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**SHIPPING LAW**

**The Bill of Lading & other related documents[[1]](#footnote-1)**

**Suggested reading**

resource.gif

Read and make notes:

Bools, *The Bill of Lading*, 1997, LLP.

Bradgate and White, ‘The Carriage of Goods by Sea Act 1992’ (1993) MLR 188.

Burden, ‘EDI and bills of lading’ [1992] Computer Law and Security Report 269.

Carver on Bills of Lading, 2nd Edition, 2005, Sweet & Maxwell.

Chandler, ‘The electronic transmission of bills of lading’ (1989) 20(4) JMLC 571.

Curwen, ‘The problems of transferring carriage rights: an equitable solution’ [1992] JBL 245.

Davie, ‘Continuing dilemmas with passing of property in part of a bulk’ [1991] JBL 111.

Debattista, *Sale of Goods Carried by Sea*, (Butterworths).

Dockray, *Cases and Materials on the Carriage of Goods by Sea* (Routledge).

Gaskell, Baatz and Asariotis, ‘Bills of lading’, in Yates (ed), *Contracts for the Carriage of Goods by Land, Sea and Air*, 1993, LLP.

Girvin, Bills of Lading and straight bills of lading: principles and Practice, 2006, JBL.

Gliniecki and Ogada, ‘The legal acceptance of electronic documents, writings, signatures and notices in international transport convention: a challenge in the age of global electronic commerce’ (1992) 13 Northwestern Journal of International Law and Business 117.

Gronfors, ‘The paperless transfer of transport information and legal functions’, in Schmithoff and Good (eds), International Carriage of Goods; *Some Legal Problems and Possible Solutions*, 1988, Centre for Commercial Law Studies, Queen Mary College.

Humphreys and Higgs, ‘Waybills: a case of common law laissez faire in European commerce’ [1992] JBL 453.

Kelly, ‘The CMI charts a course on the sea of electronic data interchange’ [1992] Tulane Maritime LJ 349.

Kozolchyk, ‘Evolution and present state of bill of lading from a banking law perspective’ [1992] JMLC 161.

Kozolchyk, ‘The paperless letter of credit and related documents of title’ [1992] Law and Contemporary Problems 39.

Livermore and Krailerk, ‘Electronic bills of lading’ [1997] Journal of Maritime Law and Commerce 55.

Lloyd, ‘The bill of lading – do we really need it?’ [1989] LMCLQ 47.

Merges and Reynolds, ‘Towards a computerised system for negotiating ocean bills of lading’ (1986) 6 Journal of Law and Commerce 36.

Melis Özdel, *Bills of Lading Incorporating Charterparties* (Hart, 2015)

Ritter, ‘Defining international electronic commerce’ (1992) 13 Northwestern Journal of International Law and Business 3.

Tetley, ‘Waybills: modern contract of carriage of goods by sea’ [1983] JMLC 501.

Todd, ‘Dematerialisation of shipping documents’ [1994] Journal of International Banking Law 410.

Todd, ‘Bill of Lading and documents of title’, 2005, JBL.

Urbach, ‘The electronic presentation and transfer of shipping documents’, in Goode (ed), *Electronic Banking: the Legal Implications*, 1985, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College.

**Introduction**

There are a number of documents involved in the international trade transaction. The bill of lading is one of the most important documents where sea carriage is involved. The use of the bill of lading can be traced back to the early middle ages when trading practices changed because owners of goods were no longer able to travel with their goods to their destination. The bill of lading, therefore, developed from being merely a receipt acknowledging that the goods had been placed on board the vessel to also incorporating the terms of the contract and acting as a document of title.

Generally, the buyer of the goods is not the shipper of the goods and is, therefore, not privy to the contract of carriage with the carrier. Property in those goods may have passed to the buyer as may have risk of loss or damage to the goods. The buyer may have had constructive possession of the goods at the time of the loss if he had received a bill of lading in respect of those goods prior to that loss as the bill of lading is a document of title at common law. However, the buyer would not have been able to sue for breach of contract of carriage in respect of the loss or damage to his goods. To remedy this problem arising from the doctrine of privity of contract the Bills of Lading Act 1855 was passed. The Carriage of Goods by Sea Act 1992 was enacted to remedy defects which arose from the Bills of Lading Act 1855 as will be seen later.

The bill of lading does not have a definition either by common law or statute. However, where the document is acknowledged as having the following characteristics it will be recognised as a bill of lading:

* Receipt for goods
* Evidence of the contract of carriage
* Document of title

The above three functions of a bill of lading will each be examined in this section.

**The bill of lading and the contract of carriage**

The carrier or his agent will issue the bill of lading after the goods have been placed on board. It will contain contractual terms but will not necessarily be the contract of carriage, which in normal circumstances will have been concluded between the shipper and the carrier before the bill of lading is issued.

The terms printed on the bill of lading may well have been incorporated into the contract of carriage by use of some such phrase as ‘subject to the exceptions of our bills of lading’ *(Armour & Co., Ltd., v Leopold Walford (London) Ltd.,* [1921] 3KB 473*)* or have been implied into the contract by the parties’ previous dealings on the bill of lading terms. Nevertheless, the bill of lading, at least as between the carrier and the original shipper, amounts only to evidence of the contract of carriage. In *Ardennes SS (Cargo Owners) v SS Ardennes (Owners)* [1951] 1KB 55 oranges were shipped from a Spanish port on the understanding that the ship would sail directly to London. The ship called at Antwerp and the consequent delay in arrival at London caused loss to the cargo owner. The bill of lading contained a term which would have permitted the ship to call at Antwerp and the carrier relied on this term. It was held, however, that the bill of lading was only evidence of the contract of carriage and that the cargo owner was entitled to prove that the contract the parties had in fact made contained a term that the voyage would be direct. With reference to the bill of lading Lord Goddard, C.H. commented that.

No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some terms additional to the bill of lading; nor does he sign it.

In the international trade transaction the buyer is not normally the shipper of the goods and will not be privy to the contract of carriage. The contract of carriage will have earlier been entered into by the carrier and the shipper but the buyer will not be a party to that contract. Even though the buyer may have property in the goods, the buyer will be unable to sue the carrier for breach of contract of carriage in respect of loss or damage to the goods. However, an important statute within the international trade context is the Bills of Lading Act 1855 and the Act assisted the buyer in section 1 which provided that:

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

This meant that whereas at common law the transfer of the bill of lading to the consignee or indorsee did not operate as an assignment of the contract of carriage, under s1 this was satisfied providing:

* the document relied upon was a bill of lading;
* the holder of the bill of lading was the consignee or indorsee of the bill of lading;
* property must have passed to the holder of the bill of lading upon or by reason of such consignment or endorsement.

Providing the above requirements were satisfied there was an effective assignment of the contract of carriage contained in the bill of lading.

Other problems arose under the Bills of lading Act 1855 and, therefore, subsequent legislation pertaining to this area was enacted, which will be discussed later.

In *The Heidberg* [1994] 2 Lloyds Rep 287, Judge Diamond QC said the transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and shipowner (of which the bill of lading is merely the evidence).This is clearly the position as between the original shipper and the carrier, but the bill of lading will usually be transferred eventually by indorsement to a third party, such as an overseas buyer, who will, in most cases, take over the original shipper’s rights and liabilities under the contract of carriage. Such a third party may well be unaware of any terms agreed between shipper and carrier which are not set out in the bill of lading and will not be bound by them. As between carrier and indorsee, the bill of lading will in fact represent the contract of carriage even though, as between carrier and original shipper it would have been mere evidence of the contract. Thus in *The Emilien Marie* (1875) 44 LJ Adm 9, three bills of lading were issued on the understanding that the third would only be met if sufficient cargo remained. It was held that the indorsee of this third bill was entitled to demand the full quantity of goods. *Leduc & Co., v Ward* (1888) 20 QBD 475, is often cited on this point but the judgments are in fact based largely on the para 1 evidence rule and on the assumption, no longer valid, that the Bills of Lading Act 1855 had made the bill of lading the contract of carriage.

