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

DUSTY-LEE DONNELLY

Submitted in fulfilment of the requirements for the degree of Masters of Law (Maritime Law)

College of Law and Management Studies

School of Law

University of KwaZulu-Natal (Durban)

2013

DECLARATION OF ORIGINALITY

DECLARATION

I, Dusty-Lee Donnelly, declare that:

(i) The research reported in this dissertation, except where otherwise indicated, is my original work.

(ii) This dissertation has not been submitted for any degree or examination at any other university.

(iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

(iv) This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

(a) their words have been re-written but the general information attributed to them has been referenced;

(b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

(v) Where I have reproduced a publication of which I am author, co-author or editor, I have indicated in detail which part of the publication was actually written by myself alone and have fully referenced such publications.

(vi) This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the dissertation and in the References sections.

_____

Dusty-Lee Donnelly

Date: _____

DEDICATION

This dissertation is dedicted to Martin, whose unconditional love and support has made all things possible.

ACKNOWLEDGEMENTS

It has been a privilege to work under the guidance of my supervisor, The Hon. Justice M.J.D. Wallis. I am very grateful for his guidance, his willingness to share his wealth of knowledge, and his patience.

I would also like to thank Patrick Corbin, director of the International Chamber of Commerce South Africa, for his ready willingness to discuss the problem. His experience and insights into the practical aspects of the shipping industry provided a timely course correction for some of my thinking.

ABSTRACT

The Sea Transport Documents Act, 65 of 2000, was a remedial statute intended to provide a solution to the problem of title to sue under the contract of carriage evidenced by sea transport documents.

At common law a contract of carriage is not transferable. The contract of carriage is ordinarily concluded between the shipper and the carrier. The consignee lacks title to sue yet in terms of international sale contracts on C.I.F and F.O.B terms the consignee would be the person who stood to suffer the loss as risk in the goods passes from seller to buyer when the goods are loaded on board at the port of shipment.

The Act provides a mechanism to transfer the contractual rights and liabilities with the transfer of the sea transport document. However section 2(2) restricts the application of the relevant provisions to documents that are 'transferable or negotiable'.

By custom of merchants bills of lading made out 'to order', and bearer bills of lading, are transferable and negotiable. However, straight bills of lading and sea waybills are made out to a named consignee only. These modern forms of sea transport document are increasingly popular and offer many advantages to traders and ocean carriers. Yet they are both regarded as non-negotiable.

The dissertation examines the interpretation of the terms 'transferable' and 'negotiable' as they came to be applied to both negotiable instruments and bills of lading, and considers current academic and judicial opinion on the meaning of these terms. The provisions of the Sea Transport Documents Act are analysed, and compared to the remedies provided in the Carriage of Goods by Sea Act, 1992 (United Kingdom), similar legislation in other commonwealth countries and the law in the United States and Europe. Finally alternative means of establishing title to sue, including the stipulatio alteri, are considered.

CONTENTS

In order to know what [the law] is, we must know what it has been and what it tends to become.

Oliver Wendell Holmes Jr., The Common Law, 1 (1938)

CHAPTER ONE: INTRODUCTION

1.1 *Background and Context to the Problem of Title to Sue*

When goods are lost or damaged at sea whilst being conveyed under a contract of carriage, the party or parties with an interest in the cargo, or their marine cargo underwriters, will wish to recover the loss from the carrier. When such parties consult an attorney for legal advice on the claim the initial enquiries may justifiably be upon the circumstances giving rise to the loss of or damage to the goods, and the carrier's potential liability. Yet an equally essential, but easy to overlook, requirement of any successful cargo claim is the establishment by the claimant(s) of title to sue. Such are the intricacies of the enquiry into title to sue in relation to maritime claims that the issue has been described by Professor William Tetley as at times taking on 'nightmare proportions'.[1]

If legal proceedings are commenced in the name of the wrong party that could decisively determine the outcome of the matter. This consideration takes on heightened significance in admiralty matters where considerably shorter prescription periods usually apply to cargo claims,[2] and where decisions about which forum to select for the legal action will involve advance consideration of several, complex factors, such as the relationship between choice of law and jurisdiction clauses, compulsory statutory provisions, and conflict of laws issues.

There are two legal principles that give rise to this title to sue problem: the principle that only the party to the contract can sue upon it (also termed the doctrine of privity of contract), and the requirement that the plaintiff must have suffered some loss in order to claim damages. A plaintiff cannot claim for a loss which was felt by another.

The problem of title to sue therefore becomes particularly acute when one party has the contractual rights to sue, and another party has suffered the loss arising from non-delivery

[1] Tetley W 'Who May Claim or Sue for Cargo Loss or Damage? (part 1)' (1986) 17(2) *J. Mar. L. & Com.*153

[2] For example, there is a one year time bar under art.III rule 6 of the International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), 1924, and the Hague Rules as amended by the Brussels Protocoal (Hague-Visby Rules) 1968. Carriers can include even shorter contractual time bars outside of the 'tackle to tackle' limits of the Conventions.

of or damage to the goods. In such circumstances the claim for damages ‗disappears into some legal black hole'.[3]

The party with title to sue is ordinarily the shipper. However where the shipper is also the seller under an international sale contract the party that would usually stand to suffer the loss is the buyer, being either the consignee or a subsequent indorsee receiving the goods under the bill of lading. Ordinarily the risk for the loss or damage of the goods will have passed to the buyer from the time when the goods were loaded on board the vessel, and, depending on the facts, ownership will be intended to transfer from seller to buyer. The shipper will thus have contractual rights of suit, but will stand to suffer no loss if the goods are not actually delivered, or are damaged during the ocean voyage. These foundational principles in relation to title to sue are discussed in depth in chapter 2.

Recognising this problem the English and Scottish Law Commissions recommended reform[4] in the shape of the Carriage of Goods by Sea Act 1992[5] (‗UK COGSA 1992'), ‗for the benefit of cargo and ship alike.'[6]

> ‗For cargo interests, because it is unsatisfactory that the only person who has suffered loss (the consignee) cannot sue, even though the contract was made for his benefit, whereas the only person who has a contractual right of action (the shipper) may have no incentive to sue where he has suffered no loss, and may in any event be unable to recover substantial damages. For shipowners, because any actions brought against them will be on the terms of the contract of carriage. Such liability is clearly preferable to the potentially greater and more indeterminate liability in tort.'[7]

1.2 *Nature and Functions of Sea Transport Documents*

Historically the problem of title to sue arose in relation to contracts of carriage evidenced by ‗negotiable' bills of lading – that is bills of lading made out ‗to order' and capable of being transferred by endorsement and delivery, or as bearer bills by delivery alone. Much has been

[3] Macmillan C ‗The end of the exception in *Dunlop v Lambert*' (Case and Comment) 2001 *LMCLQ* 338.
[4] The Bills of Lading Act (1855) 18 & 19 Vict. c.111 had attempted to address the problem by statute with only partial success. It did not cover sea waybills although it may have applied to straight bills of lading.
[5] c.50
[6] The English Law Commission and the Scottish Law Commission Report (Law Com No. 196) (Scot Law Com No. 130) *Rights of Suit In Respect of Carriage of Goods by Sea* (1991) 42 at para 5.11
[7] Ibid.

written about the issue of title to sue under contracts of carriage evidenced by negotiable bills of lading, and it has been addressed, largely satisfactorily by legislation in South Africa, under the Sea Transport Documents Act 65 of 2000 (_STDA').

This thesis examines the problem of establishing title to sue in South African law under contracts of carriage evidenced by alternative forms of sea transport document that are being increasingly used in sea trades: the sea waybill and the straight bill of lading.

Sea waybills are a relatively modern phenomenon in ocean transportation, and their development is a product of the accelerated pace of developments in ship technology and international trading patterns in the twentieth century. These advances are underpinned by the rapid move to containerisation[8] in the second part of the century, which brought with it exponentially larger vessels, faster transit and cargo handling times, and seamless integration of sea, land and air transportation, and provided opportunities for the use of a fully paperless system of transport documentation.

The straight bill of lading appears to have a much older pedigree. Although regarded as unusual in the early twentieth century, it did exist and may even have been in use as early as the late eighteenth century.[9] Yet little has been written about either the functions or the legal status of the straight bill of lading, and it has been aptly described as now occupying something of _a legal no-mans' land'.[10]

The named consignee under both the sea waybill and the straight bill of lading has no right to transfer the document to a third party. This feature has led to both documents being described by academics and jurists alike as _non-negotiable'[11] in contrast to the classic _order' bill of lading, and _bearer' bill of lading forms, which are termed _negotiable'.

[8] Girvin S.D. _Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' (2003) 119 *SALJ* 317 at 319
[9] See chapter 4
[10] Aikens, Bools & Lord *Bills of Lading* para 2.48
[11] Ibid para 2.20. Also see Schoenbaum T.J. *Admiralty and Maritime Law* 4 ed at 551, Girvin op cit note 8 at 322, and Tetley W _Waybills: The Modern Contract of Carriage of Goods by Sea' (1983) 14 *J. Mar. L. & Com.* 465 at 467 fn 7.

1.3 *Legislative Reform*

Sir Anthony Lloyd, who sat on the International Sub-Committee of the Comité Maritime International (‗CMI') responsible for drafting the CMI Uniform Rules for Sea Waybills (1990), extolled the advantages for trade presented by widespread use of sea waybills, but lamented their ‗grave disadvantage' that ‗[n]obody can be sure whether the consignee can sue or be sued on the contract of carriage'.[12]

The same parlous position prevailed in relation to all bills of lading under English common law. The transferee of the bill of lading (whether a named consignee or a subsequent indorsee) acquired no rights or liabilities. [13] That remained the position that prevailed in England in relation to sea waybills prior to the enactment of UK COGSA 1992, although similar problems did not arise in the United States of America and continental Europe.

That position has now been remedied in England by UK COGSA 1992, which makes specific and separate provision for the transfer of rights of suit, and liabilities under contracts of carriage evidenced by negotiable bills of lading, sea waybills and straight bills of lading (which are dealt with as one species of waybill), and ship's delivery orders.[14]

The STDA whilst enacted with the similar intent of remedying the title to sue problem in South Africa, has not made express provision in respect of sea waybills and straight bills of lading.

