (1) that title to sue now vests in the consignee identified in the sea waybill. In terms of this legislation the transfer of rights and liabilities under the contract of carriage can be effected independently. In this way a consignee can acquire the right to sue the carrier for loss or damage to the goods while avoiding liability under the contract.

<sup>32</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 216.

<sup>33</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 216. Tetley, *Marine Cargo Claims*, p. 942.

<sup>34</sup> Todd, *Modern Bills of Lading*, p. 252.

<sup>35</sup> Wilson, *Carriage of Goods by Sea*, p. 163. Tetley, *Marine Cargo Claims*, p. 942. Todd, *Modern Bills of Lading*, p. 252.



proportion of transactions require a “fully-fledged” bill of lading.<sup>36</sup> All such circumstances lend themselves to the use of sea waybills. Sea waybills are appropriate transport documents for replacing bills of lading in most situations where a document of title is not necessary. The types of transit for which they are suitable include port-to-port, container and general cargo transport, and the sea-leg of multimodal or door-to-door transport. Under the auspices of the United Nations a recommendation has been adopted favouring the use of sea waybills in all instances where a bill of lading is not required for negotiation purposes.<sup>37</sup> The CMI has also recommended that where they are not required the issue of bills of lading should be discouraged.<sup>38</sup>

Because the sea waybill is not a negotiable document of title it does not provide the same measure of security as the bill of lading when used in a documentary credit transaction, nor can it be used where the consignee may wish to sell the goods while in transit.<sup>39</sup> Where these documents are used these two aspects of negotiability are forfeited. For the banks a negotiable document of title endorsed in blank has traditionally been the ideal document, providing the necessary security for the credit without placing the bank under any obligations under the contract of carriage. The use of a sea waybill could only provide equivalent security if the bank were named as consignee on the sea waybill. As the bank is not a party to the contract of carriage, this is not necessarily a satisfactory solution, because the shipper is entitled to change his instructions and require the carrier to deliver the goods to a party other than the consignee designated in the sea waybill. Furthermore, the non-negotiable character of the sea waybill means that it will be of no use in transactions involving bulk cargo which is commonly subject to resale while in transit. If there is doubt as to the buyer’s solvency, or the ability or willingness of the seller to perform, the sea

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<sup>36</sup> Tetley, *Marine Cargo Claims*, p. 997.

<sup>37</sup> United Nations Economic and Social Council, ECE, Committee on the Development of Trade, paper on Transport Documents and Procedures, *Facilitation of Maritime Transport Documents*, transmitted by the Swedish Trade Procedures Council (SWEPRO), TRADE/WP.4/R.392, 20 January 1986, p. 1. Lloyd, *Lloyd’s Maritime and Commercial Law Quarterly*, 1989, p. 50, states that

(t)here seems to be a curious reluctance to say a long farewell to the bill of lading. The possession of a bill of lading still makes people feel comfortable, even when it serves no commercial purpose other than could be served by a sea waybill. If we are going to persuade shipowners and merchants, customs authorities and indeed governments throughout the world to give up the bill of lading when it is not really necessary, and to use the sea waybill instead, there is still much work to be done by way of education.

<sup>38</sup> Shipping lines could do so by charging large amounts for their issue. Todd, *Modern Bills of Lading*, p. 252.

<sup>39</sup> Wilson, *Carriage of Goods by Sea*, p. 163. Todd, *Modern Bills of Lading*, p. 252.

waybill is not a satisfactory alternative to the bill of lading.<sup>40</sup>

When a buyer has paid for goods in advance of arrival at their destination or a bank has extended credit under a documentary credit, the buyer and the bank traditionally look to the transport documents to protect their interests. Sea waybills do not secure their interests. The duty to deliver the goods to the consignee arises from the contract made between the shipper and the carrier, the terms of which may at any time be waived or varied. The shipper has the right to give new delivery directions to the carrier and may instruct the carrier to withhold delivery of the goods, or to deliver them to a different consignee. In the sea waybill system the right to control the goods is independent of the transport documents. The main feature of the sea waybill contract is that the consignor has the right to control the goods until they arrive at their destination and that the person identifying himself as the named consignee has the right to request their delivery. The right to control the goods does not depend on the production of the sea waybill any more than does the right to claim delivery of the goods at their destination.<sup>41</sup>

Waybills issued in terms of the international conventions which govern the carriage of goods by air, road and rail offer some protection. The rights of the buyer who has paid in advance<sup>42</sup> are secured by provisions which limit the right of the shipper to redirect goods to another consignee. In order to give new instructions for the delivery of goods to the carrier the consignor must provide the shipper's copy of the air waybill<sup>43</sup> or produce the "duplicate" or first copy of the waybill or consignment note.<sup>44</sup> Possession of the "duplicate" copy of the waybill provides evidence of who has the right of control over the goods. The handing over of the duplicate waybill, from the consignor to the consignee, implies that the consignor assigns his right to control the goods to the consignee. An express declaration assigning the right of control to the consignee

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<sup>40</sup> Todd, *Modern Bills of Lading*, p. 253.

<sup>41</sup> Grönfors, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, p. 31.

<sup>42</sup> The rights of the bank which has extended credit on the basis of an air transport document or a road or rail transport document are protected in the same way.

<sup>43</sup> Warsaw Convention, article 12. 3.

<sup>44</sup> CMR, article 12. 2 and COTIF/CIM, article 21. 4.

achieves the same effect as the handing over of the duplicate waybill.<sup>45</sup>

In an attempt to ensure that the sea waybill, as a contract of carriage, satisfies the security requirements of contracts of sale<sup>46</sup> and the financing of those sales, it has been necessary to make use of such declarations. To secure the position of buyers and banks, clauses in which the shipper irrevocably declares that he has assigned his right to control the goods during transit to the named consignee have been incorporated into many sea waybills. These NODISP clauses may also declare that the carrier has agreed to hold the goods in security and as collateral for the buyer or bank named as consignee.<sup>47</sup> The NODISP clause enables the buyer to pay against documents, and the bank issuing a letter of credit to acquire security in the goods transported. When the NODISP declaration applies, the named consignee is placed in full control of the goods from the time the sea waybill is issued. Where a sales contract is financed by a documentary letter of credit it is important that the bank is named as consignee on the sea waybill. The consignee can rely on the sea waybill in the same way as if he were the holder of a full set of original bills of lading. Clear stipulations to the right of disposal of goods in transit and the manner of the release of the goods are provided.<sup>48</sup>

A new article specifying requirements in relation to non-negotiable sea waybills has been incorporated into the 1993 revision of the UCP.<sup>49</sup> The banking community has shown its willingness to regard sea waybills as acceptable documents where the sales contract is financed by means of a documentary letter of credit.

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<sup>45</sup> Grönfors, in *International Carriage of Goods: some Legal Problems and Possible Solutions*, p. 32.

<sup>46</sup> Where, for example, the consignor wishes to transfer his right to control the goods in transit to the consignee, who has paid for the goods and needs to be able to give instructions to the carrier.

<sup>47</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 9.

<sup>48</sup> SWEPRO, TRADE/WP.4/R.392, pp. 2 & 3. On the SWEPRO sea waybill a box containing the words NODISP appears. If the shipper wishes to retain the right of disposal the word NODISP is deleted. In other standard form sea waybills the words NODISP need to be written on the form, if the consignor has agreed to give up his right of disposal.

<sup>49</sup> Article 24. See 6. 3. 2 in chapter 6.

### 3 The Uniform Rules for Sea Waybills

A sea waybill is a non-negotiable contract of carriage of goods by sea, regulated by the terms and conditions found in the sea waybill. Sea waybills are generally unregulated and many types are found under common law, each with its own terms and conditions.<sup>50</sup> Two examples of sea waybills found in English Law, which are representative of two broad categories, are the General Council of British Shipping (GCBS)<sup>51</sup> Common Short Form Sea Waybill, which was introduced in 1977 by the GCBS and the Simplification of International Trade Procedures Board (SITPRO),<sup>52</sup> and the Peninsular and Oriental (P&O) Containers Limited Waybill (P&OCL).<sup>53</sup> The United States straight bill of lading is regulated by the Pomerene Act and has the advantage of consistent and uniform terms and conditions.<sup>54</sup>

To introduce some uniformity in the use of sea waybills the CMI adopted the CMI Uniform Rules for Sea Waybills in June 1990.<sup>55</sup> The Rules are intended for voluntary incorporation into the contract of carriage covered by a sea waybill. The Rules recognise that neither the Hague nor the Hague-Visby conventions apply but provide that a contract of carriage covered by a sea waybill will be subject to the international convention or national law, where applicable, whose application would have been mandatory had the contract in fact been covered by a bill of lading or similar document of title.<sup>56</sup> The Rules incorporate provisions relating to representations in a sea waybill

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<sup>50</sup> Tetley, *Marine Cargo Claims*, p. 943.

<sup>51</sup> Hereinafter GCBS.

<sup>52</sup> Hereinafter SITPRO.

<sup>53</sup> The GCBS is issued in a common form and may be used by any carrier for outward liner shipments from the United Kingdom. It is filled out by the shipper and completed by the carrier and is subject to the Carrier's Standard Conditions of Carriage. This sea waybill is suitable for use in port-to-port and through transport operations but not for multimodal transport as it does not have the necessary space for information relating to multimodal transport. The P&OCL sea waybill is of a proprietary nature and intended for use by one carrier only and is filled out and completed by that carrier. This type of sea waybill is suited to both multimodal transport and port-to-port operations since space is provided for listing the origin and destination "zones" in addition to the loading and discharging ports. Both bills are marked non-negotiable. Tetley, *Marine Cargo Claims*, pp. 943 & 944. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 218.

<sup>54</sup> Tetley, *Marine Cargo Claims*, p. 943. See 4. 3. 2. 3 of chapter 3.

<sup>55</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 224.

<sup>56</sup> Rule 4.

concerning the quality or condition of goods received for shipment which are similar in effect to those in the Hague and the Hague-Visby Rules.<sup>57</sup> It is also provided that a shipper entering a contract of carriage does so not only on his own behalf, but also as an agent for, and on behalf of the consignee. The shipper warrants to the carrier that he has the authority to do so.<sup>58</sup> In this way the consignee acquires rights and incurs liabilities under the contract of carriage.

Relevant to the financing of international sales contracts is the Rule acknowledging the right of the shipper, as original party to the contract of carriage, to change the name of the consignee at any time before he claims delivery of the goods on their arrival at their contractual destination.<sup>59</sup> The shipper may relinquish this right of control to the consignee at any time prior to the receipt of the goods by the carrier. The Rules thus facilitate the use of NODISP clauses.<sup>60</sup> The transfer of control must be recorded on the sea waybill.<sup>61</sup> Where banks rely on a sea waybill as security for a commercial credit it is likely that they will insist on such transfer of control.<sup>62</sup> To mitigate the position of the carrier the Rules require delivery of the goods to the consignee on production of proper identification but relieve him of liability for wrong delivery where he can prove that he exercised reasonable care in seeking to identify the consignee.<sup>63</sup>

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<sup>57</sup> Rule 5. Article III 3 and 4 Hague-Visby Rules. Such representations, if not qualified by the carrier, constitute *prima facie* evidence in favour of the shipper and conclusive evidence in favour of a consignee in good faith.

<sup>58</sup> Rule 3.

<sup>59</sup> Rule 6 i. This is subject to the shipper giving the carrier adequate warning and indemnifying him against possible additional expenditure.

<sup>60</sup> Debattista, *Butterworths Journal of International Banking and Finance Law*, vol. 9, no. 7, p. 334.

<sup>61</sup> Rule 6 ii.

<sup>62</sup> Wilson, *Carriage of Goods by Sea*, p. 165.

<sup>63</sup> Rule 7.

**CHAPTER 5**  
**THE LEGAL NATURE AND ROLE OF THE MULTIMODAL TRANSPORT**  
**DOCUMENT**

**1 The role played by freight forwarders and non-vessel operating multimodal transport operators**

In traditional CIF and FOB contracts the seller arranges for overland carriage to the ship, the sea carriage is arranged by the seller or buyer, as the case may be, and the buyer arranges the overland carriage of the goods after their discharge from the ship. Increasingly, modern contracts of carriage are conducted on a door-to-door basis by non-vessel operating multimodal transport operators (NVO-MTOs),<sup>1</sup> traditionally known as freight forwarders, who issue multimodal transport documents. These contracts involve a series of different modes of carriage and a number of different carriers. With the more frequent use of containers, the sea carriage only constitutes one leg of the multimodal transport contract.<sup>2</sup>

These contracts may take various forms. A freight forwarder may act as the shipper's agent and on his behalf enter into a series of individual carriage contracts with the relevant road, rail, air and sea carriers. The individual carriers issue transport documents for their leg of the journey. Each of these contracts is independent and will be governed by the appropriate unimodal provisions.<sup>3</sup> This is typical of the undertaking of a traditional freight forwarder which is simply to arrange for transport on the customer's behalf. There is no underlying contractual obligation to assume the liability of a carrier.<sup>4</sup> The forwarder's undertaking does not constitute a contract of carriage but only a contract of agency<sup>5</sup> and any documents issued by the freight forwarder to the shipper under

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<sup>1</sup> Hereinafter NVO-MTOs.

<sup>2</sup> Wilson, *Carriage of Goods by Sea*, p. 237.

<sup>3</sup> See the definition of "unimodal transport" in 4.3 in chapter 1.

<sup>4</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 10. De Wit, *Multimodal Transport*, p.19.

<sup>5</sup> Tetley, *Marine Cargo Claims*, p. 929.

this type of legal agreement are not transport documents.<sup>6</sup>

Alternatively, the freight forwarder or a specific carrier may act as principal for one stage of the carriage and as the shipper's agent for the other stages, for which independent contracts of carriage would be entered. For the segment of the transport which the freight forwarder undertakes as an actual carrier, the relevant document issued by the forwarder to the shipper will be a transport document.<sup>7</sup> Transport documents would also be issued by the other actual carriers to the freight forwarder, who receives them on the shipper's behalf.

Another possibility would be for a freight forwarder to conclude a single contract with the shipper for the multimodal transportation of the goods on a door-to-door basis. When the freight forwarder contracts on this basis he becomes a NVO-MTO and is regarded as a carrier. The NVO-MTO would negotiate separate contracts for the different legs with the individual unimodal carriers but would accept full responsibility to the shipper for the safety of the goods for the full duration of transit. The shipper would be in a contractual relationship only with the NVO-MTO and not with the individual "actual carriers" and his rights and obligations would depend entirely on the terms of the multimodal transport contract issued to him by the MTO.<sup>8</sup>

Containerisation and multimodal transport in the United States gave rise to the non-vessel

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<sup>6</sup> The traditional freight forwarder "house bills of lading" is a misnomer because these documents are not bills of lading in a technical legal sense. House bills of lading are issued to shippers by freight forwarders, who consolidate cargo belonging to different owners in one consignment, to be shipped under a groupage bill of lading issued by the carrier to the freight forwarder. This is a frequent practice in the container trade. Schmitthoff, *Schmitthoff's Export Trade*, p. 580.

<sup>7</sup> See the definition of "intermodal transport" in 4.3 in chapter 1.

<sup>8</sup> Wilson, *Carriage of Goods by Sea*, p. 237. See the definition of "multimodal transport" in 4.3 in chapter 1. When sea carriage constitutes one leg of a multimodal transport contract two documents, both of which may be negotiable documents of title, are issued. One of these documents is the multimodal transport document issued by the MTO to the shipper and the other is the bill of lading issued by the actual ocean carrier to the MTO. This situation may have serious implications for all the parties concerned. A French case which led to "exceptionally protracted litigation" had to deal with the problem which arose in consequence of an actual ocean carrier delivering the goods to the consignee on presentation of the FIATA Bills of Lading. The ocean carrier did not insist on the presentation of one of the originals of its own ocean bill of lading, which were being held as security by a sub-contractor who had arranged the ocean carriage. Cass France, 29 January 1991 (The Diana no. 2) DMF 1991, 354; on *renvoi* Cass, France, 31 March 1987 (The Diana no. 1) DMF 1988, 451. De Wit, *Multimodal Transport*, p. 315.

operating common carrier (NVOCC),<sup>9</sup> which initiated the change in the traditional role of the freight forwarder as a relatively minor player in the transport industry.<sup>10</sup> In 1984 the United Kingdom's Institute of Freight Forwarders (IFF) produced a new set of standard trading conditions reflecting the international trend for freight forwarders to assume the role of MTOs.<sup>11</sup> The International Federation of Freight Forwarders Associations (FIATA),<sup>12</sup> a European based global association of international freight forwarders, has also played a positive role in the promotion of multimodal transport. The wording of the back clauses on the FIATA Multimodal Transport Bill of Lading (FBL)<sup>13</sup> also reflect the more active part played by freight forwarders or MTOs in international transport operations.<sup>14</sup> The South African Association of Freight Forwarders is a FIATA member and has a licence to print and sell the FBL to its members.

