

**TITLE TO SUE UNDER CONTRACTS OF CARRIAGE OF GOODS BY SEA:
A COMPARATIVE ANALYSIS OF TRANSFER OF CONTRACTUAL
RIGHTS AND LIABILITIES UNDER A BILL OF LADING IN ENGLISH AND
SOUTH AFRICAN LAW**

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DECLARATION OF ORIGINALITY

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Date : 19/12/2016

DEDICATION

This dissertation is dedicated to my close friends, my family and my parents in particular, whose unconditional love and support has made this achievement possible.

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ABSTRACT

In carriage of goods by sea the bill of lading is the document through which third parties acquire contractual rights and liabilities. The bill of lading is thus the document which provides title to sue to third parties. Having said that, the bill of lading is very important in determining when and under what circumstances such rights and liabilities are acquired. It is therefore important in cargo claims that either the consignee or the carrier ascertains their rights and liabilities under the bill of lading before instituting legal action. A claim instituted against the wrong party will not be entertained by the Court.

South African maritime law was based on the English Bills of Lading Act, 1855. That Act has been replaced by the Carriage of Goods by Sea Act 1992 c.50 (COGSA 1992), which is the Act regulating title to sue in the United Kingdom. The enactment of the South African Sea Transport Documents Act 65 of 2000 (STDA) was inspired by COGSA 1992. Many other countries like New Zealand and Australia have adopted provisions similar to the COGSA 1992.

The purpose of this study is to critically analyse the concept of title to sue in cargo claims under a negotiable bill of lading. The focus shall be on the relevant provisions of the South African Sea Transport Document Act 65 of 2000 and the UK Carriage of Goods by Sea Act (C.50) of 1992.

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Chapter 1: INTRODUCTION

1.1. Introduction

The bill of lading is a very important document in contracts of carriage. Its importance is reflected in its ability to perform three functions: a receipt for the goods, evidence of the contract of carriage and a document of title to the goods. However it is also an essential document to facilitate the transfer of contractual rights and liabilities from a shipper to a consignee. The bill of lading is the document through which a consignee acquires contractual rights of suit. Before a consignee can sue a carrier in contract, he must ensure that he has acquired rights of suit and liabilities under a bill of lading. On the other side, a carrier must also ascertain which party has acquired contractual rights of suit and liabilities under a bill of lading so that he does not find himself instituting an action against a wrong party. The transfer of contractual rights of suit and liabilities does not take place at common law. This thesis will examine the legislative mechanisms by which such a transfer of rights of suit and liabilities is facilitated in English and South African law.

In international trade law a seller from one country normally enters into a sale contract with a buyer from another country. In concluding the sale contract, the seller and the buyer must decide the mode of transport by which the goods will be carried at the port of destination. Various factors will affect whether the goods will be carried by air, road, rail or sea.¹ This thesis only discusses the carriage of goods by sea. The seller who is the person responsible for arranging a contract of carriage of goods by sea is known as the shipper. The person with whom the shipper enters into a carriage contract is known as the carrier. The buyer who is the person to whom the goods are delivered by the carrier is known as the consignee.²

A contract of carriage of goods by sea is also called a contract of affreightment. In a carriage contract, the shipper hires a space on a carrier's vessel so that the carrier may deliver the goods to a consignee as indicated under a bill of lading. The money a carrier receives for his services is called freight. The carriage contract may take two forms: one contained in a

¹ JP Van Niekerk 'An Introduction to the Carriage of Goods by Sea' (1993) 78 (5) *Mercantile L.J.* 78.

² It is an assumption for the purposes of the analysis of this comparative study that the seller of the goods has contracted with the carrier, and the seller is named as the shipper on the bill of lading. This starting point is also explored in R Aikens, R Lord & M Bools *Bills of Lading* (2006) para 7.71; G Treitel & FMB Reynolds *Carver on Bills of Lading* 3 ed (2011) para 4-003; J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 570-72.

charter party and the other evidenced in a bill of lading. The thesis only focuses on the latter form.

Once the carriage contract is concluded between the shipper and the carrier, the shipper (or his forwarding agent) brings the goods to the carrier at the port of loading for shipment. The forwarding agent completes the details of the goods on a document known as the bill of lading. The master of the vessel, a carrier's agent, checks the details of the goods against the goods shipped on board the vessel. Once satisfied about the details of the goods, the master or one of his agents signs and issues a set of three originals of the bill of lading to the shipper. The shipper then sends one original to the consignee so that the consignee may take delivery of the goods from the carrier at the port of discharge.³

The above background is a simplified and traditional description on how carriage of goods by sea works. In practice, carriage of goods by sea can involve much more complex scenarios. For instance where the carriage of goods includes a combined mode of transport (multimodal) or where the carriage contract involves a chain of sales between the shipper and different buyers, etc. In order to understand the legal implications of these complex scenarios, it is important to have a good understanding of the 'traditional arrangements for the carriage of goods by sea properly.'⁴ Therefore the thesis focuses on the traditional method of carriage of goods by sea as described above.

In carriage of goods by sea, goods may either be damaged, lost, misdelivered or short-delivered as a result of the carrier's breach of contract. The party who is likely to suffer financial loss is the consignee. The shipper does not normally incur financial loss because he either receives payment for the goods before discharge of the goods or risk normally passes to the consignee after shipment of the goods.

In principle, the party who suffers financial loss is the one who must recover against the party who caused the loss. In cargo claims the consignee who incurs damages must normally be the one claiming against the carrier. However it is not possible for the consignee to claim against the carrier because in English law, the doctrine of privity of contract provides that only parties to a contract may sue or be sued upon it. The consignee is not a party to the carriage contract and therefore cannot sue the carrier for breach of contract.

³ Van Niekerk op cit note 1 at 80; Hare op cit note 2 at 570-73.

⁴ Van Niekerk op cit note 1 at 80.

As an illustration, S (shipper) concludes a sale contract with B (buyer). S arranges a contract of carriage of goods by sea in accordance with the sale contract. S and C (carrier) agree to a carriage contract. As a result C must transport the goods onto its vessel in exchange for freight. B pays S the purchase price in respect of the goods shipped. While in transit, the goods are damaged. According to the doctrine of privity of contract, B who suffers loss cannot sue C as B is not a contractual party. Title to sue lies with S, a contractual party. However S has no interest to sue C because it did not suffer any financial loss. This is one aspect of the problem related to the issue of title to sue in cargo claims.

The second aspect of the problem arises where a carrier suffers loss in the form of unpaid freight, warehousing charges or damage caused to a vessel due to shipment of dangerous cargo. The carrier normally receives freight from the shipper in accordance with the carriage contract. In some circumstances, however, the carrier may find itself unable to recover unpaid freight or damages directly from the shipper with whom it has entered into a carriage contract.⁵ The carrier is then obliged to recover its loss from another party, the consignee. However the carrier is unable to sue the consignee in contract because the consignee is not a party to the carriage contract.

As a result of the above problems, two key research questions arise:

- (1) Who has title to sue a carrier where there has been damage, loss, misdelivery or short-delivery of the cargo?
- (2) Whom can the carrier sue when he has suffered loss?

Sub-questions:

- What is the common law doctrine which prevented transfer of rights under the carriage contract?
- What provisions in the Bills of Lading Act of 1855 ('1855 Act') made the Act ineffective in solving the common law problem?

⁵ Institute of Maritime Law *Southampton on Shipping Law* (2008)123-4.

- Who is the holder of the bill of lading? Are there many significant differences between the South African and the English statutes in this regard?
- When are contractual rights of suit transferred to the holder of the bill of lading? Are there any significant differences between the South African and English statutes in this regard?
- When are liabilities transferred to the holder of the bill of lading? Are there any significant differences between the South African and English statutes in this regard?
- If the bill of lading is transferred by the shipper, does the shipper retain any rights under the carriage contract?
- If the bill of lading is transferred by the shipper, does the shipper retain any liabilities under the carriage contract?

The above questions are necessary to address, first because the party who intends to sue the carrier when the cargo is damaged, is the consignee. The consignee, however, is not a contractual party to the carriage contract. Therefore the consignee is not entitled to sue the carrier for the financial loss incurred as a result of the carrier's breach of contract. Secondly the party whom the carrier intends to sue beyond the shipper, is the consignee who is not a contractual party. These two key questions will be addressed throughout this thesis.

1.2. Aim and Scope of the thesis

The aim of the thesis is to critically analyse the mechanisms of transfer of contractual rights of suit and liabilities under a bill of lading in English and South African law. The thesis will draw a comparative analysis between the relevant provisions of the UK Carriage of Goods by Sea Act (C.50) of 1992 ('UK COGSA 1992') and the South African Sea Transport Document Act 65 of 2000 ('STDA').

The thesis discusses the nature and the functions of the bill of lading in chapter 2. The bill of lading is arguably the oldest and most important sea transport document in the world.⁶ It is therefore important that the thesis refers to its nature and various functions as it plays a major role in the transfer of rights of suit and liabilities in the carriage of goods by sea. The

⁶ Hare op cit note 2 at 688.

thesis is limited to the examination of ‘negotiable’ bills of lading such as order bills or bearer bills. An analysis on the transfer of title to sue under non-negotiable bills of lading such as sea waybills or straight bills of lading is beyond the scope of this thesis.

1.3. Terminology of the thesis

This study will mainly refer to the following terms: bill of lading, shipper, consignor, carrier and consignee.

The bill of lading is 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.’⁷ The shipper is a ‘person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.’⁸ The shipper is also known as a consignor but they are not always the same person.⁹ Aikens et al defines a consignor as ‘the person who has possession of the goods prior to shipment or delivery to the carrier or his agents.’¹⁰ The shipper is therefore a person who ‘consigns the cargo for shipment [i.e. the consignor], who contracts with the carrier and is named as shipper in the bill of lading.’¹¹

The carrier is either the ship-owner or the charterer who enters into a contract of carriage with a shipper.¹² The consignee is the person who is entitled to take delivery of the goods.¹³ He is also defined as ‘[t]he person to whom the cargo is to be delivered under the contract of carriage contained in or evidenced by the bill of lading, and usually named as consignee in the bill.’¹⁴ The term will be given the same meaning in this thesis.

Reference to English terms such as property in the goods means ownership in South African law. The English term special property in the goods has no equivalent in South African

⁷ United Nations Convention on the Carriage of Goods by Sea (‘Hamburg Rules’) 1978, art. 1(7). Neither the Hague Rules, nor the Hague Visby Rules nor the Rotterdam Rules define the bill of lading.

⁸ Hamburg Rules, art. 1(3); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (‘Rotterdam Rules’) 2008, art. 1(8); neither the Hague Rules nor the Hague Visby Rules nor the Rotterdam Rules define the bill of lading.

⁹ Aikens, Lord & Bools op cit note 2 at vii.

¹⁰ Ibid.

¹¹ Ibid.

¹² International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (‘Hague Rules’); and Protocol of Signature 1924 art. 1(a); Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (‘Hague Visby Rules’) 1968, art. 1(a); Hamburg Rules, art. 1(1); Rotterdam Rules, art. 1(5).

¹³ Hamburg Rules, art. 1(4); Rotterdam Rules, art. 1(11).

¹⁴ Aikens, Lord & Bools op cit note 2 at vii.

law but it refers to possession or rights of pledgees such as banks.¹⁵ Reference to rights of suit means title to sue.

1.4. Structure of the thesis

Chapter 2, *Historical Background and Functions of the Bill of Lading*, is an overview on how the bill of lading has developed over the past centuries to become the document it is today. The bill of lading has three functions: receipt of the goods, evidence of the carriage contract and document of title. The study will particularly emphasize the last function, which is the most relevant one. A brief examination of the meaning of ‘negotiable’ document will also be made.

Chapter 3, *Title to sue under English Law*, discusses the position of the English law in regard to title to sue under a bill of lading in cargo claims. The English common law did not recognize contractual rights of suit of third parties. The English common law principle of privity of contract prevented third parties from acquiring contractual rights of suit under a bill of lading.¹⁶ The Bill of lading Act of 1855 was enacted into law in order to solve the privity of contract dilemma. Unfortunately, the Bill of lading Act of 1855 partially resolved the dilemma.¹⁷ This led the English Law Commission to draft the Carriage of Goods by Sea Act (‘UK COGSA 1924’) which was enacted into law in 1924.¹⁸ The Act will be discussed in depth in this chapter.

Chapter 4, *Title to sue under South African law*, is a discussion of the position of the South African law on the transfer of contractual rights of suit and liabilities under a bill of lading in cargo claims. The South African common law could transfer contractual rights to third parties by means of *stipulatio alteri* and cession. None of them was a complete solution to the dilemma.¹⁹ After the enactment of the new English legislation, the South African legislature eventually followed its English counterpart by enacting into law the Sea Transport Documents Act, 65 of 2000 (‘the STDA’). The Act was assented to by the president of the Republic on 5 December 2000, published in the *Government Gazette* No. 21884 (Vol 426) of 13 December 2000 and came into force on 20 June 2003. The object of the Act was to dispense

¹⁵ D.L Donnelly *An examination of the application of the Sea Transport Documents Act 65 of 2000 to title to sue under contracts of carriage evidenced by sea waybills and straight bills of lading* (unpublished LLM thesis, University of Kwazulu Natal, 2013) 9.

¹⁶ Hare op cit note 2 at 707; J F Wilson, *Carriage of Goods by Sea* 7 ed (2010).

¹⁷ Hare op cit note 2 at 707.

¹⁸ Carriage of Goods by Sea Act (.50) of 1924.

¹⁹ Hare op cit note 2 at 706-07.

with the problems caused by the Bills of Lading Act of 1855. An assessment will be made whether the Act has reached its object.

Chapter 5, *Conclusion*, will conclude by answering the two research questions set out at in chapter one. Finally, recommendations will be made on how to improve the provisions the STDA related to transfer of rights of suit and liabilities.

Chapter 2: HISTORICAL BACKGROUND AND FUNCTIONS OF THE BILL OF LADING

2.1. Introduction

This chapter reviews the historical development of the bill of lading. The bill of lading is arguably the most important and oldest sea document in carriage of goods by sea.¹ As such, it is necessary to explore how it has developed in the past in order to understand the various functions it fulfils today. The first part of the chapter is a discussion of the origin of the bill of lading. The second part is a detailed examination of the functions of the bill of lading as a receipt of the goods, evidence of the contract and a document of title. The extent to which these functions relate to the question of the title to sue under the contract of carriage will be discussed.

2.2. Origin

The origin of the bill of lading is blurred.² No historian is certain about the exact period merchants had commenced to use the bill of lading.³ There is, however, evidence of documents that existed in Roman times in the 15th century, which had similar characteristics to the bill of lading.⁴

‘From Arctus Bibulus, pilot of a public vessel of 2000 artabas burden, whose figure head is an ibis, acting through sextus Atinius of the 22nd legion, second maniple, to Acusilaus, public collector of corn for the two villages of Lysimachus, deputy of Lucius Marius, freedman of Augustus, greeting:

I acknowledge that you have embarked into my vessel at the harbor of Ptolemais in the Arsinoite name at Erboeis to the address of Dionysus and Philologis... first Syrian wheat, pure, genuine, unadulterated and winnewed, measured in a public brazen measure of Alexandria, of first Syrian corn on thousand seven hundred and eighteen and half artabas... which I will convey to Alexandria and deliver to Dionysus and Phililogus or to whomsoever they shall order it to be given, and I have no claim against you (signed) J.H.

... in the 2nd year of Tiberius Ceasar [sic] Augustus.’

The above passage shows a document that was similar to a bill of lading. Such a document describes the condition and the weight of a cargo. Such a document is evidence

¹ J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 688.

² Ibid; R Aikens, R Lord & M Bools *Bills of Lading* (2006) para 1.1.

³ SF Du Toit *The Bill of Lading in South African law* (LLD thesis Rand Afrikaans University 2000) 14.

⁴ Ibid; Du Toit citing K Gronfors *Towards Sea Waybills and Electronic Documents* (Akademiforlaget Gothenburg 1991) 10.

showing that at that time there was already a document fulfilling the receipt of goods and evidence of contract functions.⁵ It is argued that older documents might have existed with the same functions.⁶ There is, however, no evidence of such claim. Although older documents might have had similar characteristics to the bills of lading, it is argued that such documents should not be regarded as a bill of lading because they lack the document of title function.⁷

The creation of the bill of lading was not the result of one event. The bill of lading is a document that had gradually developed over time in accordance with the needs of the merchants at the time. There is no trace of the bill of lading of lading in Northern Europe. In fact one of the first times the bill of lading was referred to by its modern name was in the law of Hanseatic cities in Southern Europe in 1591.⁸ Prominent authors have proclaimed Italy as the birthplace of the bill of lading. The main reasons for this development is said to be because of the prosperous economies of the Italian cities and dynamic activities of sea commerce in the region.⁹

2.2.1. The Book of lading and the Bill of lading

Initially there was no need of a written record of the shipment of the goods as the shipper, who was also the master of the vessel at the time, was sailing with its goods on board to sell to unknown buyers in various ports.¹⁰ As the world evolved and the shippers stopped sailing with their goods on board the vessel, there was a need to keep a written record of the goods on board the vessel. Statutes such as *the Ordinamenta et Consuetudo* were enacted to require the master to have a written record of the goods shipped.¹¹ The goods then started being recorded in a ‘parchment book or register.’¹² The book of lading thus became the ship’s register that served as a receipt of the goods.