1.4 *Central Proposition of the Thesis and Objectives*

The central proposition advanced is that there is a lacuna in the STDA in that the provisions for the transfer of rights (and liabilities) under contracts of carriage by sea are expressly restricted by section 2(2) of the Act to sea transport documents that are ‗negotiable or transferable', a description which has not traditionally been applied to either sea waybills or straight bills of lading.

---

[12] Lloyd A ‗The Bill of Lading: Do We Really Need It?' (6th Annual lecture of the Institute of Maritime Law of the University of Southampton) 1989 *LMCLQ* 47 at 50

[13] Treitel G.H. ‗Bills of Lading: Liabilities of Transferee. The Berge Sisar' (Case & Comment) 2001 *LMCLQ* 344

[14] See chapter 5 for a full discussion.

This is an issue on which there is no academic[15] or practitioner[16] commentary, despite vigorous criticism of the STDA in other respects. [17] There is also no reported South African case law.[18] The importance of the issue, the existence of the lacuna, and the factors to be considered in a proper interpretation of section 2(2) of the statute will be examined in depth in chapters four and five.

The first objective is to investigate a proposal that an interpretation must be adopted that is mindful of emerging merchant practice, and of a wider interpretation of the terms _transferable' and _negotiable' than is admitted under English law. The existence of merchant practice and wider interpretations will be examined to determine if it is possible to recognise straight bills of lading at least, and possibly sea waybills, as _transferable', and thus bring the regulation of these important sea transport documents within the scope of the STDA.

However since that proposition offers a tenuous solution, at best, in relation to sea waybills and is also dependent on the outcome of litigation in some future case, alternative mechanisms for establishing title to sue are also considered. In this regard the second objective is to determine whether title to sue can be established by the consignee of both straight bills of lading and sea waybills by developing the South African common law

---

[15] Surjan M *Title to Sue at the Dawning of the Sea Transport Documents Act 65 of 2000, A Comparative Analysis* (unpublished dissertation in partial fulfilment of the requirements of the L.L.M, University of Cape Town, April 2002) (Available at http://webdav.uct.ac.za/depts/shiplaw/theses/surjan.pdf) (Accessed on 4 October 2013). The author states (at pg 30) that: _The transfer of rights provisions under the STDA therefore find no application in the case of sea waybills and nonnegotiable receipts which are by definition not transferable.' Holloway, writing before the STDA was enacted, does not consider section 2(2) and the position of straight bills of lading and sea waybills. *Ownership, Risk and Title to Sue With Respect to the Carriage of Goods by Sea – The Perspective of a South African Attorney Acting on Behalf of Cargo Interests* (unpublished dissertation in fulfilment of the requirements of Postgraduate Diploma in Law, University of Cape Town, 1999) (Available at http://web.uct.ac.za/depts/shiplaw/holloway.htm) (Accessed on 07.12.2012)

[16] Greenhalgh R and Robinson A _Commentary on recent developments in South Africa' *The International Journal of Shipping Law* Part 4 (1997), 233 at 234 states simply that the (then named) Bills of Lading bill would give title to sue to the holders of bills of lading. Girvin op cit note 8 refers to other contemporary commentaries which it has not been possible to locate.

[17] Girvin op cit note 8. Also see: Du Toit S.F. _Comments on the Sea Transport Documents Act, 65 of 2000' 2003 *JSAfrL* 731, Du Toit S.F. *The Bill of Lading in South African Law* (LL D thesis RAU 2000) (Available at https://ujdigispace.uj.ac.za/handle/10210/6358) (Accessed on 25.10.2013) at 156-161; Girvin S.D. _Third party rights under shipping contracts' 1997 *SA Merc LJ* 97 at 111-112.

[18] It is unknown whether any matters involving s2(2) of the STDA have been the subject of unreported judgments. There is a dearth of case authority on sea waybills in general. *Cape and Transvaal Printers Ltd v Rennies Coasters (Pty) Ltd* 1980 (2) SA 982 (D) is the only case in the South African law reports that deals with a sea waybill rather than a bill of lading involved a document described as a _non-negotiable coastal transit bill', and it does not concern issues of title to sue. The case does illustrate the difficulties that arise reconciling terms of the contract with the Hague Rules when incorporated by reference.

doctrine of *stipulatio alteri,* without recourse to some of the complex doctrines that evolved under English law to ameliorate the title to sue problem, such as permitting the shipper to sue for loss suffered by the consignee,[19] or implying the existence of a contract between shipowner and consignee where delivery of the goods is demanded.[20] Contractual mechanisms existing in the law of agency, and cession, and by way of the voluntary incorporation into the contract of the CMI Rules for Sea Waybills, and the alternative of an action in delict, will also be considered.

1.5 *The Imperatives of Certainty and Uniformity in the Law Pertaining to Transfer of Rights of Suit under Sea Transport Documents*

The guiding principle behind the approach adopted in this thesis is that considerations of certainty and common sense underpin mercantile law, and that those considerations apply with some force to the problem to be considered in this thesis. It was famously held that:

> 'The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.'[21]

> 'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.'[22]

Much more recently the same approach was authoritatively re-affirmed in *The Starsin*[23] in much the same terms.

A second guiding principle adopted in this thesis is that there should be no slavish adherence to English law, since it is neither directly applicable to the interpretation of the

[19] *Dunlop v Lambert* (1839) 6 Cl. & Fin. 600, affirmed by not applied in *The Albazero* [1976] 2 Lloyd's Rep. 467 at 474.
[20] *Brandt v Liverpool* [1924] 1 K.B. 575 (Court of Appeal), which has been curtailed in later decisions. See: *The Aramis* [1989] 1 Lloyd's Rep 213 and *Mitsui & Co Ltd v Novorossiysk Shipping Co (*The Gudermes) [1993] 1 Lloyd's Rep 311
[21] *Pelly* v *Royal Exchange Assurance Co.* (1757) 1 Burrow 341at 347; 97 ER 342 at 346 and *Hamilton* v *Mendes* (1761) 2 Burrow 1198 at 1214; 97 ER 787 at 795 per Lord Mansfield
[22] *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153 per Lord Mansfield
[23] *Homburg Houtimport BV and Others v Agrosin Private Limited and Another* [2003] 1 Lloyd's Rep. 571 para [13] per Lord Bingham

STDA, but moreover that English law, and more particularly English maritime law, must be viewed in its historical context, and against the development of similar concepts within the mercantile laws of other nations. This principle is examined further in chapter 5 with reference to judicial authorities on the approach to be taken to the interpretation of statutes.

1.6 *Scope of the Thesis*

Lorenzon states that the ‗purpose of the entire commercial shipping industry and its regulatory and contractual framework is to make *international trade* possible, safe and efficient'.[24] However international trade is a wide-ranging area and the thesis will focus only on issues affecting carriage to or from South Africa under straight bills of lading and sea waybills. These are used predominantly in the containerised trades, conducted by liner shipping companies.[25]

The thesis is further limited to an analysis of shipments where there is no intention to sell the goods at sea. There is thus no consideration of the question of title to sue in respect of contracts for the sale of bulk commodities where a negotiable bill of lading remains the usual document, because it permits multiple sales and can be used as collateral security with banks.[26] Whilst this is a common, if not defining, feature of sales in the commodity trades it is unusual for containerised shipments to be on-sold at sea[27] and thus there is no need for the parties to use a negotiable transport document capable of transferring title to the goods multiple times.

The extent to which sea waybills and straight bills of lading are used by South African traders in preference to negotiable bills of lading, and the contexts in which they are used, has not been determined by any existing empirical study. It is beyond the scope of this thesis to undertake a comprehensive survey of shipping practices. Undoubtedly such documents are in use and given international trends that use would be expected to continue rising.[28]

---

[24] Lorenzon *CIF and FOB Contracts* 5 ed 1-001
[25] Kozolchyk B ‗Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' (1992) 23 *J. Mar. L. & Com.* 161 at 196–198
[26] Murray, Holloway and Timson-Hunt *Schmitthoff's Export Trade* at 310
[27] Kozolchyk op cit note 25 discussing the North Atlantic and Baltic trades.
[28] Discussions with the freight departments of major shipping lines, maritime lawyers and the International Chamber of Commerce, Johannesburg.

The examination of the law will also focus on the CIF or FOB trade terms. These are the most widely used Inco terms and have been described as the _mainstays of international trade'.[29]

1.7 *Terminology used in the Thesis*

Reference will be made throughout this thesis to the terms straight bill of lading, shipper, consignor and consignee.

The term straight bill of lading is used to describe a bill of lading made out to a named consignee only, and sometimes referred to as _straight consigned' bills of lading.[30] The term originated in the United States of America in the *Uniform Bills of Lading Act*, 1909[31] and the *Federal Bills of Lading Act* (*The Pomerene Act*), 1916.[32] The term has been replaced in that legislation[33] by the term non-negotiable. Straight bills of lading are also typically stamped non-negotiable, or stated to be _non-negotiable if not to order'.[34] Because reference to the straight bill of lading in commerce and academic texts[35] remains commonplace, in this thesis the term straight bill of lading is adopted to avoid pre-judging the enquiry as to whether such bills of lading are _negotiable or transferable' for the purposes of the STDA.

Aikens et al use the term consignor to refer to the _person who has possession of the goods prior to shipment or delivery to the carrier or his agents'.[36] The consignor is _usually' the shipper but need not be the same person.[37] The shipper is thus usually the 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' but does not always fulfil all of these roles.[38]

---

[29] Reynolds F.M.B. _The Bills of Lading Act: Reform Nearer?' (1991) 107 *LQR*
[30] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 at [12] per Rix L.J. Upheld on appeal [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462
[31] The Act has been incorporated within the Uniform Commercial Code (UCC) art 7.
[32] The Act has now been incorporated within The Code of Laws of the United States of America (USC) under Title 49.
[33] 49 USC §80103 (b) (1994); UCC s7-104
[34] Treitel & Reynolds *Carver on Bills of Lading* at 1-014
[35] Treitel G.H. _The Legal Status of Straight Bills of Lading' (2003) 119 *LQR* 608
[36] Aikens, Bools & Lord *Bills of Lading,* at *vii*
[37] Ibid.
[38] Ibid.