If an exporter charters a vessel, his contract of carriage will be expressed in the charterparty. When cargo is loaded on to the chartered vessel, a bill of lading will be issued, but as between the shipper-charterer and the carrier the bill of lading will not replace the charterparty as the contract of carriage. It will not even be evidence of it, since the contract is expressly set out in the charterparty. But if the bill of lading is indorsed to a third party his contract with the carrier will be that contained in the bill of lading. He will only be affected by the charterparty if its terms are clearly incorporated into the bill of lading.

It will be seen from the above that the bill of lading has a somewhat strange relationship to the contract of carriage. In the hands of the original shipper the bill of lading will merely be evidence of the contract of carriage and if the original shipper is the charterer it will not even be that. However, once the bill of lading has been indorsed to a third party it becomes, for all practical purposes, the contract between third party and carrier. The idea that a party can transfer contractual rights which he does not have is not a common one in English law but no practical difficulties or injustice usually arise since a carrier is, or should be, aware when he issues a bill of lading that he may become bound to a third party on its terms whatever arrangement he may have made with the original shipper.

**The bill of lading as a receipt**

The bill of lading will acknowledge the quantity of goods put on board, their description and their condition. The bill of lading form will usually be completed by the shipper or his forwarding agent and sent to the carrier. As the goods are loaded they will be checked by tally clerks and if the particulars are found to be correct the bill of lading will be signed for the carrier by his agent, the loading broker. Obviously mistakes can occur and it may be that a bill of lading is signed and issued for a quantity of cargo which has not been put on board or for cargo which is other than that described in the bill of lading or which is not in the condition in which the bill of lading states it to be. It is necessary to consider the legal aspects of this situation.

Under the Hague-Visby Rules (Carriage of Goods by Sea Act 1971, Sch. Art III) the carrier is bound, on the shipper’s demand, to issue a bill of lading which must show, among other things, the leading marks necessary for identification of the goods, the number of packages/pieces *or* the quantity *or* the weight of the goods and their apparent order and condition. This information will be furnished in writing by the shipper, usually on the bill of lading form. The carrier is not bound to show any of this information in the bill of lading if he has reasonable ground to suspect its accuracy *(The Mata K* [1998], 2 Lloyd’s Rep. 614*)* or if he has no reasonable means of checking it *(The Esmeralda* [1988] 1 Lloyd’s Rep 206*)*. **The shipper is deemed to have guaranteed to the carrier the accuracy of his information and must indemnify the carrier against any loss or expense suffered by the latter as a result of inaccuracy**. In *The Mata K* the bill of lading described the cargo as 11,000 tonnes of muriate of potash, but then stated in the box marked “SHIPPED”, ‘weight, measure, quality, condition, contents and value unknown’. On final discharge of the cargo it was discovered that there was a shortfall of about 2705 tonnes. The defendants denied the alleged shortfall and said that all the cargo shipped was discharged and that, if less than the total bill of lading quantity was discharged, the explanation was that the total bill of lading was not shipped. The plaintiffs argued that the defendants were bound by the bill of lading quantity and that they could not say that the whole quantity was not shipped. The issue revolved around whether s4 of the Carriage of Goods by Sea Act, 1992 was satisfied. s4 provides as follows:

A bill of lading which: (a) represents goods to have been shipped on board a vessel . . .; and (b) has been signed by the master of a vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods . . . .

The plaintiffs case was that the bill of lading met the requirements of s4. The court assumed that s4(b) had been satisfied and that the plaintiffs had express, implied or apparent authority of the defendants to sign the bill of lading on their behalf under the charterparty. Therefore, did the bill of lading on its true construction satisfy s4(a)? Clarke J. at p.617, considering his decision referred to the judgment of Viscount Reading, C.J. in *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2.K.B.664, 669:

Where in a bill of lading, which is prepared by the shippers for acceptance by the defendants’ agent, the agent accepts in the margin a quantity “said to be 937 tons,” and in the body of the bill of lading there is a clause “weight, &c., unknown,” there is no prima facie evidence that 937 tons have been shipped. Sankey J. in my judgment omitted to give proper effect to the words “weight, &c., unknown.” He based his judgment on the decision in *Smith & Co. v. Bedouin Steam Navigation Co.* [1896] AC 70, but he omitted to notice that in that case a definite quantity was given in the bill of lading and that there were no qualifying words such as “**said to be**” or “**weight unknown**”. I think that the true effect of this bill of lading is that the words “weight unknown” have the effect of a statement by the shipowner’s agent that he has received a quantity of ore which the shippers’ representative says weight of 937 tons but which he does not accept as being of that weight, the weight being unknown to him and that he does not accept the weight of 937 tons except for the purpose of calculating freight, and for that purpose only.

As a consequence it was decided that the bill of lading did not represent that 11,000 tonnes were shipped so as to be conclusive evidence against the defendants.

*Prima facie evidence*

In the hands of the shipper, the statements in the bill of lading are prima facie evidence of the **receipt of the goods as described**. Thus it is open to the carrier to rebut (tu choi) this evidence by proving that the goods stated were not in fact put on board or that the goods put on board were not as described. In the case of *Grant v Norway* (1851) 19 C.B. 665, the master signed a bill acknowledging the shipment of 12 bales of silk but none of the bales had been loaded. The Court held that the plaintiffs, who were indorsees of the bill for value, had no remedy when the carrier established that no bales had been shipped. Jervis CJ at p.688 emphasised this point when he stated that:

It is not contended (argued) that **the captain had any real authority to sign bills of lading**, unless the goods had been shipped: nor can we discover any ground upon which a party taking a bill of lading by indorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. If then, from the usage of trade, and the general practice of ship-masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of authority; and, claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.

As against the shipper this is reasonable since he must be taken to know what was put on board and, as has been said, will in practice have himself furnished the particulars. **The indorsee of the bill of lading, on the other hand, has no knowledge of the goods other than that obtainable from the bill of lading**. For this reason once the bill of lading has been transferred to **a third party acting in good faith**, no evidence may be brought to contradict the bill of lading statements; they are then conclusive.

It is necessary to look further at the various statements about the goods which are set out in the bill of lading and to consider these points on which the common law differs from the Hague-Visby Rules.

**Statement of quantity**

Under **the Hague-Visby Rules, the carrier is obliged only to commit himself to one expression of quantity**. If, for example, he states the number of packages, he need not also state weight or measurement or may disclaim knowledge of them. *(Oricon Waren – Handels Gmbtt v Intergraan NV* [1967] 2 Lloyd’s Rep 82*)*.

**At common law the carrier need not state any quantity**. In practice, of course, he will, since the bill of lading would otherwise serve little purpose, but it is common to add words indicating that weight, quantity etc are ‘not known and noted only for the **purpose of calculating freight'** or 'as declared by shipper but unknown to carrier’. **If the carrier inserts a clause in the bill of lading to the effect that weight/quantity is unknown, the Hague – Visby Rules as to prima facie evidence does not apply**: *The Atlas* [1996] 1 Lloyd’s Rep 642. Longmore J at p.646 supported this by saying,

Do the . . . bills show the numbers of packages or weight (as furnished in writing by the shipper)? In one sense, it can be said they do, because the bills have figures which were in fact provided by the shipper in writing. But if the bills provide ‘weight . . . number . . . quantity unknown’, it cannot be said that the bills ‘show’ that number or weight. They ‘show’ nothing at all because the shipowner is not prepared to say what the number of weight is. He can of course be required to show it under Art III (3) but, unless and until he does so, the provisions at Art III (4) as to prima facie evidence cannot come into effect.