The person in charge of the book of lading was called a clerk. The clerk was a member of the ship’s crew. His main duty was to record the goods shipped into the book of lading. The clerk was regarded as a public officer protecting the interests of both the shipper and the master.¹³ The book of lading also contained ‘the contract of carriage, payments made by the

⁵ Du Toit op cit note 3 at 14-5.

⁶ SF Du Toit ‘The Evolution of The Bill of Lading’ (2005) 11 *Fundamina* 10.

⁷ Du Toit op cit note 3 at 15.

⁸ Ibid at 17; Du Toit op cit note 6 at 15.

⁹ Du Toit op cit note 6 at 15.

¹⁰ Aikens, Lord & Bools op cit note 2 at para 1.1.

¹¹ WP Bennett *The History and Present Position of the Bill of Lading as Document of Title to Goods* (1914) 7.

¹² Du Toit op cit note 6 at 16.

¹³ Ibid at 15.

ship and other related concerns'.¹⁴ Bennett said that the book of lading 'would also be of the nature of a document of title at the end of the voyage it would manifest the merchant's right to the goods entered in his name.'¹⁵

At the time when the shippers stopped sailing with their goods, there was a need to create a copy of the book of lading for the shipper in the event the original book of lading became lost or damaged. Later on, another copy of the book of lading was created to send to potential buyers. It was important that all interested parties concerned be provided with a copy of the book of lading in order to avoid disputes.¹⁶ The statutes of Marseilles (1253-1255) and the statute of Ancona (1397) made it compulsory for the clerk to deliver a copy of the book of lading to the shipper only if the shipper so requested. Should the clerk fail to do so he would be held liable for a fine or damage in a civil action.¹⁷

As a copy of the book of lading, the bill of lading did not transfer possession of the goods.¹⁸ According to Bennett the bill of lading became a document of title in the sixteenth century. In *The Brandaris* (1546) the bill of lading says the following: 'In Witness whereof I have given you three cognossemments all of one tenor marked with myne owne marke the one performed the other to be of none effecte.'¹⁹ In *Hurlocke and Saunderson v Collett*²⁰ the bill of lading contains the following words: 'In witness I the said master have firmyd three bylls of one tenor the one complyed and the fulfilled and the other to stand voyd'.²¹ The two cases clearly show that when one of the three bills of lading is produced for delivery of the goods, the others stand void. For Bennett this is clear evidence that the bill of lading served as a document of title.²²

Having said that, there is no evidence that the bill of lading was transferred by endorsement and delivery in the sixteenth century. Bennett believes that the endorsement and delivery of the bill of lading was widely used in the seventeenth century because the 'law reports of the eighteenth century regarded the indorsement of the bills of lading as a well-

¹⁴ Du Toit op cit note 6 at 15.

¹⁵ Bennett op cit note 11 at 5.

¹⁶ Kozolchyk B 'Evolution and Present State of Ocean Bill of Lading from a Banking Law Perspective' (1992) 23 *Journal of Maritime Law and Commerce* 166.

¹⁷ Du Toit op cit note 6 at 17.

¹⁸ Ibid at 24.

¹⁹ Bennett op cit note 11 at 10 citing I *Select Pleas in the Court of Admiralty* 127.

²⁰ (1539) *Select Pleas*, Vol.1, at 88-89.

²¹ Bennett op cit note 11 at 10 citing I *Select Pleas in the Court of Admiralty* 88.

²² Ibid at 10.

known custom.²³ According to Du Toit, the practice of the endorsement and delivery of the bill of lading was formally confirmed in the eighteenth century.²⁴

2.3. Functions of the Bill of Lading

As a result of this historical development it is now clear that the modern bill of lading fulfils three functions: receipt for the goods shipped, evidence of the contract, and document of title. Each function will be examined below.

2.3.1. The Bill of Lading as a receipt for goods shipped

At the time when the bill of lading only served as a receipt of the goods, the bill of lading contained statements as to quantity and condition of the goods received. Such a custom has not vanished; the modern bill of lading still contains these descriptive statements. Nowadays the bill of lading contains statements as to:²⁵

- The leading marks
- The quantity of the goods
- The order and the condition of the goods.

Before examining each of the above statements, it is of great importance to highlight the reasons for including these statements in the bill of lading. These statements exist first because they help the consignee to make cargo claims in the event there is loss, misdelivery, short delivery or damage of goods on discharge. Secondly, the consignee will be allowed to discard the goods in the event the statements in the bill of lading do not match the descriptions of the goods on the sale invoices. Lastly a bill of lading stating that the goods are in bad condition would affect the consignee's chances of reselling the goods in transit.²⁶

It is important that these statements be inserted into the bill of lading with great care and accuracy. Initially the shipper is the one who fills in a copy of the carrier's bill of lading form with the details of the condition and quantity of the goods. Thereafter the carrier's agent verifies if the information on the bill of lading form is correct and corresponds with the tally reports at

²³ Bennett op cit note 11 at 11.

²⁴ Du Toit op cit note 3 at 30.

²⁵ JF Wilson *Carriage of Goods by Sea* 7 ed (2010) 119; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ('Hague Visby Rules') 1968, art. III (3)(a),(b),(c); United Nations Convention on the Carriage of Goods by Sea ('Hamburg Rules') 1978, art. 15(1)(a)&(b); Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ('Rotterdam Rules'), 2008, art. 36(1)(a),(b) & (c).

²⁶ Wilson op cit note 25 at 118.

the time of loading.²⁷ Once the bill of lading form is verified, the master signs and hands over the bill of lading to the shipper.²⁸

In light of what has been said, the shipper has the duty to guarantee to the carrier that statements as to the type, quantity and condition of the goods are true and accurate.²⁹ If it were averred that details of the goods supplied by the shipper are untrue and inaccurate, the shipper will be liable to indemnify the carrier for any loss or damages arising out of the untrue and inaccurate details of the goods.³⁰ The carrier can discard the details of the goods supplied by the shipper on the bill of lading if he has ‘reasonable grounds for believing the information supplied to be inaccurate, or has no reasonable means of checking it’.³¹

2.3.1.1 *Receipt as quantity*

At common law, statements as to quantity or weight of the goods are *prima facie* evidence in favour of the shipper.³² This means for instance that in the event there is short delivery of the goods at the time of discharge the claimant may rely on the bill of lading’s statements to prove his claim.³³ In order to avoid liability, the carrier has the onus of proving that the quantity of the goods as described on the bill of lading has not been shipped. In *Smith v Bedouin Steam Navigation Co*³⁴ where 988 bales of jute had been shipped on board, the bill of lading recorded that 1000 bales were shipped. Lord Shand said that the carrier may discharge his burden of proof provided that ‘the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped, but that in fact they were not shipped.’³⁵ It is a heavy burden of proof because it requires the carrier to prove an event that probably took place some days, weeks, even months ago.

According to the common law, the carrier can escape liability even if the bill of lading is in the hand of a bona fide consignee.³⁶ In *The Belle: Grant v Norway*³⁷ the master had signed and issued a bill of lading stating that 12 bales of silk were loaded on board the vessel. In fact

²⁷ Wilson op cit note 25 at 118.

²⁸ Ibid at 117-18.

²⁹ Hague Visby Rules, Art. III(5).

³⁰ Wilson op cit note 25 at 119.

³¹ *Ace Imports Ltd v Companhia de Navegacao (The Esmeralda)* (1988) 1 Lloyd’s Rep 206; Wilson op cit note 25 at 119.

³² Wilson op cit note 25 at 120.

³³ *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas)* (1996) 1 Lloyd’s Rep. 642.

³⁴ (1896) AC 70.

³⁵ Ibid.

³⁶ Wilson op cit note 25 at 120.

³⁷ (1851) 138 ER 263.

none of them were loaded. The court found in favour of the carrier because it held ‘a master had no authority to sign for goods that were not in fact shipped’.³⁸ The court did not want to hold the carrier responsible for the master’s independent act. The master had no authority to sign for goods not shipped.³⁹ The judgment received much criticism⁴⁰ because the court gave a judgment against a bona fide consignee. Fortunately, this judgment has been reversed by the provisions of the provisions of COGSA 1992 and the STDA. Section 4 of COGSA 1992 and section 6 of the STDA make the statements on the face of the bill of lading conclusive evidence in the hands of a bona fide consignee. At an international level, international instruments rules have also nullified the effect of the *Grant v Norway* judgment.⁴¹

2.3.1.2. Receipt as to condition

Apart from statements as to quantity, the bill of lading contains statements as to the condition of the goods shipped. Unlike the quantity of the goods which is information supplied by the shipper, the carrier obtains statements as to condition of the goods after he has had a ‘reasonable inspection of the goods’.⁴² It was acknowledged in *The Peter der Gross*⁴³ and later confirmed in *The Compania Naviera Vascongada v Churchill*⁴⁴ that statements as to condition of the goods refer to the external appearance of the goods and not to the internal appearance.⁴⁵ The carrier does not need to give an absolutely accurate statement as to condition of the goods. He is simply required to give an honest and reasonable statement as to the external examination of the goods.⁴⁶

At common law it is established ‘that delivery of the goods in a damaged state provided *prima facie* evidence of a breach of the contract of carriage’.⁴⁷ At common law, the doctrine of estoppel applies in cases where the carrier has caused prejudice to the shipper or the consignee by ‘making an incorrect statement on the face of the bill of lading as to the condition of the

³⁸ N Gaskell, R Asariotis, Y Baatz *Bills of Lading, Law and Contracts* (2000) 211.

³⁹ *Grant v Norway* (1851) 10 CB 655 at 688; GM Carvajal *Taking a snapshot of the goods on shipment which is the safest document* (unpublished LLM thesis, University of Southampton, 2011) 20.

⁴⁰ Hare op cit note 1 at 672.

⁴¹ Hague Visby Rules, art. III(4); Hamburg Rules, art. 16 (3) (a) & (b); Rotterdam Rules art. 41 (a) & (b); The Hague-Visby Rules are incorporated in English law in the Schedule to the Carriage of Goods by Sea Act of 1971 and are incorporated into South African law in the Schedule to the Carriage of Goods by Sea Act 1 of 1986.

⁴² Wilson op cit note 25 at 125.

⁴³ (1875) 1 PD 414.

⁴⁴ (1906) 1 KB 237.

⁴⁵ Wilson op cit note 25 at 123; Carvajal op cit note 39 at 22.

⁴⁶ Wilson op cit note 25 at 123; see also *Owners of Cargo Lately Laden on Board the David Agmashenebeli v Owners of the David Agmashenebeli (The David Agmashenebeli)* (2003) 1 Lloyd’s Rep 92 at 104 ff.

⁴⁷ Gaskell, Asariotis, Baatz op cit note 38 at 217.

goods'.⁴⁸ In *Silver v Ocean Steamship*⁴⁹ a clean bill of lading covered the shipment of a cargo of cans of eggs. The bill of lading stated that the goods were shipped in good order and condition. At the port of discharge, the cans of eggs were 'visibly gashed and some with scarcely visible pinholes'.⁵⁰ The Court of Appeal held that the carrier was liable as the condition of the cans of eggs was 'discernible by reasonable external examination'.⁵¹ The carrier was estopped from denying the truth of the statements on the bill of lading. The carrier, however, was not held liable for the perforated pinholes because they were not visible on a reasonable external examination.⁵²

At common law, the carrier can have a defence against estoppel. All the carrier needs to do is to place the words 'condition unknown' on the bill of lading to avoid liability for the statements as to the condition of the goods. Such a defence is called 'marginal endorsement'.⁵³ In *Canada & Dominion Sugar Co Ltd v Canadian National Steamships Ltd*⁵⁴ a cargo of sugar was shipped under a clean bill of lading stating that the goods were in good order and condition. The carrier, further, placed these words on the bill of lading 'signed under guarantee to produce ship's clean receipt'. An external inspection of the sugar cargo showed that the cargo was in fact damaged. The court held that:

'But the bill did in fact on its face contain the qualifying 'words signed under guarantee to produce ship's clean receipt': that was a stamped clause clear and obvious on the face of the document and reasonably conveying to any 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.'⁵⁵

In this case the court considered the words 'signed under guarantee to produce ship's clean receipt' as a marginal endorsement which exonerated the carrier from the correctness of the statements as to the condition of the goods.

Article III rule 3(c) of the Hague Visby rules provides that the carrier is under the obligation to issue, at the shipper's request, a bill of lading stating the 'apparent order and condition' of the goods. The carrier, however, may refuse to issue a clean bill of lading if he

⁴⁸ Hare op cit note 1 at 695.

⁴⁹ *The Aeneas* (1929) All ER (611) CA.

⁵⁰ Hare op cit note 1 at 696.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Wilson op cit note 25 at 125.

⁵⁴ (1947) AC 46 (PC).

⁵⁵ *Ibid* at 2.

has ‘reasonable grounds for suspecting’ that the representation as to the condition of the goods is not accurate.⁵⁶ The carrier cannot place a clause in the bill of lading, which relieves him from its obligations imposed by Article III rule 8 which provides:

‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.’

2.3.1.3 Receipt as to leading marks

Leading marks are ‘any identification or quantity mark appearing on the goods shipped’.⁵⁷ Leading marks are incorporated into the bill of lading just like quantity and condition of the goods. At common law the ship owner will not be estopped from denying the truth of the leading marks on the bill of lading as long as such marks are not ‘essential to their identity or description’.⁵⁸ In *Parsons v New Zealand Shipping Co*⁵⁹ a cargo of 608 frozen carcasses of lamb were shipped under a bill of lading stating that each carcass bore the leading mark 622x. In reality, only 507 carcasses had that mark and the other 101 had the mark 522x. On discharge, the endorsees claimed that estoppel should be applied against the carrier. The trial court held that the leading marks were irrelevant as to the quantity and the value of the goods. The endorsee’s claim was dismissed. On appeal Collins LJ said:

‘It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which would not be material to such identity need to be embraced in estoppel. It is obvious that where the marks have no market meaning, and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying, it is absolutely immaterial to him whether the goods bear one mark or another.’⁶⁰

The receipt function of the bill of lading is thus important to the determination of the cargo claim under a negotiable bill of lading because the claimant needs to prove its loss in the form of short delivery or non-delivery of the goods. The bill of lading as a receipt helps the

⁵⁶ Hague Visby Rules, art. III(3).

⁵⁷ Carriage of Goods by Sea Act 1971; Hague Visby Rules, Art. III (3)(a).

⁵⁸ Wilson op cit note 25 at 127; Carvajal op cit note 39 at 25.

⁵⁹ (1901) 1 KB 548.

⁶⁰ Ibid at 564.

claimant to prove such a loss and further that the loss occurred within the sea leg of the carriage, i.e. after being loaded on board in good order and condition. However the receipt function of the bill of lading does not assist in determining the question of who has title to sue.

2.3.2. Bill of lading as evidence of the contract

The bill of lading is not the carriage contract, but it is the evidence of the contract.⁶¹ The reason why the bill of lading is not regarded as the carriage contract is simply because the carriage contract is concluded prior to the issue of the bill of lading.⁶² The bill of lading, however, remains an excellent proof of the carriage contract. In *The Ardennes*⁶³, the carrier and the shipper orally agreed that the consignment of mandarin oranges would go direct from Cartagena to London. There was a liberty clause in the bill of lading which, without the shipper's knowledge, allowed the carrier to make any deviation. The vessel arrived first at Antwerp and thereafter at its final destination, London. In finding in favour of the shipper, Lord Goddard CJ said:

‘It is, I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms... The contract has come into existence before the bill is signed. The bill of lading is signed by one party only and handled by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or that it does not contain some term which he has stipulated, he might, if there were time, demand his goods back, but he is not in my opinion thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed and it was different from that which is found in the document or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it.’⁶⁴

The further question of whether a consignee can regard the bill of lading as being the exclusive record of the terms of the contract is discussed by Wilson. For him, the *Ardennes* principle is still good law.⁶⁵

⁶¹ *North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd* 1932 NLR 1 at 17; Hare op cit note 1 at 697; *Lendlease Finance (Pty) Ltd v Corporation de Mercadeo Agricola* 1976 (4) SA 464 (A); Du Toit op cit note 3 at 76; SF Du Toit ‘Bills of Lading Held by Indorsees and Issues under Charterparties: Interpreting Section 4(1)(a) of the Sea Transport Documents Act 65 of 2000’ (2004) 2004 (4) *South African Law Journal* 758.

⁶² Hare op cit note 1 at 697; Wilson op cit note 25 at 129.

⁶³ (1951) 1 KB 55.