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<sup>9</sup> Hereinafter NVOCC.

<sup>10</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 53. A NVOCC is, "a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier", § 3 United States Shipping Act of 1984, 46 USC App. § 1702 (17). The NVOCC enters a contract of affreightment with the shipper, issues its own bill of lading and takes full responsibility for the carriage from the point of origin to destination. In a transaction involving a NVOCC the NVOCC bill of lading is subsidiary to a "master" or underlying bill of lading issued by the carrier to the NVOCC. To obtain delivery of the goods covered by a NVOCC bill, the bill is presented to an agent of the NVOCC at the port of discharge, who in turn presents the master bill of lading to the shipping company to take delivery of the goods. The control of the consignee or his creditors over the goods is uncertain. A registry system for the NVOCCs has been established to make relevant information available to interested parties and to assist the NVOCC bills to acquire a status equal to that of their European counterpart, the FIATA bill of lading, Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, pp. 202, 203 & 206.

<sup>11</sup> To become an IFF member, or to remain one, freight forwarders taking on the role of MTOs have to provide adequate through transport liability insurance cover to establish their acceptance. UNCTAD, *The Economic and Commercial Implications ...*, p. 53. In the United States the NVOCCs need, in addition to the normal liability insurance, to file an up-to-date tariff with the Federal Maritime Commission as well as posting a performance bond of not less than \$50,000. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, pp. 204 & 205.

<sup>12</sup> Hereinafter FIATA.

<sup>13</sup> Hereinafter FBL.

<sup>14</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 53. The FBL may only be used by forwarders who are FIATA members. When the FIATA freight forwarder issues the FBL he does so as a carrier. He concludes a contract for multimodal transport with the shipper and subcontracts with other carriers to perform the carriage. Generally, the FIATA freight forwarder is not the actual carrier. When the FIATA freight forwarder acts as an agent only and not as a carrier the FIATA Freight Forwarder's Certificate of Transport (hereinafter FCT) is issued. This document is not a transport document but may be a "controlling" document (as provided for in article 58 of the CISG) between buyers and sellers as it is specified that the freight forwarder will only deliver goods against the surrender of the properly endorsed document. When a FIATA Freight Forwarder's Certificate of Receipt (hereinafter FCR) is issued the freight forwarder does not undertake to deliver goods in exchange for the document, but will deliver on the identification of the consignee as under the waybill system. The freight forwarder will only accept new directions on the surrender of the original FCR. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 10.



SAAFF members may use the FBL providing that their full name and other details are printed on the FBL, and that they have acceptable legal liability insurance.<sup>15</sup>

Where the NVO-MTO arranges that goods are carried by various carriers from the points of reception to destination a contract of carriage is entered into between himself and the shipper for which he issues a multimodal transport document. The 1993 Revision of the UCP shows that banks have taken cognisance of the developments in the transport industry. Two new articles demonstrate the bank's willingness to accept multimodal transport documents, subject to certain requirements, and transport documents issued by freight forwarders acting as carriers or MTOs.<sup>16</sup> Furthermore, the multimodal transport document will indicate that goods have been taken in charge by the MTO. The appearance of multimodal transport contracts has brought about a change in the traditional insistence on a shipped on board bill of lading. The multimodal transport document is a new type of transport document which is not connected to sea transport, so the traditional reference to a "shipped" document is not relevant.<sup>17</sup> The 1993 Revision of the UCP reflects this distinctive characteristic of multimodal transport documents by specifying that multimodal transport documents stating that "goods have been dispatched, taken in charge or loaded on board" are acceptable where the sales contract is to be financed by a letter of credit and the buyer specifies that payment will be made against such a document.<sup>18</sup>

## **2 The Uniform Rules for a Combined Transport Document**

In the early years of multimodal transport contracts there was a lack of uniformity in the terms and conditions of carriage. Documents which differed in character and effect from traditional bills of lading were used by multimodal transport operators to evidence the multimodal transport

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<sup>15</sup> SAAFF is a member of the Federation of Clearing and Forwarding Associations of Southern Africa, formed early in 1996. Although most of the members of the Federation are non-FIATA members, it is intended that the Federation will function within FIATA parameters. Information regarding SAAFF was provided by Alan J. Cowell, Executive Director of the SAAFF.

<sup>16</sup> Article 26 and article 30. See 6. 3. 4 and 6. 3. 5 in chapter 6.

<sup>17</sup> An opinion expressed by Dr Hans Carl, UNCTAD, Chief, Multimodal Transport and Technological Development Section, Services Development and Trade Efficiency Division.

<sup>18</sup> Article 26 a (ii).

contract. No uniform documentary practice emerged.<sup>19</sup> The existence of a number of different mandatory unimodal transport conventions with different liability regimes for the carriers by the various modes and the lack of a generally accepted convention to govern the multimodal transport contract complicated the situation.<sup>20</sup>

Recognition of the need to provide shippers who enter multimodal transport contracts with some degree of legal certainty led to the CMI draft convention for combined transport which resulted in the 1969 CMI Tokyo Rules. After a conference held under the auspices of The International Institute for the Unification of Private Law (UNIDROIT) the Tokyo Rules resulted in the production of the Draft Convention on the Combined Transport of Goods (TCM)<sup>21</sup> in 1971. The TCM, which attempted to harmonise the different documents which were in use, was never converted into a formal international convention. Its provisions have, however, been adopted by important commercial bodies and have provided the basis for many standard forms of contract used in container transport today.<sup>22</sup> In 1973 the ICC produced the Uniform Rules for a Combined Transport Document, revised in 1975,<sup>23</sup> which were based on the TCM and intended to provide minimum standard rules to be incorporated by the parties into their combined transport contracts. These rules were replaced by the ICC in 1992.<sup>24</sup>

The Rules recognised a new type of businessman, the Combined Transport Operator (CTO),<sup>25</sup> who issued a combined transport document. The basis of the Rules is that a seller wanting to ship his goods to a purchaser in another country will only need to deal with one person, the CTO. The

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<sup>19</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 257. Schmitthoff, *Schmitthoff's Export Trade*, p. 614.

<sup>20</sup> Wilson, *Carriage of Goods by Sea*, p. 237. Schmitthoff, *Schmitthoff's Export Trade*, p. 609. The adoption by the European Union of the CMR Convention, 1965 and the COTIF/Cim Convention, 1970, have been successful in regulating certain aspects of combined carriage.

<sup>21</sup> *Transport Combiné de Marchandises* (hereinafter TCM).

<sup>22</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 260.

<sup>23</sup> ICC Publication No. 273, 1973 & ICC Publication No. 298, 1975 (Reprinted 1985).

<sup>24</sup> Carl, H. Paper presented at a one-day seminar on the UNCTAD/ICC Rules for Multimodal Transport Documents, organised by the Jordan Shipping Agents' Association, at ICC Amman, 20 March 1996, p. 1.

<sup>25</sup> Hereinafter CTO.

CTO, acting as a principal and not as an agent for the seller, undertakes to perform or to procure the performance of combined transport by two or more modes of transport. As far as the sender is concerned the CTO is the carrier.<sup>26</sup> The Uniform Rules adopt a network system of liability for the CTO who assumes liability for the whole carriage.<sup>27</sup> The combined transport document could be issued in negotiable or non-negotiable form.<sup>28</sup> The combined transport document is able to serve as a document of title;<sup>29</sup> throughout the transaction it remains under the control of the CTO.<sup>30</sup>

The use of the combined transport document required that certain traditional statements appearing on the bill of lading be modified or replaced. The traditional “on board” notation was replaced by a “taking in charge” statement. The terms “place of receipt” and “place of delivery” either replaced or accompanied the traditional “port of loading” and “port of discharge” specifications. The traditional prohibition against transshipment was also dispensed with because transshipment is fundamental to the operation of combined transport.<sup>31</sup>

In the absence of any agreement on a uniform international regime on multimodal transport, a number of standard forms of transport document have incorporated modified versions of the ICC Rules.<sup>32</sup> These Rules provided the basis for both the Combidoc standard form Combined

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<sup>26</sup> Booyesen, *International Transactions*, p. 267.

<sup>27</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 615. Under this system if it is known at which stage of the combined transport the loss or damage occurred, the international convention governing that mode of transport will apply in regard to both the basis and limitation of liability. If it cannot be ascertained at which stage the loss or damage occurred the Rules provide their own maximum limits of compensation.

<sup>28</sup> Rule 2 C

<sup>29</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 206.

<sup>30</sup> Rule 3 (f) provides

delivery of the goods may be demanded only from the CTO [combined transport operator] or his representative, and against surrender of the CT [combined transport] document duly endorsed where necessary.

<sup>31</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 207. Where international sales contracts are to be financed by a documentary letter of credit and the transport document specified for submission to the bank was a combined transport document, the changes were provided for in article 25 b iii of the 1983 Revision of the UCP (ICC Publication no. 400). The changes are now accommodated in article 26 a ii of the 1993 Revision of the UCP (ICC Publication no. 500) relating to multimodal transport documents.

<sup>32</sup> Wilson, *Carriage of Goods by Sea*, p. 238. Examples are the P&OCL bill, and the ACL bill.

Transport Document issued by The Baltic and International Maritime Council (BIMCO)<sup>33</sup> and the FIATA Combined Transport Bill of Lading (FBL).<sup>34</sup> However, many container operators issue documents with their own standard conditions based on some variation of the Rules.

### 3 The United Nations Convention on International Multimodal Transport of Goods

As a result of work done by UNCTAD, The United Nations Convention on International Multimodal Transport of Goods (MT Convention)<sup>35</sup> was adopted in May 1980.<sup>36</sup> The aim of the Convention is to create a uniform international legal regime which will regulate a contract for the multimodal international transportation of goods from origin to destination.<sup>37</sup> The Convention will apply to a single multimodal transport contract concluded between a multimodal transport operator (MTO), who acts as principal, and a consignor for the door-to-door movement of goods, from a place of receipt in one country to a place of delivery in another, by more than one form of transport.<sup>38</sup> Either the place where the goods are taken in charge or the place where they are delivered must be located in a contracting state.<sup>39</sup> The MTO is responsible for the goods throughout the duration of the carriage from the time he takes them in his charge until the time of their delivery.<sup>40</sup> The convention has adopted a “modified uniform”<sup>41</sup> or a “modified” or “limited

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<sup>33</sup> Hereinafter BIMCO.

<sup>34</sup> This document may only be used by forwarders who are members of their national associations.

<sup>35</sup> UN Doc. TD/MT/Conf/17 (1980). The term “multimodal transport” was used instead of “combined transport” to distinguish the Convention from the TCM. Hereinafter MT Convention.

<sup>36</sup> The provisions of the convention are largely in line with those of the Hamburg Rules

<sup>37</sup> Booyesen, *International Transactions*, p. 268.

<sup>38</sup> Article 1.

<sup>39</sup> Article 2.

<sup>40</sup> Article 14. 1.

<sup>41</sup> Carl, paper presented at the IBA 12th Biennial Conference, Paris, September 1995, p. 6. Schmitthoff, *Schmitthoff's Export Trade*, p. 613. Article 19 of the Convention attempts a compromise between the “uniform” and “network” solutions to the problem of the MTO’s liability. Where the damage can be traced to a particular stage of the transit the basis of the MTO’s liability is uniform but a network limitation will apply. Consequently, where an applicable international convention or mandatory law provides a higher limit of compensation than that provided for by the Convention the MTO will be liable to the extent of the higher limit. If the location of the damage cannot be ascertained, both the basis and limit of the MTO’s liability will be uniform as determined by the Convention. In many countries

network” system of liability<sup>42</sup> for the MTO based on the concept of presumed fault. Consequently, the contractual undertaking of the MTO and the liability he assumes confers a unique status on the multimodal transport document when compared with traditional transport documents.<sup>43</sup>

The multimodal transport document is a document issued by the multimodal transport operator<sup>44</sup> which

evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.<sup>45</sup>

The multimodal transport document serves as a receipt for goods taken in charge<sup>46</sup> and evidence of the multimodal transport contract. The multimodal transport document can be issued in a negotiable or non-negotiable form at the option of the consignor.<sup>47</sup> The multimodal transport

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influential commercial parties, particularly insurers, object to the changed risk allocation under the Multimodal Transport Convention and the Hamburg Rules. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 14

<sup>42</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 265. Article 16.

<sup>43</sup> Todd, *Cases and Materials ...*, p. 343, referring to a paper by E. Chrispeels, Legal Officer in the UNCTAD Secretariat, *The Convention and the Multimodal Transport Document*, presented at the UNCTAD Seminar on Ocean Transport Documentation and its Simplification, 1980.

<sup>44</sup> Article 5. 1.

<sup>45</sup> Article 1. 4.

<sup>46</sup> Article 8. 1 stipulates the particulars which must appear in the multimodal transport document. Article 10 provides that the multimodal transport document is *prima facie* evidence of the MTOs having taken charge of goods as described in the document. If the document is issued in negotiable form and has been transferred to a third party acting in good faith, proof to the contrary will not be permitted. Article 8. 1 (f) and (g) provides that the places for the taking in charge of the goods and their delivery, and the date of their taking in charge, must appear on the multimodal transport document. The date on which the multimodal transport document is issued must also appear, article 8. 1 (j). Where a seller is to receive payment under a documentary credit, the distinction between the date on which the goods were taken in charge and the date on which the multimodal transport document is issued must be kept in mind when considering the instructions given by the letter of credit applicant to the bank. It may be necessary to know whether the multimodal transport document was issued and signed by the MTO on the same or on a different date to the date of taking in charge of the goods. In practice it is possible that multimodal transport documents are issued before the goods are taken in charge and signed subsequently. UNCTAD, *The Economic and Commercial Implications ...*, p. 163.

<sup>47</sup> Article 5. 1. Included in the particulars which must appear in the multimodal transport document is a statement indicating whether it is a negotiable or non-negotiable document, article 8. 1 (I). While it is possible to establish the nature of the document by reading the text dealing with the release of the goods it is appropriate that a statement as to the negotiable or non-negotiable nature of the document appear conspicuously at the heading of the document.

document will be negotiable if it is made out to order or to bearer,<sup>48</sup> in which case delivery of the goods will depend on the surrender of the negotiable multimodal transport document.<sup>49</sup> In this way it can be made a negotiable document of title which symbolically represents the goods, allowing title in the goods to be transferred by transferring the document and controlling delivery of the goods at destination. The multimodal transport document, like the bill of lading, functions as a quasi-negotiable document.<sup>50</sup> If the document is issued to a named consignee, it is non-negotiable<sup>51</sup> and the goods can only be delivered to the person identifying himself as such.<sup>52</sup> The MT Convention

confers on the multimodal transport document the legal and commercial functions both of a traditional negotiable ocean bill of lading, and its modern corollary, the non-negotiable sea waybill.<sup>53</sup>

The MT Convention is not yet in force.<sup>54</sup> It has been said that elements of national self-protection and self-interest, while they are understandable, have unfortunately prevented the adoption of the Convention, which provides an intelligent answer to most of the problems of multimodal

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<sup>48</sup> Article 6. 1.

<sup>49</sup> Article 6. 2. In article 6. 1 (d) the questionable practice of issuing negotiable transport documents in several originals is retained. It is important that the holder of the multimodal transport document knows how many originals have been issued so that action can be taken to exercise control over the documents and the goods, and prevent the risk of fraud or the delivery of the goods at their destination to someone presenting one original to the carrier. Article 6. 3 contains the generally recognised principle that the MTO will be discharged from his obligation to deliver the goods if he, or someone acting on his behalf, delivers the goods in good faith against the surrender of one original negotiable multimodal transport document. UNCTAD, *The Economic and Commercial Implications ...*, p. 161.

<sup>50</sup> Chrispeels, in Todd, *Cases and Materials ...*, p. 343. See 4. 3. 4 in chapter 3.

<sup>51</sup> Article 7. 1.