The goods must be received at their destination port. Aikens etal define the receiver as the party _to whom the cargo is delivered'. He _may also be the consignee, and holder and indorsee of the bill of lading'. The consignee is 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'.[39] The terms will be used in the same way in this thesis.

Where necessary reference is made to the concepts of ownership, possession and risk, on the assumption that South African law applies. In cases of quotations the authors' words are used, but otherwise the South African terms are used in preference to the English law terms of property in the goods or title, which are employed in variable formulations that have no clear equivalent in South African law. For example reference in English law to the general property in the goods could mean ownership, but it could also refer to equitable title. Special property in the goods can refer to possession or the rights of various types of possessor, such as those of a pledgee. Title can mean ownership, or some more limited right in the goods, such as _possessory title'.

1.8 *Reference to English Law*

This thesis has to do with questions arising under bills of lading and sea waybills. Wherever possible reference has been made to relevant South African judgments. However often principles are explained on the basis of reference to English judgments and the textbooks written by English academics and practitioners.

In this regard it should be noted that the South African law in relation to bills of lading has (thus far) been capable of harmony with the established principles of English maritime law, and that English maritime law is _widely accessible' and frequently referred to in a wide variety of admiralty suits.[40]

Furthermore the provisions of UK COGSA 1992 are an appropriate counterpoint for a comparative analysis of the STDA, as the provisions of the English statute were adopted after

[39] Ibid.
[40] *mv* Pasquale Della Gatta*: mv Filippo Lembo Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA), criticising use of expert evidence to prove English maritime law as foreign law.

a very thorough investigation into the issue by the English and Scottish law commissions. Further the provisions of the English statute have been adopted in identical or materially similar statutes in a number of other important maritime jurisdictions who have addressed the problem of title to sue in legislation.[41]

1.9 *Presentation of Key Research Questions*

1.9.1 *Key Research Question 1*:

The thesis will commence with an examination of the foundational principles of title to sue in chapter two, in order to determine if a plaintiff claiming loss or damage to cargo carried under a sea waybill or straight bill of lading must establish that it is both the party to the contract of carriage and the party that suffered the loss or damage.

1.9.2 *Key Research Question 2:*

In chapter three the definition and functions of both the sea waybill and straight bill of lading will be set out, contrasting them where relevant to the classic _order' bill of lading, in order to determine whether there are any significant differences between the documents which might warrant their being treated differently under the STDA.

1.9.3 *Key Research Question 3:*

The analysis in chapter four will be focused on the central question of determining the meaning of the terms _transferable' and _negotiable' used in section 2(2) of the STDA. The history and development of the concepts of negotiability and transferability as applied to negotiable instruments and bills of lading will be traced, and then current judicial and academic opinion will be considered.

[41] Fully set out in chapter 5

1.9.4 *Key Research Question 4:*

In chapter five the relevant provisions of the STDA will be analysed and compared to the provisions of UK COGSA 1992 and the law of other selected jurisdictions, to examine the main differences and to determine whether there is a lacuna in the STDA in relation to straight bills of lading and sea waybills.

1.9.5 *Key Research Question 5:*

Lastly, in chapter 6, *stipulatio alteri* is examined to determine if it provides an alternative mechanism for establishing title to sue. A brief examination of other alternatives based in agency, cession, contract and delict will also be undertaken.

Finally conclusions and recommendations, if any, will be made on the basis of this analysis.

1.10 *Conclusion*

This thesis will suggest that to most effectively serve the international trading community the mechanism permitting the consignee a right of action on the carriage contract should be both simple and certain. Furthermore, a mechanism to permit transfer of rights of suit would avoid a multiplicity of law suits and would ensure that the carrier‘s liability is adjudged in accordance with the terms (and limitations) imposed by the carriage contract, rather than in accordance with principles of delict.

Against this background it is suggested that the solution should lie in an easily understood and easily applied statutory provision. The recommendations of the English and Scottish Law Commissions‘ Report on Rights of Suit expressly recognised the benefits of

retaining the ‗statutory assignment model' on the basis that it is ‗familiar to international traders' and reform should be ‗evolutionary', retaining what had worked well in the past.[42]

Changes in trade practices over the last three decades have brought about recognition of the use of all forms of sea transport document although there remains much that is unclear. If the STDA is not capable of including such documents upon a proper interpretation of s2(2) then the STDA may need to be amended, or some other legal mechanism must be found to permit of an action by consignees under such documents. It is only if the law permits a recovery against the carrier by the party that has suffered the loss that the imperatives of certainty and business-like common sense, so important to the trading community, can be met.

[42] Law Commission report No. 196, Scot. Law Com. 130 para 2.34(iv). The report is referred to in *Borealis A.B. v Stargas Ltd and Others (The 'Berge Sisar')* [2001] 1 Lloyd's Rep. 663 at [27–28] per Lord Hobhouse, specifically to ‗identify the mischief to which the Act is directed and, in the case of ambiguity, to help in resolving any such ambiguity'.

CHAPTER TWO: THE FOUNDATIONAL PRINCIPLES OF TITLE TO SUE

2.1 *Introduction*

It was stated in the introduction that there are two legal principles that give rise to the title to sue problem: the principle that only a party to the contract can sue upon it (also termed the doctrine of privity of contract), and the requirement that the plaintiff must have suffered some loss in order to claim damages.[1]

These principles apply in English law,[2] American law[3] and, leaving aside for the moment a *stipulatio alteri*, in South African law.[4] Thus for the South African consignee under a sea waybill or straight bill of lading, absent the existence of factors indicating that they are an original party to the contract of carriage, the legal effect of the doctrine of privity of contract is that the consignee is prevented from bringing an action upon the contract of carriage[5] unless some legal mechanism for transferring the contractual rights of the shipper is found.

In the following sub-section the preliminary question of determining which party is the original party to the contract is considered in some depth in order to demonstrate the difficulty that can attend the enquiry, if there is no clear statutory mechanism in place to determine where title to sue lies.

2.2 *Identifying the Party to the Contract of Carriage*

Both bills of lading and sea waybills name a shipper and a consignee but do not expressly record which of those parties contracted with the carrier; an _astonishing' situation giving rise

[1] Tetley W _Waybills: The Modern Contract of Carriage of Goods by Sea' (1983) 14 *J Mar. L. & Com*. 465 at 497.
[2] Under English law nominal damages can always be claimed for breach of contract, but a claim for substantial damages rests upon proving that a loss has been suffered: *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] 3 WLR 946
[3] Tetley W _Who May Claim or Sue for Cargo Loss or Damage - Part I' *(1986) 17 J. Mar. L. & Com.* 153 at 154.
[4] *Thompson v Scholtz* 1999 (1) SA 232 (SCA). Also see *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A).
[5] Reynolds F.M.B. _The Carriage of Goods by Sea Act 1992' 1993 *LMCLQ* 436 at 437

to ‗considerable scope for arguments of fact and law'.[6] Conversely it is not uncommon to find a term in bills of lading stating that the contract is between the carrier and the ‗Merchant', who is defined to include the shipper, consignee and agent of the goods. In *Butler v Banimar Shipping Co SA*[7] a claim was advanced by the cessionary of the party named as consignee in the bill of lading (and apparently also the owner of the goods) and thus alleged to be the ‗Merchant' with whom the contract was concluded. Whether such a term is effective when the party that actually concluded the contract had no authority to do so on behalf of the said persons must be open to considerable doubt, but did not arise for consideration in that case which concerned only an application for an attachment to found jurisdiction.

An easy solution to the central concern raised by this thesis would be to regard the original party to the contract of carriage when the sea transport document is made out to a named consignee, as being the consignee rather than the shipper. In the very early shipping cases there are several decisions which appear to indicate a presumption to the effect that the shipper acted as agent for the consignee,[8] although some cases appear to relate this to the question of whether ownership of the goods vested in the buyer on shipment.[9] That would still appear to be an important consideration for if ownership has passed before or on shipment, it may be inferred that the shipper acted as agent of the consignee.[10] However the old English law was unsettled.[11] so that it becomes next to impossible to reconcile the conflicting case law.

The modern approach is to seek the intention of the parties to the contract, and Aikens suggests that ‗the assumption implicit in the modern approach [is] that the consignor intends to contract with the carrier himself'[12] but against the warning that it is ‗impossible to generalise'.[13] In each case the facts about the contract of sale and the contract of carriage must be ascertained and carefully analysed. Inferences cannot be drawn from the sea

[6] Aikens, Bools & Lord *Bills of Lading* para 7.58
[7] 1978 (4) SA 753 (SE)
[8] *The Albazero* [1976] 2 Lloyds Rep. 463 at 471 – 472
[9] *Sargent v Morris* (1820) 106 E.R. 665 per Abbott CJ, where the English consignee under a bill of lading was non-suited because property at the time of shipment vested in the shipper, and it was found that the contract of carriage was made for the shipper's risk and benefit.
[10] *Texas Instruments v Nason* [1991] 1 Lloyd's Rep. 146 at 149, although it is not clear why the court decided the point on the basis of agency since it was a road freight contract governed by the CMR and the consignee had an unqualified right to sue under article 13(1) of the Convention.
[11] Reynolds F.M.B. ‗The Bills of Lading Act: Nearer Reform?' (1991) 107 *LQR*
[12] Aikens, Bools & Lord op cit note 6 para 7.73 & fn 172
[13] Ibid para 7.78

transport document alone, but only if justified upon a consideration of the underlying contractual relationships,[14] namely the terms of the international sale contract, to determine the obligations imposed upon the parties to that contract, and secondly the terms of the carriage contract itself. The formation of the contract of carriage will have occurred prior to the issue of the transport document. In the context of the liner shipping industry the formation of the contract is usually represented by the booking note,[15] but there can be a considerably more complex chain of contracts involving freight forwarders, and sometimes this raises the question of whether the booking note as issued constitutes a valid and binding contract of carriage.[16]