⁶⁴ *Ibid* at 59-60.

⁶⁵ Wilson op cit note 25 at 132.

The evidence of contract function is important to the question of title to sue because the bill of lading is relevant to identify the original parties to the contract. In the traditional arrangement set out in chapter one, the parties would be the named shipper and the named carrier, although in practice it may be more difficult to so identify the parties.⁶⁶ However although merchants had developed the practice of transferring bills of lading to third parties, at common law there was no mechanism to transfer contractual rights to a third party. The function of transferring contractual rights to non-contractual parties has therefore been the object of legislative reforms that will be discussed in chapters three and four.

2.3.3. Bill of lading as a document of title

A document of title has been called a ‘control document’⁶⁷ or ‘document of possession’.⁶⁸ In the well-known words of *Sanders v Maclean*, the bill of lading is ‘the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.’⁶⁹ The document of title function is the most important function of the bill of lading.⁷⁰ As a document of title, the bill of lading is the symbol of the goods in transit; that is, the bill of lading represents the goods.⁷¹ In *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola*⁷² Corbett JA said:

‘The most significant of the shipping documents is the bill of lading. This constitutes an acknowledgement by the master of the ship, on behalf of the ship owner, that goods have been delivered on board and evidences an undertaking to carry the goods to the stated place of destination. The person in whose name or to whose order the bill of lading is made out by endorsement and delivery transfer his rights under the bill to another. The holder of the bill, i.e. the person in whose favour it was originally made out or the endorsee thereof, is entitled, to the exclusion of all others, to receive the goods at the places of destination. He is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognised as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery. It is usual under a cif contract that the seller to take the bill of lading in his own name, or to his order, and for the bill, duly endorsed, to be tendered, together with the other shipping documents, against payment of the invoice price, either in cash or by the acceptance of

⁶⁶ Hare op cit note 1 at 697.

⁶⁷ Du Toit op cit note 3 at 92.

⁶⁸ Ibid; C DeBattista *Sale of Goods Carried by Sea* (1990) 35.

⁶⁹ (1883) 11 QBD 327 at 341.

⁷⁰ Malan Fr & Faul W ‘Some aspects of bills of lading’ (1989) South African Mercantile Law Journal 327.

⁷¹ Ibid at 328.

⁷² *Lendlease Finance* supra note 61.

a draft. Ownership in the goods normally passes to the purchaser upon transfer of the bill of lading and concurrent payment.⁷³

As explained above, the transfer of the bill of lading to a consignee or endorsee amounts to a symbolic delivery of the goods. The reason why the bill of lading replaces the goods is because the seller wants to dispose of the goods and receive money as soon as possible. On the other side, the buyer wishes to obtain the goods so that he may timeously sell them to another buyer. Hence, the bill of lading helps the seller and the buyer to deal with the goods while the goods are still in transit.⁷⁴ The bill of lading is thus a means by which possession of the goods is transferred to a consignee. Possession of the bill of lading is deemed to be possession of the goods although the carrier has physical control of the goods during the voyage.

Du Toit discusses the difference between constructive possession and symbolic possession drawn in English law. But he argues that there is no distinction between symbolic and constructive possession in South African law.⁷⁵ In South African law, possession amounts to an ‘effective physical control (the corpus element) and the intention to possess (the animus possidendi)’.⁷⁶ Intention means the intention to extract benefit from the possession of the goods. The consignee has the intention to extract benefit by possessing the goods, whereas the carrier’s intention is only to keep the goods for the shipper.⁷⁷

Possession of the goods is therefore passed by the endorsement and the delivery of the bill of lading.⁷⁸ Ownership on the other hand does not necessarily always pass merely by endorsement and transfer of the bill of lading to a consignee. Ownership passes when the shipper has the necessary intention to transfer ownership, and when the consignee has the intention to receive ownership. In English law transfer of ownership may pass ‘independently of the transfer of the bill of lading, transfer of ownership depending upon the intention of the transferor and transferee’.⁷⁹ In South African law ownership of the goods passes when the requisite intention is accompanied by delivery, and the additional requirement in cash sales that

⁷³ *Lendlease Finance* supra note 61 at 492.

⁷⁴ Hare op cit note 1 at 572-573.

⁷⁵ Du Toit op cit note 3 at 105.

⁷⁶ *Ibid* at 103.

⁷⁷ *Ibid* at 104.

⁷⁸ Hare op cit note 1 at 698; Malan & Faul op cit note 70 at 329.

⁷⁹ Du Toit op cit note 3 at 107.

payment has been made.⁸⁰ In many cases transfer of the bill of lading will constitute delivery by transferring symbolic possession of the goods.

The bill of lading is not a negotiable document in the technical sense. This means that when the bill of lading is transferred, a bona fide transferee ‘does not necessarily acquire good and complete title to the instrument.’⁸¹ The bill of lading is negotiable in the sense that it can be transferred.⁸² The bill of lading is thus transferable but the transferee has no better title to the goods than that of its transferor.⁸³ In *Gurney v Behrend*⁸⁴, the court held:

‘A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented.’⁸⁵

2.4. Conclusion

As seen above the origin of the bill of lading is difficult to trace with certainty. The bill of lading is a multi-functional document that has evolved over time in accordance with mercantile customs. While the origin of the bill of lading is obscure, there is however evidence of similar documents to the bill of lading around the 15th century performing as a receipt and evidence of the contract. It is only in the 18th century that the bill of lading function as document of title was recognized.⁸⁶ The document of title function is the most important function of the bill of lading. It plays an important role when it comes to title to sue. Such importance will further be explained in the next chapter.

⁸⁰ *Lendlease Finance* supra note 61 at 489-90; SF Du Toit ‘Reflections on bills of lading and silo receipts used in the South African futures market’ (2007) 2 (3) *Journal of International Commercial Law and Technology* 107.

⁸¹ Du Toit op cit note 3 at 70.

⁸² Ibid; D L Donnelly *An examination of the application of the Sea Transport Documents Act 65 of 2000 to title to sue under contracts of carriage evidenced by sea waybills and straight bills of lading* (unpublished LLM thesis, University of Kwazulu Natal, 2013) 61-2.

⁸³ Malan & Faul op cit note 70 at 329.

⁸⁴ (1854) 3 El & BL 622 (118ER 1275).

⁸⁵ Ibid at at 633-34, the judgement of this case reinforced by Lord Devin in *Kun v Wah Tat Bank Ltd* [1971] 1 Lloyd’s Rep 439 at 446.

⁸⁶ Wilson op cit note 25 at 115.

Chapter 3: ENGLISH LAW ON TITLE TO SUE

3.1. Introduction

This chapter discusses the issue of the transfer of rights of suit and liabilities under cargo claims in English law. The chapter starts primarily with a discussion of the position of the common law in regard to the transfer of rights of suit and liabilities to a holder of the bill of lading. Thereafter the chapter briefly examines section 1 of the Bills of Lading Act of 1855¹ ('the 1855 Act') and the problems the 1855 Act created with transfer of rights and liabilities. Lastly, the chapter discusses the relevant provisions of the UK Carriage of Goods by Sea Act of 1992² ('UK COGSA 1992'). The chapter analyses the transfer of rights of suit and liabilities under the UK COGSA 1992 and how such a mechanism of transfer of rights and liabilities differs from the common law and the 1855 Act.

3.2. English Common Law

3.2.1. *The common law doctrine which prevents the transfer of rights of suit to a third party under a bill of lading*

The common law doctrine that prevents the transfer of contractual rights of suit to a third party is known as the doctrine of privity of contract. According to the doctrine of privity of contract, only parties to the contract may sue or be sued upon the contract. A non-contractual party cannot have contractual rights of suit.³ That is, when the bill of lading is delivered to a consignee, the consignee is not entitled 'to sue the carrier for damage to the cargo based on the contract and the carrier will not be able to sue the [consignee] of the bill of lading for freight or demurrage.'⁴ The doctrine of privity of contract was acknowledged as a legal principle in *Tweddle & Atkinson*.⁵ Prior to the doctrine of privity of contract, it is argued there was already a rule that prevented a consignee or endorsee from suing under a carriage contract.⁶ In

¹ Bills of Lading Act (1855) 18 & 19 Vict. C.111.

² Carriage of Goods by Sea Act 1992 c.50.

³ R Aikens, R Lord & M Bools *Bills of Lading* (2006) para 8.4; G Treitel & FMB Reynolds *Carver on Bills of Lading*. 3 ed (2011) para 5-002; SF Du Toit *The Bill of Lading in South African Law* (unpublished LLD thesis, Rand Afrikaans University, 2000) 132; Tetley W 'Who may claim or Sue for Cargo Loss or Damage'(part 1)(1986) 17 *Journal of Maritime Law and Commerce* 154.

⁴ Du Toit op cit note 3 at 132-33.

⁵ (1861) 1 B. & S. 393.

⁶ Treitel & Reynolds op cit note 3 at para 5-002.

*Thompson v Dominy*⁷ the court held that ‘the transfer of the bill of lading does not transfer the contract.’ The 1855 Act was adopted as a response to that case.⁸

3.3. Bills of Lading Act, 1855

3.3.1. The provision in the Bills of Lading Act, 1855 that made the Act ineffective in solving the difficulties created by the common law privity of contract doctrine

Section 1 of the Bills of Lading Act 1855 provides:

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

On its face, section 1 allows the transfer of the rights of suit and liabilities to a consignee and endorsee. This is a development from the common law position, which did not permit the transfer of contractual rights of suit and liabilities to a third party. Section 1 marks the change between the common law and the 1855 Act. The 1855 Act was regarded as a solution to the common law problem.⁹

Section 1 of the 1855 Act, however, was not a complete solution to the problem of transfer of contractual rights of suit and liabilities.¹⁰ Section 1 of the 1855 has two major problems. First, the transfer of contractual rights of suit is linked to the passing of property in the goods (ownership). If ownership does not pass, the Act will not apply and the consignee will not acquire rights of suit.¹¹ Secondly, ownership must pass ‘upon or by reason of such consignment or indorsement’.¹² The passing of ownership upon or by reason of consignment occurs where ‘ownership passes on the shipment of the goods, in the case of oil often when oil passes through the vessel’s hose connection.’¹³ On the other side the passing of ownership upon or by reason

⁷ (1843) 14 M & W 403 (153 ER 532) at 407.

⁸ Du Toit op cit note 3 at 133; N Francis ‘Transferring right of suit under bills of lading: The conflict of laws implications’ (2006) 20 (5) *Australia & New Zealand Maritime Law Journal* 9.

⁹ Girvin SD ‘Carriage of goods by sea : the Sea Transport Documents Act 2000 in historical and comparative perspective’ 119 SALJ 326-7; Du Toit op cit note 3 at 132-33; M Surjan *Title to Sue at the Dawning of the Sea Transport Documents Act of 65 of 2000, A Comparative Analysis* (unpublished LMM thesis, University of Cape Town, 2002) 16.

¹⁰ Aikens, Lord & Bools op cit note 3 at para 8.16; J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd ed (2009) 705.

¹¹ Du Toit op cit note 3 at 133.

¹² Bills of Lading Act of 1855, s 1; Du Toit op cit note 3 at 133.

¹³ Du Toit op cit note 3 at 135.

of endorsement occurs when ownership and endorsement pass simultaneously.¹⁴ If ownership passes before or after endorsement, the Act will not apply. The word endorsement is defined as ‘a written indorsement coupled with a transfer of the document.’¹⁵

Section 1 of the 1855 had been interpreted in different ways. Two approaches came to the fore: the narrow and wide approach.¹⁶ According to the narrow approach, the words ‘upon or by reason of’ means that ownership must pass ‘at the same time as the consignment or indorsement.’¹⁷ Whereas according to the wide approach, ownership can pass before or after consignment or indorsement.¹⁸ The time of the passing of ownership is irrelevant in this approach.¹⁹

3.4. The Carriage of Goods by Sea Act (C.50) of 1992

3.4.1. Transfer of rights and liabilities

The UK COGSA 1992 was enacted into law to solve the problems related to transfer of contractual rights of suit and liabilities under the Bills of Lading Act 1855.²⁰ As mentioned earlier, the 1855 Act linked the transfer of rights of suit with the passing of ownership ‘upon or by reason of the consignment or indorsement.’²¹ The UK COGSA 1992 has now severed such a link. The UK COGSA 1992 was adopted in accordance with the recommendations made by the English and Scottish Law Commission, which stipulates that rights of suit are transferred to a third party holder of a bill of lading irrespective of whether ownership has passed.²² The UK COGSA 1992 deals with the transfer of rights of suit and liabilities by means of three documents: the bill of lading, the sea waybill and the ship’s delivery order.²³ For the purposes of this thesis, this chapter will be limited to the analysis of transfer of rights of suit and liabilities by means of a bill of lading. It is important to mention that the UK COGSA 1992 separates the transfer of rights and liabilities. This separation will be discussed in more detail below.

¹⁴ *The Delfini* [1990] 1 Lloyd’s Rep 252 at 274.

¹⁵ *The Delfini* supra note 14 at 270; Lorenzon *F.C.I.F and F.O.B Contracts* 5 ed (2012) at para 5-076.

¹⁶ The English Law Commission and the Scottish Law Commission Report (Law com No.196) (Scot Law Com No. 130) *Right of suit in Respect of Carriage of Goods by Sea* (1991) para 2.5.

¹⁷ Ibid para 2.5 citing T H Scrutton, *Scrutton on Charterparties* 19th ed (1984) 27.

¹⁸ Aikens, Lord & Bools op cite note 3 at para 8.16.

¹⁹ The English Law Commission op cit note 16 at para 2.5 citing Carver, *Carriage by Sea* 13th ed (1982) 98; Treitel & Reynolds op cit note 3 at para 5-010.

²⁰ Du Toit op cit note 3 at at 146.

²¹ Bills of Lading Act 1855, s 1.

²² English Law Commission op cit note 16 at para 2.22.

²³ UK COGSA 1992, s 1(1).

3.4.2 Transfer of rights of suit to the holder of a bill of lading

Section 2(1) of the Act provides:

‘2(1) Subject to the following provisions of this section, a person who becomes-

- (a) the lawful holder of a bill of lading;
- (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
- (c) the person to whom delivery of the goods to which a ship’s delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.’

On the face of it, section 2(1) no longer links the transfer of rights of suit with the passing of ownership. Section 2(1) makes possible the transfer of rights of suit by means of lawful possession of the bill of lading;²⁴ that is, the holder in possession of a bill of lading is deemed to have acquired rights of suit.²⁵ For instance when the carrier issues a bill of lading to the shipper after shipment of the goods the shipper then endorses and delivers the bill of lading to a buyer named as a consignee on the bill. According to section 2(1), the buyer acquires rights of suit by virtue of being the holder of the bill. Unlike the 1855 Act where the transfer of rights of suits is linked to the passing of ownership, the holder of a bill of lading does not need to be the owner of the goods to acquire rights of suit.²⁶ It is therefore submitted that contractual rights of suit are transferred when a person acquires lawful possession of a bill of lading in terms of section 2(1).

Although section 2(1) mentions ‘bill of lading’, the bill of lading is however not defined in the Act.²⁷ Nonetheless section 1(2)(a) provides that references in the Act to a bill of lading ‘[does] not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without endorsement’. This means that straight

²⁴ Surjan op cit note 9 at 25.

²⁵ Aikens, Lord & Bools op cit note 3 at para 8.33; Treitel & Reynolds note 3 at para 5-013.

²⁶ *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The Pace No2)* [2010] EWHC 2828 (comm), (2011) 1 Lloyd’s Rep. 537 at para 7; Under the UK COGSA 1992, section 2(2)(a) grants rights of suit to a non-owner.

²⁷ Treitel & Reynolds op cit note 3 at para 5-014; Thompson M ‘Title to sue on Overseas Contracts of Sea Carriage: the Need for Reform in Australia’ (1994) 10 *Austl. & N.Z. Mar. Law Journal* 30.

bills of lading do not fall within the meaning of the bill of lading as provided in section 1(2)(a) because straight bills of lading are neither transferable by endorsement nor by delivery as provided in section 1(2).²⁸ However straight bills of lading falls within the meaning of sea waybills as provided by section 1(3).²⁹ Gaskell et al states the following this about section 1(2):

‘Nevertheless, it was intended that holders of such documents have to sue the carrier and the straight bill would be treated, in effect, as a sea waybill in section 1(3) of the Carriage of Goods by Sea Act 1992. A straight bill is certainly one which identifies the consignee as the person to whom delivery is to be made within section 1(3)(b).’³⁰

Section 2(1) should be read with the definition of ‘holder’ in section 5(2) because it is the latter that triggers the application of the former. In other words it is when a third party becomes a holder of the bill of lading that rights of suit are vested in him. This is the reason the holder of a bill is discussed next.

3.4.3. Lawful holder of a bill of lading

Section 5(2) provides:

‘(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say-

- (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
- (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates; ...’