<sup>52</sup> Article 7. 2. The Multimodal Transport Convention does not deal fully with the legal problems associated with non-negotiable multimodal transport documents. It does not contain any specific provision which secures the position of the consignees when non-negotiable multimodal transport documents have been issued under the Convention. There is no provision which prevents the shipper from instructing the carrier to change the route or deliver the goods to another person by, for example, the specific regulation of a duplicate of the non-negotiable multimodal transport document as is done by the Warsaw Convention, the CMR and the COTIF/CIM. See 2 in chapter 4. When payment is made in advance of the goods arriving at their destination, caution is required. UNCTAD, *The Economic and Commercial Implications ...*, p. 65. The use of NODISP clauses employed in non-negotiable sea waybills is appropriate.

<sup>53</sup> Chrispeels, in Todd, *Cases and Materials ...*, p. 343.

<sup>54</sup> By 1996 only Chile, Georgia, Malawi, Mexico, Morocco, Rwanda, Senegal and Zambia had ratified the Convention and Norway and Venezuela had signed it subject to ratification.

carriage.<sup>55</sup> Should it come into force, this Convention could well become the most important of all the carriage conventions.<sup>56</sup>

If the MT Convention were to come into force, the multimodal transport documents currently in use would need to be replaced where the Convention would mandatorily apply. UNCTAD has proposed the use of a multimodal transport document, MULTIDOC, with provisions compatible with those of the Convention.<sup>57</sup>

By giving multimodal transport documents recognition in the UCP, the international banking community have adopted a pragmatic approach to the increasing use of such documents in international trade transactions. It is unfortunate that the international transport community have not taken the same view and have so far failed to adopt the MT Convention.

#### **4 The UNCTAD/ICC Rules for Multimodal Transport Documents**

The delay in the universal application of the MT Convention has led to concern that commercial parties would not have an instrument to govern multimodal transport. UNCTAD, together with the interested commercial parties, agreed that a set of rules for multimodal transport ought to be formulated to provide an interim measure that would assist those involved in international trade

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<sup>55</sup> Tetley, *Marine Cargo Claims*, pp. 925 & 937. The Convention does contain provisions recognising national interests in controlling transport operations. The Convention does not regulate and control multimodal transport operators and operations at a national level. The right to do so is recognised in the preamble to the Convention, paragraph f and in article 4. Furthermore, Article 13 contains provisions recognising the issuing of other documents relating to transport or other services involved in international multimodal transport, in accordance with the applicable international conventions or national law. The issue of a multimodal transport document, in terms of the Convention, will not preclude the issue of other documentation, the issue of which will not affect the legal character of the multimodal transport document. In article 3. 2 the Convention recognises the right of the consignor to choose between multimodal and segmented transport.

<sup>56</sup> Glass & Cashmore, *Introduction to the Law ...*, p. 263. The Convention will come into force one year after 30 countries have ratified or acceded to it.

<sup>57</sup> Report by the UNCTAD Secretariate, *Multimodal Transport and its Containerisation*, UNCTAD/ST/SHIP/5, September 10, 1986, p. 1. The document is of two types, one negotiable and the other non-negotiable and both are received for transport documents. The documents declare that they are subject to the Multimodal Transport Convention. Until the Convention comes into force UNCTAD has created two MULTIDOC forms as alternatives to multimodal transport documents currently used. Certain of the provisions of the Convention will apply and will be incorporated into the documents by reference. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 16.

with the conduct of multimodal transport operations until such time as the MT Convention comes into force.<sup>58</sup> It was also apparent that the ICC Rules for Combined Transport Documents, which have been found to be lacking in the face of recent developments in the carriage of goods,<sup>59</sup> needed to be modernised and consequently the ICC agreed to collaborate with the other parties in the creation of new rules for multimodal transport.<sup>60</sup> The basis of the new Rules was taken to be the existing ICC Rules for Combined Transport Documents, the Hague-Visby Rules, the CMR and the MT Convention. Commercial practice, as embodied in the FIATA negotiable Combined Transport Document, FBL, and the old BIMCO Combidoc, was taken into consideration.<sup>61</sup>

A final draft was approved in 1991 and, satisfied with the outcome of their efforts, the ICC decided that the outdated ICC Rules for Combined Transport would be replaced by the new rules. On 1 January 1992 the draft was approved by the ICC's Executive Board and the old Rules for combined transport documents withdrawn. The UNCTAD/ICC Rules for Multimodal Transport Documents<sup>62</sup> replaced the old ICC Rules and not the MT Convention. The new Rules provide private commercial parties with a set of rules on which they can voluntarily conduct their private contracts; they are not intended to provide a basis for national legislation on multimodal transport.<sup>63</sup>

In terms of the new Rules multimodal transport documents may be negotiable or non-negotiable transport documents or an electronic data interchange message, where paper documents have been replaced. The provisions governing the liability of the MTO ensure that the vessel-operating MTO (VO-MTO) enjoys the same protection as is available under a unimodal sea transport contract and a NVO-MTO would be able to claim recourse against the actual performing carrier

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<sup>58</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 1.

<sup>59</sup> Ford & Mercadal, in *Global Economic Co-Operation*, p. 228.

<sup>60</sup> The UNCTAD/ICC working party was chaired by Prof. Jan Ramberg and included participants from the private sector, the shipowners (CENSA, BIMCO and ICS), the shippers, FIATA, the insurers and UNCTAD's Multimodal Transport and Technological Development Section. Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 1.

<sup>61</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 2.

<sup>62</sup> ICC Publication No. 481.

<sup>63</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 2.



according to Rules compatible with the Rules establishing his own liability.<sup>64</sup>

The new Rules are consistent with the provisions of the 1993 Revision of the UCP and as such are acceptable to the international banking community. The Rules are available for world-wide application to international contracts of carriage. Since their introduction they have been accepted by a number of MTOs of which FIATA is the largest user. The FBL has been amended to comply with the new UNCTAD/ICC Rules.<sup>65</sup> Likewise BIMCO has changed its Combidoc to conform with the Rules.<sup>66</sup> The Rules are also available for use by individual MTOs as a basis for their own multimodal transport documents. Since it is not required that MTOs be registered, the exact sphere of influence of the UNCTAD/ICC Rules for Multimodal Transport Documents cannot easily be determined.<sup>67</sup>

An important characteristic of standard form multimodal transport documents like the FBL is the possibility of employing the document as a unimodal transport document. The Standard Conditions (1992) governing the FIATA FBL in clause 1 provides that, "Notwithstanding the heading 'FIATA MULTIMODAL TRANSPORT BILL OF LADING' these conditions shall also apply if only one mode of transport is used." Both the BIMCO MULTIDOC 95 and COMBICONBILL contain similar provisions and can be used for unimodal, port-to-port traffic,

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<sup>64</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 4. These objectives are largely achieved by retaining the defences of nautical fault and fire together with a liability based upon presumed fault or negligence. A complete incorporation of the "network" liability principle, which provides for all modes of transport, would be much too complex, while mandatory provisions applicable to unimodal transport would still supersede the Rules.

<sup>65</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 2. The new version of the FBL is used by FIATA members worldwide and has provided them with a document of great commercial potential. In Germany alone 300,000 FBLs were sold in 1995. By comparison it is estimated that approximately 10 000 FBLs were sold in South Africa in 1995. Alan J. Cowell.

<sup>66</sup> The MULTIDOC 95 Multimodal Transport Bill of Lading is in negotiable form. The MULTIWAYBILL 95 is in non-negotiable form and is subject to both the UNCTAD/ICC Rules and the CMI Uniform Rules for Sea Waybills. The COMBICONBILL Combined Transport Bill of Lading, revised in 1995, is strictly based on the Hague-Visby Rules and is an alternative document to the MULTIDOC 95. The COMBICONWAYBILL is the non-negotiable version and like the MULTIWAYBILL 95 is subject to the CMI Uniform Rules for Sea Waybills. On both the MULTIDOC 95 and the COMBICONBILL the signature boxes have been amended to comply with the requirements of article 26 of the 1993 Revision of the UCP which provides that the multimodal transport document must appear on its face to indicate the name of the carrier or MTO. MULTIDOC 95 and COMBICONBILL, *BIMCO BULLETIN*, vol. 91, no. 1, 1996, pp. 21 & 22.

<sup>67</sup> Carl, paper on the UNCTAD/ICC Rules for Multimodal Transport Documents, p. 2.

as well as for multimodal transport. Other standard form multimodal transport documents may also function similarly. The ICC Banking Commission, however, does not favour the use of multimodal transport documents in this manner.<sup>68</sup>

## 5 How documents acquire the status of documents of title

The general view is that documents become documents of title either through the practice developed by mercantile custom or through statutory enactment. There are no provisions in the Hague Rules,<sup>69</sup> the Hague-Visby Rules or the Hamburg Rules which deal with the legal status of the bill of lading. In *Lickbarrow v Mason*<sup>70</sup> it was recognised as a custom of merchants that the bill of lading served as a document of title, which among other things entitles the holder to transfer the property in the goods by transferring the bill.<sup>71</sup> In theory other documents could become documents of title by proof of the existence of a mercantile custom.<sup>72</sup>

It is widely accepted that the bill of lading is a document of title or a symbol of the goods which gives the holder the right to control the goods during transit and to claim their delivery on surrender of the document. In the absence of any international convention, it is not clear which circumstances are of decisive importance in creating this status for the bill of lading and so distinguishing it from other transport documents.<sup>73</sup> Another approach suggests that the relevant circumstance enabling recognition of the bill of lading as “representing the goods” is the simple fact that the person who issues the document undertakes not to deliver the goods to anyone other

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<sup>68</sup> Jack, *Documentary Credits*, p. 173.

<sup>69</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 5.

<sup>70</sup> (1787) 2 Term Rep 63 KB.

<sup>71</sup> Benjamin, *Benjamin's Sale of Goods*, p. 891.

<sup>72</sup> In English law a document can be a document of title to goods in a narrow common law sense or in a broad statutory sense. The bill of lading is the only document of title recognised at common law. The statutory definition of a document of title to goods includes, *inter alia*, bills of lading, delivery orders, dock and warehouse warrants. Benjamin, *Benjamin's Sale of Goods*, p. 891. While common law jurisdictions will more readily validate judicial customs that create documents of title than civil law jurisdictions, their validation in common law has been mostly by legislation. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 170 and *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439.

<sup>73</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 4.

than the holder of at least one original bill against the surrender of which the goods will be delivered.<sup>74</sup> This promise, together with the practice of issuing bills in a negotiable form, ensures the transferability of the bill of lading and the goods it represents.<sup>75</sup> If this view is acceptable there is no reason to limit the transferability of transport documents to the bill of lading. The status of transferability could as easily be conferred on multimodal transport documents on condition that the issuer undertakes to deliver the goods only to the holder of one original document.<sup>76</sup>

In commercial practice it is accepted that the multimodal transport document is a document of title, if issued in negotiable form, and fulfils all the same functions as the traditional bill of lading.<sup>77</sup> Banks deal with this document in exactly the same way as they do with the bill of lading.<sup>78</sup> However, the question as to how multimodal transport documents acquired the status of documents of title is unresolved. In the absence of any international convention governing these documents there is clearly no statutory provision in terms of which multimodal transport documents constitute documents of title.

In an attempt to ensure that the multimodal transport document will possess all the legal attributes of the bill of lading, parties have endeavoured to confer the status of document of title on these documents by contractual agreement. Clause 3.1 of the Standard Conditions (1992) governing the FBL states the following:

This FBL is issued in negotiable form unless it is marked “non-negotiable”. It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be

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<sup>74</sup> It is possible that the transfer of title to goods could be achieved by giving irrevocable instructions to the carrier, possibly with his confirmation, to hold the goods subject to the direction of the transferee. Following this thinking a financing procedure, which is independent of a bill of lading or corresponding document, could be arranged if it were possible for the consignee to give instructions to the carrier to issue an acknowledgement to the pledgee or buyer, stating that he will hold the goods irrevocably for them and that he will deliver the goods to him or to someone indicated by him. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 17, referring to K. Rodhe, *Legal Aspects of Document Replacement*, *Gothenburg Maritime Law Association Publication* 48, pp. 103-117.

<sup>75</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 6.

<sup>76</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 6.

<sup>77</sup> De Wit, *Multimodal Transport*, p. 317.

<sup>78</sup> On the authority of Dr Hans Carl, UNCTAD, Chief, Multimodal Transport and Technological Development section, confirmation being provided by Mr Don Beckett, Trade Services Manager at Nedbank, South Africa. Debattista, *Sale of Goods ...*, p. 226. Tetley, *Marine Cargo Claims*, p. 929.

entitled to receive or transfer the goods herein mentioned.

This technique is questionable. It is not clear whether parties can simply decide by contractual agreement that a particular document is a document of title where that characteristic is not conferred by the general law.<sup>79</sup>

The opinion has been expressed that a legally binding custom exists which holds that a multimodal transport document is a document of title at common law. The support for this argument is the fact that trading parties treat the multimodal transport document as a document of title; carriers, traders and banks all deal with these documents in exactly the same way as they do with bills of lading. The value of these documents as security for money paid under a letter of credit does not depend on their acceptability to the banks under the UCP but rather on their status at common law. While the UCP does not have the power to make multimodal transport documents documents of title their acceptance by the banking community provides persuasive evidence that by custom they are regarded as documents of title by the common law.<sup>80</sup> Furthermore, the use of multimodal transport documents is so widespread and apparently trouble-free, given the dearth of case law, that it would be inappropriate to consider that there is something seriously wrong in law with these documents. If the existence of such a custom is proved, all that remains is to confirm this in law.<sup>81</sup>

One way of creating international uniformity and certainty in this area is the adoption of an international convention dealing with the transfer of title to goods in international transit.<sup>82</sup> Another more immediate and practical solution would be the promotion of the international acceptance of the MT Convention on International Multimodal Transport of Goods. Not only would this give the multimodal transport document statutory recognition as a document of title, it would make multimodal transport operations and the multimodal transport document subject to mandatory international legal regulation.

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<sup>79</sup> Debattista, *Sale of Goods* ..., p. 217. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 17.

<sup>80</sup> Debattista, *Sale of Goods* ..., p. 228. Van Houtte, *The Law of International Trade*, p. 270.

<sup>81</sup> Debattista, *Sale of Goods* ..., pp. 214 & 226.

<sup>82</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 18.

**CHAPTER 6**  
**THE ROLE OF THE BILL OF LADING, SEA WAYBILL AND MULTIMODAL**  
**TRANSPORT DOCUMENT IN AN INTERNATIONAL SALES TRANSACTION**  
**FINANCED BY A DOCUMENTARY LETTER OF CREDIT**

**1 Financing international sales contracts**

In an international sale of goods transaction where the contracting parties are situated in different countries, both the seller and the buyer face the risk that the other party might fail to perform their obligations in terms of the contract.<sup>1</sup> It is understandable that either party will be reluctant to be the first to perform its obligations until there is some degree of certainty as to the other party's capability and intention of doing so. To further complicate such trade situations, there is likely to be an extended time period between the shipment of the goods by the seller/exporter and their receipt by the buyer/importer. The seller will want payment as soon as possible after having shipped the goods while the buyer would rather pay for the goods only once he has received them.<sup>2</sup>

Bankers' documentary credits and collection arrangements<sup>3</sup> are two important methods of payment which are characterised by the interposition of a bank between the buyer and the seller, and the use of transport documents as collateral security by the bank.<sup>4</sup> The letter of credit

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<sup>1</sup> Stassen, J. C. Die Dokumentäre Kreditbrief als Betalingsmethode in die Internationale Handel. *Modern Business Law*, 1982, vol. 4, p. 14.

<sup>2</sup> Stassen, *Modern Business Law*, 1982, vol 4, p. 14.

<sup>3</sup> Banking practice relating to collection arrangements is standardised by the ICC's Uniform Rules for the Collection of Commercial Paper 1978 (ICC Publication no. 322). The Uniform Rules apply when the parties have incorporated them into their contract. In terms of the Uniform Rules collections involve the bank's handling of financial and/or commercial documents, on the instructions received from the seller/exporter, in order to obtain acceptance and/or payment on the delivery of commercial documents against acceptance and/or payment or on other terms and conditions. Financial documents include such things as bills of exchange, promissory notes and cheques and commercial documents refer to invoices, shipping documents, documents of title or other similar documents. Clean collections, which involve only the collection of financial and not commercial documents, are distinguished from documentary collections where the collection of only commercial documents or commercial and financial documents is involved. The collection arrangement which is of interest to the exporter is one in which the collecting bank presents the commercial and financial documents to the buyer. Schmitthoff, *Schmitthoff's Export Trade*, p. 243. ICC Publication no. 322.