If a bill of lading to which the common law applies does state a quantity without qualifications this statement will, in the hands of the shipper, be merely prima facie evidence of the shipping of the goods described. In the hands of an ***indorsee, however, the statement will be conclusive (quyet dinh) evidence, as against the carrier***, of the loading of the goods as long as the bill of lading is signed by the master or by any person having the express, implied or apparent authority of the carrier to sign bills of lading. In the case of a received for shipment bill of lading the statement will be conclusive evidence of the receipt of the goods by the carrier. (**Carriage of Goods by Sea Act 1992, s4).**

**Statement of condition**

Bills of lading usually contain the printed words, ‘Shipped in good order and condition …‘. **At common law**, in the hands of the shipper, this statement is not even prima facie evidence of the condition of the goods when shipped. It amounts merely to evidence of the condition and if goods arrive damaged the onus remains with the shipper to show that the goods were shipped in good condition. The indorsee is in a somewhat better position. If the statement is clear and unqualified by any clause as to bad condition noted on the bill of lading, **the carrier will be estopped (ngan chan loai tru) , as against the indorsee**, from denying the truth of the bill of lading statement, provided that the indorsee has acted to his detriment by relying on the statement. In *Compania Naviera Vasconzada v Churchill and Sim* [1906] 1 KB 237, timber was stained with oil when shipped but a ‘clean’ bill of lading was nonetheless issued to the shipper who indorsed it to a third party. The indorsee sued the carrier in respect of the damage. **The carrier was estopped (nguoi van chuyen ko the tranh duoc trach nhiem vi go duoc duoc len thuyen trong dieu kien tot)**, by the statement in the bill of lading**, from denying that** ***the timber was in good condition when loaded*** and was ***thus liable to the indorsee for the damage***. *The “David Agmashenebeli”* [2003] 1 Lloyd’s Rep. 92 dealt with the extent of the master’s duty to state the apparent order and condition of the goods. Mr Justice Colman stated that:

For this purpose the law does not cast upon the master the role of an expert surveyor. He need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful master. ***What he is required to do is exercise his own judgement on the appearance of the cargo being loade***d. If he honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading … Nevertheless, the master who honestly takes an eccentric view of the apparent condition of the cargo which would not be shared by any other reasonably observant master would not be justified in issuing bills of lading which were qualified to reflect his view.

However, estoppel will only apply in respect of defects which would be apparent on a reasonable inspection by the carrier or his agents. In *Silver v Ocean Steamship Co* [1930] 1 KB 416, the shipowners had issued clean bills of lading covering a cargo of Chinese eggs shipped in 42lb square tins which were not covered with any cloth or packing. When the goods arrived at their destination in a damaged condition, the Court of Appeal held that, while the shipowners were estopped from contending either that the cargo was sufficiently packed or that the tins were gashed on shipment, they were not estopped from alleging that pin-hole perforations in the tins were present on shipment, since the latter would not necessarily be apparent on a reasonable inspection.

Thus, if a master does not comply with the contractual duty of properly exercising his judgement, the shipper will have his remedy against the carrier for breach of contract. Any stricter duty would cause the master to conduct detailed investigations of the cargo and possibly require him to engage expert advice as to whether or not the bills should be claused. In *The “David Agmashenebeli*“, the court held that the master was entitled to clause the mate’s receipt and bills of lading to refer to the fact that a small proportion of the cargo was discoloured but he was not entitled to use words to the effect that the whole or a substantial part of the cargo was affected when only a small percentage was discoloured. Thus, an untrue statement was inserted which would not have been inserted by a “reasonably observant master”.

*Clausing on bills of lading*

Following on from The “*David Agmashenebeli*” in 2005, the case of *Sea Success Maritime Inc v African Maritime Carvers Limited* [2005] 2 Lloyd’s Rep 692 further discussed clausing on bills of lading. The case concerned a charterparty between Sea Success Maritime Inc Carvers who chartered their vessel to African Maritime Carvers Ltd (AMC). AMC in turn sub-time chartered the vessel and there were various successive sub-time charterers. The Head Charter and various sub-time charters contained a clause 52 which stated that the “master to authorise, time by time, in writing charterers or their appointed agents to sign bills of lading on behalf of master in accordance with mate’s receipt. Master has the right and must reject any cargo that are [*sic*] subject to clausing of the bills of lading.”

When the vessel reached Novorossiysk a cargo of hot rolled steel coils was tendered for shipment by AMC. The cargo was in a damaged condition and the master refused to permit the cargo to be loaded because he considered that he was required to do so by the final sentence of clause 52 of the charter. He believed that the cargo was “subject to a clausing on the bills of lading”. The parties subsequently entered into a “**without prejudice” (moi thiet hai) agreement** as to their respective rights and the cargo was loaded. AMC and the sub-charterers asserted that the master had no good reason to refuse to load the cargo under the terms of Clause 52 as AMC had insisted that the bills of lading as presented to the master would set out a complete and accurate description of the steel coils according to the finding of a pre-loading survey report at Novorossiysk by surveyors. The survey report stated that the hot rolled steel coils had been kept in an open store subject to adverse weather conditions, were rusty with a percentage of the cargo suffering from dents and buckles. Therefore, providing the description was accurate there was no need for clausing by the master and he should have loaded the cargo. There was no dispute that the description in the survey was accurate. Aitkens J discussed the meaning of “apparent good order and condition” and said that “good” in the phrase means “proper” that is proper order and condition. He accepted that cargo that is properly described as damaged or imperfect in some way can be stated to be in “good order and condition” in the sense of being in “proper” order and condition and that in the context of clause 52, therefore, the position is that if the description of goods is such that the master can sign a bill of lading that says that these goods, as described, are in, “apparent good order & condition” then the cargo will not be “subject to clausing of the bill of lading”, but if the master would have to make a notation on the bill of lading so as to reconcile the description of the goods with a statement that they are in “apparent good order and condition” then the cargo is “subject to clausing of the bill of lading”.

On the other hand in *Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships* [1947] AC 46 the bill of lading contained the phrase ‘signed under guarantee to produce ship’s clean receipt’, thus clearly incorporating the receipt terms into the bill of lading. The receipt stated, ‘Many bags stained, torn and re-sewn’. **The bill of lading statement thus qualified did not estop the carrier from proving the condition of the cargo when shipped**, as Lord Wright stated,

If the statement at the head of the bill, “received in apparent good order and condition” had stood by itself, the bill would have been a “clean” bill of lading, an expression which means at least in a context like this that there was no clause or notation modifying or qualifying the statement as to the condition of the goods. But the bill did in fact on its face contain the qualifying words “signed under guarantee to produce shop’s clean receipt”: that was a clause clear and obvious on the face of the document and reasonably conveying to say business man that if the ship’s receipt was not clean the statement in the bill of lading as to apparent order and condition could not be taken to be unqualified. If the ship’s receipt was not clean the bill of lading would not be a clean bill of lading, with the result that the estoppel which could have been set up by the indorsee as against the shipowner if the bill of lading had been a clean bill of lading, and the necessary conditions of estoppel had been satisfied, could not be relied upon. That type of estoppel is of the greatest importance in this common class of commercial transactions.