Section 5 (2) provides that there are three types of holder of the bill of lading. Section 5(2)(a) refers to a person who is identified in the bill of lading as a consignee. Section 5(2)(a) applies

²⁸ Surjan op cit note 9 at 24; D L Donnelly *An examination of the application of the Sea Transport Documents Act 65 of 2000 to title to sue under contracts of carriage evidenced by sea waybills and straight bills of lading* (unpublished LLM thesis, University of Kwazulu Natal, 2013) 117.

²⁹ Donnelly op cit note 28 at 118; Section 1(3) provides: ‘References in this Act to a sea waybill are references to any document which is not a bill of lading but- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.’

³⁰ Gaskell N, Asariotis R and Baatz R, *Bills of Lading, Law and Contracts* (2000) 147-48.

to the case where X is named as a consignee in the bill of lading and the goods are consigned 'to X or Order'. X is considered as the holder because he is identified in the bill as a consignee. A person qualifies as the holder under section 5(2)(a) once he is identified in the bill as a consignee and he is in possession of the bill of lading. There is no need for endorsement of the bill of lading. Mere delivery of the bill of lading is enough to make a person the holder.³¹

In *East West Corporation v DKBS 1912 and AKS Svendborg*³², goods were carried under bills of lading from Hong Kong to Chile pursuant to a sale contract. The seller, who was the shipper under the bill of lading, endorsed the bills to its agents, Chilean banks, as consignees so that they could deliver the goods to the buyer against cash payment. The goods were deposited in customs warehouse in Chile according to Chilean laws. On payment of the customs duty, the goods were released from customs to the agents of the buyers without presentation of the bills of lading. The buyers failed to pay for the goods as per the sale contract. As a result thereof the Chilean banks, as consignees, returned the bills to the seller without re-endorsing them. The issue was whether the Chilean banks had title to sue in accordance with section 5(2)(a) or whether the seller had title to sue after re-indorsement of the bill by the consignees. The court held:

'The express consignment of the goods under the bills to the Chilean banks or order, followed by the delivery of such bills to such banks by or under the authority of the claimants, equates with a personal indorsement.'³³

The above passage simply affirms that a person named as a consignee in a bill of lading, who becomes the holder of a bill of lading, acquires rights of suit as if he was an original party to the contract. The Chilean banks were named as consignees, they had possession of the bills and acquired rights to the exclusion of the seller. The court held that the Chilean banks became holders of the bills of lading in accordance with section 5(2)(a).

Section 5(2)(b) refers first to a person who receives the bill of lading (order bill) as a result of endorsement and delivery of the bill. Secondly it refers to a person who receives the bill of lading (bearer bill) as a result of mere delivery. With regard to both persons, they do not simply become the holders of the bill of lading by mere possession of the bill of lading. The shipper must have the intention to deliver the bill and the consignee must have the intention to

³¹ Aikens, Lord & Bools op cit note 3 at para 8.43; Treitel & Reynolds op cit note 3 at para 5-018.

³² [2003] EWCA Civ. 83.

³³ Ibid at para 16.

‘accept delivery.’³⁴ In *The Aegean Sea*³⁵ Louis Dreyfus, the seller, mistakenly endorsed the bill of lading to Repsol instead of endorsing it to ROIL, the buyer. After the transfer of the bill and when the mistake was realised, Repsol forwarded the bill to ROIL who sent it back to Louis Dreyfus for cancellation of the endorsement and re-endorsement of the bill to ROIL. The issue was whether Repsol became the lawful holder of the bill of lading in terms of section 5(2)(b) of the UK COGSA 1992. The court held that Repsol could only become the holder of the bill of lading if Repsol accepted delivery of the bill by endorsement in accordance with section 5(2)(b) the UK COGSA 1992. Thomas J held:

‘In my view Repsol therefore never obtained possession of the bill of lading as the result of completion by delivery of the bill by endorsement. There was never any delivery of the bill of lading by Louis Dreyfus to Repsol to complete the indorsement. Even if Repsol had obtained possession of the bill of lading from Louis Dreyfus, they never accepted delivery of it as the indorsee or transferee.’³⁶

In *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)*³⁷, the Court of Appeal had to interpret the words ‘completion, by delivery of the bill, of any indorsement of the bill’ in section 5(2)(b). The court held:

‘In my view completion of an indorsement by delivery requires the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee.’³⁸

Both the *Aegean Sea and Erin Schulte* judgments confirm that section 5(2)(b) is satisfied when there is a voluntary transfer of the bill of lading by the holder and an unconditional acceptance of the bill by a subsequent holder.

Section 5(2)(c) refers to a person who becomes the holder of a bill of lading that ceases to give a right to possession of the goods. The question of whether a person becomes the holder of a bill of lading after the goods were destroyed were dealt with in *The Ythan*³⁹. *On the facts*, the carrier was suing Primetrade of the goods for damages that had been caused to the vessel. The carrier was trying to establish that they had acquired rights of suit in terms of the UK

³⁴ Aikens, Lord & Bools op cit note 3 at para 8.40; Treitel & Reynolds op cit note 3 at para 5-020; *The Aegean* (1998) 2 Lloyd’s Rep. 39.

³⁵ *The Aegean Sea* supra note 34.

³⁶ Ibid at 59-60.

³⁷ [2014] EWCA civ 1382.

³⁸ Ibid at para 28.

³⁹ *Primetrade AG v Ythan Ltd* [2006] 1 All ER 367, (2006) 1 Lloyd’s Rep. 457.

COGSA 1992. That was opposed and the issue before the court was whether Primetrade had acquired rights of suit under the operation of the UK COGSA 1992. When the bill of lading was transferred to Primetrade's insurance company, the goods had already been destroyed. Aikens J held that 5(2)(c) 'does apply to a situation where the goods have been lost forever, as in this case.'⁴⁰ However the court held that Primetrade did not become the holder because the other requirements of section 5(2)(c) had not been satisfied, namely that they would have become the holder if the bills had been transferred to them at the time when the bills still gave a right to delivery. The reason for transfer of the bills to Primetrade's insurance company was not to transfer rights of suit but it was to allow the insurance company to settle the claim under the insurance policy. That's the reason why Primetrade was not regarded as the holder of the bill of lading.

The Act may transfer rights of suit and liabilities provided that the conditions of sections 5(2), 2(2) and 3(1) are all satisfied.⁴¹ This is discussed further below.

3.4.3.1. The Holder of a spent bill of lading

Section 2(2) provides:

'Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.'

The bill of lading is a document of title that allows for the transfer of contractual rights of suit to a lawful holder. When the carrier delivers the goods against presentation of the bill of lading, the bill of lading ceases to be a document of title and it therefore becomes spent or

⁴⁰ Ibid at para 71.

⁴¹ Ibid.

accomplished. A spent bill of lading thus ‘can no longer purport to be the ‘key to the warehouse’ once delivery has been made to the person entitled to delivery.’⁴²

In most of the cases in international trade, a bill of lading becomes spent when the bill of lading takes a long time to reach its destination. Delays sometimes cause the holder to receive the bill of lading after delivery of the goods. In such a situation the bill of lading normally ceases to be a document of title and does not confer contractual rights of suit on the holder. The effect of section 2(2)(a) is however to confer contractual rights of suit on the holder of a spent bill of lading which ‘no longer gives a right (as against the carrier) to possession of the goods.’⁴³

As mentioned above, the holder of a spent bill of lading may assert rights of suit. But he may do so provided he acquires the bill of lading ‘by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill’.⁴⁴ In *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The Pace No2)*⁴⁵ Churchgate claimed against the shipowners, Pace, for short-delivery of a cargo of rice covered by a bill of lading. The issue before the court was whether Churchgate had title to sue as the bills were endorsed to them after they had become spent. The issue was whether Churchgate had title to sue in terms of COGSA 1992. The court held that a spent bill of lading can be endorsed to another party as long as the other party became endorsee pursuant to ‘contractual or other arrangements’ entered into before the cargo was delivered. The court held that Churchgate acquired rights of suit before the bills had become spent.

As seen above, the bill becomes spent because a party obtains it after delivery of the goods. However that party acquires rights of suit in terms of section 2(2)(a) because he became the holder of the bill in pursuance of the arrangement of the sale contract with the seller before the bill ceases to be a document of title.⁴⁶

There is also a situation where the holder of a spent bill of lading acquires rights of suit ‘as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.’⁴⁷ For instance when a seller

⁴² The English Law Commission op cit note 16 at para 2.42.

⁴³ Aikens, Lord & Bools op cit note 3 at para 8.77 and UK COGSA 1992, s 2(2)(a).

⁴⁴ UK COGSA 1992, s 2(2)(a).

⁴⁵ *The Pace* supra note 26.

⁴⁶ The English Law Commission op cit note 16 at para 2.44.

⁴⁷ UK COGSA 1992, s 2(2)(b).

endorses and delivers the bill of lading to a buyer but upon delivery of the goods to the buyer, the buyer rejects the goods or the documents for some reason. The seller acquires rights of suit back in terms of section 2(2)(b).⁴⁸

There may be another situation where the bill of lading is delivered to a wrong person after delivery of the goods. The question here is whether the bill of lading becomes spent when it is delivered to a wrong person. This is what occurred in *East West Corporation v DKBS 1912*⁴⁹ where the carrier delivered goods without production of the bill of the bill of lading to a wrong party. The court held:

‘At or after the time of misdelivery to a person not entitled, the bill of lading may be being negotiated between banks on the basis that it is still a document of title... Until the goods are delivered to the person actually entitled, the bill of lading must remain the document of title to the goods.’⁵⁰

The above judgement makes it clear that when the bill of lading is delivered after discharge to a person who is not entitled to delivery of the goods, the bill of lading does not become spent. The bill becomes spent when it is delivered to the correct person. Hence the notion of good faith plays an important role in determining whether a person who holds the bill of lading acquires rights of suit under the Act.

3.4.3.2. Good faith

Section 5(2) refers to the holder of the bill of lading as a person who ‘has become the holder of a bill of lading in good faith’. Good faith is a term not defined in the UK COGSA 1992⁵¹ but is a term well known in law.⁵² Good faith has been attributed to ‘honest conduct’. In *The Aegean Sea*,⁵³ Thomas J stated that good faith ‘connoted honest conduct and not a broader concept of good such as the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.’ This means that a person who acquires a bill of lading by fraud or theft or even violence does not obtain the bill in good faith.⁵⁴ It is argued that a person who acquires the bill of lading with prior knowledge that the

⁴⁸ Du Toit op cit note 3 at 148, citing MD Bools *The Bill of Lading A Document of Title to Goods An Anglo-American Comparison* (1997) 96, who deals with the problems related to section 2(2)(b).

⁴⁹ *East West Corporation v DKBS 1912* [2002] EWHC 83 (Comm).

⁵⁰ Ibid at para 39.

⁵¹ Aikens, Lord & Bools op cit note 3 at para 8.54; Treitel & Reynold op cit note 3 at para 5-025.

⁵² Sale of Goods Act 1979, s 61(3) describes ‘good faith’ as a thing is done honestly; Aikens, Lord & Bools op cit note 1 at para 8.54.

⁵³ *The Aegean Sea* supra note 34 at 60.

⁵⁴ Aikens, Lord & Bools op cit note 3 at para 8.54; Treitel & Reynolds op cit note 3 at para 5-025.

bill of lading was obtained by theft or fraud, is not a holder in good faith.⁵⁵ Aikens et al disagree by stating that a person's knowledge should not be the basis to negate his good faith:

'It has been suggested that a person who becomes holder with knowledge of any misrepresentation or misstatement in the bill is not a holder in good faith. The contrary view, which it submitted is the preferable one, is that the Act is focussing on the circumstances in which the person becomes the holder of the bill and not his knowledge of any defects in it. It is hard to see why a person should be deprived of the benefit of transfer of the right of suit on the bill of lading because of his knowledge that, for example, the goods were shipped two days later than indicated or that the quantity in the bill is overstated, although such knowledge may have other effects on the holder's rights.'⁵⁶

3.4.4. The holder's capacity to sue on behalf of another person

In English law a person who is not party to a contract is not entitled to sue upon that contract. As discussed earlier, this principle derives from the doctrine of privity of contract. This position is very unfair to a person who suffers financial loss but cannot recover his loss from the carrier because he lacks rights of suit. This is the reason why the English Law Commission recommended that the holder of a bill who does not suffer loss may recover loss on behalf of a person who suffers financial loss but cannot claim against the carrier.⁵⁷ The English law commission's recommendation was incorporated in UK COGSA 1992 in the form of section 2(4). Section 2(4) provides that when a person has suffered financial loss as result of the carrier's breach of contract, the holder of a bill may sue the carrier for the benefit of the person who suffers financial loss. The effect of section 2(4) changes the common law position that 'if a person sues in contract, he only sues for his own loss'.⁵⁸

Section 2(4) has been the subject of academic consideration. Aikens et al's comment on the provision as follows:

'This is a necessary part of the scheme that separates rights of suit from property, and it arises from the general rule in English law, which is that if a person sues in contract, he can only sue for his own loss. It prevents the potential injustice which would occur if a person were to acquire

⁵⁵ Treitel & Reynolds op cit note 3 at para 5-025.

⁵⁶ Aikens, Lord & Bools op cit note 3 at para 8.56.

⁵⁷ The English Law Commission op cit note 16 at para 2.27.

⁵⁸ Ibid at para 8.82.

title to sue under the Act only to be met with a plea that it was a different party (without such title) who had suffered the relevant loss.⁵⁹

In the same way, Treitel and Reynolds state the following about section 2(4):

‘The purpose of [section 2(4)] is to avoid the consequences which might, but for the subsection, flow from the general principle of English law that damages in a contractual action can be recovered only in respect of the claimant’s own loss.’⁶⁰

Beatson and Cooper, whose article on rights of suit has been cited with judicial approval in *The Pace*, state the following:

‘The issue raised by cl 2(4) proved a difficult one. It deals with the scenario where someone has suffered loss or damage but does not have rights of suit and allows the person with rights of suit to exercise those rights [my emphasis] for the benefit of the person who has suffered the loss or damage in question.’⁶¹

It must be said that although the holder of a bill may sue for another person’s financial loss, section 2(4) does not impose an obligation on a holder to recover damages for that person. This especially occurs ‘where those actually interested in the litigation are insurers who may have difficulty in obtaining co-operation from the trading partners of their assureds.’⁶² If the holder does not sue for the benefit of another person who incurs cargo loss, that person may have recourse in tort (delict) to claim against the carrier.⁶³

3.4.5. The rights of the holder under a bill of lading

According to section 2(1)(a), the holder of the bill of lading acquires contractual rights ‘as if he had been a party to that contract.’ At first sight, it seems as if the contractual rights of the shipper are transferred to the holder of the bill of lading. However, this is not always the case. In *Leduc v Ward*⁶⁴, the bill of lading covered a carriage of goods from Fiume to Dunkirk without allowing for a deviation. The shipper and the carrier knew in advance the carrier would deviate. The endorsee of the bill however did not know about the deviation because there was no indication of that on the bill. The court held that since the bill of lading made no mention of

⁵⁹ Aikens, Lord & Bools op cit note 3 at para 8.82.

⁶⁰ Treitel & Reynolds op cit note 3 at para 5-075.

⁶¹ *The Pace* supra note 26 at para 25, Justice Burton quoting J Beatson and J Cooper ‘Rights of Suit in Respect of Carriage of Goods by Sea’ (1991) *Lloyd’s Maritime and Commercial Law Quarterly* 24.

⁶² R Aikens, R Lord & M Bools op cit note 3 at para 8.84.

⁶³ Gaskell, Asariotis, Baatz op cit note at 30 at 129.

⁶⁴ (1888) 20 Q.B.D 475.

the deviation, the endorsee was ‘entitled to recover damages from the carrier in respect of loss of the goods in the course of the deviation.’⁶⁵ This shows that the terms of the contract between the shipper and the carrier may differ in some extent to the terms of the contract evidenced in the bill of lading between the carrier and the holder.⁶⁶ Section 2(1) reinforces the decision taken in *Leduc v Ward*.⁶⁷ In order to identify the holder’s rights, the question is not what ‘the rights of the shipper were, but what the rights of the holder would have been if he had been a party to the contract contained in or evidenced by the bill of lading.’⁶⁸

3.4.6. Transfer of liabilities to the holder of a bill of lading

Section 3(1) provides:

‘Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection -

- (a) takes or demands delivery from the carrier of any of the goods to which the documents relates;
- (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods;
- or
- (c) is a person who, at a time before those rights were vested in him took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.’

Section 3(1) regulates the imposition of contractual liabilities upon a lawful holder of the bill of lading. Section 3 is only applicable where the ‘requirements of section 2(1) of the Act are satisfied.’⁶⁹ This means liabilities are imposed only on a person who becomes the holder of the bill of lading. The reason the UK COGSA 1992 separates the transfer of rights and liabilities is to protect entities like banks. The drafters of the UK COGSA 1992 found that it would be unfair to impose liabilities on institutions like banks that would merely hold the bill

⁶⁵ Treitel & Reynolds op cit note 3 at para 5-026.