<sup>4</sup> Schmitthoff, *Schmitthoff's Export Trade*, p. 401. Gutteridge & Magrah, *The Law of Bankers ...*, p. 1.

reconciles the conflicting interests of the buyer and the seller by effecting a negotiation of the shipping documents between them. It allows documents and money to move in opposite directions, giving the seller a reliable paymaster in his own jurisdiction and providing the buyer with a documentary screening mechanism at the time payment is to be made to the seller.<sup>5</sup> The documentary letter of credit has become the most important payment instrument used in international trade<sup>6</sup> and has been referred to as “the life blood of international commerce”;<sup>7</sup> it is a financial system “designed to enable commercial transactions to be carried out with the greatest money convenience to both parties”.<sup>8</sup>

## 2 The Uniform Customs and Practice for Documentary Credits

The documentary letter of credit was widely known in Anglo-American international trade by the early 20th century. There was no standard form for documentary credits and banks issued their own form of credit on their own terms. In time it became clear that standardisation would benefit merchants, bankers and international trade as a whole.<sup>9</sup> In 1933 the ICC produced the first copy of the UCP. Since then the UCP has undergone a series of revisions, namely in 1951, 1962, 1974 and 1983. The version currently in force is the 1993 Revision, which came into operation on 1 January 1994.<sup>10</sup>

The more recent revisions have been formulated to take into account, *inter alia*, developments in transport technology, notably the expansion of containerisation and the door-to-door carriage of goods. They accommodate the creation of new documents, new methods of producing documents, and advances in communications which have led to the replacement of paper-based

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<sup>5</sup> Debattista, *Sale of Goods* ..., p. 10.

<sup>6</sup> Hugo, C. The Development of Documentary Letters of Credit as Reflected in the Uniform Customs and Practice of Documentary Credits. *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 44.

<sup>7</sup> *Intraco Ltd v Notis Shipping Corporation of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256.

<sup>8</sup> *Guaranty Trust Company of New York v Hannay* [1918] 2 KB 623; *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W).

<sup>9</sup> Hugo, *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 44.

<sup>10</sup> ICC Publication no. 500.

information by methods of automated or electronic data processing.<sup>11</sup> The 1983 Revision provided a thorough, but not necessarily an effective, reworking of provisions regarding transport documents.<sup>12</sup> It was the inadequacy of these provisions which was largely responsible for prompting the promulgation of the 1993 Revision in which the articles relating to transport documents have been subjected to far-reaching changes.<sup>13</sup>

Payment in terms of documentary letters of credit is the area of international trade where the ideal of international uniformity has to the greatest extent been attained. The UCP enjoys almost worldwide acceptance in the international banking community. It has produced the certainty and predictability which have allowed the documentary letter of credit to be utilised in international trade, regardless of the differing legal and commercial systems of countries.<sup>14</sup>

While the UCP enjoys widespread application, its legal status and position as a source of binding legal norms is undefined.<sup>15</sup> One view holds that codifications like the UCP enjoy legal force, not because they represent customary or statutory law, but rather because they are comprised of

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<sup>11</sup> Jack, *Documentary Credits*, p. 8. In international banking the need for paperless electronic communication of messages has led to the creation of the Society for Worldwide Interbank Financial Telecommunications or SWIFT, of which only banks can be members. The teletransmission of trade data is referred to as EDI, electronic data interchange, or EDP, electronic data processing. The organisations working on the standardisation of EDI are most notably SITPRO, ECE, ICC, and UNCITRAL. Schmitthoff, *Schmitthoff's Export Trade*, p. 78.

<sup>12</sup> The division into marine bills of lading and combined transport documents in the 1974 Revision was replaced by a classification of transport documents into marine bills of lading (article 26), postal receipts (article 30) and "other transport documents" (article 25), which was intended to cover, *inter alia*, combined or door-to-door transport documents.

<sup>13</sup> Ellinger, *Lloyd's Maritime and Commercial Law Quarterly*, 1994, p. 381.

<sup>14</sup> Stassen, J. C. The Legal Nature of the Uniform Customs and Practice for Documentary Credits (UCP). *Modern Business Law*, vol. 4, 1982, p. 125. Schmitthoff, *Schmitthoff's Export Trade*, p. 246.

<sup>15</sup> It does not qualify as statutory law as it is not an international treaty having been formulated by the ICC, a private non-government organisation, and not by official government representatives. This means that states are under no obligation to recognise or enforce the UCP in their national courts or to give effect to its provisions in their national law. There has also been no attempt to persuade governments to regard the UCP as a model statute to be incorporated in their legislation. Neither is it possible to argue that the UCP has automatic application as a codification of customary law of a universal nature. To qualify as customary law all of the articles of the UCP would have to meet the qualifications of customary law of all of the national legal systems, a situation which is most unlikely to materialise. Nonetheless, certain States do recognise them as customary law. Stassen, *Modern Business Law*, vol. 4, 1982, pp. 126 & 127. Van Houtte, *The Law of International Trade*, p. 267.

general principles of law recognised by states.<sup>16</sup> Alternatively, the contractual incorporation of the provisions of the UCP can be regarded as giving the rules legal force.<sup>17</sup>

### 3 The operation of a letter of credit

Internationally it is now standard banking practice to include a clause incorporating the UCP in the parties' documentary credit dealings.<sup>18</sup> Its application is not mandatory, since the parties are free to exclude its application entirely, or to the extent to which they agree, and they will be bound accordingly.<sup>19</sup> A documentary credit is an arrangement in terms of which an "issuing bank", acting at the request and on the instructions of a customer or "applicant", who is the buyer or importer, undertakes to make a payment to a third party "beneficiary", who is the seller or exporter, or to accept and pay bills of exchange or drafts drawn by the beneficiary. Alternatively, the issuing bank authorises another bank either to make such payment or to accept and pay such bills of exchange or to negotiate, against stipulated documents, provided that the terms and conditions of the credit are complied with.<sup>20</sup>

The procedure involved in setting up a letter of credit is initiated by the buyer of the goods, who arranges with a bank to provide finance for an exporter in another country on delivery of the shipping documents.<sup>21</sup> Prior to this a sales contract, referred to as the underlying contract, is concluded between the buyer and the seller of goods and one of its terms is that payment is to be made by means of a documentary letter of credit.<sup>22</sup> The sales contract should specify, *inter alia*,

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<sup>16</sup> Booyesen, *International Transactions*, p. 58.

<sup>17</sup> Stassen, *Modern Business Law*, vol. 4, 1982, p. 127.

<sup>18</sup> Jack, *Documentary Credits*, p. 12. As provided for in article 1 of the UCP.

<sup>19</sup> Jack, *Documentary Credits*, p. 11. Gutteridge & Magrah, *The Law of Bankers ...*, p. 7. The requirements in the UCP regarding the different types of documents are not imperative and only apply where there is no contrary stipulation in the credit. Ellinger, *Lloyd's Maritime and Commercial Law Quarterly*, 1994, p. 393.

<sup>20</sup> Article 2.

<sup>21</sup> Schmitthoff, C. *Schmitthoff's Export Trade: The Law and Practice of International Trade*, Stevens, 7th edition, 1980, p. 244. (This edition has only been used in the present chapter).

<sup>22</sup> Schmitthoff, *Schmitthoff's Export Trade* 7th edition, p. 245. Jack, *Documentary Credits*, p. 4. Gutteridge & Magrah, *The Law of Bankers ...*, p. 4.



the type of credit required, its terms, the bank to which documents are to be presented<sup>23</sup> and most importantly the documents required for presentation by the seller/beneficiary in order to obtain payment.<sup>24</sup> Although this contract is the origin of the letter of credit, it is a separate contract and forms no part of the credit, which operates on its own terms.<sup>25</sup>

The buyer/applicant approaches a bank with instructions to open a credit on specified terms.<sup>26</sup> The primary consideration for the bank when deciding to issue a letter of credit is the credit standing of the buyer, but the security provided by the merchandise is also an important consideration.<sup>27</sup> The issuing bank, once it has decided to open a credit, will correspond with a bank in the seller's jurisdiction, which bank will either advise the seller of the opening of the credit in his favour or confirm the credit opened by the issuing bank, so adding its own undertaking to pay the purchase price.<sup>28</sup> Once the seller/beneficiary has dispatched the goods and has acquired the stipulated transport and other shipping documents, he presents them to the bank indicated in the credit<sup>29</sup> and draws for the price of the goods.<sup>30</sup> The bank will check the documents to ensure that their presentation and content complies with the credit.<sup>31</sup> It is of vital importance that the contents of the transport documents correspond exactly with the requirements specified in the letter of

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<sup>23</sup> Jack, *Documentary Credits*, p. 4.

<sup>24</sup> Gutteridge & Magrah, *The Law of Bankers ...*, p. 5. Article 5 b.

<sup>25</sup> Jack, *Documentary Credits*, p. 4. An international sale of goods transaction, which is to be financed by means of a documentary letter of credit, gives rise to a number of contracts. Lord Diplock in the *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 All ER 720 refers to "four autonomous though interconnected contractual relationships." The UCP governs the relationships, and contracts, between the issuing bank and applicant, issuing bank and beneficiary and between the different banks involved in a documentary credit transaction. It has no application to the relationship between the applicant for and the beneficiary of the documentary credit. The underlying sales contract between the applicant and the beneficiary, in terms of which they agree that payment will be by means of a documentary credit, is a separate contract to which the UCP has no application. *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W).

<sup>26</sup> Schmitthoff, *Schmitthoff's Export Trade*, 7th edition, p. 247. Jack, *Documentary Credits*, p. 5.

<sup>27</sup> *Sztejn v J Henry Schroder Banking Corp* 177 Misc 719, 31 NYS 2d 631 (1941).

<sup>28</sup> Debattista, *Sale of Goods ...*, p. 10.

<sup>29</sup> Jack, *Documentary Credits*, p. 5. Gutteridge & Magrah, *The Law of Bankers ...*, p. 5.

<sup>30</sup> Gutteridge & Magrah, *The Law of Bankers ...*, p. 5.

<sup>31</sup> Article 13 a.

credit.<sup>32</sup> It is this documentary screening process which facilitates payment to the seller before the goods are received by the buyer and which in turn assures the buyer that goods as stipulated in the credit have been dispatched. If the documents are in order and conform to the instructions given by the buyer to the issuing bank, in the application for the credit, and the provisions of the UCP, the bank will accept them and comply with the payment instructions,<sup>33</sup> if not it may refuse them.<sup>34</sup> It is, however, common practice for the buyer/applicant to waive the discrepancies and to pay the price and accept the goods.<sup>35</sup> Transport documents are important to the system of documentary credits as in the initial stage the bank is able to check the information on the document to establish whether the seller has complied with the conditions imposed by the bank for granting the credit before it advances payment.

If the documents have been submitted to a correspondent bank which has accepted them, it must then remit them to the issuing bank. The issuing bank also checks the documents. If they do not conform to the credit and the discrepancies have not been waived, it will send a notice of refusal together with the documents to the correspondent bank.<sup>36</sup> If the documents do comply, the issuing bank will reimburse the correspondent bank for what has been paid to the beneficiary.<sup>37</sup> Finally, the issuing bank makes the documents available to the buyer/applicant against payment.<sup>38</sup> If the buyer fails, for whatever reason, to make payment of the sum of the credit, the bank, because it holds the bill of lading, will be able to claim possession of the goods from the carrier,

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<sup>32</sup> See 5 following.

<sup>33</sup> Debattista, *Sale of Goods ...*, p. 10. Article 14 a.

<sup>34</sup> Article 14 c.

<sup>35</sup> Jack, *Documentary Credits*, p. 5. Article 14 c. Where technical discrepancies which do not affect the value or merchantability of the goods appear in the documents the bank is obliged to take note unless instructed by its customer that the documents are acceptable. If the buyer is a trader speculating on the commodity market and the value of the market has dropped, the buyer may be unwilling to waive the discrepancies and will reject the documents, so avoiding the financial loss associated with the downturn in the market value of the goods. There may be additional reasons why a buyer would not want to take up the documents and pay for them. Because so many documents are required under a credit transaction this may be the buyer's best opportunity for rejecting the documents if he suspects that the goods do not comply with the documents. Jack, *Documentary Credits*, p. 143.

<sup>36</sup> Article 14 d.

<sup>37</sup> Article 14 a.

<sup>38</sup> Jack, *Documentary Credits*, p. 6.

so realising its security.<sup>39</sup> The essence of the documentary credit transaction involves the use of the goods, traditionally represented by the bill of lading as a document of title, as a means of financing the transaction.<sup>40</sup> Hence, the bill of lading, and the commercial functions it performs, lies at the “centre of a mechanism which is essential to the smooth progress of international trade”.<sup>41</sup>

## 4 Important principles relating to documents

### 4.1 The autonomy of the credit

A fundamental principle embodied in the UCP involves the strict separation of the documentary aspect of the export transaction from the goods aspect, and stipulates that the banks are only concerned with the former.<sup>42</sup> The principle that the credit is treated as an autonomous transaction, specifically that it is independent of the terms of the underlying sales contract which gives rise to the credit, and that its performance is independent of the performance of that contract, is referred to as the autonomy of the credit.<sup>43</sup> This principle is indispensable to the viability of the documentary credit as a secured means of payment in international transactions. In the *United City Merchants (Investments) Ltd v Royal Bank of Canada* Lord Diplock stated:

The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.<sup>44</sup>

When fulfilling their obligations the banks involved in the credit transaction are only bound by the terms of the letter of credit and they may not give effect to any of the stipulations in the sales contract which differ from the wording of the credit. The banks have no authority to change the terms of the credit agreement, even if the amendments would ensure the compliance of the credit

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<sup>39</sup> Debattista, *Sale of Goods ...*, p. 11.

<sup>40</sup> Schmitthoff, *Schmitthoff's Export Trade*, 7th edition, p. 245.

<sup>41</sup> Debattista, *Sale of Goods ...*, p. 11. Todd, *Modern Bills of Lading*, p. 54.

<sup>42</sup> Schmitthoff, *Schmitthoff's Export Trade*, 7th edition, p. 246.

<sup>43</sup> Jack, *Documentary Credits*, p. 17. Article 3.

<sup>44</sup> [1982] 2 All ER 720.

with the sales contract. Likewise, if the buyer and seller agree to alter the terms of their sales contract, the bank will nonetheless be obliged to comply with the terms of the original credit, unless the buyer and seller amend the terms of the credit accordingly.<sup>45</sup> The principle of autonomy is fundamental to documentary credit transactions and it is “essential for the continuation of the documentary credit system as the primary means of payment in international trade that it should be scrupulously observed”.<sup>46</sup>

#### 4.2 Banks deal in documents

Alongside the principle of autonomy of the credit there is the principle that a documentary credit is a transaction in documents and in documents alone.<sup>47</sup> The value of the documentary letter of credit in international sales transactions lies in the fact that the beneficiary of the credit has the bank’s promise to pay, and provided the documents are correct, the bank is bound to honour its payment obligations in terms of the credit.<sup>48</sup> If the documents in terms of the letter of credit are in order, the performance of the underlying sales contract between the applicant and the beneficiary is immaterial to the beneficiary/seller’s right to receive payment. The bank is not entitled to consider any information outside the documents and in particular to consider any information about the quality of the goods which is not reflected in the documents.<sup>49</sup> The only established exception to this is the fraud of the beneficiary.<sup>50</sup>

The English courts, in encouraging negotiability, have strictly upheld the principle of autonomy of the credit, recognising the distinction between goods and documents, even where the possibility

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<sup>45</sup> Aronstam, P. Letters of Credit. *Businessman’s Law*, no. 8, 1978, p. 23.

<sup>46</sup> Jack, *Documentary Credits*, p. 17.

<sup>47</sup> Article 4.

<sup>48</sup> Jack, *Documentary Credits*, p. 18.

<sup>49</sup> *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159.