As a starting point for the enquiry one may adopt the view of the authors of *Bills of Lading* that in the normal course of events, where the consignor delivers goods to a shipping line and receives a bill of lading naming him as shipper, then _it may legitimately be inferred, in the absence of countervailing factors' that the shipper is the original contracting party to the contract of carriage with the carrier.[17]

The form of transport document issued may be an important indicator. In relation to _non-negotiable transport documents ... in the waybill system' the ICC publication on Inco terms 2010 states that the shipper _and the shipper alone' enters into the contract of carriage with the carrier.[18] This assertion is made on the basis that the document does not need to be presented to obtain delivery of the goods, and the shipper retains the right to vary delivery instructions.[19] Tetley also states that sea waybills (which he regards as straight bills of lading) constitute a contract of carriage with the shipper.[20]

However, it is dangerous to generalise without considering the terms of the contract of sale. If the sale was on CIF terms this would strengthen the conclusion that the party

[14] *Cho Yang Shipping Co Ltd v Coral* (UK) Ltd [1997] 2 Lloyd's Rep. 641 per Lord Hobhouse, criticising the opposite approach in the court a quo.
[15] Aikens, Bools & Lord op cit note 6 para 7.7. See *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd* (The Pembroke) [1995] 2 Lloyd's Rep. 290 at 291and G*ulf Steel Co. Ltd v Al Khalifa Shipping Co.Ltd (*The Anwar al Sabar) [1980] 2 Lloyd's Rep 261 at 263 per Mustill J.
[16] *mv* Cos Prosperity *: Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* 2012 (3) SA 381 (WCC)
[17] Aikens, Bools & Lord op cit note 6 para 7.71. Also see Treitel & Reynolds *Carver on Bills of Lading* at 4-003 describing this as the _obvious starting point'.
[18] Ramberg J *ICC Guide to Inco terms 2010* at 71
[19] Ibid. Also see Treitel & Reynolds op cit note 17 at 4-004 and Law Com no. 196 and Scot Law Com no. 130, pg 41, para 5.8.
[20] Tetley W op cit note 1 at 497

contracting with the carrier is the shipper, not the consignee.[21] This is because the seller is obliged under the terms of the contract to procure a contract of carriage and marine insurance policy in respect of the goods, and to place the goods on board the ship, and then tender the commercial documents, bill of lading, commercial invoice and marine insurance policy, to the buyer. [22]

There are three variants of the FOB contract. Under a classic FOB contract the buyer nominates the vessel, but the seller must place the goods on board for the account of the buyer and procure a bill of lading in the terms usual in the trade, or in a variation of this classic form the seller is required to make the shipment arrangements. In the third type the buyer makes all the transport arrangements.[23]

This distinction between CIF and FOB sales is retained in the ICC Inco terms which describe the respective obligations concerning the arrangement of the contract of carriage as follows:

_CIF (and CFR)

A3 Contracts of carriage and insurance

a. The seller must contract or procure a contract of carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller‘s expense and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold.‘[24]

_FOB (and FAS and FCA)

A3 Contracts of carriage and insurance

[21] Aikens, Bools & Lord op cit note 6 para 7.71. Also see Murray, Holloway and Timson-Hunt *Schmitthoff’s Export Trade* at 45, *Domett v Beckford* (1883) 5 B. & Ald. 521 and *Cho Yang Shipping Co Ltd v Coral* (UK) Ltd supra note 14 at 643.
[22] *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola*(1976) 4 SA 464 (A) at 491 H. Also see *Prime Site Outdoor Advertising (Pty) Ltd v Salviati & Santori (Pty) Ltd* 1999 (1) SA 868 (W) at 876C – 877B, and the further cases cited therein.
[23] *Pyrene Co. Ltd v Scindia Steam Navigation Co. Ltd* [1954] 1 Lloyd‘s Rep. 321.
[24] Ramberg J op cit note 18 — discussed under each of the relevant C–terms. The CPT and CIP terms have a similar wording, with the principle difference that there is a named place of destination as the goods are carried to an inland place rather than to a delivery port. The other differences in wording are inconsequential for present purposes.

a. The seller has no obligation to the buyer to make a contract of carriage. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on the usual terms at the buyer's risk and expense. In either case, the seller may decline to make the contract of carriage and, if it does, shall promptly notify the buyer.'[25]

When the underlying sale transaction was on CIF terms great emphasis is placed on the fact that a party is named shipper as an indication that as a 'normal rule' the CIF seller named as shipper is the original party to the contract,[26] and bailor.[27] This has been the case even when contrary indications arise on the facts. Thus it was held that where the named shipper had not contracted directly with the carrier, but with one of a chain of freight forwarders, even if the forwarders each acted as principals the named shipper was still a party to the contract of carriage evidenced by the bill of lading, save that the terms of that contract were determined not on the basis of the bill of lading alone but upon a consideration of all of the underlying contracts.[28] In another case where the freight forwarder was named as shipper, and had been acting only as agent of the named consignee, who had made all the transport arrangements directly, the court nevertheless held that the named shipper was the original party to the contract of carriage.[29]

When the sale term is FOB there is no presumption that the contracting party is the consignee,[30] and in each case the underlying facts must be carefully examined. Thus judicial statements in *The Albazero,*[31]and the *Berge Sisar*[32]to the effect that where there is a named consignee who is an FOB buyer, he is the party to the contract of carriage and the bailor of the goods (acting through the agency of the shipper) cannot be treated as laying down a

[25] Ramberg J op cit note 18 — discussed under each of the relevant F–terms. Term A3 is identical in all cases.
[26] *TICC Ltd v Cosco (UK) Ltd* [2002] C.L.C. 346 para[17] per Rix LJ
[27] *Leigh and Sillivan Ltd v Aliakmon Shipping Co. Ltd* (The Aliakmon) [1986] 2 Lloyd's Rep. 1 at 10 per Lord Brandon of Oakbrook, discussed in Treitel G.H. 'Bills of Lading: Liabilities of Transferee. The Berge Sisar' 2001 *LMCLQ* 244 at 352
[28]*Cho Yang Shipping Co Ltd v Coral (UK) Ltd* supra note 14, where the question arose whether the shipper was liable for freight, when the ocean carrier's agent had invoiced a freight forwarding intermediary that was acting as a principal and not as the shipper's agent.
[29] *TICC Ltd v Cosco (UK) Ltd* supra note 26.
[30] *East West Corp. v. DKBS 1912* [2003] 1 Lloyd's Rep. 239 at 251 [34] – [35] collects and examines the relevant case authorities. Although Mance L.J. regarded the case as falling into the 'second category' of claims identified by Lord Brandon in *The Albazero,* where the seller retains ownership and risk throughout the transaction, that is a very unusual situation, and does not indicate the much wider array of circumstances in which an FOB seller can still be the original party to the contract and the bailor
[31] [1976] 2 Lloyd's Rep. 467
[32] *Borealis A.B. v Stargas Ltd and Others (The* 'Berge Sisar*')* [2001] 1 Lloyd's Rep. 663 para [18] per Lord Hobhouse.

general rule. Devlin J held that in the first two variants of the FOB contract there was no doubt that the FOB seller was the party to the contract of carriage unless he took out a bill of lading in the buyer's name, and in such cases it may be that both shipper and consignee are parties to the contract of carriage.[33] However if the shipper does not hold the bills of lading as security for payment this may indicate that he acts only as agent for the buyer.[34]

The buyer will be an original party to the contract when he appoints his own forwarding agent in the country of origin,[35] at least where he is named as shipper and the bill of lading does not pass through the hands of the seller.[36] Even then problems can still arise where the FOB buyer is named as consignee but is not named as the shipper. The complexities that can arise in practice are well-illustrated in the decision of *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul and others*[37], a case decided under UK COGSA 1992 and concerned with which party had the right to instruct the carrier to alter delivery instructions under a straight bill of lading. The shipment was booked by a freight forwarder, who took instructions and received freight from B&D Co Ltd, a party that purported to have been acting for a subsidiary of the consignee (who was in turn the FOB buyer). The bill of lading named B&D Co Ltd as shipper _p/c' (pour compte de/for account of) two parties, Vernal Investment, a subsidiary of the consignee and buyer, and Yekalon, the seller.

The seller of the goods, remaining unpaid, obtained an order from the Guanghzhou Maritime Court that the Chinese freight forwarder deliver the original bills of lading to it. It tendered the original bills to Maersk Lines with instructions to re-direct the shipment. The court in Benin upheld a suit in damages at the instance of the original consignee, on the basis that he was the original party to the contract of carriage, whilst the court in England upheld Maersk's claim that the bills of lading were subject to English law and the consignee did not have title to sue having never received transfer of the original bills of lading.

Even in the comparatively simple case of *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* where there was a sale by an English seller to its Cypriot buyer on credit terms, and shipment (one of many under their distribution agreement) was made under a

[33] *The Athanasia Comninos and the Georges Chr. Lemos* [1990] 1 Lloyd's Rep 277 at 280 per Mustill J.
[34] *Enichem Anic SpA v Ampelos Shipping Co Ltd* (The Delfini) [1990] 1 Lloyd's Rep 252
[35] Ibid.
[36] *El Amria and El Minia* [1982] 2Lloyd's Rep. 28 at 32; Murray, Holloway and Timson-Hunt op cit note 21 at 22
[37] [2011] 1 Lloyd's Rep. 1. The case is also discussed in Treitel & Reynolds op cit note 17 at 4-031.

straight bill of lading naming the buyer as consignee[38], the questions of when ownership passed, and who had contracted with the carrier, were debated at length in the court a quo and before the Court of Appeal[39] and House of Lords.[40] It was held on the evidence that the sale was FOB in nature, as the buyer nominated the shipping line, and arranged the freight rates from Cyprus, even though the seller agreed to pay the freight, admitted liability to the carrier as principal for the freight, and invoiced the sale as one CFR. The contract was on credit terms and provided for the bills of lading to be sent _immediately after shipment by registered or express mail'.[41] The court was concerned with where delivery of the goods took place[42] and the question of which party contracted with the carrier was of subsidiary importance. However, it analysed the contracts as being between the consignee and carrier or if made by the shipper, then possibly between both shipper and consignee, and the carrier.[43] Likewise the consignee was the bailor of the goods.[44] The result could have been different had the seller retained a right of disposal over the goods, and there are indications in the judgment of the Court of Appeal that the issue of a straight bill indicates that no such right was reserved to the seller,[45] while the House of Lords preferred to consider that in this case the bill was not retained as security for payment and was to be transferred immediately to the buyer.[46]

What the above analysis demonstrates is that there are no hard and fast rules about whether the shipper or the consignee is the party to the contract of carriage, and there is thus a need for a simple mechanism of determining which party holds the contractual rights to sue the carrier. In this way, in the vast majority of cases, a detailed analysis of which party was the original party to the contract would be rendered unnecessary, with welcome savings in time and costs by excluding from the trial a great deal of evidence that is not directed at the merits of the claim against the carrier.