⁶⁶ Ibid at para 5-027.

⁶⁷ *Leduc* supra note 64.

⁶⁸ Treitel & Reynolds op cit note 3 at para 5-027.

⁶⁹ Aikens, Lord & Bools op cit note 3 at para 8.87.

of lading as security interest.⁷⁰ Thus it was decided that the holder of a bill of lading will be subject to liabilities if he seeks to enforce his rights⁷¹

Contractual liabilities are transferred to the holder of the bill of lading when one of the conditions in paragraphs (a), (b) or (c) of section 3(1) is satisfied. Paragraph (a) is satisfied when the holder of the bill of lading takes or demands delivery from the carrier. Paragraph (a) was considered in *The Berge Sisar*.⁷² In the case the vessel carried a cargo of propane. At the port of discharge the consignees requested samples of cargo for testing. The consignees rejected the goods because they were off-specification. The carriers sued the consignees for damage caused by the cargo to the vessel. The issue before the court was whether the consignees's request for samples of cargo for testing amounted to demanding or taking delivery in accordance with section 3(1)(a). The House of Lord held that the consignee's request did not amount of to demanding delivery within the meaning of section 3(1)(a)⁷³. Lord Hobhouse held:

'To make a claim may be anything from expressing a view in the course of a meeting or letter as to the liability of the carrier to issuing a writ or arresting the vessel. A 'demand' might be an invitation or request, or, perhaps, even implied from making arrangements; or it might be a more formal express communication, such as would have sufficed to support an action in retinue. From the context in the 1992 Act and the purpose underlying s 3(1), it is clear that s 3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are. I would therefore read the phrase demands delivery as referring to a formal demand made to the carrier or his agent asserting the contractual right as the endorsee of the bill of lading to have the carrier deliver the goods to him. And I would read the phrase 'makes a claim under the contract of carriage' as referring to a formal claim against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading'⁷⁴

The judgement continued:

⁷⁰ The English Law Commission op cit note 16 para 2.30-31.

⁷¹ Aikens, Lord & Bools op cit note 3 at para 8.87.

⁷² [2001] 2 All ER 193 at para 33.

⁷³ Ibid at para 38.

⁷⁴ Ibid at para 33.

‘Taking delivery’ in paras [sic] (a) and (c) means, as I have said, the voluntary transfer of possession from one person to another. This is more than just co-operating in the discharge of the cargo from the vessel. Discharge and delivery are distinct aspects of the international carriage of goods.⁷⁵

The term ‘making a claim’ was further explained in *The Ythan*.⁷⁶ The Ythan approved the analysis of Lord Hobhouse on the interpretation of section 3(1).⁷⁷ In this case the claimant’s cargo insurance requested the carrier’s P&I club to provide security for the claim. The issue before the court was whether a security request amounted to ‘making a claim’. Aikens J held:

‘In my view, on the facts of this case, the successful request by Atlantis for security in the form of the LOU does not amount to making a claim for the purposes of s 3(1)(b). My reasons are: first, that this request for security for a claim, even though successful, is different in character from the arrest of a vessel in support of a claim. The latter is a formal use of court procedures by identified claimants in the context of an existing suit or one that is started at the time of arrest. An arrest is a positive, formal, and final action by a claimant. A LOU, by contrast, is a contractual arrangement. In this case throughout discussions the precise identity of the potential claimant was not known to the club and the owners. Hence the wording of this LOU leaves at large the question of who is the owner of the cargo or any ‘other persons entitled to sue in respect of the cargo’. I accept that, in this case, the request for security carried the implied threat of arrest. But the club and the owners were anxious to turn that to their advantage. They did so by insisting that all potential claimants would be bound as to jurisdiction (London arbitration) and an agreement not to attempt to arrest vessels in the same management anywhere in the world. In return the club agreed to pay an award made in respect of claims within the scope of the LOU. But, vitally, at all stages up to and after the provision of the LOU, no one is committed to making a claim against the owners at all. Hence the LOU provides that the future claimant must give ‘notice of arbitration proceedings’. Therefore the provision of a LOU is not a statement, made to the owners through the club, of a formal choice by Primetrade to avail itself of its contractual rights against the owners.’⁷⁸

To sum up a person must acquire rights of suit in terms of section 2(1) before liabilities can be imposed on him. The holder of the bill of lading is only subject to liabilities if one of paragraphs (a), (b), or (c) of section 3(1) is satisfied. As said earlier, the reason for separating

⁷⁵ *The Berge Sisar* supra note 72 at para 36.

⁷⁶ *The Ythan* supra note 39.

⁷⁷ *Ibid* at para 30 & 111.

⁷⁸ *Ibid* at para 103.

the transfer of rights and liabilities is simply to protect banks and other entities that merely possess bills of lading as a security interest in the goods by imposing liability on them.⁷⁹ These institutions will only be subject to liabilities when they assert their rights against the carrier.⁸⁰

3.4.7. Whether the holder of the bill of lading retains rights after transfer the bill of lading to a subsequent holder

Section 2(5) provides:

‘Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives-(a) where that document is a bill of lading, from a person’s having been an original party to the contract of carriage; or (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document; ...’

Section 2(5) deals with both the shipper and an intermediate holder. Section 2(5) extinguishes the rights of suit of the shipper after someone else has become the holder of the bill of lading.⁸¹ For instance if S (shipper) sells the goods to B (the buyer) by endorsing and delivering the bill of lading, S’s rights of suit are extinguished after transfer of the bill. As a result B acquires rights of suit and becomes the holder of a bill of lading. This was the same position under the 1855 Act⁸², reinforced by the English Law Commission.⁸³ Gaskell et al is of the view that although section 3(1) bars the shipper from suing the carrier after he has lost his rights, the shipper still retains rights to defend himself against any carrier’s claims:

‘It could be argued that the shipper has lost all rights to launch proceeding under the bill. It is submitted that the better approach would be to interpret ‘all rights of suits under the contract of carriage’ in s.2(1) as referring in this context to positive claims against the carrier in relation to the carriage of the goods and not to defences to claims brought by the carrier against the shipper. Section 2(5) clearly does not remove defences which the shipper might have under the express terms of the bill of lading.’⁸⁴

With regard to an intermediate holder, he loses both rights and liabilities to a subsequent holder of a bill of lading. This situation may pose some problems to an intermediate holder who might still be on risk after transfer of a bill of lading, particularly in an oil trade where the

⁷⁹ The English Law Commission op cit note 16 para 2.30-31; Aikens, Lord & Bools op cit note 3 at para 8.88.

⁸⁰ Du Toit op cit note 3 at 151.

⁸¹ Aikens, Lord & Bools op cit note 3 at para 8.85; LS Chan ‘The Holder of a Bill of Lading’ (1995) 7 (2) *SAC LJ* 364

⁸² Ibid at para 8.85.

⁸³ The English Law Commission op cit note 16 para 2.34; Thompson op cit note 27 at 30.

⁸⁴ Gaskell, Asariotis and Baatz op cit note 30 at 147.

bill has an ‘out-turn’ clause providing that the purchase price will be paid on delivery of the cargo and that the sale contract will be cancelled on short delivery. This is dangerous for an intermediate holder if short delivery is made because he will be unable to sue even if risk is still on him.⁸⁵

3.4.8. Whether the holder of the bill of lading retains liabilities after transfer of the bill of lading to a subsequent buyer

Section 3(3) provides:

‘This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.’

According to section 3(3), the shipper retains liabilities even after the bill of lading is transferred to a subsequent holder of the bill of lading; that is, the shipper remains liable even after his rights are transferred to a subsequent holder of the bill of lading.⁸⁶ However the shipper does not remain liable after transfer of liabilities to the subsequent holder as provided by section 3(1). The English Law Commission dealt with the shipper’s liability in respect of shipment of dangerous goods which the holder is unaware of. The English Law Commission confirmed the shipper’s liability in respect of shipment of dangerous goods can be transferred to the holder because there is no difference between liability in respect of shipment of dangerous goods and liabilities in respect of other matters on which the holder has no control of.⁸⁷ Aikens also says that it ‘can be assumed with confidence’ that this is the case⁸⁸, citing *The Ythan*⁸⁹. It is possible that a shipper extinguishes its liabilities after transfer a bill of lading by means of a cesser clause.⁹⁰

An intermediate holder becomes liable once he demands or takes delivery from the carrier. Once an intermediate holder transfers the bill of lading to a subsequent holder, he loses both his rights and liabilities. Such principle was adopted in *Smurthwaite v Wilkins*⁹¹ and

⁸⁵ The English Law Commission op cit note 16 at para 2.40; *Smurthwaite v Wilkins* (1862) 11 C.B. (N.S.) 842 is the first case confirming that a person loses both rights and liabilities after endorsement of the bill of lading to another.

⁸⁶ The English Law Commission op cit note 16 at para 3.23-4.

⁸⁷ The English Law Commission op cit note 16 at para 3.22.

⁸⁸ Aikens at para 8.89.

⁸⁹ *The Ythan* supra note 39, although Aikens notes that the point was not argued as it was common cause between the parties.

⁹⁰ Gaskell, Asariotis and Baatz op cit note 30 at 140; a cesser a clause is a contractual term which provides that the liabilities of the shipper cease at a certain time. This clause is often included in charter parties.

⁹¹ (1862) 11 C.B. (N.S.) 842, the court held that an intermediate holder was not liable for freight. This was a case decided under the Bills of Lading Act of 1855. The principle of this case was adopted in *The Berge Sisar*

confirmed in *The Berge Sisar*⁹² by Lord Hobhouse who held ‘if the person should cease to have the rights vested in him he should no longer be subject to the liabilities’.⁹³

3.5. Conclusion

Title to sue has been an issue in English law for a very long time. The common law did not allow the transfer of title to sue to a third party. The 1855 Act partially solved the common law problem by allowing the transfer of title to sue to a third party but only if ownership had passed on or by reason of the endorsement of the bill of lading. The UK COGSA 1992 has now settled the matter. A third party may acquire title to sue provided he becomes the lawful holder of the bill of lading.⁹⁴ The UK COGSA 1992 also allows for the transfer of liabilities.⁹⁵ The particularity with the UK COGSA 1992 is that contractual rights and liabilities are not transferred at the same time. This means that a holder of the bill of lading may acquire rights but may not be subject to liabilities against the carrier. This position is different from the 1855 Act which did not separate the transfer of contractual rights and liabilities. The UK COGSA 1992 is very clear on how the mechanisms of transfer of title to sue and liabilities work. The Act is a significant improvement on the 1855 Act. First the UK COGSA 1992 has severed the link between the transfer of rights of suit and the passing of property in the goods.⁹⁶ Another significant improvement has been the separation of contractual rights and liabilities.⁹⁷ Institutions like banks are no longer exposed to liabilities as they were under *Sewell v Burdick*⁹⁸. Under the Act, a party must assert its rights before he can be subject to liabilities.

The adoption of the UK COGSA 1992 has inspired other countries to reform their outdated national legislation to keep up with technological and maritime developments.⁹⁹ South Africa has followed suit by enacting the Sea Transport Documents Act, no. 65 of 2000 (STDA). South Africa, like other commonwealth countries, has adopted the STDA that would have the same effect as UK COGSA 1992 in English law. Unlike other foreign legislations, the STDA

Under the Bills of Lading Act of 1855, the shipper’s liabilities were extinguished after transfer of the bill of lading to an indorsee.

⁹² *The Berge Sisar* supra note 72.

⁹³ Ibid at para 45.

⁹⁴ UK COGSA 1992, s 2(1).

⁹⁵ UK COGSA 1992, s 3.

⁹⁶ Francis op cit note 8 at 12; FMB Reynolds ‘*Bills of Lading Act: Do they have a future ?*’ (1994) 10 MLANZ J 40.

⁹⁷ Francis op cit note 8 at 13; Reynolds op cit note 98 at 40.

⁹⁸ (1884) 10 App Cas 74.

⁹⁹ Australia (Sea-Carriage Documents Act 1996; Hong Kong (Bills of Lading and Analogous Shipping Documents Ordinance 1993); New Zealand (Mercantile Law Amendment Act 1994); Singapore (Bills of Lading Act); Canada’s Bills of Lading Act, R.S.C. 1985 still applies provisions contained in the 1855 Act.

is not substantially the same as UK COGSA 1992. For instance the STDA provisions on delivery are unique.¹⁰⁰ The differences and similarities between the STDA and COGSA 1992 will be discussed in the next chapter.

¹⁰⁰ Girvin op cit note 9 at 343.

Chapter 4: SOUTH AFRICAN LAW ON TITLE TO SUE

4.1. Introduction

This chapter discusses the issue of title to sue in South African law. The chapter starts by examining the South African common law position on title to sue before the enactment of the Sea Transport Document Act 2000¹ ('STDA'). Before the STDA, legal devices were used² to enable the transfer of rights of suit and liabilities to a third party under South African common law. These legal devices were used to circumvent the doctrine of privity of contract. There are many of these legal devices but this chapter will be limited to two: stipulatio alteri and cession. The chapter briefly deals with how these legal devices have to some extent solved the problem of rights of suit and obligations in a carriage contract. Thereafter the relevant provisions of the STDA will be discussed. The focus of the chapter will be whether the STDA has fully solved the problem of the transfer of rights of suits and liabilities in South African law and whether the STDA is in keeping with other foreign legislation, particularly with the UK COGSA 1992.

4.2. South African Common law

4.2.1. Stipulatio alteri

Under both South African and English law, the doctrine of privity of contract prevents a non-contractual party from acquiring contractual rights of suit and obligations.³ According to the doctrine of privity of contract, only a party to a contract can sue or be sued. But the South African common law recognises the Roman Dutch law concept of stipulatio alteri⁴, which is a contract for the benefit of a third party.⁵ In terms of stipulatio alteri, A (the stipulans) and B (the promisor) enter into contract for C (third party), so that C may become the beneficiary of the contract once C accepts the terms of that contract. Therefore under stipulatio, the shipper, acting as an agent, would enter into a contract with the carrier on behalf of the consignee. Once the consignee accepts the benefit of the contract, there is a legal bond (vinculum iuris) created between the consignee and the carrier.⁶ As a result, the consignee becomes a party to the

¹ Sea Transport Documents Act 65 of 2000.

² D.L Donnelly *An examination of the application of the Sea Transport Documents Act 65 of 2000 to title to sue under contracts of carriage evidenced by sea waybills and straight bills of lading* (unpublished LLM thesis, University of Kwazulu Natal, 2013) 156.

³ SD Girvin 'Third Party Rights under Shipping Contracts in English and South Africa Law' (1997) *South African Mercantile Law Journal* 115; see *Administrator, Natal v Magill, Grant & Nell (pty) Ltd 1969 (1) SA 660 (A)*

⁴ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 705.

⁵ RH Christie *The Law of Contract in South Africa* 2 ed (1991) 310.

⁶ Girvin op cit note 3 at 115.

contract and acquires rights of suit and obligations. In *McCulloch v Fernwood Estate Ltd*⁷, Innes CJ held:

‘The third person having once notified his acceptance and thus established a vinculum juris between himself and the promisor would be liable to be sued, as well as entitled to sue.’

Hare explains that although a third party could acquire contractual rights of suit and obligations by means of stipulatio alteri, a stipulatio alteri is, however, not a complete solution to the problem of transfer of rights of suit and obligations; this is because under a true stipulatio, a shipper retrospectively acts as the agent of the consignee and the shipper would disappear once the carriage contract is concluded.⁸ However under a carriage contract a shipper does not act as the agent of a consignee and may not lose all its rights and obligations even after the transfer of the bill of lading. Stipulatio alteri is a concept that is difficult to implement fully in a carriage contract because it has its limitations; hence it is only a partial solution to the problem of transfer of rights of suit.⁹

4.2.2. Cession

Besides stipulatio alteri, cession¹⁰ is another legal device by means of which a third party may acquire contractual rights of suit under South African law. Under a cession, A (cedent) may cede its rights to C (cessionary) without the consent of the debtor (B); cession is completed once the documents evidencing the rights are delivered to the cessionary. Under a carriage contract, the shipper would cede its rights to the consignee without notifying the carrier; cession would be completed once the bill of lading is transferred to the consignee and that consignee would exercise its rights against the carrier by claiming delivery upon presentation of the bill of lading.¹¹

One of the problems with cession is that liabilities are not automatically transferred with rights; the shipper and the consignee would have to agree to a delegation of rights and liabilities for the shipper’s liabilities to be released to the consignee. But in practice, this would be

⁷ (1920) AD 204 at 06.

⁸ Hare op cit note 4 at 706.

⁹ Ibid.

¹⁰ *Johnson v Incorporated general Insurance Ltd* 1983 (1) SA 318 at 319.