<sup>50</sup> Jack, *Documentary Credits*, p. 18. In *Sztejn v J Henry Schroder Banking Corp* 177 Misc 719, 31 NYS 2d 631 (1941) it was held that the principle of the independence of the bank’s obligation under the letter of credit should not be extended to protect the unscrupulous seller.

of fraud may be increased by giving the fraud exception a very narrow interpretation.<sup>51</sup> The American courts have adopted a more flexible approach.<sup>52</sup> In the first South African decision dealing with the legal nature of documentary letter of credit transactions, the stricter approach of the English court was followed.<sup>53</sup>

The fundamental principle that banks deal in documents underlies all the rules of documentary credits. The amendment of the UCP to accommodate modern paper routines has not led the banks so far as to honour transactions by EDP.<sup>54</sup> While banks are permitted to issue and pay credits by teletransmissions<sup>55</sup> and to accept documents produced by automated or computerised systems,<sup>56</sup> the information relating to the carriage of goods appearing on the relevant transport documents, and required by a letter of credit, must still be available on paper. The employment of an electronic equivalent of a letter of credit, which fulfils all the documentary functions of the UCP, is possible. These electronic credits would, however, need to be dealt with outside of the Rules provided in the UCP. It appears that transactions financed by letters of credit will not be executed

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<sup>51</sup> Todd, *Modern Bills of Lading*, p. 77. In the *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1982] 2 All ER 720, the bank, and presumably the buyer, were obligated to pay for defective goods because it could not be established that the seller had been fraudulent in relation to the documents. In *Gill & Duffus SA v Berger & Co Inc.* [1984] 1 Lloyd's Rep 227 the CIF buyers were not entitled to reject conforming documents where the sellers were in breach of their contractual obligations for having shipped defective goods.

<sup>52</sup> The Uniform Commercial Code, Sections 5-114 (2) (b), allows the court a discretion to grant an injunction on notification of fraud received from the customer. Proof that the beneficiary was involved in the fraud is not required. An injunction will be granted only if its refusal would cause the plaintiff "irreparable injury". *Gill & Duffus SA v Berger & Co Inc* [1984] 1 Lloyd's Rep 227.

<sup>53</sup> De V Dijkman, J. H. The Autonomy Principle in Documentary Letter of Credit Transactions: The First South African Decision, *South African Law Journal*, vol. 102, 1985, p. 382. In *Phillips v Standard Bank of South Africa Ltd* 1985(3) SA 301 (W) it was held that

where an irrevocable documentary credit constitutes an independent contract between the issuing bank and the seller, the purchaser may not go behind the documents and cause payment to be stopped or suspended because of complaints concerning the quality of the goods or other alleged breaches of contract by the seller.

*Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W).

<sup>54</sup> Kindred, in *New Directions in Maritime Law*, p. 223.

<sup>55</sup> Article 11.

<sup>56</sup> Article 20 b.

by EDP until the UCP is further amended.<sup>57</sup>

## 5 The banks' role in dealing with the documents

As the banks in letter of credit transactions deal in documents only, their most important duty *vis-à-vis* the applicant is to receive and examine the documents. If they are satisfied that the documents presented by the seller conform with the requirements of the credit and the UCP they are obliged to make payment as required by the credit.<sup>58</sup>

It is the duty of the bank to exercise reasonable care in examining all the documents stipulated in the credit to determine whether they appear, on their face, to comply with the terms and conditions of the credit. If the documents appear on their face to be inconsistent with one another they will be regarded as failing on their face to be in compliance with the terms of the credit. If documents not stipulated in the credit are submitted, the banks will not examine them and will return them to the presenter, or pass them on without responsibility.<sup>59</sup> Banks have a reasonable time in which to examine the documents, and determine whether to accept or reject them and inform the presenter accordingly, which time is not to exceed seven days following the day on which the documents were received.<sup>60</sup> If a credit specifies conditions, without indicating the documents required for presentation, the banks will disregard such conditions.<sup>61</sup> The bank must

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<sup>57</sup> Kindred, in *New Directions in Maritime Law*, p. 224. The ICC Project E100 was formed with the intention of addressing this issue. The Working Party on Electronic Credits Proposed Terms of Reference, prepared by the Working Party Rapporteur, B. S. Wheble, are

To discuss, develop and promote an electronic alternative or alternatives, to paper-based methods of international trade transactions - making optimal use of electronic commerce techniques and practice, enabling the speed of financial transactions to match the speed of movement of the goods. Preserving or improving security for all parties involved in the transaction, being equally feasible for emerging economies and industrialised countries, ensuring a fair balance in the distribution of risk and obligations between all parties involved in the transaction, ensuring compliance with legal and regulatory directives.

ICC, *International Commercial Policy and Techniques*, ICC Project E100, Document no. E100-21/INT.1, 25 October 1995.

<sup>58</sup> Jack, *Documentary Credits*, p. 68.

<sup>59</sup> Article 13 a.

<sup>60</sup> Article 13 b.

<sup>61</sup> Article 13 c.

establish, on the basis of the documents alone, whether it will accept them or reject them.<sup>62</sup> The bank's duty is not absolute in that by its acceptance of documents after examination it does not guarantee their compliance with the credit.<sup>63</sup>

The bank to which documents are presented has a right to reject documents submitted by the seller to obtain payment if they do not strictly conform with the terms of the credit.<sup>64</sup> The doctrine of strict compliance has its origin in *Equitable Trust Co of New York v Dawson Partners Ltd.*<sup>65</sup> Details in the bill of lading must conform exactly with the requirements specified in the credit.<sup>66</sup> Where the UCP applies, the principle has been somewhat relaxed.<sup>67</sup> It has been recognised that in evaluating documents a measure of flexibility may be necessary and the decision in *Soproma Spa v Marine and Animal By-Products Corpn*<sup>68</sup> indicates a reluctance of the judges "to take the

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<sup>62</sup> Article 14 b.

<sup>63</sup> Jack, *Documentary Credits*, p. 68. In *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 Lloyd's Rep 1 it was held that even if the plaintiff had established that the document in question carried a forged signature the bank would still have been entitled to accept the documents and debit the plaintiff's account, provided that it had exercised reasonable care in examining the documents and in spite of this had failed to detect the forgery.

<sup>64</sup> Marasinghe, *Contract of Sale ...*, p. 399. The reason for the rule is that the advising bank is the agent of the issuing bank who in turn is an agent of the buyer and if an agent with limited authority acts outside of his authority or mandate, the principal is entitled to denounce the act of the agent. Schmitthoff, *Schmitthoff's Export Trade*, p. 406.

<sup>65</sup> (1926) 27 Ll L Rep 49. It was held that it is the bank's duty to determine that the documents presented are in strict compliance with the requirements specified in the credit. Documents which are "almost the same" or "will do just as well" are not acceptable. In this case the credit required a quality certificate "issued by experts who are sworn brokers". This requirement was not regarded as having been satisfied by a certificate signed by one such broker. See also *English, Scottish & Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21; *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A).

<sup>66</sup> In *Rayner & Co Ltd v Hambro's Bank* [1943] KB 37, the credit related to a cargo of "Coromandel groundnuts". The documents presented included a bill of lading for "machine-shelled groundnut kernels" and an invoice for "Coromandel groundnuts". According to trade usage "coromandel groundnuts" are the same as "machine-shelled groundnut kernels". The bill of lading was rejected because of the inconsistency of the descriptions in the documents. The banks were not bound or entitled to take into consideration any special meaning in the trade. Banks deal in finance and not in goods. The bank's mandate stated that it was to pay against documents which related to "coromandel groundnuts" and if it paid against any other documents it paid at its peril.

<sup>67</sup> Todd, *Modern Bills of Lading*, p. 59. The UCP makes provision for a degree of tolerance in regard to the quantity of goods, amount of the credit and unit price stated in the documents. Article 39.

<sup>68</sup> [1966] 1 Lloyd's Rep 367.

principle of strict compliance to absurd lengths”.<sup>69</sup>

The 1993 Revision of the UCP has added a provision stating that

compliance of the stipulated documents on their face with the terms and conditions of the credit, shall be determined by international standard banking practice as reflected in these articles.<sup>70</sup>

If any changes to the compliance requirement develop in international banking practice, they will only be given recognition once they have been incorporated in the provisions of the UCP, so ensuring international uniformity in the standard of compliance required in the examination of documents.<sup>71</sup>

## **6 The UCP provisions relating to shipping documents**

### **6.1 The commercial invoice**

The commercial invoice is the primary document in that it provides details of the goods in respect of which the documents are being presented and the price claimed as payment.<sup>72</sup> The UCP requires that the description of the goods in the commercial invoice should correspond to the

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<sup>69</sup> Where strict compliance and reasonable care have been taken to be synonymous, a functional standard of document verification has not been provided. Conversely, where strict compliance has been interpreted as allowing for deviations taking into consideration “reasonableness”, “equity”, “good faith” or “boni mores”, a functional standard has likewise not been provided. It is important that banks develop customs and practices that earn trust and that create international standard banking practices which are honest and predictable. ICC Publication no. 511, p. 39.

<sup>70</sup> Article 13 a.

<sup>71</sup> The introduction of the international banking standard must not be seen as limiting a bank’s duty to exercise reasonable care when checking documents, but is rather intended to establish the scope within which reasonable care is to be applied. Many international standard banking practices have already been incorporated into the UCP. The cause of promoting standardised banking practice has been advanced considerably by standardising practices of formatting and message content. Once a uniform EDIFACT document “syntax” becomes operative international standard, banking practice will have taken another important step forward. ICC Publication no. 511, pp. 39 & 40. See footnote 27 in chapter 7.

<sup>72</sup> Jack, *Documentary Credits*, p. 166. When the underlying contract is a contract of sale the invoice must be made out in the name of the seller and addressed to the buyer, article 37 a. The total amount of the invoice must not exceed the amount of the credit. The bank may accept the documents, against payment of the maximum amount of the credit, unless otherwise stipulated in the credit, article 37 b. In addition to the amount to be paid for the goods the invoice will show the amount to be paid for freight and insurance, if these are for the account of the buyer. These amounts should be reflected separately if so required by the credit. Jack, *Documentary Credits*, p. 169.



description in the credit.<sup>73</sup> The UCP also provides that in all other documents it is sufficient if the goods are described in general terms, provided they are not inconsistent with the description of the goods in the credit.<sup>74</sup> Banking practice, however, demands that the contents of the bill of lading conform strictly with the requirements of the credit. The UCP makes no provision for indicating how the transport documents, insurance documents and commercial invoice should relate to one another and to other documents. As the commercial invoice is the key document, it is clear that all other documents, including the transport and insurance documents, must relate to it and must not appear to be inconsistent with it.<sup>75</sup>

## 6.2 Insurance documents

The credit must stipulate the type of insurance required and the additional risks that need to be covered.<sup>76</sup> Another important provision relating to insurance documents states that, unless it is otherwise stipulated in the credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board, or dispatch, or the taking in charge of the goods, the banks will not accept the insurance document.<sup>77</sup> This provision ensures that the goods are subject to insurance cover from the moment the carrier takes them in charge to the time they are delivered at their destination. Such provisions are important because they allow the shipping documents to embody valuable and comprehensive rights to the goods represented, so ensuring that the shipping documents play a central role in the smooth functioning of international trade.

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<sup>73</sup> Article 37 c. *Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68. The description of the goods in the documents is different from the identification of the goods. While some latitude is allowed in the description of the goods in all documents other than the invoice, it is important that the documents tendered to the bank relate clearly to the same goods. It is not necessary that the documents themselves should be linked by mutual references. Schmitthoff, *Schmitthoff's Export Trade*, p. 415.

<sup>74</sup> Article 37 c.

<sup>75</sup> Jack, *Documentary Credits*, p. 155.

<sup>76</sup> Article 35 a.

<sup>77</sup> Article 34 e.

### 6.3 Transport documents

The marine bill of lading has for many years been the most widely used form of transport document.<sup>78</sup> The bill of lading, because it is a document of title, was essential to the operation of documentary letters of credit.<sup>79</sup> With the development of containerisation and other transport practices new forms of transport document have been created. Sea waybills, which are not documents of title, may now be employed instead of bills of lading in certain contracts of carriage by sea, and multimodal transport documents, which may be negotiable or non-negotiable, are becoming increasingly important in the international carriage of goods.<sup>80</sup> Their use has been accommodated in the 1993 Revision of the UCP.

The main purpose of the 1983 Revision was to amend the UCP to accommodate developments in international transport.<sup>81</sup> In explaining the approach of the 1983 Revision to transport documents it was stated that

it was ... considered essential to make a completely new approach to the whole question of transport documentation on a functional basis, “legislating” for what the transport community was, is and seems likely to be producing in the way of documentation.<sup>82</sup>

The Revision had to take into account developments like the increasing volume and geographic reach of container transport, the increase in door-to-door transport, where transshipment is the

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<sup>78</sup> In the traditional CIF or FOB sale the consignor delivers the goods to a vessel at the port of loading where he receives the bill of lading, which is essential to his obtaining expeditious payment for the goods. Payment is made to the seller/consignor by the paying bank on receipt of, *inter alia*, a conforming bill of lading, which the paying bank forwards to the issuing bank for its acceptance. Once the buyer has complied with his payment obligations to the issuing bank he will receive the bill of lading so entitling him to present them to the ship at the port of discharge and take delivery of the goods. Jack, *Documentary Credits*, p. 160.

<sup>79</sup> Van Houtte, *The Law of International Trade*, p. 269.

<sup>80</sup> Where multimodal and container transport is involved, different forms of contract are used and the FCA contract, for example, will become more frequent. When container transport is used containers are assembled and packed with goods belonging to different consignors, usually at inland clearance depots, and transported by road or rail to specialised container ports. Under an FCA contract a multimodal transport document is issued by a “carrier,” or freight forwarder, who may be either a NVO-MTO or a vessel-operating MTO, when he has received the goods from the seller and taken them in his charge. This document is negotiated through the banks in the same way as a bill of lading.

<sup>81</sup> The 1974 Revision partly addressed the developments in containerisation and combined or door-to-door transport but problems continued to exist. The primary problem with the 1974 Revision was that it was principally based on the traditional transport documents that were no longer appropriate in the face of the new developments in international transportation.

<sup>82</sup> Hugo, *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 74 quoting Wheble.

norm and not the exception, and the move away from the traditional “on board” or “shipped” sea transport documents to the “taken in charge” multimodal transport document which characterises door-to-door transport.

The approach adopted by the 1983 Revision was to establish the general characteristics of an acceptable transport document.<sup>83</sup> In revising the 1983 Revision the ICC working group followed a different approach and noted as one of its objectives “the need to list the elements of acceptability for each type of transport document presented under a Documentary Credit”. It was decided that the existing articles dealing with the transport documents needed to be rewritten and that new transport articles covering all the various modes of transport should be introduced.<sup>84</sup> Substantial changes were made to the existing articles covering transport documents. In the 1993 Revision the explicit requirements of each type of transport document have been categorised, so limiting the potential for misinterpretation and misapplication of the transport articles as under the 1983 Revision.<sup>85</sup>

The 1993 Revision reflects, *inter alia*, the major transformation that is taking place in the area of transport documentation. The bill of lading is losing some of its primacy in documentary credit transactions.<sup>86</sup> Until the 1960s most documentary letters of credit required payment against the

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<sup>83</sup> Hugo, *South African Mercantile Law Journal*, vol. 5, no. 1, 1993, p. 75. Article 25 was the main provision and dealt with the mandatory general requirements which must be fulfilled by each document in order to be acceptable in terms of the credit.

<sup>84</sup> ICC Publication no. 511 Preface III. New articles dealing specifically with marine/ocean bills of lading (article 23); non-negotiable sea waybills (article 24); charter party bills of lading (article 25); multimodal transport documents (article 26); air transport documents (article 27); road, rail or inland waterway transport documents (article 28); courier and post receipts (article 29) and transport documents issued by freight forwarders (article 30) have been introduced. Article 28 which deals with road, rail and inland waterway transport is a major innovation in the 1993 Revision. The principles developed in relation to marine bills of lading are applied with a few important modifications. Ellinger, *Lloyd's Maritime and Commercial Law Quarterly*, 1994, pp. 396 & 397. Article 28 ii allows banks to accept COTIF/CIM and CMR documents even though there is some doubt as to their acceptability because the “received for shipment, dispatch or carriage or wording to this effect” does not appear on the consignment notes but is clearly set out in the COTIF/CIM and the CMR. ICC Publication no. 511, p. 83.

<sup>85</sup> ICC Publication No. 511, p. 65. If the credit requires or allows a transport document, like a delivery order, which does not fall within one of the transport articles, the banks must exercise caution. Given the problems regarding security and the absence of guidance in the UCP, the bank should request clear and detailed instructions from its customer. Jack, *Documentary Credits*, p. 171. Debatista, *Butterworths Journal of International Banking and Finance Law*, 1994, vol. 9, no. 7, p. 336.