[38] It is not stated whether the seller was named as shipper but this would presumably have been the case.
[39] [2007] 2 Lloyd's Rep. 341
[40] [2008] 1 Lloyd's Rep. 462
[41] Ibid para [44] per Lord Mance
[42] For the purpose of determining a jurisdiction dispute under article 5(1)(b) of Council Regulation (EC) No 44/2001
[43] Supra note 40 para [45] per Lord Mance
[44] Ibid para [47]
[45] Ibid para [37]
[46] Ibid para [15] per Lord Rodger and para [44] per Lord Mance

2.3 *The Necessity of Establishing that Plaintiff has Suffered Loss*

It is general principle that damages are compensatory, and thus damages cannot be awarded beyond the measure of the loss suffered by the claimant and caused by the carrier. Although described by Lord Diplock in *The Albazero* as „slow in its historical development"[47] the rule is now firmly established. Thus a consignee under a bill of lading, who was also the time charterer of the vessel, was non-suited on the basis that ownership of the cargo of crude oil had transferred to the indorsee under the bill of lading prior to the loss of the cargo when the vessel sank. The indorsee was part of the same group of companies, but was a separate legal entity. It was accordingly the party that ought to have brought the claim for the loss but its claim had prescribed under the one-year time bar that applies to contracts of carriage evidenced by bills of lading subject to the Hague and Hague-Visby Rules.

Likewise the loss must be caused by the carrier. Thus in *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd*[48] although the claimant established a breach of contract by the carrier in releasing cargo without production of the original bills of lading, it was unable to demonstrate that it would have received payment from its buyer if the carrier had released the cargo against production of the original bills. Similarly in *The David Agmashenebeli*[49] the carrier was in breach of contract for clausing a bill of lading in language which suggested contamination of the whole cargo. However the carrier would still have been entitled to clause the bill by indicating that a very small proportion of the cargo was discoloured. Albeit minor, the discrepancy would still have entitled the buyer to reject the documents when tendered under the documentary credit, and the fact that the commodity price had fallen between the time of the sale and the time of presentation, indicated that the buyer would most likely have rejected the documents in any event. Thus in both cases the claimant failed to establish that the loss claimed was caused by the carrier.

It should perhaps be noted that the difficult questions around when a maritime claim can be said to arise, as opposed to when a claim becomes due, do not arise in the context of

[47] [1976] 2 Lloyd's Rep. 467 at 470
[48] 2001 (3) SA 766 (SCA)
[49] [2003] 1 Lloyd's Rep. 92

this enquiry.[50] It is only once the claim is due, that an action can be commenced, and a debt, whether for breach of contract or in delict, does not fall due until damage has been suffered.[51]

There is no provision in the STDA that suggests that the holder of a sea transport document can claim damages without establishing that a loss was suffered. Likewise under UK COGSA 1992, although rights of suit pass without any requirement that ownership should pass to the holder (whether on transfer of the bill of lading[52] or at all) or that the holder should be the person who has the risk in and to the goods, [53] it remains necessary for the holder of the bill of lading to demonstrate that they have suffered a loss.[54]

In a limited category of cases rights of suit will transfer under UK COGSA 1992 and the STDA to a party who is neither the owner, nor the party bearing the risk of loss, although it is overstating the point to say that the _pendulum has swung',[55] since ordinarily risk will have passed to the holder.[56]

Furthermore UK COGSA 1992 section 2(4) provides that the party holding the rights of suit can sue for the benefit of a person who holds _any interest or right in or in relation to goods to which the document relates' and who has _sustained the loss or damage' arising from breach of the contract of carriage.

This provision was necessary to prevent a situation arising where one party holds the rights of suit, but is met by a plea that they have not sustained a loss,[57] and can also be used

[50] In relation to section 11(4)(c) of AJRA see *mv* Forum Victory: *Den Norske Bank ASA v Hans K Madsen CV* 2001 (3) SA 529 (SCA), and in relation to section 3(7) of AJRA see *mv* Cape Courage*: Bulkship Union SA v Qannas Shipping Co Ltd SA* 2008 SCOSA C124 (D). Although overturned on appeal 2010 (1) SA 53 (SCA) the judgment of Farlam JA at para [14] suggests that the Supreme Court was concerned with the question of when a cause of action is complete.

[51] *Swart v van der Vyfer* 1970 (1) SA 633 (A) at 643 C–D affirmed in *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 211.

[52] This was the case under s. 1 of the *Bills of Lading Act* (1855) 18 & 19. Vict. c111, which linked the transfer of rights of suit to the transfer of _propery' in the goods _upon or by reason of' the _consignment or endorsement' of the bill of lading.

[53] Law Com no. 196 and Scot Law Com no. 130, pg 14, para 2.19 and 2.20

[54] *Standard Chartered Bank v Dorchester LNG (2) Ltd* (*The* Erin Schulte) [2013] 2 Lloyds Rep. 338, where it was accepted that a bank holding a bill of lading suffered a loss represented by its –security interest" in the goods.

[55] *East West Corp. v. DKBS 1912* supra note 30 para [44] per Mance L.J.

[56] On all of the Inco terms except D–terms, the risk will have passed at the latest upon shipment. In the case of D–terms the shipper will remain at risk until delivery at the destination port or place, and thus has the risk for the shipment during the entire sea voyage.

[57] Aikens, Bools & Lord op cit note 6 para 8.82

when more than one party has an interest in the goods,[58] in which case the party with contractual rights can sue on its own behalf, and for the loss sustained by another. The STDA contains no similar provision so that as the legislation presently stands there are a small category of exceptional cases in which title to sue under sea transport documents that are ‗transferable or negotiable' will have transferred to the holder who will have no title to sue as ownership and risk remain with a prior party.

The treatment of title to sue under waybills in rail, road and air law does not offer guidance for the position of consignees under straight bills of lading and sea waybills in this regard. International instruments governing rail,[59] road[60] and air transport[61] all expressly give the consignee a right to sue. Those Conventions would be interpreted on their own terms, in harmony where possible with foreign decisions, and without reference to purely domestic rules of law.[62] Thus *Impala Platinum Ltd v KLM* held in relation to air transport governed by the Warsaw Convention that a party named as consignor[63] can claim the value of the goods lost despite not having suffered any financial loss.[64]

No consideration was given to whether the consignor remained the owner of the goods, or whether the transfer of risk and the insurance payments received were *res inter*

---

[58] Over 100 years ago it was held in *Standard Bank v Carter; Standard Bank v McKenzie* (1902) 19 SC 302 that the endorsement of bills of lading to a bank as security would not extinguish the consignor's interest in the cargo.

[59] Rail transportation is governed internationally (although not in South Africa) by the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (‗CIM'), which is annexure B to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999. Rule 3(a) of CIM defines carrier in terms which make it clear that the person who contracts with the carrier is the consignor. Rule 17 §3 of the CIM expressly provides that after the goods have arrived at the place of destination, and the consignee has asked the carrier to deliver the goods, if loss of the goods is established the ‗consignee may assert in his own name, his rights against the carrier under the contract of carriage.'

[60] The international road transportation of goods in Europe, and certain part of the Middle East and North Africa, is governed by the Convention for the International Carriage of Goods by Road (‗CMR'). Article 13 of the CMR convention expressly provides that once the goods have arrived at the place of delivery and the consignee has demanded delivery, if loss of or damage to the goods has occurred ‗the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage'

[61] Articles 12, 13 and 14 of the Warsaw Convention, 1929[61], and now the equivalent (and identically worded) provisions of article 12 of the Montreal Convention, 1999 provide that ‗the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage' (article 13(3)) and ‗[t]he consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract..' (article 14).

[62] *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV and Another*2008 (6) SA 606 (SCA) at [17] per Navsa JA

[63]Consignor is the term used for shipper in air waybills

[64]*Impala Platinum Ltd v KLM* supra note 62 at para [40] – [42] per Navsa JA. A statement to the contrary by Steyn CJ delivering the minority decision in *Pan American World Airways Inc v SA Fire and Accident Assurance* 1965 (3) SA 150 (A) at 166 C–D was distinguished as obiter and not followed.

alios acta. These may have been alternative basis to justify the decision but were not referred to in the decision. The decision has been criticised by Stewart for raising more questions than it answers, such as how to deal with a multiplicity of suits in different jurisdictions for the same loss.[65] Interestingly Stewart draws a comparison to the STDA which is said to deal with privity of contract issues, and thus impliedly on the author's reasoning does not disturb the requirement that a claimant must prove that he has suffered a loss.[66]

Tetley[67] writing on the position in America indicates that being party to the contract of carriage is not sufficient unless the claimant has also suffered a loss. He cites the example of *Mitsubishi v Mammoth Fir*[68] where only nominal damages of $1 were awarded as no loss had been suffered by the plaintiff. Although distinguished in the more recent decision of *Coastal Seafood Processors, Inc. v. Orient Overseas Container*[69] nothing in the latter decision is at odds with the basic legal principle that an action for recovery of damages cannot be pursued, whether in contract or on any alternative basis, unless the claimant has suffered a loss.