¹¹ Donnelly op cit note 2 at 161.

difficult because the shipper cannot simply delegate its obligations to a consignee without the carrier's consent.¹² Hare states the following:

‘Although it is arguable that the consignee who takes the bill of lading from the shipper by endorsement thereby becomes the cessionary of the shipper's rights against the carrier, it is by no means certain that a cession of rights may be implied from a normal bill of lading, even where the shipper requests and the carrier issues the bill of lading as ‘to order’, thereby indicating their knowledge that the bill of lading will in all likelihood be transferred to a third party. Nor would the shipper be able to delegate its obligations, without the consent of the carrier as the creditor of such obligations. Furthermore, in a contract of carriage, the shipper does not lose its rights against the carrier, nor may it absolve itself of its obligations simply by endorsing the bill onwards to a transferee.’¹³

Under South African law, it is possible to transfer rights of suit and liabilities in a carriage contract by means of stipulatio alteri and cession. Under stipulatio alteri, a consignee acquires contractual rights of suit from the shipper who acts as his agent. Under a cession, the shipper cedes his rights of suit to a consignee without the consent of the carrier. However, as mentioned earlier, there are some difficulties to implement fully both these legal devices in a carriage contract. This is why it was important for South Africa to adopt legislation that would enable and regulate the transfer of rights of suit and obligations under a bill of lading. The STDA was adopted for such a purpose. The manner in which the STDA operates in transferring contractual rights of suits and obligations will be discussed below.

4.3. Sea Transport Documents Act 65 of 2000

4.3.1. *Transfer of rights and liabilities*

The STDA was assented to by the President of the Republic on 5 December 2000 and came into force on 20 June 2003. The purpose of the STDA is ‘[t]o regulate the position of certain documents relating to the carriage of goods by sea; and to provide for incidental matters.’¹⁴ Staniland describes the underlying purpose of the STDA as being to bring changes in the manner transfer of rights of suit and obligations operates in a contract of carriage of goods by sea and to regulate delivery of goods carried.¹⁵ Prior to the enactment of the STDA, the position of South African law on the transfer of rights of suit was uncertain. Some writers argue that the

¹² Donnelly op cit note 2 at 162.

¹³ Hare op cit note 4 at 707.

¹⁴ STDA, s 1.

¹⁵ H Staniland ‘Maritime Law’ (2003) *Annual Survey of South African Law*, 856.

1855 Act applied in South Africa.¹⁶ It is argued however that there is no authority that confirms that the 1855 Act was applicable in South Africa.¹⁷ It is submitted that the STDA has brought clarity to the South African law position on the transfer of rights of suit irrespective of whether or not the 1855 Act applied in South Africa.

The STDA is the legislation that regulates transfer of rights of suit and obligations in South Africa.¹⁸ The legislative reform in the United Kingdom with the enactment of the UK COGSA 1992 has inspired South Africa to adopt its own legislation that was intended to be in keeping with developments in the shipping industry.¹⁹ A noticeable element however is that the STDA is in fact at odds with other foreign legislation, particularly with the UK COGSA 1992. The STDA has made some major changes from the provisions of the UK COGSA 1992.²⁰ For instance, the UK COGSA 1992 only applies to documents issued after its coming into force,²¹ whereas the STDA applies to documents issued before and after its commencement. This is known as the retroactive application of the STDA.²²

Section 2(1) provides:

‘This Act applies-

- (a) to any sea transport documents issued in the Republic, irrespective of whether it was issued before or is issued after the commencement of this Act;
- (b) to goods-
 - i. consigned to a destination in the Republic, or
 - ii. landed, delivered or discharged in the Republic; and
- (c) to any proceedings instituted in the Republic in any court or before any arbitration tribunal after the commencement of this Act in respect of any sea transport document or goods contemplated

¹⁶ SD Girvin ‘Carriage by Sea: The Sea Transport Documents Act 2000 in historical and comparative perspective’ (2003) 119 *South African Law Journal* 319; Hare op cit note 4 at 666; Surjan M *Title to Sue at the Dawning of the Sea Transport Documents Act of 65 of 2000, A Comparative Analysis* (unpublished LMM thesis, University of Cape Town, 2002) 22; Staniland op cit note 15 at 856.

¹⁷ Donnelly op cit note 2 at 111, the author explains: ‘There is only one unreported decision of doubtful authority, being a decision on an application for joinder in the Witwatersrand Local Division, where the point was apparently not argued and was taken as being ‘generally accepted’. Citing *First National Bank of Southern Africa Ltd in re Bank of India v Kien Hung Shipping SA (Pty) Ltd*[1994] CLD 96 (w), delivered by McArthur J on 11 January. The judgment has been included in M Stranes, *Commercial Law Reported* 1994 (W) 98.

¹⁸ SF Du Toit ‘Comments on the Sea Transport Documents Act 65 of 2000’ *Tydskrif vir die Suid-Afrikaanse Reg* (2003) 731.

¹⁹ Surjan op cit note 16 at 22; Girvin op cit note 16 at 342.

²⁰ SF Du Toit *The Bill of Lading in South African Law* (unpublished LLD thesis, Rand Afrikaans University, 2000)156.

²¹ UK COGSA 1992, s 6(3).

²² Du Toit op cit note 20 at 157.

in paragraph (a) or (b), irrespective of whether those proceedings relate to a cause of action arising before or after the commencement of this Act.’

This section could be read in one of two ways. The first, narrow interpretation is that subsections (a) and (b) must be read conjunctively so that the STDA only applies when the sea transport document has been issued in South Africa and the goods are consigned, landed, delivered or discharged in South Africa.

Hare adopts a wider interpretation arguing that it is implied that when goods are consigned to South Africa, the STDA will apply ‘whether or not the sea transport documents are issued in South Africa.’²³ Although Hare does not provide a reason for this view it is reasonable as in international trade where goods are consigned to South Africa it would usually be the case that the sea transport document has been issued in the country of shipment.

A narrow interpretation would exclude all those shipments from the application of the STDA. It is thus more likely that a South African court will adopt a wider approach because it would extend the application of the Act to a wider category of South African consignees.

Hare goes on to state that the Act is ‘essentially applicable to inward cargo only therefore.’²⁴ This may be an over-simplification as on a wide approach section 2(1)(a) would mean that the STDA applies whenever a sea transport document is issued in South Africa, whether or not the goods are consigned to a destination in South Africa. The Act also expressly states that it applies to any proceedings taking place in any court or any arbitration tribunal in the Republic in respect of any sea transport document or goods contemplated in section 2(1)(a)

²³ Hare op cit note 4 at 670 referring to STDA, s 2(1)(b).

²⁴ Ibid.

or (b).²⁵ In other words when proceedings are instituted in a South African court the STDA makes it clear that the Act must be applied.²⁶

Section 2(1)(a) applies to sea transport documents that are issued after its commencement as well as to those issued before its commencement. This is known as the retrospective application of the STDA. Section 2(1)(a) is different to section 6(1) of the UK COGSA 1992 which provides that the Act only applies to sea documents issued after its commencement. Du Toit argues that the retrospectivity of the STDA may not be fair on contractual parties because it seems as the Act will apply to commercial dealings, entered into between contractual parties under a different legislation, without their choice. On the other side Girvin states that ‘a clear statement was need on the retrospectivity of the Act in order to avoid certain of the difficulties encountered with the Admiralty Jurisdiction Regulation Act of 1983.’²⁷ It is submitted that in order for contractual parties not to be prejudiced by the STDA, the Act should retrospectively apply to sea transport documents issued before its commencement provided that the contractual parties agree that the STDA should apply to their commercial dealings.

Section 1 defines a sea transport document as:

‘(a) a bill of lading; (b) a through bill of lading; (c) a combined transport bill of lading; (d) a sea waybill; and (e) any consignment note, combined transport document or other similar document relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable.’²⁸

²⁵ STDA, s 2(1)(c).

²⁶ Hare op cit note 4 at 670. Further section 6(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983 makes it clear that in determining the law to be applied to a maritime claim the provisions of any relevant South African statute must be applied. This was upheld in *The Mieke: Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) where it was decided that even if the contract contains a choice of law clause the parties cannot exclude mandatory provisions of a South African statute.

²⁷ Girvin op cit note 16 at 344, see also *Government Gazette No. 18541 of 12 December 1997 Draft Sea Transport Documents Bill- Invitation to Comment*.

²⁸ STDA, s 1.

The STDA materially departs from the UK COGSA 1992 by incorporating a definition of ‘sea transport document’. The UK COGSA 1992 has no definition of sea transport documents. It deals separately with bills of lading, sea waybills and ship’s delivery orders.²⁹ Further while the UK COGSA 1992 applies to ship’s delivery orders,³⁰ the STDA does not expressly mention a ship’s delivery order as a sea transport document. But it is argued that a ship’s delivery order falls within section 1(e) of the STDA.³¹

Although the STDA applies to any sea transport document, section 2(2) provides that sections 3, 4, 5 and 6 are only applicable to ‘transferable’ or ‘negotiable’ sea transport documents. This means the STDA excludes non-transferable sea transport documents such as sea waybills and straight bills of lading from its ambit when it comes to transfer of rights of suit and obligations.³² For instance, the holder of a sea waybill cannot acquire rights of suit nor liabilities in terms of section 2(2) because a sea waybill is not a transferable sea transport document.

Unlike the UK COGSA 1992,³³ the rights of suit and obligations under a bill of lading contract are automatically transferred together under the STDA.³⁴ This aspect of the STDA is controversial because it imposes obligations on a party merely by virtue of being the holder of a sea transport document.³⁵ This places the STDA out of step with other foreign legislation. Tiberg³⁶ explains:

‘The general answer for transport documents has been that no one becomes liable by merely taking possession of a document conferring rights, but that the fulfilment [sic] of liabilities may be a condition for the exercise of the rights expressed in the document. Thus, if the purchaser of the documents refuses to pay for the goods due to high charges, he cannot be sued by the carrier for those charges unless he affirms the agreement by claiming performance under the contract. English law was previously different, but through the 1992 Carriage of Goods by Sea Act, it has been brought into line with other legal systems.’

²⁹ UK COGSA 1992, s 1(1).

³⁰ UK COGSA 1992, s 1(1)(c).

³¹ Du Toit op cit note 20 at 156; Du Toit op cit note 18 at 732; Girvin op cit note 16 at 344.

³² Girvin op cit note 16 at 344; Donnelly op cit note 2 at 125.

³³ UK COGSA 1992, s 2(1) & s 3(1).

³⁴ STDA, s 4.

³⁵ *Sewell v Burdick* 10. App. Cas. 74; Donnelly op cit note 2 at 132; Surjan op cit note 16 at 32; Du Toit op cit note 20 at 157.

³⁶ H Tiberg ‘Legal qualities of transport documents’ (1998) 23 (1) *Tulane Maritime Law Journal* 4.

Under the STDA, the mechanism of transfer of rights of suit and obligations is different not only from the UK COGSA 1992 but also from other foreign legislation. Australia³⁷, Hong Kong³⁸, New Zealand³⁹, and Singapore⁴⁰ have all adopted legislation which is substantially similar to the UK COGSA 1992. The legislation of these countries operates to transfer rights of suit and liabilities in the same manner as the UK COGSA 1992. Canada however still applies the provisions of the 1855 Act in its Bills of Lading Act R.S.C. 1985.⁴¹

There was no need for the STDA to depart from the UK COGSA 1992⁴² because it is probably correct to say that merchants are used to, and thus more comfortable with, the provisions of the UK COGSA 1992.⁴³

‘Although UK COGSA has not been problem free, it is probably correct to say that traders are comfortable with UK COGSA 1992 not least because it has been adopted as a model in numerous other commonwealth countries contributing to a substantial measure of uniformity in this area of law.’⁴⁴

The relevant provisions of the STDA related to the transfer of rights and liabilities are examined below. References will sometimes be made to the provisions of the UK COGSA 1992 for comparison purposes.

4.3.2. Transfer of rights of suit to the holder of a sea transport document

Section 4 (1) provides:

‘The holder of a sea transport document—

- (a) is subject to the same obligations and entitled to the same rights against the person by whom or on whose behalf the document was issued or who is responsible for the performance of the contract of carriage evidenced by or contained in the document as if the holder were a party to a contract with that person on the terms of the document; and

³⁷ Sea-Carriage Documents Act No 92 of 1997.

³⁸ Shipping Documents Ordinance No 85 of 1993.

³⁹ Mercantile Law Amendment Act 106 of 1994.

⁴⁰ Bills of Lading Act Cap 384, Rev, Ed, 1994.

⁴¹ Girvin op cit note 16 at 339-41.

⁴² Du Toit op cit note 20 at 156.

⁴³ Donnelly op cit note 2 at 123, see also Girvin op cit note 16 at 335 where Girvin shows that the UK COGSA 1992 has caused numerous cases; see also Du Toit op cit note 18 at 732-37.

⁴⁴ Donnelly op cit note 2 at 123.

(b) must be regarded as the cessionary of all rights of action for loss of or damage to the goods referred to in the document, whether arising from contract or the ownership of the goods or otherwise.’

Section 4 is similar to section 2 of the UK COGSA 1992 in that the transfer of rights of suit is not linked to the passing of ownership of the goods as was previously the case under the 1855 Act. Both sections now confer rights of suit on a person by virtue of being the holder of a sea transport document.⁴⁵

In terms of section 4(1)(a), a person acquires contractual rights of suit when he becomes the holder of a sea transport document. The holder acquires the same rights against the carrier as if the holder were the original party to the contract with the carrier on the terms of the sea transport document.⁴⁶ The words ‘as if the holder were a party to a contract with that person on the terms of the document’ in section 4(1)(a) is similar to ‘as if he had been a party to that contract’ in section 2(1) of the UK COGSA 1992. In *Leduc v Ward*⁴⁷, the court held that a contractual term of the contract between the shipper and the carrier did not apply to the endorsee because the contractual term was not mentioned in the bill of lading. This means that the contract between the shipper and the carrier may differ to some extent to the terms of the contract evidenced in the bill of lading between the carrier and the holder.⁴⁸ It is submitted that the holder of a bill of lading under section 4(1)(a) is not bound by the same exact terms of the contract between the shipper and the carrier.

It is not clear why section 4(1)(b) includes a reference to cession. There is no similar provision in UK COGSA 1992. Du Toit states that there is no compelling reason for section 4(1)(b) to be there because section 4(1)(a) already provides that the holder of the bill of lading is entitled to rights of suit as if he were a party to the contract.⁴⁹ However it is argued that since section 4(1)(a) is not clear on whether the holder of a sea transport document loses rights after transfer of the bill of lading, section 4(1)(b) confirms that a holder of a sea transport document loses its rights.⁵⁰ This is because under the law of cession a cedent retains no rights after the cession.⁵¹ It is submitted that section 4(1)(b) is redundant because section 4(2) already deals

⁴⁵ Surjan op cit 16 note 30.

⁴⁶ Donnelly op cit note 2 at 129.

⁴⁷ (1888) 20 Q.B.D 475.

⁴⁸ Q.C. Treitel & FMB Reynolds Carver on Bills of Lading 3rd ed (2011) para 5-027.

⁴⁹ Du Toit op cit note 20 at 159.

⁵⁰ Donnelly op cit note 2 at 130.

⁵¹ D Hutchison et al *The Law of Contract In South Africa* 2nd ed (2012) 365-6.

with the issue of cession of rights and delegation of obligations. Section 4(2) is discussed further below but for present purposes what is important to note at this point is that by introducing the legal concept of cession into the STDA the drafters may have created some doubt about whether the ‘Leduc v Ward’ principle applied in English law will also apply to transfer of rights of suit under the STDA. Ordinarily a cessionary takes over the exact rights enjoyed by the cedent. This means that a cessionary acquires both privileges (ancillary rights to interests, dividends, security or preference) and defects of the cedent’s rights. This is because ‘the cessionary can never be in a better position than the one previously occupied by the cedent.’⁵² According to the law of cession, the holder of a sea transport document acting as a cessionary will be bound by the exact contractual terms enjoyed by the cedent, even by those which are not written in the contract. The law of cession is thus in contradiction with the ‘Leduc v Ward’ principle. It is submitted that the STDA should not rely on cession of rights to deal with issues of retention of rights or liabilities because it can lead to unnecessary complications as explained above.

4.3.3. Holder of a sea transport document

Section 3(2) provides:

‘A person is the holder of a sea transport document if that person is in possession of an original sea transport document, or possession of such a document is held on that person’s behalf, and that person is—

- (a) The person to whom the document was issued;
- (b) the consignee named in the document; or
- (c) a person to whom the document is transferred in accordance with subsection(1).’