<sup>86</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 11.

presentation of a “clean, on board, negotiable bill of lading” endorsed to the issuing or confirming bank. The bill of lading provided reliable collateral security and if necessary a secondary source of repayment. This is no longer so and increasingly bills of lading are being regarded as simply another letter of credit document. Half of the commercial letters of credit issued by banks in the United States do not require ocean bills of lading but provide for payment against documents issued by freight forwarders.<sup>87</sup> The traditional position of the bill of lading is also being threatened by the increasing use of the sea waybill. It is banking practice which will reveal what lies ahead for the bill of lading, as it was the bankers’ willingness to deal in ocean bills of lading which provided much of the motivation for standardising bill of lading practices in the past. Whatever the future of the bill of lading may be, the role that has been played by the bill of lading in financing international sales contracts has been of inestimable value in the facilitation of international trade.

### 6.3.1 The marine/ocean bill of lading

In the 1993 Revision of the UCP it is provided that if a credit calls for a bill of lading covering port-to-port shipment the banks will, unless otherwise stipulated, accept a document regardless of how it is named, as long as it meets certain requirements.<sup>88</sup> The article only applies to sea transport from one port to another.<sup>89</sup> The first requirement relating to bills of lading specifies that it must indicate the name of the carrier. Because the bill of lading provides evidence of a contract

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<sup>87</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 162.

<sup>88</sup> Article 23 a. The provision makes it clear that the bill of lading will only cover “port-to-port” shipment or the sea leg of the voyage. This is in keeping with the Hague-Visby Rules which provide that the bill of lading will be issued once the carrier has received the goods into his charge and that the Rules apply to every bill of lading relating to the carriage of goods between ports in two different states. See articles III (3) and X of the Hague-Visby Rules.

<sup>89</sup> If the sea carriage covers only a leg of a door-to-door transport transaction, the sea transit will be covered by a multimodal transport document and will be subject to the provisions of Article 26. The UCP 500 anticipates this type of arrangement by accepting that a bill of lading may show places of taking in charge and final destination different to the ports of loading and discharge. Article 23 a (iii) corresponds with article 26 a (iii). A standard form multimodal transport document may be completed in such a manner allowing it to be employed exclusively in relation to the carriage of goods by sea. The document will need to be completed appropriately and to comply with the provisions of article 23 in order to be acceptable as a marine bill of lading. The notation showing that the goods have been loaded on board is of particular importance, article 23 a (ii). The ICC Banking Commission has confirmed that the FIATA FBL may be employed in this way and as such will be regarded as a marine bill of lading. Commercial banks in Europe appear to be willing to accept the FBL as a marine bill of lading if it conforms to the provisions of article 23. It is uncertain whether they will find acceptance by banks in other countries. Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 12. Jack, *Documentary Credits*, p. 173.

of carriage it is important that the bill indicates who the carrier is.<sup>90</sup> The parties who are permitted to sign or authenticate the bill are the carrier or the master or their respective agents. An agent signing or authenticating the bill of lading must record his authority to act as agent for the principal.<sup>91</sup> The carrier will invariably be a company and the only way to provide a handwritten signature will be through an agent.<sup>92</sup>

The bill of lading must show that the goods have been shipped on board a named vessel.<sup>93</sup> The loading on board may be indicated by a preprinted clause or a notation giving the date on which the goods were loaded.<sup>94</sup> The requirements of a signature or an initial on the on board notation have been abandoned. The loading on board a named vessel must also be evidenced by an on board notation. The ports of loading and discharge stipulated in the credit must be indicated on the bill of lading.<sup>95</sup> It does not matter if the bill shows a place of taking in charge or receipt different to the port of loading, nor a place of final destination different to the port of discharge. An on board notation must indicate the port of loading stipulated in the credit.<sup>96</sup> When the bill of lading is preprinted in the loaded on board form, the date the bill is issued is deemed to be the date of shipment. When an on board notation appears, that date is deemed to be the date of shipment.<sup>97</sup>

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<sup>90</sup> Jack, *Documentary Credits*, p. 174.

<sup>91</sup> Article 23 a (i).

<sup>92</sup> Article 20 b provides, *inter alia*, that “a document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol or by any other mechanical or electronic method of authentication”. Article 20 d provides that where a document needs to be authenticated, this will be satisfied by “any signature, mark, stamp or label on such document that on its face appears to satisfy the above condition”.

<sup>93</sup> See 2. 3 in chapter 3.

<sup>94</sup> Article 23 a (ii). By requiring that the bill of lading shows the ports of loading and discharge stipulated in the credit the carriers are committed to load and discharge at the contracted ports and a notation showing intended ports of loading and/or discharge would not satisfy the stipulated condition of port-to-port shipment. ICC Publication no. 511, p. 66.

<sup>95</sup> Article 23 a (iii).

<sup>96</sup> Article 23 a (ii).

<sup>97</sup> Jack, *Documentary Credits*, p. 176.

The documents tendered must consist of a sole original bill of lading or the full set if so issued.<sup>98</sup> Another requirement states that the bill of lading must either contain all the terms of carriage or must include them by reference to a source document other than the bill of lading; banks are not expected to examine the terms of the bill of lading.<sup>99</sup> The bill must not indicate that it is subject to a charter party or that the vessel is propelled by sail only<sup>100</sup> and it must in all other regards meet the stipulations of the credit.<sup>101</sup>

It is provided that unless the credit prohibits transshipment the banks will accept a bill of lading which indicates that the goods will be transhipped on condition that the entire ocean carriage is covered by one and the same bill of lading.<sup>102</sup> Even if the credit does prohibit transshipment, the banks will nonetheless accept a bill of lading which shows that transshipment will take place.<sup>103</sup> Transshipment is regarded as the unloading and reloading from one vessel to another during the sea carriage from the port of loading to the port of discharge indicated in the credit.<sup>104</sup>

### **6.3.2 The non-negotiable sea waybill**

The transport industry has introduced the use of the non-negotiable sea waybill to expedite the handling of goods at the port of discharge, as the goods are delivered to the nominated consignee

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<sup>98</sup> Article 23 a (iv). The wording of the new rules make clear the bank's preference for only one bill of lading to be issued. Debattista, *Butterworths Journal of International Banking and Finance Law*, 1994, vol. 9, no. 7, p. 332. Issuing bills in sets of several originals poses a security weakness for the banks. The bank secures its control over the goods by requiring a full set of originals before any money will be advanced. See 4. 1 in chapter 3. INCOTERMS 1990 also require that when a seller under a CIF contract must tender a transport document issued in several originals, the full set must be tendered to the buyer.

<sup>99</sup> Article 23 a (v).

<sup>100</sup> Article 23 a (vi).

<sup>101</sup> Article 23 a (vii).

<sup>102</sup> Articles 23 c.

<sup>103</sup> This is subject to Article 23 d, which provides that the cargo in question is shipped in containers, trailers and/or LASH barges, which must be indicated on the transport document, provided that the entire ocean carriage is covered by one and the same bill of lading and/or the transport document incorporates a clause reserving the carrier's right to tranship. It has been noted that these articles make it difficult for an applicant to prevent the goods from being transhipped. The credit should reflect the wishes of the buyer and seller. If they choose to prohibit transshipment they should be entitled to do so. An applicant wanting to prohibit transshipment should ensure that the credit states that the article in relation to transshipment is not applicable by expressly excluding its application. ICC Publication no. 511, p. 69.

<sup>104</sup> Article 23 b.

simply upon proof of identity, so avoiding the delay and charges associated with the non-arrival of documents. Because of the increasing commercial trend towards the use of the non-negotiable sea waybill in international marine transport it was decided that there was a need for an individual transport article to address the non-negotiable sea waybill.<sup>105</sup>

The provisions of the UCP which determine what constitutes an acceptable non-negotiable sea waybill for submission in terms of a letter of credit are the same as those for marine bills of lading, with the substitution of the words “non-negotiable sea waybill” for “bill of lading”. Bills of lading and sea waybills have a role to play in financing contracts for the international sale of goods since they both employ the goods as collateral security for the credit extended to the buyer. The difference lies in the fact that traditionally the bill of lading functions as a document of title whereas the non-negotiable sea waybill does not share this status.<sup>106</sup> Where bills of lading are used the bills are pledged to the bank as security.<sup>107</sup> Where a sea waybill is employed the banks acquire a security interest in the goods by being named as consignee on the sea waybill and/or by including a NODISP clause in the document.<sup>108</sup> In terms of this clause the consignor relinquishes his right to change the delivery instructions while the goods are in transit and the carrier agrees

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<sup>105</sup> Article 24. UNCTAD has shown support to the ICC for the concept and regards this development in the UCP as important for international trade facilitation. ICC Publication no. 511, p. 72. In certain countries national law does not permit the acceptance of the non-negotiable sea waybill. Section 4 (c) (ii) of the South African Exchange Control Rulings lists the documents against which international payments can be made. In terms of this section South African Banks are not authorised to make payments against the tender of a non-negotiable sea waybill under a documentary letter of credit transaction. However, the Exchange Control Rulings provide that arrival notifications issued by specified companies to a consignee, pursuant to a contract of carriage covered by a sea waybill, are acceptable as evidence of the importation of goods under an international sales contract and international payments, not involving a documentary letter of credit, can be made on this basis. It is possible that when South Africa’s trade with other African countries becomes more frequent, the need for sea waybills in the financing of international sales contracts, through letters of credit, will be felt. Bills of lading and multimodal transport documents are acceptable in terms of the Exchange Control Rulings, where payment is to be made under a letter of credit. Information provided by Mr Don Beckett, Trade Services Manager at Nedbank, South Africa.

<sup>106</sup> See 1. 2 in chapter 4.

<sup>107</sup> See 4. 5 in chapter 3.

<sup>108</sup> It is essential that these requirements be stated in the application for the letter of credit and in the letter of credit itself as they are special instructions not provided for by the UCP 500. In the absence of such specific stipulation aimed at protecting the bank’s security interest, a bank would be obliged to accept the tender of a sea waybill naming the shipper as consignor and the buyer as consignee. Debatista, *Butterworths Journal of International Banking and Finance Law*, 1994, vol. 9, no. 7, p. 334.

to hold the goods in security and as collateral for the bank.<sup>109</sup> While securing the interests of the buyer and the bank this situation may cause difficulties for the seller. If the documents he submits are rejected under the credit he will have no control over the goods. A solution could be provided by a clause which states that the seller will give up his right to change the identity of the consignee only when the sea waybill has been accepted under the documentary credit and that acceptance has been communicated to the carrier.<sup>110</sup>

### 6.3.3 Charter party bills of lading

The 1983 Revision of the UCP required the banks to reject the tender of a bill of lading indicating that it was “subject to a charter party”, unless it was otherwise stipulated in the credit. In consequence of the frequent use of bills of lading incorporating charter parties, particularly in the commodity trades, the ICC have changed the rules by introducing a new article to deal specifically with charter party bills of lading.<sup>111</sup> In substance the article broadly follows the requirements relating to marine bills of lading, *mutatis mutandis*. One noteworthy difference is that charter party bills are not required to identify the carrier.<sup>112</sup>

### 6.3.4 The multimodal transport document

In the drafting of the new article on multimodal transport documents<sup>113</sup> substantial changes were made to the article relating to combined transport in the 1983 Revision. The changes also ensured uniformity with the wording of the other transport articles in the 1993 Revision. The term “multimodal transport document” was favoured above that of “combined transport document”

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<sup>109</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, p. 9. See 2 in chapter 4. The buyer who is the banks’s client is named as the notify party. The bank can assign its rights as consignee to the buyer when it has received payment.

<sup>110</sup> Jack, *Documentary Credits*, p. 181.

<sup>111</sup> Article 25.

<sup>112</sup> Article 25 a (iii). This provision is realistic given the difficulty of identifying the carrier when goods are carried on a chartered ship and that generally in the commodity trades, where public bills of lading printed on shipping company forms are not frequently used, the charter party bills do not identify the carrier. Debattista, *Butterworths Journal of International Banking and Finance Law*, 1994, vol. 9, no. 7, p. 335.

<sup>113</sup> Article 26.



or “intermodal transport document” to achieve uniformity with the work done by UNCTAD.<sup>114</sup> The changes made reflect the need for documentary credit practice to reflect the advances in the transport industry and acknowledge the growing number of shipments made under a multimodal transport contract of carriage. Furthermore, the article serves the purpose of helping the parties to the credit to distinguish the marine or ocean bill of lading, which is a traditional ocean transport document, from a transport document which covers a contract of carriage by more than one mode of transport from the place of receipt to the place of delivery.<sup>115</sup>

The article states that if a credit calls for a transport document which covers at least two different modes of transport the banks will accept such a multimodal transport document.<sup>116</sup> The basic provisions which govern marine bills of lading are also applicable, *mutatis mutandis*, subject to three important distinctions.<sup>117</sup> Firstly, it is acceptable that the document be signed by a multimodal transport operator or his named agent in addition to the carrier, the master or their respective agents.<sup>118</sup> Secondly, it is sufficient that the goods have been dispatched or taken in charge; it is not necessary for the document to evidence shipment, which is a characteristic of sea transport documents and not multimodal transport documents.<sup>119</sup> Thirdly, it is provided that even if transshipment is prohibited in the credit the banks will accept a multimodal transport document which indicates that transshipment will or may take place on condition that the entire voyage is covered by one and the same multimodal transport document.<sup>120</sup> Prohibitions on transshipment are inconsistent with the manner in which multimodal transport functions. The multimodal transport document necessarily implies transshipment. An important factor contributing to the acceptability of multimodal transport documents to the bank is that the issuer of the document accepts

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<sup>114</sup> ICC Publication no. 511, p. 77. See 4. 2. 3 in chapter 1 and 4 in chapter 5.

<sup>115</sup> ICC Publication no. 511, p. 77.

<sup>116</sup> Article 26 a.

<sup>117</sup> Ellinger, *Lloyd's Maritime and Commercial Law Quarterly*, 1994, p. 396.

<sup>118</sup> Article 26 a (i).

<sup>119</sup> Article 26 a (ii).

<sup>120</sup> Article 26 b.

responsibility for the goods for the entire carriage.<sup>121</sup>

There is the same need for documentary credits to finance international sales contracts when multimodal transport is used as when goods are carried unimodally. Although the multimodal transport document is not statutorily recognised as a document of title it is treated as such by the banks. When the multimodal transport document is made to the order of the bank, or endorsed to it, it can be transferred to the bank with the intention of creating a pledge in the goods represented by the documents. Hence the multimodal transport document is able to provide the same security as a bill of lading in financing an international sales contract and the banks are able to deal with the multimodal transport document in the same way as they do with the bill of lading.<sup>122</sup>

### **6.3.5 Transport documents issued by freight forwarders**

The 1993 Revision also addresses the problem of transport documents issued by freight forwarders. The 1983 Revision accepted the FBL, approved by the ICC, and any other transport document issued by a freight forwarder acting as a carrier or agent of a named carrier.<sup>123</sup> The new provision regards a document issued by a freight forwarder as acceptable provided the forwarder issues and signs the document as a carrier or multimodal transport operator, or as their agent acting on their behalf. Documents issued by the freight forwarder must comply with the provisions of the UCP 500 transport article, or articles, covering the specific type of transport document required by the credit.<sup>124</sup> The express reference to a FIATA document has been deleted and the article allows the acceptance of any transport documents issued by any individual freight forwarder company, or by any company member of a freight forwarder's association or similar entities, provided it meets the requirements of article 30 as well as all the conditions of the

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<sup>121</sup> Debattista, *Sale of Goods* ..., p. 227. Conversely, when carriage involves transport by more than one mode and a carrier only accepts responsibility for that segment performed by him, and acts as the shipper's agent in respect of the carriage by the other carriers, the document will be unacceptable unless the credit expressly permits it. Jack, *Documentary Credits*, p. 178. See 4. 3 in chapter 1 and 1 in chapter 5.

<sup>122</sup> See 5 in chapter 5.

<sup>123</sup> ICC Publication no. 400, article 25 d.