*Indemnities*

A ‘claused’ bill of lading, that is, one bearing a note by the carrier as to some defect in the condition of the goods, will not normally be acceptable to a third party such as a buyer of goods under a cif contract or a bank which has agreed to pay the seller under a documentary credit on receipt of the documents. For this reason a practice has developed whereby **the carrier issues a clean bill of lading for goods shipped in a condition** which would normally have resulted in the bill of lading being claused. The shipper, in return, agrees to indemnify the carrier in respect of any loss the latter may suffer as a result of this issue. If the carrier is held liable to an indorsee for the damage not noted, the question arises as to **whether or not the carrier can sue the shipper on the indemnity.** In *Brown, Jenkinson & Co v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621 the plaintiff shipping agents arranged for the carriage of 100 barrels of orange juice from London to Hamburg. Many barrels were found to be old and leaking on delivery. Therefore, the defendant shippers offered the plaintiffs an indemnity for any resulting loss if they would refrain from clausing the bills. The plaintiff agreed to do so and subsequently were liable to consignees when sued for damages. The plaintiffs sought to recover their loss from the defendants by enforcing the indemnity, L.J Morris at p 632 that said,

At the request of defendants, the plaintiffs made a representation which they knew to be false and which they intended should be relied upon by persons who received the bill of lading, including any banker who might be concerned. In these circumstances all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from the representation is unenforceable. The claim cannot be put forward without basing it upon an unlawful transaction. The promise upon which the plaintiffs rely is in effect this: if you make a false representation, which will deceive indorsees or bankers, we will indemnity you against any loss that may result to you. I cannot think that a court should lend its and to enforce such a bargain.

Thus it was held that such a contract of indemnity would normally be void on public policy grounds as being in fraud of a third party since both carrier and shipper will be aware that any third party will accept the bill of lading at its face value. Accordingly the carrier will be unable to enforce the indemnity unless, possibly, the arrangement was made honestly as a result of a dispute between shipper and carrier about the condition of the goods, or, presumably, if the carrier had good reason to believe that no third party would be involved.

In the case of *Brown Jenkinson* there was reference to evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon in international trade and as suggested above, such indemnities may be useful where there is a bona fide dispute as to the condition of packing of goods in order to avoid the necessity of rearranging a letter of credit which may cause difficulty if time is short. Under the Hague-Visby Rules the carrier is entitled to refuse to acknowledge the condition in which the goods are received when there is no reasonable opportunity to inspect the goods. Such an event would be a valid use of an indemnity as the shipper would be anxious to receive a clean bill of lading but such an indemnity would only be acceptable if the carrier was unaware of any possible falsity of the declaration.

***Condition on shipment***

The condition of the goods noted in the bill of lading is normally the condition on shipment. In *Golodetz & Co Inc v Czarnikow-Rionda Inc, The Galatia* [1980] 1 All ER 501 sugar was loaded on to a vessel and then damaged as the result of a fire. A bill of lading was then issued stating in the usual form that the goods were shipped in good condition but noting that they had been damaged and discharged. The buyers and two banks refused to accept the bill of lading. The Court of Appeal, upholding Donaldson J, held that the bill of lading was clean (since the goods had originally been shipped in good condition) and that the buyers and the banks should therefore have accepted it. This decision has been criticised for ignoring commercial reality. However, many modern day transactions involve the transportation of containerised cargo when only the exterior of the container or packaging, and not the condition of the goods inside the container are commented upon. It is important to note that a clean bill of lading is necessary where a documentary credit underpins the transaction.

***Statement of leading marks***

Leading marks are the distinguishing marks, code marks, symbols etc placed on the goods or their containers by the shipper. Where ***the Hague-Visby Rules apply***, the carrier can refuse to enter them on the bill of lading unless they are such as should ordinarily remain legible until the end of the voyage.

At ***common law*** the carrier is entitled to show that goods shipped were marked otherwise than as noted in the bill of lading as long as the marks in question are not material to the description of the goods. In *Parsons v New Zealand Shipping Co.,* [1901] 1 QB 548, by a bill of lading signed by the shipowners' agents goods shipped for carriage from New Zealand to London were described as a certain number of frozen carcases of lambs “marked and numbered as in the margin.” The carcases were described in the margin of the bill of lading as bearing a certain mark and a number consisting of three figures. The mark indicated the quality of the carcase, as being of a particular brand; one figure of the number indicated approximately its weight; and the other two figures of the number were private marks of the shippers, which indicated certain particulars with regard to the carcase for their own purposes, but had no bearing on the nature, quality, or commercial value of the goods. The bill of lading contained a clause stating that the ship would not be responsible for correct delivery, unless each package was distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address. The mark and number mentioned in the margin of the bill of lading were inserted by the shippers. On the discharge of the ship in London it was found that a portion of the carcases in fact shipped under the bill of lading bore a mark and number which corresponded with the description in the margin of the bill of lading as regards the mark, and the figure indicating weight, but which differed from that description as regards one of the figures forming the private marks of the shippers. An indorsee of the bill of lading for valuable consideration refused to take delivery of these carcases as forming part of his shipment, and sued the shipowners' agents for short delivery, relying on the provisions of the Bills of Lading Act, 1855, s3.

The question was whether the marks were material to the identity of the goods. Were these marks indicating characteristics necessary to the nature and identity of the goods or were they merely used for easy tracing? The marks in question only reflected details in the shipper’s storage system and were not related to the quality or description of the carcases. Romer L J stated that,

marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist in the more sure or speedy identification or delivery of the goods, do not, in my opinion, form part of the description of the goods . . . so as to bind the signer of the bill of lading by way of estoppel”. The carrier was thus entitled to prove that the carcases delivered were the ones actually loaded. It appears, however, that the carrier is not bound by any statement as to marks that indicate quality, on the grounds that he is not a judge of quality. In *Cox v Bruce (1886) 18 QBD 147* the bill of lading noted marks which indicated a better quality of jute than that which had been shipped, but the carrier was not estopped by the statement. Lopes LJ explained at p.154, that It is no part of the master’s duty to insert these quality markes at all . . . and, therefore, he had not authority to make such a representation and I do not think that any man of business was entitled to assume that he had such authority.

The justification for this rule is not easy to see, since the carrier, however justifiably abysmal his ignorance of the finer points of the cargoes he carries, is in as good a position as anyone to see what marks it bears and to know the effect such marks might have on the mind of an indorsee. The effect of these cases seems to be that at common law the carrier will only be estopped by a statement of leading marks if they are relevant to the description of the goods but do not indicate their quality.

**The bill of lading as a document of title**

A document of title is one which the law recognises as representing the goods so that the transfer of the document to a party will vest in that party the ownership or possession of the goods to which the document relates, provided that this transfer of rights was intended by the parties. Some documents of title are so by virtue of the **common law’s** recognition of mercantile usage while others have been made so by statute. The ability to transfer property rights in goods by the transfer of a document is the keystone of international trade practice.

The bill of lading has long been recognised by the courts, following mercantile usage, as having this quality. This was established in *Lickbarrow v Mason (1787)* 2 Term Rep 63. In *E Clemens Horst Co v Biddell Bros* [1912] AC 18 the buyer under a cif contract was offered a bill of lading but refused to pay until the goods themselves were delivered. It was held that since possession of the bill of lading amounted in law to the possession of the goods the seller was entitled to perform his part of the contract by handing over the document.

*Negotiability of the bill of lading*

While a bill of lading may to this extent be said to be negotiable as long as the goods are in transit it is not a negotiable instrument of the same class as a bill of exchange. The indorsee of a bill of lading, even when he takes it in good faith and for value, will take subject to equities, that is, he will acquire only such rights as were in the transferor, unless the Sale of Goods Act 1979, sections 21–25 apply. These lay down certain situations where a transferee of a document of title may acquire full property rights even though the transferor did not have these rights**. In practice**, a substantial number of **carriers issue negotiable bills of lading,** principally because these are required as **a security under a letter of credit or other financing arrangement**. Bills of lading may also be requested by the seller or shipper because it is intended that the goods should be sold during transit.