In terms of section 3(2), the holder is a person who is in possession of a bill of lading. The holder is also in possession of the bill of lading when someone else holds the bill of lading on his behalf.⁵³ Section 3(2)(a) refers to the shipper. A shipper becomes the holder when the shipper is issued the bill of lading by the carrier. Section 3(2)(b) refers to the situation when

⁵² Hutchison et al op cit note 51 at 366, see also RH Christie *Christie’s Law of Contract in South Africa* 7th ed (2016) 544, the author states ‘the rights acquired by the cessionary are exactly those relinquished by the cedent, no more and no less, so the cessionary is in no better and no worse a position than the cedent’; Christie citing *Van der Heerver v Cloete* (1904) 21 SC 113 115-16; *Biggs v Molefe* 1910 CPD 242; *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) 1199C-1200E; *Mergold Beleggings (Edms) Bpk v Bhamjee* [1983] **1983 1 SA** 663 (T) 289

⁵³ Du Toit op cit note 20 at 158.

the shipper delivers a bill of lading to a named consignee. The named consignee becomes the holder when he takes transfer of the bill of lading.⁵⁴

The STDA does not define the term ‘possession’. Under South African common law, possession is effective when the physical control of a thing (corpore) is accompanied with the required intention (*animus possidendi*).⁵⁵ It is submitted that under section 3(2) of the STDA, a person is therefore regarded as a holder when he has the physical control of a bill of lading and the required intention to possess the goods.

Section 3(2) also deals with the situation where a person holds a sea transport document on behalf of the holder. On the express wording of section 3(2) one can be the ‘holder’ where the sea transport document is in the possession of another person, provided that person is holding the document on your behalf. For instance when a bank holds a sea transport document on behalf of a consignee, the bank would not be considered as the holder under the STDA. The consignee’s possession will be constructive possession.⁵⁶ According to Du Toit, the fact that a person becomes the holder by virtue of another person holding on their behalf is a position that was already well established in the shipping industry, although he does not refer to any authority to support for his view.⁵⁷ He argues that there was no need for the STDA to make reference to that position.⁵⁸ In contrast to the STDA, the UK COGSA 1992 does not make any reference to the fact that one can hold a bill of lading on behalf of another. It is submitted that the general legal position referred to by Du Toit might not be as clear as he makes out.

Treitel and Reynolds state that in certain circumstances it will be clear when an agent holds the bill of lading as the ‘holder’ for his principal. They give the example of a staff member receiving a bill as agent for their employer. In other instances it is much less clear.⁵⁹ They argue that when a forwarding agent receives a bill of lading on behalf of their principal to receive the goods or arrange onward carriage it is the forwarding agent who is the holder for the purposes of UK COGSA 1992. They also argue that when a buyer holds a bill of lading on behalf of the seller, the buyer will have title to sue under the 1992 Act. This is supported by

⁵⁴ Donnelly op cit note 2 at 129.

⁵⁵ *Yeko v Qana* 1973 (4) SA 735 (A) 739; Du Toit cit op note 20 at 103; Surjan op cit note 16 at 40, citing Kleyn & Boraine *Silberberg and Schoeman’s The Law of Property* 3 ed (1992) 118 and Sonnekus and Neels *Sakereg Vonnisbundel* 2ed Vonnisbundel 2ed (1994) 132.

⁵⁶ Donnelly op cit note 2 at 133.

⁵⁷ Du Toit op cit note 20 at 158.

⁵⁸ Du Toit op cit note 18 at 733-34; Du Toit op cit note 20 at 158.

⁵⁹ Treitel op cit note 48 at para 5-023

Aikens et al⁶⁰ who refer to the case of *East West Corporation v DKBS 1912 A/S*⁶¹. The named consignees on certain bills of lading were a bank, and the banks held the bills of lading but only as agents for the sellers. The bills of lading had been endorsed and transferred to the banks and thus under section 2(1) of UK COGSA 1992 the rights of suit had been transferred to the banks. Therefore the court held that those sellers could not sue even though the banks were acting as their agents.

It would seem that if the case had been argued in South Africa under the STDA the seller would have had title to sue as the banks were acting as its agent. There is no reported decision in South Africa on the application of the STDA to a bank holding a bill of lading.⁶² It is however debatable whether section 3(2) has brought certainty on this point. The STDA does not lay down any clear rules relating to banks. Each case would depend on its own facts. The banks in the *East West* case were named as consignees⁶³ but it was common cause that the banks were acting as the agents of the claimants.⁶⁴ Treital and Reynolds states:

‘Where the person receiving the bill acts in a purely ministerial capacity, there can be little doubt that possession of the bill will be regarded as having been transferred to the buyer: this would be so in the common case in which possession is acquired on behalf of a corporate buyer by a member of its staff. It is less clear who is the ‘holder’ of a bill which is transferred to an agent who has been engaged as an independent contractor by the buyer for the purpose of taking delivery of the goods from the ship.’⁶⁵

⁶⁰ R Aikens, R Lord & M Bools *Bills of Lading* (2006) para 8.39.

⁶¹ [2003] QB 1509 at para 44.

⁶² The writer has conducted a review of the South African law reports and unreported decisions in Juta, Butterworths and Saffli and these reports do not contain any cases directly referring to the STDA in the decision. In *Hentiq 1320 (Pty) Ltd v Mediterranean Shipping Company SA Geneva (The Sarah)* SCOSA D 349 is a case where a South African receiver of a cargo of rice who was not named as the consignee on the bill of lading sued the carrier as the holder of the bill of lading. Although the STDA is not referred in the judgment, the receiver must have impliedly relied on section 3(1) and 4(1) of the STDA for having acquired rights of suits. The problem for the receiver was that there had been a chain of two sales from the supplier of the rice to an Islam bank which acted as a finance intermediary. But because of the principles of Islamic banking law, it was not structured as a finance deal involving interest. The bank in fact acted as an intermediary buyer of the goods and there was a second sale from the bank to the plaintiff. The plaintiff sued as the holder of the bill of lading but they could not prove that they had actually suffered loss because they had no legal obligation to pay their sellers for defective goods. The plaintiff had paid the banks out of their moral obligation and as part of their ongoing business relationship with the bank. The court held that the plaintiff had not suffered any legal loss and therefore they did not have title to sue. Under the UK COGSA 1992 the plaintiff could have sued both for their own claim and the loss of the bank. But the case impliedly indicates that the only way one can do that in South Africa is by taking cession of the bank’s claim. The difficulty with taking a cession is that the bank is not the holder of the bill of lading under the STDA.

⁶³ *East West Corporation* supra note 61 at para 8.

⁶⁴ *Ibid* para 16.

⁶⁵ Treitel op cit note 48 at para 5-023.

The fact that a bank is named as consignee might be an important indication that the bank is acting as a principal and not as an agent. Under the STDA it will be important in every case where a bank is involved in the transaction to determine whether the bank acted as a principal rather than as an agent only, as this will determine whether the bank is a holder and is thus entitled to rights and subject to liabilities under the carriage contract.

4.3.3.1. Holder of a lost sea transport document

Section 3(3) provides:

‘For the purposes of subsection (2), a person must be regarded as being in possession or as holding possession of an original sea transport document if-

- (a) the original document has been lost or cannot, for any reason, be produced by that person or on behalf of that person; and
- (b) that person or the agent of that person would be entitled to possession of the document if the original could be produced.’

This is a unique provision that is not found in any other commonwealth legislation.⁶⁶ The provision applies to a situation where a bill of lading is lost and where the bill of lading cannot be produced for some reason.⁶⁷ Despite the goods being lost or untraceable, or delayed in the post, the consignee will be considered as the holder who is in possession of the bill of lading.⁶⁸ Section 3(3) thus provides a solution for common difficulties facing parties in international trade. This section has been used to release the goods to a person entitled to possession of the goods against the fraudulent retention of the original bill of lading by the shipper.⁶⁹

Section 3(3) can however lead to fraud. For instance in a long transaction chain, it is very difficult for the carrier to identify with certainty whether a person is entitled to possession of a document.⁷⁰ Du Toit argues that section 3(3) should have been drafted in a way that it allows ‘the carrier to demand security to indemnify it against any claims when delivering the goods where the bill of lading is lost.’⁷¹

⁶⁶ Girvin op cit note 16 at 345.

⁶⁷ Donnelly op note 2 at 135; Du Toit op cit note 18 at 734.

⁶⁸ Girvin op cit note 16 at 345.

⁶⁹ *ProRoof Steel Merchants (Pty) Ltd v Topsheen Shipping Ltd, Transnet Limited Sino-Express International Logistics Co. Ltd* (unreported; Judgement by Wallis J in the Kwazulu-Natal High Court Durban).

⁷⁰ Du Toit op cit note 18 at 734.

⁷¹ *Ibid.*

4.3.3.2. *Mala fide holder*

Section 8(1) provides that no person will be protected under the STDA in situations where they are acting in bad faith. The section provides:

Persons acting in bad faith

‘Nothing in sections 3, 4, 5, 6 or 7 entitles any person in possession of a sea transport document or any person making delivery of any goods to which a sea transport document relates to any rights or to any defence to or discharge from any obligation if, at the time when that person acquired possession of the document or made that delivery-

- (a) in the case of a person acquiring possession, that person knew or had reasonable grounds for believing that-
 - (i) the goods to which the document related had not been shipped or received for shipment; or
 - (ii) the person from whom possession was acquired had no right to transfer the document or any rights thereunder; or
- (b) in the case of a person making delivery, that person knew or had a reasonable grounds for believing that the person to whom delivery was made had no right to receive delivery.’

According to this section, a person who obtains possession of a sea transport in the circumstances outlined in section 8(1)(a) and (b)⁷² does not acquire rights of suit nor obligations. It is submitted that in applying this section the court must also be satisfied that the person was acting in bad faith. The section heading specifically refers to mala fides (bad faith). For instance, a thief does not acquire rights of suit nor obligations under this provision because he holds a sea document in bad faith. Du Toit argues that section 8(1)(a) has the same effect as section 5(2) of UK COGSA 1992.⁷³ The wording of the section is however different. Section 5(2) provides that a person becomes a lawful holder of a bill of lading when he is in possession of a bill in good faith. The concept of good faith has been described as ‘honest conduct’⁷⁴. It is argued that good faith is negated when the holder obtains a bill of lading by theft or fraud or when a holder obtains a bill of lading from a person who to his knowledge had acquired the

⁷² The meaning of good faith has been discussed in cases such as *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) at 802; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SSA 645 (A) at 652; *Mutual & Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) at 433.

⁷³ Du Toit op cit note 18 at 737 ; Du Toit op cit note 20 at 161.

⁷⁴ *Aegean Sea Traders Corp v Repsol Petrleo S.A. (The Aegean)* [1998] 2 Lloyd’s Rep. 39 at 60.

bill by fraud or theft.⁷⁵ Aikens et al disagree to the fact that good faith is negated on the grounds of a holder's knowledge:

'It is hard to see why a person should be deprived of the benefit of transfer of the rights of suit on the bill because of his knowledge that, for example, the goods were shipped two days later than indicated or that the quantity in the bill is overstated, although such knowledge may have other effects on the holder's rights.'⁷⁶

If that arose in a South African context it falls under s8(1)(a) but if the section is interpreted in such a way that the court is also required to find that the person did not act in good faith this gives the court room to judge each case on its own facts.

Section 8(1)(a)(ii) is in accordance with the South African common law principle 'nemo plus iuris ad alium tranferre potest quam ipse habuit', which means 'no one can transfer more rights to another than himself has.'⁷⁷ This simply means that a person cannot transfer rights that he does not possess.

Section 8(1)(b) provides for a situation where a master delivers the goods despite knowledge or warning of irregularities. The master will not be protected under this provision if the irregularities materialise.⁷⁸

4.3.4. Transfer of liabilities to the holder of a sea transport document

Section 4(2) provides:

'(2) A holder who has transferred a sea transport document must be regarded as having ceded his, her or its rights and as having delegated his, her or its obligations to the new holder except in so far as those rights or obligations arise from a *delectus personae* relating to the holder.'

Section 4(1) provides that the holder of a sea transport document is subject to 'the same obligations [against the carrier] as if the holder were a party to a contract with [the carrier] on the terms of the document'. Section 4(1) refers to the holder acquiring 'the same obligations' which is similar to the reference to 'the same liabilities' under section 1 of the 1855 Act⁷⁹ and

⁷⁵ Treitel op cit note 48 at para 5-025

⁷⁶ Aikens op cit note 60 at para 8.56

⁷⁷ Surjan op cit note 16 at 41 citing Hiemstra and Gonin, *Trilingual Legal Dictionary*, Juta & Co. 1992 at 236.

⁷⁸ Du Toit op cit note 18 at 737; Du Toit op cit note 20 at 161

⁷⁹ Surjan op cit note 16 at 33

section 3(3) of UK COGSA 1992. This is discussed further below as the introduction in the STDA of reference to a *delectus personae* complicates the application of section 4(1).

Under the STDA the transfer of rights of suit and obligations are transferred together. Unlike the UK COGSA 1992 that imposes obligations on a holder as soon as he demands delivery or makes a claim,⁸⁰ the STDA automatically imposes obligations on the holder of a sea transport document.⁸¹ By imposing obligations on a party simply by virtue of being a holder, the STDA places South Africa out of keeping not only with the UK COGSA 1992 but also with other foreign legislation.⁸² Tiberg affirms that the general rule in English law and other jurisdictions is that liabilities are not to be imposed on a party unless such a party enforces his contractual rights.⁸³

Section 4(1) places institutions like banks at a disadvantage. Banks merely hold sea transport documents as security and not to extract benefit from the carriage contract. Under the STDA, banks will be prejudiced because they will automatically be subject to obligations if they are found to be the holder of the bill. Under the UK COGSA 1992, banks do not automatically incur obligations by virtue of being a holder. The banks incur liabilities only when they demand or take delivery of the goods.⁸⁴ The position in the UK COGSA 1992 is different and preferable because it ‘respects the commercial reasoning behind such transactions.’⁸⁵ In other words the bank is usually only holding the bill of lading as security for the finance advanced. It will not want to obtain delivery of the goods in most instances, nor will it want to acquire liabilities under the contract.

Section 4(2) expressly provides that a holder who transfers a sea transport document must be regarded as having delegated his obligations to a new holder ‘except in so far as those rights or obligations arise from a *delectus personae* relating to the holder.’ The term delegation implies that the previous holder would not remain liable after transfer of a sea transport document.⁸⁶ This interpretation conforms with the intention of the drafters of the STDA who did not want the holder to remain liable after transfer of a sea transport document. This can be seen from the memorandum to the Draft Sea Transport Documents Bill which states:

⁸⁰ UK COGSA 1992, s 3(1).

⁸¹ Donnelly op cit note 2 at 132.

⁸² Du Toit op cit note 20 at 159; Du Toit op cit note 18 at 734

⁸³ Tiberg op cit note 36 at 4.

⁸⁴ UK COGSA 1992, s 2(1); P Todd *Bills of Lading and Bankers' Documentary Credits* 4ed (2007) at para 5.40

⁸⁵ Donnelly op cit note 2 at 132.

⁸⁶ *Ibid* at 133.

‘With regard to the transfer of obligations it is clear from the report of the Law Commission, to which we have referred in the earlier part of this memorandum, that the question whether a transfer should release the transferor from his or her obligations is one on which conflicting views exist, [sic] It appeared to us that a reasonable approach is to say that the transferor of rights should be released from his or her obligations unless his or her personal position was a significant factor in accepting him or her as an obligee. This is the relevance of the reference to *delectus personae* in clause 5(2).’⁸⁷

The criticisms raised with section 4(1)(b) can be raised with section 4(2) as well, because the STDA introduces a third concept of delegation. Delegation is an agreement according to which a third party will step into the shoes of the original debtor. In other words the third party as debtor in substitution takes the place of the original debtor.⁸⁸ The creditor and the original debtor must agree on the party to be the debtor in substitution.⁸⁹ Du Toit argues that transfer of obligation should be a statutory transfer rather than using a concept such as delegation.⁹⁰

Under UK COGSA 1992 there is no similar reference to *delectus personae*. Section 4 (2) makes the holder’s right and obligations cedable except where the contract involves an element of *delectus personae*. The term ‘*delectus personae*’ was dealt with in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*⁹¹. Botha, JA held the following:

‘The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent’s obligation *vis-à-vis* the debtor, which remains unaffected by the cession, but to the nature of the debtor’s obligation *vis-à-vis* the cedent, which is the counterpart of the cedent’s right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant’s consent because of the nature of the latter’s obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services,

⁸⁷ *Government Gazette* op cit note 27 at para 30.4.

⁸⁸ Christie op cit note 52 at 535; see also *Van Achterberg v Walters* 1950 (3) SA 734 T at 745.

⁸⁹ Christie op cit note 52 at 546.

⁹⁰ Du Toit op cit note 20 at 160.