<sup>124</sup> Article 30. ICC Publication no. 511, p. 87.

appropriate UCP 500 transport article.<sup>125</sup>

#### 6.4 Clean and claused transport documents

Where payment is arranged under a documentary credit, the terms of the credit usually require the tender of “clean” transport documents.<sup>126</sup> The UCP provides that a “clean” transport document is one which carries no clause or notation expressly declaring a defective condition of either the goods and/or the packaging.<sup>127</sup> The banks will only accept a transport document showing such a clause or notation if it is expressly provided in the credit that such a document is acceptable.<sup>128</sup> Under both CIF and FOB contracts the seller is required to tender clean bills of lading. The bill will be a valid tender if it is claused with a notation indicating that the goods have deteriorated, or been damaged or destroyed, after shipment.<sup>129</sup> A clause which does not refer to the state of the goods when loaded but to the subsequent condition of the goods and their state on discharge does not make the bill a claused one.<sup>130</sup>

#### 6.5 Presentation of documents

It must be noted that there are two important time limits within which documents must be presented. The first time limit requires that documents must be presented within the period of validity of the credit<sup>131</sup> and the second provides that any transport document required must be presented either within the specified period following the day of shipment, which has been

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<sup>125</sup> The FCR and FCT, see footnote 14 in chapter 5, are not regarded as acceptable as they are not transport documents but only receipts, so having no applicability under article 30 or any other transport article in the UCP 500. ICC Publication no. 511, p. 87.

<sup>126</sup> Jack, *Documentary Credits*, p. 192.

<sup>127</sup> Article 32 a. The banks will accept transport documents containing such clauses as “shipper’s load and count” or “said by shipper to contain”, unless instructed otherwise, article 31 ii. Clauses of this nature do not render the bill unclean. The use of containers has led to the need to clause documents in this way as containers are usually filled by the consignor, and it is impractical for the carrier to check the contents of all containers. Jack, *Documentary Credits*, p. 191.

<sup>128</sup> Article 32 b. In addition, article 32 c requires that before a transport document meets the requirement of a “clean, on board” document, it must comply with the requirements of the specific article governing that particular mode of transport.

<sup>129</sup> Todd, *Modern Bills of Lading*, p. 68.

<sup>130</sup> *Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 All ER 501.

<sup>131</sup> Article 42 a.

stipulated in the credit, or within 21 days after the date of shipment, both of which periods must fall within the period of validity of the credit.<sup>132</sup> It is also possible that the credit may specify a time limit within which the goods must be shipped and hence within which the transport documents must be issued. The individual articles dealing with transport documents make provision for determining the date of shipment.

## 6.6 The rejection of goods and documents

The buyer's right to reject the documents and the right to reject the goods are separate and distinct rights.<sup>133</sup> The right to reject the documents arises when the documents are tendered while the right to reject the goods is determined at the time they are landed and found on examination not to be in conformity with the contract. It happens frequently that documents are accepted but the goods are subsequently rejected. The passage of title is subject to the condition that the goods will revert in the seller if the buyer, after examination, rejects the goods for failing to conform with the contract. Where a seller is in breach of either the obligation to ship the goods according to contract or to tender the correct shipping documents, the buyer will have a remedy of damages for breach of contract.<sup>134</sup> A buyer who has accepted faulty documents does not lose his right to reject the goods, provided he has not dealt with them in a manner inconsistent with the power to reject them on examination,<sup>135</sup> nor by accepting the goods does he lose his right to reject the documents.<sup>136</sup>

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<sup>132</sup> Article 43 a.

<sup>133</sup> *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 481; *Chao v British Traders & Shippers Ltd* [1954] 1 Lloyd's Rep 16.

<sup>134</sup> Todd, *Modern Bills of Lading*, p. 73.

<sup>135</sup> Marasinghe, *Contract of Sale ...*, p. 125.

<sup>136</sup> Todd, *Modern Bills of Lading*, p. 74. *Procter & Gamble Philippine Manufacturing Corp v Kurt A Becher GmbH & Co KG* [1988] 2 Lloyd's Rep 21.

## CHAPTER 7

### THE FUTURE OF THE BILL OF LADING

#### 1 The past, the present and the future

The bill of lading has had a long and distinguished history. It has served the commercial community well. Indeed, it might be regarded as one of the most remarkable products of the mercantile genius. For it enabled goods to be bought and sold while still at sea, so passing not only property in the goods, but also the right to possession on arrival. So wonderfully convenient did this prove to be, especially in the days of long sea voyages, that the bill of lading became endowed (or seemed to become endowed) with an almost supernatural or magical quality. I suspect that, to some little extent, this is still so. In certain parts of the world the bill of lading is still regarded, not just as the key to the warehouse, but as the key to commerce in general. Elsewhere things have moved on.<sup>1</sup>

Prompting the move forward has been the “bill of lading crisis” in which the document is presently embroiled. The problems stem from the difficulties arising from the malpractices involved in issuing bills of lading in a number of originals and issuing clean bills of lading in exchange for a letter of indemnity. Bills of lading also move too slowly to be available at the port of destination to facilitate the lawful delivery of the goods to the party entitled to them. This has given rise to the irregular practice of delivering the goods to a party who claims that they will become the lawful holders of the original bill of lading on its arrival, against a letter of indemnity or bank guarantee which claims to protect the carrier in the event of another party presenting the original bill of lading and claiming the goods. If the delivery of the goods against letters of indemnity becomes a regular practice, the transferability function of the bill of lading would be jeopardised and buyers and banks could be threatened by an insolvent seller’s creditors.<sup>2</sup> For these reasons it can be anticipated that the bill of lading will be superseded by other documentary or even non-documentary practices.<sup>3</sup>

The greatest impediment to the efficient transportation of goods between countries is the need to physically move the bill of lading and related documents from the exporting to the importing

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<sup>1</sup> Lloyd, *Lloyd’s Maritime and Commercial Law Quarterly*, 1989, p. 48.

<sup>2</sup> UNCTAD, *The Economic and Commercial Implications ...*, p. 64.

<sup>3</sup> Ramberg, in *International Carriage of Goods: some Legal problems and Possible Solutions*, pp. 16 & 17.

country.<sup>4</sup> Solutions to the problem have been found in the simplification and standardisation of documents, the use of alternative forms of transport document, like the sea waybill, localising documents at a central registry and speeding up the transmission of the documents by the employment of electronic data processing.<sup>5</sup> All of these solutions have implications for the role played by the bill of lading and other transport documents in the financing of international sales transactions.

### 1.1 The simplification and standardisation of documents

The development of uniform layouts such as the data aligned formats created by the International Chamber of Shipping (ICS), SITPRO and other organisations have assisted in speeding up the production of documents. With such uniform formats the master document provides space for all the information and the various copies produced only include the material required.<sup>6</sup> The most frequently used format of the bill of lading is the “Model B” bill of lading. This format was the result of work done under the auspices of the ECE, which devised the ECE layout key with the assistance of the ICS and the ICC. This form also provides the model in the SITPRO aligned series.<sup>7</sup>

One of the first data-aligned documents to be used was the short form, blank back, bill of lading, so named because the printed terms of the contract of carriage are removed from the back of the bill and replaced with a clause incorporating the carrier’s standard terms and conditions.<sup>8</sup> The short form bill can be produced in either a proprietary form with the carrier’s name appearing at the top of the form, or in a common form onto which the name of the particular carrier will be inserted by the shipper.<sup>9</sup> To the advantage of the short form bill is the fact that it possesses all the qualities of the standard long form. It is a receipt, it provides evidence of the contract of carriage

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<sup>4</sup> Goode, *Proprietary Rights and Insolvency*, p. 71.

<sup>5</sup> Goode, *Proprietary Rights and Insolvency*, p. 71. Wilson, *Carriage of Goods by Sea*, p. 161.

<sup>6</sup> Wilson, *Carriage of Goods by Sea*, p. 161.

<sup>7</sup> Schmitthoff, *Schmitthoff’s Export Trade*, p. 561.

<sup>8</sup> The short form bill of lading first appeared in Sweden. It is widely used in trade in the region.

<sup>9</sup> In 1979 the GCBS and SITPRO produced a Common Short Form Bill of Lading. Wilson, *Carriage of Goods by Sea*, p. 162.

and it constitutes a transferable document of title.<sup>10</sup> It can be used as an alternative to the long form bill in any circumstances,<sup>11</sup> including the provision of security in documentary credit transactions.<sup>12</sup>

The solutions posed by the use of short form bills of lading and sea waybills<sup>13</sup> are simply modifications of existing documentary practices and it has become evident over the past few years that a more radical approach involving the employment of modern technology is both necessary and appropriate. The real objective is the electronic transmission and negotiation of negotiable bills of lading, and other negotiable transport documents, in a system that will provide for the processing of all the shipping documents, without generating any paper.<sup>14</sup> Two moves towards the achievement of this end are the employment of a registry system and the use of electronic data processing to facilitate paperless cargo movement.

## 1.2 A registry system

A system of this nature envisages the creation of a central registry at which the negotiable bill of lading, issued in the normal manner, would be deposited by the shipper immediately after its issue by the carrier.<sup>15</sup> Once deposited, there would be no further physical transfer of the bill of lading. Any subsequent dealings with the bill would need to be recorded at the registry after notification by the currently registered consignee. This would be regarded as having the same effect as the physical transfer of the bill. Property in the goods would be passed to the party recorded to be the consignee, who in turn could refer to the record to establish details of the quantity and condition of the shipped goods. Where a documentary credit transaction is involved a bank would be able to register its security interest in the goods. The parties would be able to access the registry by

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<sup>10</sup> Ridley, *The Law of the Carriage* ..., p. 113.

<sup>11</sup> Ridley, *The Law of the Carriage* ..., p. 113. Wilson, *Carriage of Goods by Sea*, p. 162.

<sup>12</sup> Article 23 a. v UCP 500.

<sup>13</sup> See 1 and 2 in chapter 4.

<sup>14</sup> Wilson, *Carriage of Goods by Sea*, p. 165. For any new system of documentation to be effective it will need to find the approval of a wide range of parties, a few of which are shippers, carriers, consignees, banks, underwriters, and P&I Clubs.

<sup>15</sup> Chandler, G. F. The Electronic Transmission of Bills of Lading. *Journal of Maritime Law and Commerce*, vol. 20, no. 4, October 1989, p. 571. Wilson, *Carriage of Goods by Sea*, p. 166.

using a correctly coded key. In this way they could record changes against the bill or retrieve information relevant to the goods shipped. The carrier would be required to notify the registry of his estimated time of arrival and the registry would contact the last recorded consignee to establish the identity of the person to whom the goods had to be delivered. Once this had been done, no further transactions could be registered against the bill. The receipt of information by the carrier from the registry as to the identity of the consignee entitled to delivery of the goods is regarded as the equivalent of the presentation of the bill to the carrier and likewise discharges the carrier's obligations under the contract of carriage.<sup>16</sup>

The system has the advantage of using existing documents and procedures as well as solving the problem of the late arrival of documents. Furthermore, there would be no possibility of competing claims from holders of different original bills as no bill would be in circulation. There are, however, a number of difficulties facing such a registry system, one of which would be persuading banks and insurance houses of the security of their interests. One concern would be establishing the identity of the person entitled to delivery with certainty.<sup>17</sup>

The first attempt to create such a registry system was made by Chase Manhattan Bank and INTERTANKO, an association of independent oil tanker operators.<sup>18</sup> The intention was that SeaDocs Registry Limited (SeaDocs)<sup>19</sup> would initiate the telecommunicated negotiation of bills of lading employed in connection with bulk oil shipments. Although the SeaDocs experiment did not last a year, it did prove that an international, centralised, electronic bill of lading system could work on a world wide scale. It has been said that from a banking perspective SeaDoc's main shortcoming may have been the modesty of its scope rather than its premature ambition. SeaDocs was a private registry only accessible to trading partners and not to third parties with an interest in knowing the details of the sale, pledge or shipment of a cargo.<sup>20</sup>

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<sup>16</sup> Wilson, *Carriage of Goods by Sea*, p. 166.

<sup>17</sup> Wilson, *Carriage of Goods by Sea*, p. 167.

<sup>18</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 227.

<sup>19</sup> Hereinafter SeaDocs.

<sup>20</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 229.



### **1.3 The electronic transmission of information**

#### **1.3.1 The data freight system**

The data freight system<sup>21</sup> facilitates the issue of a computer-printed data freight receipt containing all the relevant information. The first printout is certified and handed to the shipper. The particulars in the computer are then transferred to the carrier's computer at the port of destination, where advance notice of the arrival of the cargo and a copy of the data freight receipt will be forwarded to the consignee. This procedure is based on the sea waybill model where the question of the disposal of the goods in transit does not arise and the consignee need only identify himself to receive delivery of the cargo. This system solves the problems caused by the delayed arrival of the bill of lading, conforms to existing business practice and requires no change to the existing body of law. Two of the bill of lading's legal functions, the receipt and evidence of contract functions, are fulfilled by the computer. The disadvantage of the system is its failure to provide a document of title, which makes it inappropriate for use in transactions where the consignee wishes to sell the goods in transit. It is envisaged that the system will provide adequate security for a documentary credit where the bank is named as consignee.<sup>22</sup>

#### **1.3.2 Electronic data interchange (EDI)**

EDI has been designed with the objective of dispensing entirely with any form of documentation.<sup>23</sup> The ultimate goal of EDI is the creation of a multiuser system which links carriers, shippers, banks and forwarders in a single network and the achievement of a fully integrated electronic process to move an international cargo without generating paper documents.<sup>24</sup> With regard to bills of lading, it aims to accommodate the functions of the negotiable bill of lading, allowing for the sale of goods while in transit and preserving the bank's security interest in the goods.

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<sup>21</sup> See footnote 22 in chapter 4.

<sup>22</sup> Wilson, *Carriage of Goods by Sea*, p. 168. It is the unwillingness of bankers to rely on some electronic sea waybills as collateral under a letter of credit that has prevented their general acceptance. Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 163.

<sup>23</sup> Wilson, *Carriage of Goods by Sea*, p. 169.

<sup>24</sup> In the United States, the Chase Trade Exchange is the only system which links finance and transportation. In Continental Europe and the United Kingdom attempts have been made to create similar systems, an example of which is the Data Interchange for Shipping DISH, involving a wider range of participants. Chandler, *Journal of Maritime Law and Commerce*, vol. 20, no. 4, October 1989, p. 571.

Under this system the information normally contained in the bill of lading is entered into the carrier's computer and the shipper is issued a "private key" which enables him to access the information on the computer and control the goods during transit. His right of control over the goods is relinquished by giving the carrier irrevocable instructions to hold the goods for a named consignee who becomes entitled to claim their delivery at the port of destination. The consignee can in turn require the carrier to deliver to another consignee by similarly giving irrevocable instructions. The private key, which is issued to the shipper in substitution for the paper bill of lading, is the mechanism facilitating such transfers. With every transfer the operative private key is cancelled and replaced by a new key issued to the transferee. Holding of the private key is analogous to the possession of the bill of lading under the usual documentary procedure, as the private key fulfils a role equivalent to that of the negotiable bill of lading.<sup>25</sup> The carrier is expected only to take instructions concerning the disposition of the goods from the person holding the current private key and to deliver the goods at their destination to the party quoting the code valid at the time.<sup>26</sup>

Parties can agree to transact their business on the basis of an EDI system and the CMI Rules for Electronic Bills of Lading adopted in 1990 provide a procedure for the operation of such a system.<sup>27</sup> The Rules are available for incorporation into contracts of carriage. To ensure conformity with the mandatory carriage conventions, the Rules provide that parties may opt out of the system if, for example, the shipper requires a bill of lading to receive payment under a documentary credit or because one of the parties does not have access to EDI facilities.<sup>28</sup>

The most important characteristic of the CMI Rules is the creation of an electronic bill of lading

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<sup>25</sup> Kozolchik, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 232.

<sup>26</sup> A party intent on committing fraud may be able to access the network by establishing a valid identity but will not be able to obtain possession of the goods without the use of the private key.

<sup>27</sup> The Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID) and the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT) are two measures, both adopted in 1988, for the standardisation of EDI methods of communication. (In the United States ANSI ASC X.12 is a competitive system to UN/EDIFACT, Chandler, *Journal of Maritime Law and Commerce*, vol. 20, no. 4, October 1989, p. 572.) The Trade Data Elements Directory (UNTDDED) produced by the International Organisation for Standardisation (ISO), together with other international organisations, aims at the standardisation of substantive EDI communications. Schmitthoff, *Schmitthoff's Export Trade*, pp. 78, 79, & 80.