What this means is that where the shipper is the party to the contract of carriage, but is no longer the owner or party bearing the risk of loss of or damage to the goods, then the shipper will not be in a position to claim damages from the carrier for breach of contract.

2.4 *Identifying the Loss Suffered*

Although South African bills of lading law has drawn heavily on English law, the laws pertaining to the transfer of ownership and possession [to which may be added the common law rules on the passing of risk] are based on Roman-Dutch law.[70] That is not to say that South African law will govern the issue in any particular case. In determining the law to be applied South African law as the lex fori has been applied to determine disputes of the ownership of movable property situated in South Africa at the time of the sale, an approach

[65] Stewart A _Admiralty Law' 2007 *Annual Survey of South African Law* 58. The author was respondent's counsel in the case.
[66] Ibid.
[67] Tetley W _Who May Claim or Sue' op cit note 3 154 at fn. 10
[68] 1979 AMC 2840 (S.D.N.Y.1979)
[69] Decision of the United States District Court, Eastern Districts, Louisiana (2000); unreported in F.Supp.2d (Available on West Law 235263)
[70] Du Toit S.F. _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* 105

said to be consistent with English law.[71] This would be difficult when at the time of the transfer of ownership the goods are at sea, and a more practical approach may be to consider the law of the place of shipment[72] or the law governing the contract of sale.[73]

In the following sub-sections however, the principles are examined on the basis of South African law being applicable. The purpose of the examination is to demonstrate that although it will be clear when the risk of loss of or damage to the goods transferred to the CIF or FOB buyer, it may be difficult to establish when ownership and possession of the goods passed, particularly when the parties are using straight bills of lading and sea waybills.

This is a particularly important consideration for a consignee under such documents who may be non-suited if the contractual rights do not transfer to him. If the consignee has a right of suit in contract, he can claim damages on the basis of the loss he stands to suffer by virtue of bearing risk in and to the goods, but if he is forced to rely upon an action in delict, he will have to establish a proprietary interest in the goods in order to claim for loss or damage to the goods. The requirement of a proprietary interest in the goods is satisfied if the consignee can prove that he was the owner of the goods, at the time of their loss or at the time that the first damage to the goods occurred, [74] in which case he can sue regardless of whether any other party bore the financial risk of loss.[75] A delictual action has also been afforded to the party in possession of the goods _vir sover hulle belang strek' (to the extent of their interest).[76] For example a possessor, such as a lessee, who is contractually bound to make good any loss or damage to the thing (_'n houer van 'n saak wat hom verbind het om skade daaraan te vergoed') may sue if the thing is lost or damaged.[77] However in *The Aliakmon*[78] it

---

[71] *Numill Marketing CC and another v Sitra Wood Products Pte Ltd and another* 1994 (3) SA 460 (C), in relation to timber shipped to South Africa. Also see *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A) at 667 A–C per Corbett CH, regarding the sale of a ship situated in South Africa.

[72] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2007] 2 Lloyd's Rep. 341 para [12] per Rix L.J. Upheld on appeal [2008] 1 Lloyd's Rep. 462

[73] Lorenzon, *CIF and FOB Contracts* at 2-049 and 2-050.

[74] *Homburg Houtimport B.V. v Agrosin Private Ltd and others* (_The Starsin') [2003] 1 Lloyd's Rep. 571

[75] *Smith v Banjo* 2011 (2) SA 518 (KZP) at [15] and the cases cited therein. For the position in England see Aikens, Bools & Lord op cit note 6 para 8.82. *Obestain Inc v National Mineral Development Corporation Ltd (*The _Sanix Ace') [1987] 1 Lloyds' Rep. 465 at 469 per Hobhouse J, discusses the principle and earlier cases such as *The Charlotte* [1908] P. 206 and *The Aliakmon* supra note 27.

[76] *Smit v Saipem* 1974 (4) SA 918 (A) at 927 E per Jansen JA.

[77] *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) SA 121 (A) at 125 B per Van Heerden AR

[78] supra note 27 at 4 per Lord Brandon of Oakbrook, followed in *The Starsin* supra note 74 para [37] per Lord Bingham, although the court did not decide the question of whether a duty of care is owed where ownership of the goods passes during the voyage and not only afterwards (per Rix L.J. in the Court of Appeal [2001] 1 Lloyd's Rep. 437. at para [93]). The rationale for the rule appears to be an aversion to permitting a recovery for

was held that it is not sufficient for the plaintiff ‗to have had only contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.' This decision was upheld in *The Starsin*[79] and is in keeping with the principles governing title to sue in delict in South Africa.[80]

These differences between the fields of contract and delict only serve to exacerbate the title to sue problems that arise when there is no clear mechanism for the transfer of contractual rights of suit.

2.4.1 *Transfer of Ownership and Possession*

Determining which party has ownership is a ‗difficult and somewhat speculative exercise'.[81] No generalisations can be made about when ownership passes.[82] It is not determined by Inco terms or under the United Nations Contract for the International Sale of Goods (‗CISG').[83]

In the absence of an express term in the contract governing the transfer of ownership, the issue would be determined according to principles of the applicable legal system applied to the facts of the case. The South African law is set out in *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola.*[84] Central to the transfer of ownership is the requirement that the seller gives delivery of the property to the buyer, and this requires a transfer of possession of the goods from seller to buyer

---

pure economic loss. See the judicial remarks of Lord Hoffmann in *The Starsin* supra note 74 para [88], and the criticism of Lloyd A ‗The bill of lading: do we really need it?' (6th Annual lecture of the Institute of Maritime Law of the University of Southampton) 1989 *LMCLQ* 47 at50; Reynolds F.M.B. ‗The Significance of Tort in Claims in respect of carriage by sea' 1986 *LMCLQ* 97 at 98 and Treitel G.H. ‗Bills of Lading and Third Parties' 1986 *LMCLQ* 294

[79] supra note 74

[80] Thus in *Raqa v Hofman* 2010 (1) SA 302 (WCC) the plaintiff's suit was dismissed because of a lack of title to sue. Even though the plaintiff bore the contractual risk of loss or damage to a motor vehicle,as instalment sale purchaser, he was in the circumstances neither owner, *nor possessor* of the vehicle, having bought the vehicle on behalf of a friend.

[81] Aikens, Bools & Lord op cit note 6 para 8.36. See *The Albazero* supra note 31, *The Aliakmon* supra note 27 and *The Delfini* supra note 34 where the question proved difficult.

[82] Lorenzon op cit note 73 at 2-041

[83] Ramberg op cit note 18. Also see Lorenzon op cit note 73 at 2-044.

[84] (1976) 4 SA 464 (A) at 489G – 490G per Corbett JA and at 491B – 492D, discussing the role of the bill of lading, and the further cases cited therein. Also see PJ Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed at 181 – 2

There is a wealth of judicial authority concerning the role played by a negotiable bill of lading in the transfer of ownership. This arises from the bill of lading's function as a symbol of the goods. It is regarded as a _key'[85] to the floating warehouse that is the ship, and possession of the bill of lading gives the holder _the means of dealing effectively with the property as owner'.[86] No party can obtain the goods from the carrier without presentation of the original bill of lading.[87] Transfer of the bill transfers possession of the goods if that is the intention of the parties. [88] Being the holder of a negotiable bill of lading thus constitutes a form of constructive possession of the goods themselves. [89] The holder of the bill of lading is _in the same commercial position as if he were in physical possession of the goods'.[90]

Endorsement and delivery of a negotiable bill of lading has thus been held sufficient to transfer ownership in South African law,[91] provided it is the intention of the parties that ownership should pass.[92] Where it is intended that ownership should pass on physical delivery of the goods transfer of the bill of lading does not transfer ownership of the goods.[93] Attornment is not required when a bill of lading is used as the custom of merchants has held that the transfer of the bill of lading _operated as a transfer of the possession of, as well as the property in, the goods'.[94]

It is inferred, in the absence of other facts, that ownership was intended to pass upon payment rather than shipment where the bills of lading are retained by the seller until payment, both in both CIF[95] and FOB sales,[96] but applying South African legal principles this

[85] *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A) at 579 per Van Blerk JA
[86] *Knight Ltd v Lensvelt* 1923 CPD 444 at 447 per Watermeyer J, citing *Heydenrych v Saber* (17 SC 73) and *London & SA Bank v Donald Currie & E Co* (1875 Buch 29)
[87] *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* 2011 (2) SA 491 (KZD) at [17] per Wallis J, citing *Motis Export Ltd v Dampskibsselkabet AF 1912 Aktiesekkab* [1999] 1 Lloyd's Rep 837 at 840. The judgment also refers to the discussions in Aikens, Bools & Lord op cit note 6 *Bills of Lading* Ch 5, especially paras 5.3 – 5.10, 5.31 – 5.33 and 5.36 – 5.55 and in Treitel & Reynolds *Carver on Bills of Lading* para 6-005
[88] *East West Corp v DKBS 1912 and AKTS Svenborg* [2002] 2 Lloyd's Rep. 182; upheld on appeal [2003] 1 Lloyd's Rep.239. This case held that the shipper retained the right to sue in bailment once the bill of lading had been transferred to the consignee, as the holder of the bill of lading was a bank acting as an agent of the shipper for the collection of payment only.
[89] *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola* supra note 22 at 491G per Corbett JA
[90] Ibid at 492B
[91] *Standard Bank of SA Ltd v Efroiken and Newman* 1924 AD 171 at 189–90 *per* De Villiers JA
[92] *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) at 821A–B per Boshoff J
[93] *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* 2011 (2) SA 491 (KZD) – the case concerned a _telex release' of a bill of lading.
[94] *Official Assignee of Madras v Mercantile Bank of India Ltd* 1935 AC 53 (PC) referred to in *Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein en 'n ander* 1980 (3) SA 917 (A).
[95] *Numill Marketing CC and Another v Sitra Wood Products Pte Ltd and another* supra note 71 at 474 E – F per Olivier J. The court's statement that _there is no magic in the original bill of lading' is plainly wrong as a

would depend upon whether the transaction was a cash or credit sale.[97] If the sale was on cash terms delivery must be accompanied by payment of the purchase price in order to effect a transfer of ownership of the goods.[98] If the sale was on credit terms ownership might pass either on shipment[99], or on transfer of the bill of lading, depending on which represents delivery by seller to buyer.