Moreover a bill of lading may not be negotiable in any sense. This is clearly so if it is marked ‘Not Negotiable’ but there are other cases. By mercantile usage, recognised by the courts, a bill of lading is only normally regarded as negotiable if it states that delivery of the goods is to be made to ‘**Order or Assigns’** of the shipper or consignee.(*Henderson & Co., v Comptoir d’Escompte de Paris (1873) LR 5 PC 253)*. There is also a document called a ‘**straight’ bill of lading**. This bill of lading is not made out to order, is non-negotiable but it names a consignee. This document can be transferred once only. The Carriage of Goods by Sea Act 1992 does not treat a straight bill of lading as a document of title but as **a species of sea way bill** which is not a document of title, and its status was never determined under the Bills of Lading Act 1955. However, considering the language of s1 Bills of lading Act 1855, it does seem to suggest that straight bills would be covered. It is important to note though that these two provisions were concerned with the transfer of contractual rights and duties, and not with delivery of cargo.

*Straight bill of lading*

The status of the straight bill of lading has been considered in *The Rafaela S* [2005] 2. A.C. 423 (HL) where it was decided that a straight bill of lading was a document of title under Article 1(b) of **the Hague – Visby Rules**. In that case, under the contract of carriage the goods were to be transported from South Africa to America via England. The goods were damaged during transit from Felixstowe, England to Boston, USA. **The claimant was in possession of a straight bill of lading made out to the shipper by the carrier**. It was not made out to order and, therefore, was treated as a straight or non-negotiable bill of lading. However the bill of lading on its express terms (an attestation cause) included that the document had to be produced for the consignee to obtain delivery of the goods. The Court of Appeal held that the straight bill of lading was a document of title and Rix L.J. [2004] Q.B.702 considered that it was,

undesirable to have a different rule for different kinds of bills of lading … It is true … that in the case of a negotiable bill of the carrier needs to have the bill produced in order to be able to police the questions of who is entitled to delivery. Yet an analogous problem arises with a straight bill. A shipper needs the carrier to assist him policing his security in the retention of the bill. He is entitled to redirect the consignment on notice to the carrier, and, although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identify is necessary, as in practice it is, what is wrong with the bill itself as a leading form of proof?

Lord Bingham in the House of Lords agreed with Rix L.J. that the production of a straight bill of lading was a necessary precondition of requiring delivery, even in the absence of an express provision in the bill of lading to that effect. Lord Steyn did not clearly express agreement with Lord Bingham but he did say that he found the analysis of Rix L.J. extremely convincing. The other law lords did not express views on this point but did state that they were in agreement with the opinions of their fellow law lords.

It appears to be the case now that although a straight bill of lading does not have the characteristic of negotiability it is not to be compared with a sea way bill or to be considered as a mere request for goods. Non-transferable shipping documents such as straight bills of lading and although this decision of the English House of Lords is not binding in other jurisdiction, it most probably will be followed elsewhere where those jurisdictions apply the Hague – Visby Rules. However, new issues may arise as a result of this decision. If it is negotiable it may be transferred either by indorsement and delivery or, if it has been indorsed in blank (by the holder signing it without indicating any transferee) it may be transferred by simple delivery.

***(by delivery or indorsement, if it doesn’t perform under indorsement, it means that it is transferable under delivery***)

*Passing of property*

Even if the bill of lading is negotiable and the transferor has a good title to it, it does not necessarily follow that the delivery, or the indorsement and delivery, of the bill of lading will pass the property in the goods to the transferee. This will only happen when the bill of lading is transferred *with the intention* of passing the property. A seller may, for example, expressly or by implication, ‘reserve the right of disposal’ of the goods when transferring the bill of lading, which means that the property remains in him, usually until some condition, such as payment, is met by the buyer. (The Sale of Goods Act 1979, section 19 sets out situations where the seller is thus presumed to reserve the right of disposal.) Here there is clearly no intention to transfer the property in the goods by delivery of the bill of lading. **A seller may also indorse a bill of lading to his agent (third party) in the port of discharge of the goods to enable the agent to deal with the buyer**. Again, there is no intention to pass the property in the goods to the agent by this indorsement.

Where the bill of lading relates to goods carried in bulk, then whilst the cargo on the ship remains in bulk transfer of a bill of lading in transferable form will not transfer a proprietary interest in the goods. In *Re London Wine Co., (Shippers) Ltd.,* [1986] PCC 121 it was decided that However, the Sale of Goods Act 1979, section 20A [introduced by the Sale of Goods (Amendment Act) 1995], enables in respect of all sale contracts made after 18 September 1995, property in an individual share in the bulk to be transferred to the buyer if he has paid the price or part of the price (i.e. he becomes an owner in the common bulk).

*Passing of rights and liabilities*

It will be recalled that transfer of the bill of lading may, in addition to passing the property in the goods to the transferee, also pass to him all the rights and liabilities of the contract of carriage as evidenced by the bill of lading. Such a transfer of contractual rights and liabilities was not possible at common law and was originally made possible by the Bills of Lading Act 1855, section 1. This Act, however, made the transfer of rights and liabilities to a holder dependent on his acquiring the property in the goods ‘upon or by reason of’ the endorsement of the bill to him. Unfortunately **there are many situations in which the bill of lading holder acquires the property in the goods before or after the bill of lading is transferred to him** as was the case in *The Delfini* [1990] 1 Lloyd’s Rep 252 or never acquires the property at all as is *The Aramis* [1989] 1 Lloyd’s Rep 213.In this case cargo was shipped in bulk for which **several bills of lading** were issued. When the plaintiff presented his bill of lading, the cargo had been exhausted. **Freight had been prepaid by the shipper**. The Court of Appeal held that a contract on the terms set out in the bill of lading between the endorsee and the carrier could not therefore be implied. This contrasts with the case of *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd.,* [1924] 1 KB 575 where the pledgee of a bill of lading took delivery of the goods from the shipowner after paying freight. Here a contract was implied on the terms contained in the bill of lading between the shipowner and the pledgee. Consideration was present in the form of the payment of freight as was expressed by Lord Justice Banks at p.143,

In this case the bill of lading holder offered the freight before the goods were delivered; and in fact paid it, and under these circumstances it seems to me that by the acceptance of the freight and the subsequent delivery the shipowner’s undertook an obligation to deliver the goods as described in the bill of lading. I think from the shopowner’s point of view it must necessarily include the whole of the terms of the bill of lading, because he must desire that he should be covered by the exceptions in the bill of lading.

*Implied contract*

An implied contract may be established by co-operation between the cargo receiver and the carrier as was the case in *The Captain Gregos (No.2)* 1990 2 Lloyd’s Rep 395. Here, a contract was implied between the carrier and the ultimate purchaser against a letter of indemnity on the basis that the cargo could not have been delivered without the complete co-operation of the purchaser and the crew of the vessel. However, no such implied contract was permitted in the later case of *The Gudermes* [1993] 1 Lloyds Rep. 311 - A quantity of oil was sold to the plaintiffs and was shipped on a vessel which was subsequently discovered to have no operative heating coils. The oil having cooled in transit, the plaintiff’s sub-purchasers refused delivery in Ravenna, fearing the oil might clog their underwater sea line. Therefore, the plaintiffs arranged for the oil to be transhipped to another vessel, had the oil reheated on board and then delivered to Ravenna. The plaintiffs sought to recover the costs of transhipment and argued that as a result of the dealings between themselves and the carrier in respect of transhipment, there was an implied contract on the terms of the bill of lading which expressly incorporated the Hague-Visby Rules. The Court of Appeal rejected this argument saying that before any contract could be implied, the conduct of the parties must be explicable only on the basis of the contract sought to be implied. The final decision must be one of fact and, in the circumstances of this particular case, the facts did not evidence that any new contract between the parties should be implied.

One of the difficulties arising from the implied contract concept is in relation to the proper law of the implied contract. In the absence of a choice of law clause in the bill of lading, the proper law of the implied contract from the conduct of the parties at the port of discharge may differ from that appropriate to the original contract of carriage.