<sup>28</sup> Wilson, *Carriage of Goods by Sea*, p. 169.

by the carrier, who also provides an unofficial registry of all negotiations. The electronic bill of lading can be issued by carriers with the necessary computer facilities and “endorsed” by as many endorsees as have similar access. From a legal perspective it is uncertain whether the private key can be equal to an ocean bill of lading, since the creation of a negotiable document of title generally depends on statutory law.<sup>29</sup>

The “Bill of Lading for Europe” (BOLERO)<sup>30</sup> Project, funded by the European Union and various commercial bodies, is the most recent attempt to replicate electronically the negotiable bill of lading. BOLERO combines the procedures established in the CMI Rules with a central registry operated by an independent party. The project started in April 1994 and operated on a trial basis from July to September 1995. It involved 8 trading chains, encompassing Europe, the United States and Hong Kong, and 26 pilot users. The object of the project was to test “the technical, security, and legal aspects of providing bills of lading in electronic format.” The authors of the project have stated that “in handling all additional trade documentation BOLERO offers the shipping world the opportunity to have completely paperless systems with attendant cost savings and customer service improvements.” The BOLERO user Association has been formed by interested parties which include exporters, importers, shipping companies, freight forwarders and banks, and is intended to provide a forum for the development of BOLERO.<sup>31</sup> Any commercially acceptable form of negotiability by systems of this nature will require changes to the law and to banking standards in order to facilitate its operation.<sup>32</sup>

An important development in the application of EDI has been the finalising, in June 1996, of UNCITRAL’s work on a Model Law on Electronic Commerce, including the negotiability of EDI transport documents.<sup>33</sup> The electronic form to be taken by transport documents in the future may

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<sup>29</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 240.

<sup>30</sup> Hereinafter BOLERO.

<sup>31</sup> United Nations General Assembly, UNCITRAL, *Electronic Data Interchange*, A/CN.9/WG.IV/WP.69, 31 January 1996, pp. 19 & 20.

<sup>32</sup> Kindred, in *New Directions in Maritime Law*, p. 222.

<sup>33</sup> United Nations General Assembly, UNCITRAL, *Electronic Data Interchange*, A/CN.9/426, 24 April 1996, p. 1.

achieve some degree of certainty in consequence of the completion of this work. It is essential that these electronic “transport documents” fulfil the legal requirements of conventional transport documents, particularly the creation of collateral security for the bank, if they intend to replicate the role currently played by the bill of lading in the financing of international sales contracts.<sup>34</sup>

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<sup>34</sup> Kozolchyk, *Journal of Maritime Law and Commerce*, vol. 23, no. 2, April 1992, p. 242.

## CONCLUSION AND SUMMARY

- 1 In an international sales contract the parties are usually located in different states and the contract involves the carriage of goods from the seller in one jurisdiction, across international borders, to a buyer in another jurisdiction. The transport documents, which evidence the contract of carriage, play an important role in financing international sales contracts. They allow the movement of goods in one direction and the movement of finance in the other. Traditionally, the transport document against which international sales contracts were financed was the bill of lading. A bill of lading is a transport document which provides for the port-to-port carriage of goods by sea. It is issued by the sea carrier to the shipper once the goods have been received or loaded on board ship for carriage.
  
- 2 Maritime commerce was governed by a body of customary law, the *lex mercatoria*, until the appearance of modern statutory maritime law late in the 19th century. The bill of lading, like all other creations of the law merchant, developed to meet the requirements of practical commerce. In days gone by, when goods carried by sea were subject to lengthy sea voyages, traders needed some mechanism which would allow them to transact their business while the merchandise was still at sea. The bill of lading evolved to meet those needs. The bill of lading has allowed the seller to obtain payment soon after the sale of the goods or alternatively, to receive credit on the security of the transaction. Conversely, it has provided a means for the buyer to resell the goods in transit and to raise finance on the strength of their security.
  
- 3 It is the legal nature of the bill of lading which has enabled it to play a role in the financing of international sales contracts. It is widely recognised that the bill of lading is a receipt for the goods shipped, that it provides evidence of the terms and conditions of the contract of carriage and that it is a document of title to the goods. By virtue of these legal functions the bill of lading has become fundamental to international trade, as it provides the international trader with three important facilities. Firstly, the principal purpose of the bill of lading is to enable the owner of the goods, which are the subject of the bill of lading, to dispose of them easily and quickly regardless of the fact that they are no longer in his possession but in the custody of the carrier. Secondly, it delimits the rights and

responsibilities of the parties to the contract of carriage. When the bill of lading has been transferred to the consignee he is given a right against the carrier to demand delivery of the goods at the port of discharge; he has a right to sue on contractual terms for loss or damage to the goods, and the right of estoppel as to the condition of the goods at the time of shipment. Finally, the bill of lading allows the parties to raise finance on the strength of the document itself, functioning as the basis on which bankers provide the credit required for financing international contracts of sale. The efficient operation of trade depends on all three of these facilities. The bill of lading secures both the position of the buyer and the seller in an international trade transaction. The seller can dispatch the goods to the buyer because the bill of lading allows him to retain control over the goods in the event of the buyer's insolvency. The buyer can safely part with the payment price because of the receipt of a document which entitles him to claim delivery of the goods and to control them in transit while it also provides him with direct rights against the carrier. International trade, particularly in commodities, becomes less risky and more profitable because of the use of a document which can be bought and sold while the goods remain in transit. Trade is facilitated because banks are willing to provide finance on the basis of goods represented by a valuable document like a bill of lading.

- 4 It is the third characteristic of the bill of lading, its nature as a document of title, which allows it to feature prominently in the financing of international sales contracts. The most fundamental attribute of the bill of lading as a document of title is founded in the mercantile custom which provides that possession of the bill of lading amounts to possession of the goods. The bill of lading acts as a symbol of the goods and as such gives the holder control over them. The person in possession of the bill of lading is entitled to claim their delivery from the carrier at the port of destination upon the surrender of an original bill of lading. He is also entitled to sell the goods while they are in transit. This is achieved by the endorsement and delivery of the bill of lading with the intention of passing the title to the goods to the transferee. Such endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods.
- 5 It is a well established practice that banks advancing credit to a buyer, to fund an international purchase, hold the bill of lading as security. The bill of lading is pledged to the

bank by the seller, who transfers it to the bank with the appropriate endorsements and with the intention of creating a pledge. The pledgee bank acquires a special property interest in the goods and not full ownership associated with the acquisition of the general property in the goods. If the debtor defaults in making payment the pledgee bank can claim delivery of the goods from the carrier and sell them, so realising the security it has over the goods.

- 6 When payment for an international sale is made under a documentary letter of credit the security provided to the banks by the bill of lading is an important aspect of the procedure. The attraction of the documentary letter of credit system is the employment of a bank as an intermediary between the buyer and the seller. The bank receives and examines the documents specified by the buyer, for submission by the seller, in the application for the letter of credit. If the documents are accepted by the bank as conforming to the requirements of the letter of credit, the seller can claim payment for the goods in the manner provided for. The seller thus receives payment for the goods sold soon after their dispatch and the buyer receives credit against the security provided by the bill of lading.
- 7 Containerisation and the growing trend of carrying goods by different methods of transport in one through movement, from a point in one country to a point in another, has had important ramifications for international trade and its financing. New types of transport contracts, reflecting different trading patterns and requiring new transport documents, have appeared. The bill of lading has in many instances been replaced by the sea waybill and the multimodal transport document. This has necessitated a revision of both the *International Rules for the Interpretation of Trade Terms (INCOTERMS)* and the *Uniform Customs and Practice for Documentary Credits (UCP)* to reflect the changing documentary practices in the international carriage of goods and the financing of international sales contracts.
- 8 International contracts of carriage have widened in scope and the traditional port-to-port sea carriage anticipated in CIF and FOB contracts is being replaced by the door-to-door multimodal transportation of goods under the FCA term. While the CIF term, and the bill of lading, was once fundamental to the system of financing international sales in the form of a documentary letter of credit, this is no longer so. *INCOTERMS* 1990 indicate that in addition to bills of lading, sea waybills and inland waterway documents are also regarded

as “usual transport documents” required for the fulfilment of a CIF contract. The FOB contract may, in addition to a bill of lading, be carried out under a sea waybill or multimodal transport document. Because the needs of international trade are well served by the multimodal carriage of goods, it is anticipated that the FCA contract, covered by a multimodal transport document, will become the most frequently used in future.

- 9 The advances in the transport industry have had significant implications for the bill of lading and have contributed to what has been referred to as the “bills of lading crisis”. Port-to-port sea transport, particularly on short sea routes, has become fast and efficient. The processing of documentation and the physical movement of the bill of lading have not kept pace. The bill of lading has, with increased frequency, failed to arrive at the port of destination in time to secure the lawful release of the goods by the carrier, on their arrival at the port of discharge. The unsatisfactory practice of delivering goods against a letter of indemnity or bank guarantee jeopardises the bill of lading’s character as a transferable document of title, and threatens the security interest that the bank has in the goods represented by the bill of lading. When bills of lading are employed correctly, a bank or buyer, that has obtained possession of a bill of lading from a seller who subsequently goes bankrupt is effectively protected against the seller’s creditors. If it could be established that the bill of lading is no longer the document actually used to obtain the release of the goods in a particular trade, the bill of lading would then no longer be recognised as controlling the title to the goods and the bank, or buyer, irrespective of the possession of the full set of the original bills of lading, would not be protected against the seller’s creditors.
  
- 10 The carriage of goods by sea under a contract embodied in a non-negotiable receipt or sea waybill has provided a valuable alternative to the use of bills of lading in most circumstances. Bills of lading are only required when a trader wishes to sell the goods during the course of carriage and needs a transferable document of title to facilitate the sale. Bulk cargoes are often traded while in transit and will continue to require the use of a bill of lading. In the majority of instances in which goods are carried by sea there is no intention of reselling them during the voyage and in these cases the sea waybill can suffice. In future the use of the bill of lading will be confined to the minority of cases in which it is necessary to have a transferable transport document which is needed to facilitate the sale of goods in



port-to-port sea transit.

- 11 A development with serious implications for the bill of lading is the acceptance which the sea waybill now finds by banks financing international sales contracts through documentary letters of credit. Initially, the acceptability of sea waybills was doubtful because of their nature as non-negotiable receipts. Considering that title to the goods could not be transferred to the bank, so creating a pledge of the goods specified in the document in the bank's favour, sea waybills were not regarded as being able to provide security over the goods. It is also for this reason that a lien over the sea waybill does not provide satisfactory security. The initial solution to this problem was to name the bank as consignee on the sea waybill. This still failed to secure the bank's interest in the goods because the right to control the goods in transit remains with the consignor until the goods are delivered to the consignee named in the sea waybill. Before the goods are delivered to the consignee, the consignor is entitled to instruct the carrier to deliver the goods to an alternative consignee. Furthermore, both the right to control the goods in transit and the right to claim the delivery of the goods are independent of the sea waybill; the named consignee can claim their delivery simply on proof of identity. Thus by holding the sea waybill the bank does not acquire any security over the goods. An important innovation in the use of sea waybills has been the introduction of "No Disposal" (NODISP) clauses in which the consignor effectively gives up his right of control over the goods and in terms of which the carrier agrees to hold the goods in security and as collateral in favour of the bank named as consignee. When the bank is named as consignee and the sea waybill contains a NODISP clause the banks are able to assert a security interest over the goods.
- 12 The acceptability of sea waybills by the banking community has been confirmed by the inclusion in the 1993 Revision of the UCP of a separate article stating the requirements with which they must conform. The sea waybill is now an acceptable transport document when an international sales contract is financed by a documentary letter of credit. Sea waybills are fully equal alternatives to the bill of lading as far as credit security, but not negotiability, is concerned. The adoption in 1990 of the *Comité Maritime International* (CMI) Uniform Rules for Sea Waybills has contributed to the creation of uniformity in the use of sea waybills, so enhancing their acceptability by banks. Caution is, however, required

by the banks as the steps necessary to create a security interest in the goods are not stipulated in either the UCP or the CMI Uniform Rules. The bank will need to ensure that the terms of the letter of credit stipulate that the bank is named as the consignee on the sea waybill and that it contains the appropriate NODISP clause.

- 13 The development and growing popularity of the non-negotiable sea waybill, together with its acceptance by banks under a documentary letter of credit transaction, marks the beginning of the demise of the bill of lading in the international carriage of goods and the financing of international sales contracts. Banks no longer require “clean, on board bills of lading” to provide them with a security interest in the goods, against which they are willing to advance credit. Documents of a fundamentally different legal nature are now also able to play a role in the financing of international sales contracts.
- 14 Contributing to the demise of the bill of lading is the rise of the multimodal transport document. Under international multimodal contracts of carriage traditional port-to-port sea carriage, covered by bills of lading and sea waybills, only constitutes one leg of the door-to-door multimodal transportation of goods under a multimodal transport document. The multimodal transport document is a receipt for goods taken in charge by a multimodal transport operator (MTO): it provides evidence of the terms and conditions of the multimodal transport contract and it may be a transferable document of title.
- 15 An important characteristic of multimodal transport documents, not limited to multimodal transport documents subject to either the United Nations Convention on the International Multimodal Transport of Goods 1980, or the UNCTAD/ICC Rules for Multimodal Transport Documents 1992, is the ability to issue them in negotiable or non-negotiable form. When a negotiable multimodal transport document is used it has the same legal nature as a bill of lading and is able to replicate the role played by the bill of lading in the financing of international sales contracts. In practice it is accepted that the holder of the multimodal transport document is entitled to claim delivery of the goods from the MTO, or to sell the goods in transit by transferring the multimodal transport document with the necessary endorsement and intention. When a negotiable multimodal transport document is made to the order of the shipper and blank endorsed and handed to the bank as security, a pledge

over the goods is created in the bank's favour. This enables a buyer to raise credit founded on the security of the goods represented by the multimodal transport document. Thus, banks deal with the multimodal transport document in the same way as the bill of lading, notwithstanding the fact that its nature as a document of title is questionable. The status of the multimodal transport document as a document of title is not founded in statutory law however, its acceptance as such in international commerce is evidence of a trade custom which regards it as a document of title. When the multimodal transport document is issued in non-negotiable form its employment follows the sea waybill pattern. The bank in order to acquire a security interest over the goods must insist on being named as consignee and ensure the inclusion of a NODISP clause in the non-negotiable multimodal transport document.

- 16 The 1993 Revision of the UCP has taken cognisance of these developments and has included an article which specifies the bank's requirements for an acceptable multimodal transport document, when finance is to be provided by a documentary letter of credit. The provisions of the UCP do not distinguish negotiable and non-negotiable transport documents, nor do they provide for the creation of a security interest in the goods, by the bank, when non-negotiable multimodal transport documents are used. As in the case of non-negotiable sea waybills, the banks need to proceed with caution in order to ensure that their security interest in the goods, specified in a non-negotiable multimodal transport document, is established.
- 17 Another important characteristic of many standard form multimodal transport documents is their ability to function as unimodal transport documents. This is achieved by completing the details on the document in the appropriate manner. A standard form multimodal transport document can be an acceptable unimodal transport document if it meets the requirements of the appropriate international transport convention. If they also comply with the provisions of the relevant transport article in the UCP, there is no reason why, in principle, they cannot be accepted by banks for submission under a documentary letter of credit.
- 18 An important consequence of the new trading patterns introduced by multimodal transport

has been the changing role played by freight forwarders. Traditionally, freight forwarders acted as the consignor's agent in arranging for the carriage of the goods by transport operators of the different modes of carriage. It has become the practice for freight forwarders themselves to assume full responsibility to the consignor for the safety and prompt arrival of the goods. In this capacity the freight forwarder acts as a carrier or NVO-MTO, who issues his own multimodal transport document, and is a principal in a contractual relationship with the consignor. This development is reflected in the 1993 Revision of the UCP, which acknowledges the growing importance of transport documents issued by freight forwarders. Article 30 is devoted to specifying the basis on which documents issued by freight forwarders will be acceptable. In most instances this article is likely to work in conjunction with article 26, which specifies requirements in relation to multimodal transport documents, because of the growing trend for these documents to be issued by freight forwarders or MTOs.

- 19 The legal character and role of the sea waybill facilitates the substitution of the documentary sea waybill by a sea waybill which consists of electronically transmitted information in a computer. Bills of lading and multimodal transport documents, because they are documents of title and more than simply vehicles for the communication of information, are more difficult to adapt to Electronic Data Interchange (EDI). However, these documents will ultimately be produced and negotiated through EDI. Any electronic system which intends to replace the bill of lading or the multimodal transport document will need to accommodate all the legal functions of negotiable transport documents. Concomitantly, the present paper based system of documentary letters of credit will need to be replaced by a system of electronic credits which will accommodate the "transport documents" of the future. Furthermore, the substitution of EDI for traditional documentary transactions will initiate far-reaching changes in, *inter alia*, the law and practice of international transport and the financing of international sales contracts.

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