None of the cases cited expressly deal with the role played by a straight bill of lading or a sea waybill in the transfer of ownership. It must be regarded as an unsettled question whether the transfer of such documents constitutes a transfer of constructive possession of the goods, sufficient to transfer ownership. As regards straight bills of lading the extent to which they have gained recognition as a _document of title' is discussed in the following chapter, and it may be that transfer of such a document is recognised as having the same effect in relation to the passing of possession and ownership as a negotiable bill of lading. [100]

With respect to sea waybills because the shipper retains the right of disposal over the goods under a waybill the more convincing argument is that ownership of the goods cannot pass until actual delivery of the goods.[101] It might be possible to find that ownership transferred earlier by attornment if the carrier, as bailor, is notified that the seller has

---

statement of law if read out of context. It is clear from the facts that the original bills of lading were retained by the seller through Boland Bank which acted as its agent. The original bill of lading on one shipment was substituted for fresh _replacement' bills of lading naming the new buyer as consignee. Although not indicated in the judgment, presumably the _original' bills of lading were surrendered to the shipping line in exchange for the replacement bills. (See for example: *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* supra note 93 para [17] per Wallis J). The judgment in *Numill Marketing* supra must thus be treated with extreme caution is the court's finding that in respect of the second shipment (where replacement bills were not issued) the delivery of _amended copy' bills of lading was sufficient to pass title to the goods. It may be that on the facts (since the originals were still in the seller's possession) the amended copies acted as a form of shipper's delivery order. The case has been applied in subsequent decisions but not in relation to this issue.

[96] The locus classicus in South Africa is *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola* supra note 22. Also see *Chong Sun Wood Products Pte Ltd v Kt& TtTrading Ltd and Another*2001 (2) SA 651 (D). For English cases to the same effect see Murray, Holloway and Timson-Hunt op cit note 21 at 30 fn 80. An Australian case decided on the same basis is *McKay Massey Harris Proprietary Ltd v Imperial Chemical Industries of Australia & New Zealand Ltd. and United Stevedoring Proprietary Ltd.* (The _Mahia' (no. 2).) [1960] 1 Lloyd's Rep. 191.

[97] *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola* supra note 22 at 493.

[98] *Barlows Tractor & Machinery Co v Oceanair (Transvaal) (Pty) Ltd* 1978 (3) SA 175 (W) — the bank had received the bills of lading and referred to London for instructions. As payment had not been made and the sale was not a credit sale the seller remained the owner of the goods and defeated an application to attach the property by a credit of its buyer.

[99] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* supra note 40 para [47] – [48] per Rix L.J. The learned judges' reference to _delivery' as used in Inco terms was not relied upon by Mr Bools, counsel for the plaintiff, probably because Inco terms do not purport to deal with issues of transfer of ownership, and speak of _delivery' in relation to the point at which risk transfers.

[100] For example the judgment in *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* supra note 40 per Rix L.J. drew no such distinction.

[101] Tetley supra note 1 at 511

relinquished the right of disposal, and the carrier acknowledges that he now holds the goods for the consignee.[102]

In addition to this issue, there may be considerable complexity in the contract of sale arrangements and thus great difficulty determining when ownership passed even when it is not intended to sell the goods at sea. For example, the goods may have been sold by someone other than the consignor, under a _back-to-back' sale[103] or the named consignee may be an agent for on-sale in South Africa.[104]

The MSC Spain[105] illustrates these problems. The question arose whether a South African fruit exporter had title to sue, where it had purchased litchis on consignment from a farmer and the final sales price would only be fixed once the goods were sold in the export market. Although not clarified in the judgment whether the bill of lading issued by the carrier was a straight bill or a negotiable bill, it was clear that the plaintiff retained possession of the bill of lading at all times.[106] What was in issue was whether it had ever acquired ownership of the goods from its supplier. In the court of first instance PC Combrinck J held that the plaintiff's contract with the farmer had not given rise to enforceable obligations much less a transfer of ownership. On appeal to the full bench Levinsohn J reversed this decision, finding[107] that the fruit had been delivered under a valid contract of sale, a base price had been agreed which was sufficiently certain, and that the price had been paid to the farmer notwithstanding the damaged condition of the fruit on arrival at the destination port. Impliedly[108] the court accepted that ownership (and risk) had transferred to the plaintiff before the loss occurred. The Supreme Court of Appeal assumed without deciding the point that locus standii had been established. On its main findings the claim failed for other reasons.[109]

---

[102] These principles have been generally accepted in a different context in *Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein en 'n ander* supra note 94.
[103] *Hispanica de Petroleos S.A. and Compania Iberica Refinadera S.A. v Vencedora Oceanica Navegacion S.A., Same v. Same and the West of England Ship Owners MutualProtection and Indemnity Association (Luxembourg)*The Kapetan Markos (No. 2) [1987] 2 Lloyd's Rep. 321 at 329 per Mustill LJ
[104] *Numill Marketing CC and Another v Sitra Wood Products Pte Ltd and another* supra note 71
[105] mv Msc Spain *Tebe Trading (Pty) Ltd v Mediterranean Shipping Co (Pty) Ltd* 2006 (4) SA 495 (N) and *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA)
[106] *mv MSC Spain* 2008 (6) SA 595 (SCA) at [12]
[107] *mv MSC Spain* 2006 (4) SA 495 (N) at 503 G – H
[108] Its judgment referred to counsel's argument that ownership and risk remained vested in the farm that supplied the produce, but made no express finding as to whether, when and how ownership transferred to plaintiff.
[109] Supra note 106 at [12]

The enquiry into title to sue is also made more difficult where the goods are lost or damaged, and the parties to the sale contract try to settle their disputes, since frequently they do so without being concerned ‗with the precise legal analysis of the new bargain'.[110]

2.4.2 *Transfer of Risk*

Risk is not statutorily defined. It is a concept that applies to the international sale contract as a ‗shorthand' term which indicates the point at which the seller has complied with his contractual obligations[111] Reference to the seller's ‗delivery obligations'[112] should not be confused with the ‗delivery' of the goods in the sense of the transfer of possession necessary to transfer ownership. Risk does not have to pass at the same time as ownership and very seldom does.[113]

In the field of international sales the transfer of risk is expressly dealt with under the Inco terms. South African common law principles would only be applicable in the case of a sale not governed by Inco terms, which will not be examined as it would be a comparatively rare occurrence. In the case of both CIF and FOB sales risk passes at the load port either when the goods cross the ship's rail (under older versions of Inco terms), or when the goods are ‗placed on board' (under Inco terms 2010).[114]

The incidence of risk thus determines as between seller and buyer which of them will suffer the loss in the event of non-delivery of or damage to the goods. The transfer of risk has the result that should the goods be lost or damaged thereafter then the buyer must look to the carrier or to the marine underwriters for a recovery. It is thus convenient that the party on risk should also be the party with title to sue the carrier in contract, as this party will have reason to sue. [115]

---

[110]For example: *The Aliakmon* [1983] 1 Lloyd's Rep. 203, 205. Although reversed on appeal this comment about the parties' state of mind was accepted; [1985] 1 Lloyd's Rep. 199 at 203, per Donaldson M.R.
[111]Law Com no. 196 and Scot Law Com no. 130, pg 14, para 2.19 and 2.20
[112] Ramberg op cit note 18 – under all of the Inco terms risk passes at the point where the seller has complied with his obligation to deliver the goods.
[113] Lorenzon op cit note 73 at 2-003
[114] Ramberg op cit note 18
[115] Lloyd A op cit note 78 at 54; Reynolds F.M.B. op cit note 78 at 437. Another party may have reason to sue, such as the owner of the goods, but the questions that this raises about the possibility of a double recovery against the carrier are outside the scope of this thesis.

2.5 *Conclusion*

In this chapter it has been demonstrated that in order to make a claim in contract against the carrier, the plaintiff must be party to the contract of carriage and have suffered a loss. It has been demonstrated that it may be difficult to establish who the original party to the contract of carriage was, and that although the incidence of risk is easy to determine under Inco terms, it may be much more difficult to determine when ownership and possession of the goods was transferred.

Therefore situations can arise where a party is non-suited and the claim disappears into the ‗legal black hole' mentioned in the introductory chapter.[116] For example, if the shipper retains the rights of suit in contract, but the buyer has acquired risk and ownership of the goods, then the shipper has suffered no loss and cannot claim. The shipper is also non-suited in delict, unless it can be established that the loss or first damage to the goods occurred before ownership transferred to the buyer., with all the attendant difficulties of proof that this entails. Conversely in this situation the buyer would have no right to sue in contract, as he is not a party to the contract, and would face the same difficulties establishing title to sue in delict, if there is doubt about when ownership transferred or when the loss of or first damage to the goods occurred.

The STDA avoids this problem by providing a mechanism for the transfer of contractual rights of suit to the holder of a ‗transferable or negotiable' sea transport document, and in the instances where this person is the CIF or FOB buyer of cargo then title to sue will be easily established on the basis that such buyer bore the risk or loss or damage to the goods. In the following chapter the nature and functions of sea waybills and straight bills of lading will be considered, in order to determine if there is any reason why those sea transport documents should be excluded from the statutory regime of the STDA.

[116] Macmillan C ‗The end of the exception in Dunlop v Lambert' 338 (Case and Comment) [2001] *LMCLQ* 338. Although not cited by the author, the expression has been used in a number of English judgments, starting in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd*, 1982 SC(HL) 157 at 166 per Lord Stewart, to express judicial dissatisfaction with this state of affairs in a wide variety of contractual settings.

CHAPTER THREE: COMPARISON OF THE BILL OF LADING, THE SEA WAYBILL AND THE STRAIGHT BILL OF LADING: COMMERCIAL USE AND LEGAL FUNCTIONS

3.1 *Introduction*

A bill of lading has been defined as follows:

> _[It is] a document issued by or on behalf of a carrier of goods by sea to a person (usually known as the shipper) with whom he has contracted for the carriage of the goods. Its basic features are that it contains promises by the carrier to carry the goods to the agreed destination subject to the terms of the document, and to deliver them there in accordance with those terms; and a promise by the shipper to pay the agreed remuneration known as freight'.[1]

A similar description was approved in *Diamond Alkali Export Corporation v F.L. Bourgeois*[2]

> _A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent and stating the terms on which the goods were delivered to and received by the ship.'