This may create problems, therefore, in relation to differing rights of action. In *the Defini*, the plaintiffs purchased part of a bulk cargo. The contract stated that payment was to be made either against shipping documents or a letter of indemnity in the event that the bills of lading were unavailable at the payment date. A bank guarantee was also required by the sellers and it was stipulated that the guarantee should not be later than the nomination of the vessel. The goods were obtained by the sellers against a letter of indemnity. The sellers had issued the letter of indemnity of the ship with instructions to deliver without a bill of lading. The sellers themselves had paid for the goods against a letter to indemnity issued to them by their sellers. The plaintiffs then received the bill of lading after delivery and payment. They sued the shipowner for short delivery. The court held that property in the goods passed when the plaintiffs paid against the appropriate letter of indemnity as they were entitled to do under the contract. The bill of lading did not play any actual part in the transfer of property so as to satisfy s1 of the Bills of Lading Act 1855 and, therefore, the plaintiffs had no rights of action under this Act. In such cases, because the transfer of the bill of lading was not causally connected with the transfer of property, the bill of lading holder, even when he had suffered loss or damage, had no rights against the carrier.

**Sets of bills of lading**

Bills of lading have, under mercantile practice, normally been issued in sets of three or six originals by an agent of the ship owner (usually the ship master). The one bill remains on board the vessel and the others are sent to the consignee of the goods or a bank acting under a documentary credit for the goods. As each bill is an original this can lead to fraudulent activities. As explained above the carrier will deliver the goods against the presentation of a bill of lading. The carrier does not have to receive the full set. An endorser will not normally transfer the whole set and will retain part, this means that either the endorser could present a bill to the carrier for delivery of goods or a third party or parties to whom he has transferred the other part of the set. The well-known case of *Glyn Mills & Co., v The East & West Indies Dock Co. (*1882) 7 App. Cas. 591. illustrates this point well. The seller endorsed one out of a set of three bills of lading as security to the bank, Glyn Mills, and retained the other two bills in the set. On arrival in London, the goods were placed in a warehouse. The warehouseman delivered the goods to a person upon presentation of the unendorsed bill of lading. The bank brought an action against the warehouseman for misdelivery. Lord Blackburn, with reference to the warehouseman, said,

He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading – in this case Cottam & Co., or their assigns, that is assignees of the bill of lading, not assignees of the goods. And I quite assent to what was said in the argument that this means to Cottam & Co., if they have not assigned the bill of lading, or to their assignees if they have. If there were only one part of the bill of lading, the obligation of the master (warehouseman) under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co., on their producing the bill of lading unendorsed; he would also fulfil his contract if he delivered the goods to anyone producing the bill of lading with a genuine endorsement by Cottam & Co. He would not fulfil his contract if he delivered them to anyone else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished the others stand to void.

The House of Lords held that the warehouseman was not liable for misdelivery of the goods as he had acted in good faith and without notice of the bank’s prior claim.

Under the common law it is for the parties to ensure that they are aware of the risks involved within a commercial transaction.

**Switch bills**

Switch bills have been introduced within the international trade context as meeting a need of modern day trading. Switch bills form part of the transaction where the original set of bills of lading is surrendered to the carrier, or his agents, in exchange for a new set of bills. Normally, some of the details included in the original set are omitted or altered in the substitute set, for example, the name and address of the shipper, the date of the issue of the bills or the port of shipment. This switching is done for a variety of commercial reasons such reasons may be:

* To conceal the source of goods where the source is politically sensitive
* To avoid customs duties at the port of loading or discharge
* To misrepresent the date of shipment where the date controls the purchase price of the goods shipped.

In *The Atlas [1996]* 1 Lloyds Rep 642 a cargo of steel billets were loaded in Russia with bills of lading specifying the numbers of bundles and weight of cargo. N acquired the billets from the exporters subject to an F.O.B contract. A second set of bills were prepared with the quantity and weight expressed as being “unknown”. N argued that the weight and quantity of billets were less than disclosed in the first set of bills. The issue arose whether the bill of lading was prima facie evidence of these facts and whether the tally documents were admissible evidence of weight. It was held that neither the Russian bills nor the switch bills constituted prima facie evidence of the number of bundles or quantity shipped but the tally documents did afford admissible evidence of weight. The switch bills had been issued because the sellers did not want the receivers to know the identity of their Russian suppliers. Referring to the switch bills Longmore J. commented that,

no doubt this provision for a second set of bills of lading to come into existence was agreed for not unreasonable commercial motives but it is a practice fraught with danger, not only does it give rise to obvious opportunities for fraud (which is not suggested in this case) but also, if it is intended that the bills of lading should constitute contracts of carriage with the actual owner of the ship, the greatest care has to be taken to ensure that the practice has the shipowner’s authority.

When switch bills are issued the first set should be surrendered to the carrier in exchange for the new set. There is usually no objection to this practice, however, the switch bills may contain misrepresentations e.g. as to the true port of loading. If a receiver suffers loss as a result of this, then the carrier or his agent maybe at risk. In practice the switch bill set is often issued not against surrender of the first set, but against a letter of indemnity. This may happen in any of the above examples and clearly will be the case where the first set has been delayed. Switch bills of lading in these circumstances may leave the carrier and his agents extremely exposed. In a case decided by the High Court of Singapore, *Samsung Corporation v Devon Industries Sdn Bhd* [1996] 1 SLR 469 a vessel had loaded a total cargo of 10,500 MT of soya bean oil. It appeared that the goods had been shipped by a number of different shippers in small parcels. The plaintiffs were the holders of bills of lading covering two parcels of 1,000 MT and 1,500 MT respectively. They tendered the shipping documents to the defendant buyers, who did not pay for the goods. The buyer was also the charterer of the vessel, and arranged for the shipowners to issue what were described as “global” bills of lading naming the buyer as the shipper. The defendants were able to negotiate those bills of lading, and were paid for the cargo (which they had not themselves paid for). In an action brought by the seller to recover the original first set of bills held by the buyer, the court said that the ship agent (combined with the buyer) had unlawfully issued a second set of bills of lading in abject disregard of the seller’s interest. The buyer had acted fraudulently with the co-operation of the ship agent. Although the court did not expressly address the liability of the shipowners, or their agents, for having issued the second set of bills, there is little doubt that the owners and their agents would have faced claims from the holders of either the first set or the second set. There is no mention in the case as to whether the second set was issued against a letter of indemnity from the buyer/charterer, but the buyer was in a very bad financial position, and so any letter of indemnity is likely to have been worthless. In any event, a letter of indemnity issued in such circumstances would probably be null and void.

There are a number of issues therefore, surrounding switch bills which may arise in the future although presently there is little litigation even though switch bills are increasing in use. Difficulties may arise where, for example:

* The two sets of bills are not identical. Could an indorsee of the switch bill claim a more favourable term under the original bill, probably not?
* The two sets of bills may be issued in different jurisdictions. The Hague-Visby Rules may apply to the one but not the other. Would the rules apply to all the journey if applicable to the original bills or be terminated by substitute bills to which the rules do not apply?

As referred to above there may be difficulties where the international sale contract is financed by a documentary credit. Therefore, the developing use of switch bills may become more prominent within the courts where issues arise as to their enforceability or validity.

**An electronic bill of lading**

Bills of Lading have always been issued as paper documents; however, the replacement of a paper bill of lading with an electronic bill of lading seems a sensible step forward in the new electronic commerce world. However, such a system of replacement is not free of problems. A serious problem for an electronic bill of lading is the negotiability of such documents of title. A document of title relies upon the transferability of the document by physical possession. An electronic bill of lading cannot be handled in physical possession with the result that i**t cannot be produced on delivery, nor endorsed to a new holder**; therefore, this inhibits the capability of it representing a document of title.

Various ways around this problem have been sought. In 1985, a “bill of lading registry” was suggested by the Chase Manhattan Bank and INTERTANKO which has established Sea Dock Registry Ltd. Unfortunately this survived for only six months. The idea of a registry was further developed by the CMI Uniform Rules for Electronic Bills of Lading adopted in 1990. Also, established in 1996, the UNCITRAL Model Law on Electronic Commerce aims to absolve many of the problems affecting the legal effect of electronic documents.