⁹¹ [1991] (1) SA 100 (A) citing the classic case of *Eastern Rand Exploration Co. Ltd v AJT Nel and Others* 1903 TS 42.

because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them.⁹²

The test in South Africa law for whether an obligation has some personal nature is that 'it can make reasonable or substantial difference' to the debtor whether the cedent or the cessionary is entitled to enforce it. The test was laid out in *Eastern Rand Exploration Co. Ltd v AJT Nel and Others*⁹³ by Inns CJ as follows:

'Now, speaking generally, the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, by our law, be freely ceded.'⁹⁴

In the shipping context this would mean that, one must determine whether it would make a reasonable and substantial difference to the carrier whether he is expected to perform their obligation to the original contractual party (usually the shipper) or to the subsequent holder of the bill of lading. For instance Surjan says that the carrier's obligation to deliver the goods in the condition received 'more often than not' will not involve *delectus personae*.⁹⁵ Hare also comments briefly on the provision stating that it appears that the intention of the section is 'to prohibit the shipper or subsequent holder whom may be bound particularly to the carrier as the carrier's chosen co-contractor, from resiling from obligations simply by ceding the bill of lading to a third party.'⁹⁶ However he offers no examples of which situation will fall in a *delectus personae*.

Du Toit criticises the use of *delectus persona* in the STDA because it is 'a misguided attempt to achieve what was achieved in section 3(3) of the Carriage of Goods by Sea Act 1924: an original party to the contract remains liable to the carrier. Other parties will only be liable in accordance with section 3(1).'⁹⁷ He argues that a simple statement in the STDA as in the UK COGSA 1924 is sufficient rather than using the concept of *delectus personae*.⁹⁸ In the

⁹² Ibid at 112.

⁹³ 1903 TS 42; the test was confirmed in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* [1991] (1) SA 100 (A)

⁹⁴ Ibid at 53.

⁹⁵ Surjan op cit note 16 at 32.

⁹⁶ Hare op cit note 4 at 671.

⁹⁷ Du Toit op cit note 20 at 159.

⁹⁸ Ibid at 160

memorandum of Sea Transport Documents Bill, the drafters noted that there are conflicting views in England on whether the transferor should be released from its obligation after transfer of the bill of lading. It seems to be a ‘more reasonable’ approach to provide that liabilities cannot be transferred when they are of a delectus persona in character.⁹⁹ Unfortunately the memorandum neither gives an example of a scenario that will clarify the concept of delectus personae further nor does it discuss the example of shipment of dangerous goods discussed in the English law commission report. It is submitted in South African context the shipment of dangerous goods where the shipper would not be released from his liabilities will meet the test of being an obligation personal in nature.

4.3.5. Whether the holder retains rights of suit upon transfer of a sea transport document

The wording of section 4(1)(a) is not explicit as to whether a holder retains rights after transfer of the sea transport document. Section 4(1)(b), however, provides that the holder ‘must be regarded as the cessionary of all rights of action for loss or damage to the goods referred to in the document, whether arising from contract or the ownership of the goods or otherwise.’ Under a cession, a cedent as a holder loses its rights of suit to a subsequent holder.¹⁰⁰ It is submitted that the shipper as the holder of a sea transport document does not retain rights of suit upon transfer of a sea transport document to a subsequent holder.¹⁰¹

With regard to an intermediate holder, there is no provision in the STDA similar to section 2(5) of the UK COGSA 1992. Section 2(5) provides that where rights are transferred by an intermediate holder transferring the bill of lading in terms of section 2(1), the transfer ‘shall extinguish any entitlement to those rights’ which the intermediate holder acquired when the document was previously transferred to him.¹⁰² Although section 4(1)(b) does not make provision for intermediate holders, it is more likely that a South African court will widely interpret section 4(1)(b) to incorporate not only holders but also intermediate holders. It is therefore submitted that section 4(1)(b) has the same effect as section 2(5) of the UK COGSA 1992. Therefore an intermediate holder loses rights of suit upon transfer of a sea transport document to someone else.¹⁰³

⁹⁹ *Government Gazette No. 18541 of 12 December 1997 Draft Sea Transport Documents Bill- Invitation to Comment* at para 30.4

¹⁰⁰ Donnelly op cit note 2 at 130

¹⁰¹ Du Toit op cit note 20 at 159

¹⁰² The English Law Commission and the Scottish Law Commission Report (Law com No.196) (Scot Law Com No. 130) Right of suit in Respect of Carriage of Goods by Sea (2002) para 2.40; Surjan op cit note 16 at 36

¹⁰³ Ibid.

4.3.6. Whether the holder retains liabilities upon transfer of a sea transport document

Section 4 has been worded in a similar manner to the 1855 Act. The wording of 1855 Act has been interpreted in such a way that ‘the shipper remained liable, as an original party to the contract, in addition to the consignee or indorsee.’¹⁰⁴ However section 4(2) of the STDA provides that the holder must be regarded as having delegated his obligations unless in so far as those obligations arise *delectus personae*.¹⁰⁵ This means that a shipper does not retain his liabilities after transfer of a sea transport document except under exceptional circumstances.¹⁰⁶

As for liabilities of an intermediate holder, the STDA is not explicit on this issue but it is however implied that an intermediate holder loses its liabilities because section 4(1)(a) of the STDA has been worded as section 2(1) and section 3(1) of the UK COGSA 1992, which in turn have been worded as section 1 of the 1855 Act.¹⁰⁷ Those sections have been interpreted to mean that an intermediate holder is no longer subject to any liabilities once he has transferred the bill of lading. For example, the question of liability of an intermediate holder was dealt with in *The Berge Sisar*¹⁰⁸. The court, relying on *Smurthwaite v Wilkins*¹⁰⁹, found that an intermediate holder was not held liable for freight and held:

‘In the 1992 Act s 2(1) and s 3(1) adopt the crucial wording of the 1855 Act which formed the basis of *Smurthwaite*'s case and similar cases 'shall have transferred to and vested in him all rights of suit under the contract of carriage as if—[sic] shall become subject to the same liabilities under that contract as if'. Those words having been previously construed as having a certain effect, their repetition in the 1992 Act implies that the draftsman expected them to continue to be construed in the same way. *Smurthwaite*'s case is referred to in the report and is adopted rather than criticised. There is no provision in the 1992 Act which contradicts the intention that that decision should still have force.’¹¹⁰

It is submitted that section 4(1)(a) applies to an intermediate holder and an intermediate holder does not retain its liabilities upon transfer of a sea transport document to a subsequent holder.

¹⁰⁴ Aikens op cit note 60 at para 8.98, citing *The Giannis NK* [1998] A.C. 605, 618-619.

¹⁰⁵ *Goodwin Stable Trust v Duolex (PTY) Ltd and Another* 1998 (4) SA 606 at 617, the term ‘*delectus personae*’ was defined as ‘simply a manifestation of the general principle that the cession should not disadvantage the debtor’.

¹⁰⁶ Donnelly op cit note 2 at 133; Surjan op cit note 16 at 33; Du Toit op cit note 20 at 159.

¹⁰⁷ Surjan op cit note 16 at 35-6.

¹⁰⁸ [2001] 1 Lloyd’s Rep. 663

¹⁰⁹ [1862] 11 CB (NS) 842.

¹¹⁰ *The Berge Sisar* supra note 108 at para 44

Under the STDA, there is no equivalent provision to section 5(2)(c) of UK COGSA 1992. The consignee might nevertheless still be capable of becoming the holder on the plain wording of section 3(1). There is nothing in section 3(1) which says one has to acquire the possession of the document before the bill becomes spent. The section only says that it needs to be transferred to a third party. It may be implied by the use of the term transfer, delivery and endorsement that it has to take place at the time when the bill is still capable of being delivered and endorsed. Aikens says ‘by including section 5(2)(c) in the UK COGSA 1992 it implies that ‘a person otherwise falling within the wording of paragraph (a) or (b)’¹¹¹ cannot become the holder. One must receive possession of the goods at the time when it still give a right to possession of the goods against the carrier.¹¹² This corresponds with the ‘common law rules as to validity of spent bills’.¹¹³ Once the bill of lading becomes spent, it is no longer a valid bill of lading. Since there is no case law on this issue, it is unknown how South African courts will deal with the situation when bill of lading becomes spent and it is transferred thereafter. The commentary on English law provides that it is a principle of English common law that a bill is not valid once it becomes spent which will imply that it cannot be transferred.¹¹⁴ If that same interpretation is adopted in South Africa, section 3(1) of the STDA will also not apply in that scenario. It would be a problem that the STDA has no equivalent provision to section 5(2)(c).

4.4. Conclusion

The primary object of the STDA was to regulate title to sue in South African law. Before the STDA, the position of South African law on the transfer of rights of suit and liabilities was unclear and outdated. The STDA has brought clarity and updated the law on title to sue.¹¹⁵

In examining the provision of the STDA in this chapter, it is noticeable that although the UK COGSA 1992 has inspired the enactment of the STDA, the wording of the STDA substantially differs from the wording of the UK COGSA 1992. The STDA is not clear on whether ship’s delivery orders fall within its ambit of application.¹¹⁶ The UK COGSA 1992 however applies to ship’s delivery orders.¹¹⁷ The STDA excludes the transfer of rights of suit

¹¹¹ Aikens op cit note 60 at para 8.45.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ The English Law Commission op cit note 102 at para 2.42.

¹¹⁵ See discussion under para 4.2 and 4.3.

¹¹⁶ See discussion under par. 4.3.1.

¹¹⁷ UK COGSA 1992, s 1(c).

and liabilities in documents such as sea waybills because they are not transferable.¹¹⁸ The UK COGSA 1992 however provides for the transfer of rights suit in sea waybills.¹¹⁹ The STDA provides for a simultaneous transfer of rights of suit and liabilities.¹²⁰ The UK COGSA 1992 however separates the transfer of rights and liabilities.¹²¹ The STDA is not clear on the question of intermediate holders.¹²² The UK COGSA 1992 is clear on the question of intermediate holders.

The comparison between the STDA and the UK COGSA 1992 indicates that the STDA is unclear on a number of issues, which need to be addressed. These issues have been identified above.

Having said that it is important to acknowledge the efforts made by the South African Parliament to update South African law on title to sue in conformity with developments in the shipping industry. The STDA has settled the question on transfer of rights of suit and imposition of liabilities. But as all pieces of legislation, the STDA has its limitations. The STDA is a good foundation upon which the South African law on title to sue can build on. In the next chapter recommendations will be made on how the STDA can be improved in transferring rights of suit.

¹¹⁸ STDA, s 2(2).

¹¹⁹ UK COGSA 1992, s 2(b).

¹²⁰ STDA, s 4.

¹²¹ UK COGSA 1992, s 3(1).

¹²² See discussion under par. 4.3.6.

Chapter 5: CONCLUSION

5.1. Introduction

Title to sue is an important issue to establish in cargo claims. A party who does not have title to sue is unable to recover damages suffered as result of the carrier's breach of contract. After analysing the statutory mechanism of transfer of rights of suit and liabilities in English and South African law, the two research questions mentioned in chapter one will now be answered below.

5.2. Conclusion of Research questions

Research question 1:

1. Who has title to sue a carrier where there has been damage, loss, misdelivery or short-delivery of the cargo?

In English law, section 2(1) of the UK COGSA 1992 provides that a holder of a bill of lading is entitled to sue the carrier to recover damages for breach of contract. The holder may be either the shipper as an original party to the contract or a consignee as the buyer of the goods. Section 2(4) goes even further in providing that the holder of a bill of lading can sue for the benefit of a person who lacks rights of suit but suffers some sort of financial loss as a result of a breach of contract.

In South African law, section 4(1) of the STDA also provides that the holder of a bill of lading is entitled to sue a carrier for breach of contract. The holder may be either a shipper or a consignee as the buyer of the goods. Unlike the UK COGSA 1992, the STDA has no provision to allow someone to sue another person for the benefit of a third party. In South African law, a person who suffers financial loss but does not have rights of suit against the carrier, can sue the carrier in delict.

Under the STDA, it is clear that the shipper's rights are extinguished after transfer of a bill of lading to a subsequent holder. Although the STDA does not make provision for intermediate holders, it is implied that intermediate holders also lose their rights under the bill of lading after transfer of the bill of lading to the subsequent holder. This position is similar

to the UK COGSA 1992 where it is clear that the rights of both shippers and intermediate holders are extinguished after transfer of the bill of lading.¹

Research question 2:

2. Whom can the carrier sue when he has suffered loss?

The carrier as a party to a carriage contract has rights and duties. The carrier has the right to claim for unpaid freight, damages to the vessel caused by carrying dangerous goods and warehousing charges where the consignee fails to collect the goods at customs. In the normal course of events where there is a breach of contract against the carrier, the carrier can sue either the shipper or the charterer who is the party it entered into a carriage contract with. The problem arises when the carrier decides to sue the holder of a bill of lading, the buyer identified as a consignee on the bill of lading.

In English law, the carrier cannot sue a person by virtue of being the holder of a bill of lading. Section 3(1) provides that a holder of the bill of lading incurs liabilities on condition that the holder either demands or takes delivery of the goods from the carrier. One of the two conditions must be triggered before the carrier can sue the holder of a bill of lading for breach of contract. Therefore it is submitted in English law that the carrier is entitled to sue the holder of a bill for unpaid freight, warehousing charges or damages for carrying dangerous goods only if the holder has exercised his rights under the bill of lading.

In South African law, the STDA does not make provision intermediate holders. But the intention of the drafters was that neither the shipper nor intermediate holders retain liabilities after transfer of the bill of lading to a subsequent holder. This position is different to the UK COGSA 1992, which provides that the shipper retains liabilities but the intermediate holders lose liabilities after transfer of the bill of lading to a subsequent holder. However under the STDA in certain cases the liabilities will not be transferred when they are of nature of *delectus personae*. This position is different to the UK COGSA 1992 which provides that the shipper retains liabilities until those liabilities are transferred when a subsequent holder either makes a claim or demands delivery of the goods.

In English law the intermediate holder loses liabilities after transfer of the bill of lading to a subsequent holder. An intermediate holder will not automatically acquire liabilities if

¹ UK COGSA 1992, s 2(1) & 2(5)

they did not demand delivery of the goods or makes a claim against the carrier. And if they do acquire liabilities they will not lose them unless they are transferred to a subsequent holder under section 3(3). The rationale behind this section was to protect intermediate holders like some banks which merely hold bills of lading as security.²

In South African law where the bank is not an intermediate holder of the bill and has not transferred it in accordance with section 3(1) to a subsequent holder the bank will automatically be subject to liabilities. The carrier is entitled to sue a bank when it is the holder of the bill of lading. Under the STDA the carrier can sue the holder of the bill of lading irrespective of whether the holder demands or takes from the carrier. It is therefore submitted that the UK COGSA 1992 approach is preferable.

5.3. Recommendations

Earlier commentaries on the STDA have recommended amendments to deal with non-negotiable documents.³ This dissertation however by analysing the provisions of the STDA and the UK COGSA 1992 is to suggest that further amendments are actually necessary to fill in the lacunae found the STDA in relation to transfer of rights suit and liabilities under a negotiable bill of lading. The two most serious lacunae identified in the analysis are:

- The STDA should not automatically impose obligations to a person by virtue of being the holder because certain institutions like banks merely hold the bill of lading as security for many advanced. The STDA should protect institutions like that because not doing so may lead those institutions to be more reluctant to tender funds to holders for the purchase of cargo.
- The STDA should provide a provision to holders of spent bills of lading. The STDA should allow the holder of spent bills of lading to acquire rights of suits provided a person becomes the holder before the bills become spent.

5.4. Conclusion

² The English Law Commission and the Scottish Law Commission Report (Law com No.196) (Scot Law Com No. 130) *Right of suit in Respect of Carriage of Goods by Sea* (1991) para 3.15-23.

³ Donnelly op cit note 2 at 153

The STDA has been adopted to update South African law on transfer of rights of suit and liabilities in cargo claims. The analysis of the UK COGSA 1992 and STDA have shown however that the STDA is in need of amendments to keep in line with legislation of other jurisdictions, especially with the UK COGSA 1992. The analysis of the wording of the UK COGSA 1992 and case law has demonstrated that there is no major issue which the UK COGSA 1992 does not deal with. Therefore it is not understandable why the drafters of the STDA have preferred to depart from the wording of the UK COGSA 1992. There is no such an explanation in the memorandum of the Sea Transport Document Bill.⁴

It is therefore suggested that although English cases are not binding on South African law, they will be of persuasive value in the event the STDA is amended and worded as the UK COGSA 1992. If there is no immediate amendment of the provisions of the STDA, some of the issues dealt with in chapter 3 in *The Ythan*⁵, *The Aegean Sea*⁶, *The Berge Sisar*⁷ and other cases would not be resolved under the STDA because the Act does not contain provisions dealing with these issues. This will leave South African shippers and consignees at a disadvantage position against other shippers and consignees.

There is a need to bring the STDA in line with other major shipping countries because uniformity and certainty are fundamental in international trade⁸ The STDA should therefore be amended and modelled in the same manner as the UK COGSA 1992 to bring South Africa in line with other major shipping countries.

⁴ *Government Gazette No. 18541 of 12 December 1997 Draft Sea Transport Documents Bill- Invitation to Comment*

⁵ (2006) 1 Lloyd's Rep. 457

⁶ (1998) 2 Lloyd's Rep. 39

⁷ [2001] 1 Lloyd's Rep. 663

⁸ P Myburgh 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?' (2000) 31 *Victoria University of Wellington Law Review* 355-82.

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