The “registry” system is designed to be a depository for documents, while the rights to the goods are transferred by the communicating of authenticated messages between the registry and the parties who have an interest in the goods. The registry facilitates the transfer of title from one party to another, cancelling the first party’s title at the moment the title is transferred to the new holder. The newest project on this area is called “BOLERO”, whose name stands for Bill of Lading Electronic Registry Organisation. BOLERO is an internet based system and, therefore, relatively inexpensive. BOLERO builds on the CMI Rules but has established a central registry as the secure third party. BOLERO has a so-called “Rulebook” to which all parties agree who become members. BOLERO has set up an electronic registry for bills of lading called “the title registry”. The registry is a database application. It creates and transfers the rights and obligations relating to an electronic bill of lading. The title registry deals with any change of interest in the goods

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Where the BOLERO system is used the carrier creates a BOLERO bill of lading, sends the instructions to the title registry and the shipper is logged as holder of the BOLERO bill. If the holder of the bill wishes to transfer his constructive possession to the bill to another, he can make the transfer by attornment. Attornment occurs when the holder sends instructions to the registry that name the new holder. Once these instructions are received the registry sends a message confirming the new holder. It is important to note that when there is a record of holdership, only the record holder can give message instructions to effect the transfer of rights in the goods. The cargo is delivered to the last holder of the bill by the registry giving up the BOLERO bill to the carrier.

BOLERO incorporates security for all transactions. Digital signatures of relevant parties are used and all messages are secure from unauthorised access. In the UK the Electronic Communications Act 2000, regulates the provision of electronic signatures, encryption technology and reliance on third parties such as BOLERO. However, service providers must have a connection with the jurisdiction, i.e. the service must be provided from premises in the UK or to persons carrying on a business in the UK. This Act, therefore, does support electronic commerce.

The EU Electronic Commerce Directive (Directive 2000/31/EC) deals with certain legal aspects of information society services. Under the Directive the liability of BOLERO or other similar information society service providers is generally set out in Section 4. However, as far as the recognition of electronic documents is concerned, the Directive is not particularly instructive. The Article provides for the conclusion of contracts electronically, although there is no provision for sanctioning the recognition of a contract made and evidenced by an electronic instrument. Under English Law, however, an electronic instrument can be recognised as evidence of legal rights, and in this case recognition of a contract and the rights and liabilities of parties.

The UNICITRAL Model Law on Electronic Commerce (as amended 1998) was created because of the inadequate legislation which existed in relation to international trade and electronic commerce. It covers the main legal issues e.g. requirements for writing, signature, admissibility and probative value and actions related to contracts of carriage of goods. Its provisions have generally found their way into national laws and the UK Electronic Communications Act 2000 is consistent with the provisions of the UNICITRAL Model Law.

The International Chamber of Commerce has recently launched an e-business tool that provides secure online contracting based on ICC’s model international sale contract. It enables the speed and convenience of dealing over the web, rather than transmitting paper documents; tracking of every phase of the negotiation, with revisions preserved under time and date stamps; ability to sign contracts online, using digital ID; secure storage of contracts. Thus, the e-commerce era is moving ahead.

**The Carriage of Goods by Sea Act 1992**

This Act **effectively separates the transfer of the bill of lading and the rights and liabilities under the carriage contract from the passing of property in the goods**. Under S.2(1) the lawful holder of a bill of lading (including a received for shipment bill of lading) acquires all the rights under the carriage contract against the carrier. His acquisition of these rights, however, is dependent on his having received the bill of lading under contractual or other arrangements made before the right to possession of the goods ceased to attach to the bill of lading. This provision is designed to protect any genuine party to the sale transaction while excluding the possibility of the transfer of a bill of lading as a mere right of action against the carrier to a person not genuinely concerned in the sale transaction. The Act also protects the rights of a seller who has received the bill of lading when it is returned to him by a buyer who has rejected the goods.

Once a holder has transferred the bill of lading his rights against the carrier cease entirely, but the original shipper, although he loses his rights under the bill of lading, remains liable to the carrier under the carriage contract even after he has transferred the bill of lading. The bill of lading holder will not be subject to liabilities under the carriage contract unless and until he takes or demands delivery of the goods from the carrier or makes any claim from the carrier in respect of the goods. Thus a person (such as a bank) holding the bill of lading as security will not be liable under the carriage contract unless and until he seeks to realise his security.

The holder of the bill of lading has all rights of suit against the carrier and it is immaterial that he himself may have suffered no loss. He may, therefore, sue in his own name for the benefit of any person who has suffered actual loss. (S.2(4). It should also be noted that nothing in the Act prevents the owner of goods who is not party to the contract of carriage from suing the carrier in tort.

Under the UCP 600 Article 20 deals with a bill of lading and, in particular, signatures. A bill of lading can be authenticated by signature or may be signed by any other mechanical or electronic means of authentication. Electronic authentication is and continues to be recognised for documentary credits.

**Other documents**

**Mate’s receipt**

Documents other than bills of lading are used in respect of goods carried by sea. One of these is the ‘mate’s receipt’, which may be given when goods are in the custody of the ship but no bill of lading has yet been issued. The document is not normally a document of title although it may be so in some cases by virtue of a local custom as was illustrated in *Wah Tat Bank v Kum* [1967] 2 Lloyd’s Rep 437. The carrier is not estopped by any statement in the mate’s receipt as to quantity or condition. Such a statement is merely prima facie evidence. The holder of the mate’s receipt is, however, prima facie entitled to have the bill of lading issued to him. (*Nippon Usen Kaisha v Ramjiban Serowgee* [1938] AC 429*)*. Since the bill of lading will be issued on the basis of the mate’s receipt it follows that any defect in the condition of the goods should be noted in the latter document. In *The Nogar Marin* [1988] 1 Lloyd’s Rep 412*.* A cargo of wire rods in coils was loaded onto the vessel. Nogar Martin, which sailed from Caen to Tampa. Although some of the coils were rusty when shipped, the master made a brief inspection before shipment. The master signed a receipt which was prima facie evidence that the goods were in good order and condition. The owners by their master had authorised ship’s agents to issue bill of lading. The bills of lading issued conformed to the receipt which the master had previously signed. On arrival at Tampa the damage was discovered. The owners settled a claim with the receivers of the cargo, and then the owners sought reimbursement from the charterers. The Court of Appeal held that if the master or mate signed the receipt without qualification it was prima facie evidence of receipt in good order and condition The master should have at least have recognised enough of the time facts to require the bill to be qualified and Mustill LJ. Stated at p.421 that,

“The making of a proper inspection is not just a matter between the master and his owners; it affects the transferees as well. We see no reason to imply a term which takes the ultimate financial responsibility for this task, away from the master’s employers and places it on the shoulders of the charterer”.

Although the master did not sign the bill it was his mistake concerning the receipt which led to the ship’s agents signing the bills without qualification. The master had been negligent and was liable on the bill of lading’.

**Sea way-bill**

A sea way-bill is a receipt for goods carried by sea but differs from a bill of lading in that **it is not a document of title.** It contains or evidences an undertaking by the carrier to the shipper to deliver the goods to an identical person. The shipper may, at any time before the delivery of the goods, change the identity of the person to whom delivery is to be made. The consignee obtains delivery not by presenting the way-bill, which remains in the hands of the shipper, but by production of acceptable evidence of his identity as consignee.

Since the sea way-bill is not a document of title it cannot be used as security. Its chief advantage lies in the fact that **it does not have to be transmitted to the consignee to enable him to obtain the goods.**

Under S.2(1) Carriage of Goods by Sea Act 1992 the consignee named in the way-bill will have all rights of suit against the carrier under the contract of carriage contained in or evidenced by the way-bill. It will be recalled that the shipper of goods under a bill of lading who transfers it will by so doing lose all his rights against the carrier. The shipper under a sea way-bill, however, will retain his rights under the carriage contract since the nature of the transaction demands that he shall be able to change the name of the consignee before delivery.

Where payment is to be by way of documentary credit, the sea way-bill is not as acceptable to banks as a bill of lading because the latter is negotiable and a document of title. However, UCP 600 provides for acceptance of sea way-bills.

As in the case of the bill of lading, the consignee under a sea way-bill will only assume the liabilities under the carriage contract if he takes or claims the goods or makes a claim against the carrier. If the transport document is a sea way-bill the Hague-Visby rules do not apply but may be expressly incorporated.

**Delivery orders**

An exporter who ships a bulk cargo and receives one bill of lading in respect of it, or an endorsee of this bill of lading, may afterwards, while the goods are in transit, sell various unascertained portions of this cargo to different buyers. He clearly cannot transfer the bill of lading to all the buyers and must find some other way to satisfy each buyer’s demand for some document evidencing his right to the goods he has bought which will enable him to collect or resell them. In such cases a delivery order may be used, ‘Delivery order’ is not a precise term and the legal status and effect of such a document will depend on its nature and the circumstances in which it is issued.

A delivery order is usually a document addressed by the owner of goods to a party such as a carrier or warehouseman who has custody of the goods, ordering him to deliver them to or hold them for a holder of the order. (Under the Sale of Goods Act 1979, section 29(3) a seller is not deemed to have delivered goods in such circumstances until the party having custody of them as ‘attorned’ to the buyer, that is, acknowledged that he holds the goods on the buyer’s behalf.) The term ‘delivery order’, however, may also be used to describe a document issued by the custodian of the goods promising to hand them over on production of the document.

A delivery order is not a document of title unless proved to be so by reason of mercantile custom as was the case in *Merchant Banking Co of London v Phoenix Bessemer Steel Co*[1877] 5 ChD 205 in respect of certain orders regularly used in the iron trade.

The importance of the nature of a delivery order in a particular case is well illustrated by the case of *Colin and Shields v Weddel & Co*. [1952] 2 All ER 337. A contract for the sale of hides c and f Liverpool provided that the seller should tender, among other things, a bill of lading and/or a ship’s delivery order and that if a bill of lading were not supplied the buyers should be put in the same position as if it had been. The hides were shipped in error to Manchester, and there unloaded and sent by barge to Liverpool. The sellers tendered a document signed by the carrier and addressed to the master porter at a Liverpool dock ordering him to deliver the hides to the buyers. At this time the hides had not reached Liverpool. The sellers contended that this document satisfied the requirements of the contract. The Court of Appeal, upholding Sellers J, disagreed. Since the goods were not in the custody of the maser porter he could not attorn to the buyers and if the goods had never arrived at Liverpool the document would have been worthless. In addition, the order, since it was addressed by the carrier to the master porter, gave the buyers no rights against the carrier and therefore did not put the buyers in the position they would have been in had a bill of lading been tendered.

Under the Carriage of Goods by Sea Act 1992 the person to whom delivery is to be made under the order will have all rights of suit against the carrier under the contract of carriage. He will also be subject to liabilities under the contract once he has demanded or received delivery or made a claim against the carrier. When, as will often be the case, the goods to which the delivery note refers form part of a larger bulk, the rights and liabilities will apply only in respect of that part. As in the case of the sea way-bill the rights of the original shipper are not affected.

**Summary**

* The bill of lading and the contract of carriage have an unusual relationship. In the hands of the original shipper the bill of lading will merely be evidence of the contract of carriage and if the original shipper is the charterer it will not even be that. Once the bill of lading is indorsed to a third party it becomes the contract of carriage between the third party and the carrier.
* The bill of lading will acknowledge the quantity of goods put on board the vessel. Under the Hague-Visby rules the carrier is bound on shipment to note the leading marks and this information is provided by the shipper. If the carrier has reasonable grounds to doubt the accuracy the carrier will not support the information. Often the words “weight, measure, quality, condition, contents and value unknown” are stated on the bill of lading.
* Statements in the bill of lading are prima facie evidence of the receipt of goods but such evidence can be rebutted by the carried
* At Common Law a carrier need note state any quantity in the bill of lading, though normally he will but the carrier is obliged to do so under the Hague-Visby rules.
* A bill will normally state the condition of the goods. If the statement is unqualified then the carrier is estopped from denying its truth to an indorsee. However, in the hands of a shipper it is mere evidence of the condition of the goods when shipped and the onus will be on the shipper to prove that the goods were in good condition when shipped. Estoppel will only apply in respect of those defects which would be apparent on a reasonable inspection by the carrier.
* A ‘Claused’ bill of lading is one bearing a note by the carrier as to some defect in the condition of the goods. Such a bill of lading will not normally be acceptable to a third party. However, an indemnity may be accepted by the carrier where he may suffer loss. If the carrier does suffer loss the contract indemnity would normally be void on public policy grounds as being in fraud of a third party.
* At common law the carrier is entitled to show that goods shipped were marked otherwise than as noted in the bill of lading as long as the marks in question are not material to the description of the goods. Where the Hague-Visby rules apply, the carrier can refuse to enter them on the bill of lading unless they are such as should ordinarily remain legible until the end of the voyage.
* The bill of lading has long been recognised by the courts, following mercantile usage, as being a document of title. The bill of lading, however, need not be negotiable. If it is made out to ‘order or assigns’ it will be negotiable. It will be a straight bill of lading if it is not made out to order, is non-negotiable but names a consignee. Since the case of *The Rafaela S* it can be treated as a document of title.
* Property in the bill of lading will only transfer where intention of passing the property is present.
* Bills of lading have been traditionally issued in sets of three or six originals by the agent of the ship. One bill remains with the vessel and the others are sent to the consignee or bank under a letter of credit. As each bill is an original this can lead to fraudulent activities.
* Switch bills exist where the original set of bills of lading are surrendered in exchange for a new set of bills. Switch bills are issued for a variety of reasons, some acceptable and some fraudulent. The developing use of switch bills may give rise to more litigation in the future.
* Various ways around the problems of issuing electronic bills of lading e.g. the negotiability of a document of title, the lack of physical possession of the bill, the signing of an electronic bill of lading etc. The BOLERO system, the EU Electronic Commerce Directive (Directive 2000/31/EC), the UNICITRAL Model Law on Electronic Commerce (as amended 1998) and the UK Electronic Communications Act 2000 have aided the development of electronic bills of lading and the legal issues relating to them. The new UCP 600 Article 20 deals with a bill of lading and signatures.

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| talk.gif  Discuss:   1. How is a bill of lading defined? 2. What are the functions of a bill of lading? 3. Compare and contrast the development of the following:   a] Mate’s receipt  b] Sea way-bill  c] Delivery order   1. Critically analyse the advantages and disadvantages of the Carriage of Goods By Sea Act 1992, over the Bills of Lading Act 1855. 2. ‘The bill of lading is evidence of the contract of carriage.’ Explain. 3. What exactly does it mean to say that a bill of lading is a ‘negotiable document of title’? 4. The master of the vessel ‘Goodwill’ takes delivery of a cargo of bananas, he notices that they are starting to deteriorate and wants to issue a claused bill of lading. The shipper assures him that the appearance of the bananas is not of poor quality and offers to provide an indemnity from his bank to cover any liability. The master is convinced and issues a clean bill of lading. The indorsee of the bill of lading wishes to sue the carrier in respect of the rotten bananas.   Is the indemnity enforceable? |

1. Some of the materials here are by courtesy of a collaboration between Andy Kok and Professor Bernardette Griffin. [↑](#footnote-ref-1)