As correct as these descriptions may be, they could equally apply to the species of sea transport documents known as sea waybills and straight bills of lading.

Attempts to define the bill of lading thus fail to offer any insight into what the differences are between these three forms of transport document, and why bills of lading made out _to order' or to bearer are universally acknowledged to be transferable and negotiable, whilst sea waybills and straight bills of lading are not.[3] The purpose of this chapter is to compare their commercial use and legal functions, in order to determine whether there is any sound reason to distinguish between these forms of sea transport document for the purposes of transferring rights of suit under the contract of carriage.

---

[1] Treitel & Reynolds *Carver on Bills of Lading* at 1-009

[2] [1921] 8 Ll.L.Rep. 282 at 284 per McCardie J, referring to article 3 of *Scrutton & Mackinnon on Charter-parties and Bills of Lading*

[3] Treitel & Reynolds op cit note 1 at 1-014 – like most authors they use the terms transferable and negotiable interchangeably.

3.2 *The Bill of Lading: Form and Functions*

To make a bill of lading negotiable it must contain words on its face indicating that it is deliverable to bearer or ‗to order'.[4] It may be issued with no named consignee, deliverable only ‗to order', in which case it is held at the order of the shipper, or it can be made out to the order of the named consignee. Words such as ‗or assigns' perform the same function.

The words ‗or order' do not need to appear in the box provided for the consignee's name. If words to this effect are contained elsewhere on the face of the bill, such as in a clause that the goods will be delivered ‗unto the Consignee or to his or their assigns'[5] the document will be regarded as a negotiable bill of lading.

Such bills of lading have two characteristic features. First they are transferable by endorsement (where necessary[6]) and delivery, an unlimited number of times, until the bill becomes accomplished[7] by actual delivery of the goods.[8] Secondly, delivery of the goods can only be made against presentation to the carrier of at least one original[9] bill of lading.[10]

The bill of lading in modern times[11] performs three legal functions[12]:

a) a receipt for the goods;
b) evidence of the contract of carriage; and
c) a document of title to the goods.

---

[4]Originally this was unsettled, but it was held to have been the law ‗for some time' by the Privy Council in *CP Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253 at 260. Also see Treitel & Reynolds op cit note 1 at 1-010 — 1-011.

[5] *Parsons Corporation and others v C.V. Scheepvaartonderneming 'Happy Ranger' and others* (The ‗Happy Ranger') [2002] 2 Lloyd's Rep. 357 at 363 [27] – [29] per Tuckey L.J.

[6] When the bill of lading is made out to the order of a named consignee no endorsement by the shipper is legally necessary, and the bill of lading is transferred by delivery alone. See Treitel & Reynolds op cit note 1 at 1-012

[7]At this point the carrier has complied with his contractual obligations under the bill of lading, and possession of the bill of lading no longer evidences a right to possession of the goods.

[8] Treitel & Reynolds op cit note 1 at 1-012; *J.I MacWilliam Co. Inc. v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 Lloyd's Rep. 113 at [106], [2005] 1 Lloyd's Rep. 347 at [6].

[9] Traditionally bills of lading are issued in sets of three originals.

[10] *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* 2011 (2) SA 491 (KZD) at [17] per Wallis J, citing *Motis Export Ltd v Dampskibsselkabet AF 1912 Aktiesekkab* [1999] 1 Lloyd's Rep 837 at 840.

[11]Aikens, Bools & Lord *Bills of Lading* para 1.27 — this has only been the case since the middle to late eighteenth century.

[12] *The Maurice Desgagnes* [1977] 1 Lloyd's Rep. 290, 293; cited in Aikens, Bools & Lord op cit note 11 para 2.3. Also see Murray, Holloway and Timson-Hunt *Schmitthoff's Export Trade* at 300.

The existence of those functions is trite law in relation to negotiable bills of lading and has been accepted without demur by the South African courts subject only to the observation that whether it fulfils all of these functions in any given instance is always a question fact.[13]

3.2.1 *Receipt*

As soon as the owner of the goods places them into the possession of a carrier the need for a receipt is self-evident, and this function of the bill of lading developed around the fourteenth century.[14] The bill of lading continues to perform this function, subject to one further development. At common law representations in the bill of lading were prima facie evidence only.[15] Now in respect of contracts of carriage governed by the Hague-Visby Rules[16] such representations are conclusive evidence where the bill of lading has _bœn transferred to a third party acting in good faith'[17] which may include transfer to the consignee where the consignee was not a party to the original contract of carriage.

3.2.2 *Evidence of the Terms of the Contract of Carriage*

The original contract for the carriage of goods by sea was the charterparty and before the sixteenth century the bill of lading did not record any terms of the contract, and accordingly had no function as evidence of the terms of the contract.[18] From the sixteenth century onwards it became increasingly common for bills of lading to contain either a reference to the terms of a charterparty, or a substantive set of terms of carriage.[19] This function became

[13] *Intercontinental Export Co (Pty) Ltd v MV* Dien Danielsen 1983 (4) SA 275 (N) at 276F per Friedman J and *Owners of Cargo Lately Laden on Board the MV* Menalon *v MV* Menalon 1995 (3) SA 363 (D) at 367 D – E per Alexander J. Both cases involved the kinds of questions that arise when bills of lading are issued pursuant to charterparties.

[14] For a history of the origin and development of bills of lading see Bools M.D. *The Bill of Lading: A document of title to goods An Anglo-American Comparison* at 3 and Aikens, Bools & Lord op cit note 1 ch.1.

[15] This remains the position in respect of contracts of carriage governed by Convention for the Unification of Certain Rules Relating to Bills of Lading (_the Hague Rules'), 1924.

[16] The Hague Rules as amended by the Brussels Protocoal (Hague-Visby Rules) 1968

[17] Ibid art. III rule 4. A similar provision operates in favour of the _holder' of a _transferable or negotiable' sea transport document in s6ii of the STDA and in favour of the _holder' of a bill of lading in s4 of UK COGSA 1992 .

[18] Bools op cit note 14 at 5. Also see Francis N _Transferring Rights of Suit under Bills of Lading: The Conflict of Laws Implications' (2006) 20 *Aust. & NZ Mar. L.J.* 25 at 26

[19] Bools op cit note 14 at 5.

more important when the receiver of the goods was a stranger to the original contract and had to rely on the bill of lading as proof of its terms.[20]

The bill of lading is not the contract itself, as by the time the bill is issued the contract has already been concluded.[21] As discussed in chapter two the formation of the contract for the carriage of containerised cargo would be concluded by a booking made with the shipping line's freight department and usually evidenced by a booking note, but the bill of lading remains excellent evidence of the terms of the contract of carriage.[22]

3.2.3 *Document of Title*

The term document of title is one that is said to have created _onsiderable difficulty'.[23] A great deal of the confusion is cleared away by appreciating that the term document of title is used in at least three different contexts:

1. Control over the right to claim delivery of the goods from the carrier against production of the original bill of lading (with a corresponding discharge to the shipowner of his obligations); [24]
2. Transfer of constructive possession of the goods[25] creating a form of security in the goods (and hence making the bill of lading central to the financing by banks of the sale transaction); and
3. Transfer of ownership of the goods, which depending on the intention of the parties to the underlying contract of sale, may pass by transfer of the bill of lading.[26]

---

[20] Ibid.
[21] This was decided in two early cases: *Crooks v Allan* (1879) 5 QBD 38, *Sewell v Burdick* (1884) 10 App. Cas. 74, both approved in *The Ardennes* case, [1950] 84 Ll. L. Rep. 340 at 344. Also see Treitel & Reynolds op cit note 1 at 61.
[22] See *mv* MSC Spain: *Mediterrranean Shipping Company (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) para [16]. Although a booking was made on the basis of a promise of a direct voyage to the port of discharge (as in *The Ardennes* supra note 74), the carrier's standard terms contained a deviation clause. These terms were available to the freight forwarder who prepared the bill of lading and the bill was sent to the shipper for checking. In the circumstances the term formed part of the contract of carriage.
[23] Treitel & Reynolds op cit note 1 at 9-099
[24] *Primesite Outdoor Advertising (Pty) Ltd V Salviati & Santori (Pty) Ltd* 1999 (1) SA 868 (W) at 877 A-B per Willis JA. The court cites extensive authority including *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 491 H – 492 E. The case was overturned on appeal on an unrelated issue pertaining to proof of damages; *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) at [8] stating that it would assume without deciding the issue that there had been a breach by delivery without presentation of the original bill of lading.
[25] Discussed in chapter 2

3.3 *The Sea Waybill: Form and Functions*

The sea waybill also ‗contains or evidences an undertaking by the carrier to the shipper to deliver [the goods referred to in the document] to the person who is for the time being identified as being entitled to delivery [the named consignee].'[27] The sea waybill is issued by the carrier to the shipper and on the face of it contains many of the same provisions as the face of a bill of lading, namely the name of the shipper and consignee, a description of the goods, the port of loading and discharge, and a signature on behalf of the carrier. However there are three significant differences.

The first difference is that the named consignee can take actual delivery of the goods from the carrier upon presentation of acceptable proof of identification.[28] The carrier will stipulate what form of identification is necessary to prove that the person collecting the goods is the named consignee.[29] Production of the original sea waybill to the carrier is not required.[30] There is accordingly no need to transfer the original document to the consignee. The document is simply telexed to the destination,[31] or sent by email or Electronic Data Interchange (‗EDI').[32]

The second difference is that the shipper retains control over the destination of the goods until final release, through the ability to redirect the shipment by appropriate instructions to the carrier.[33] Mechanisms have developed which permit the shipper to notify the carrier that he has relinquished the right of control (or ‗disposal') to the consignee, such

---

[26] Ibid. The position is discussed in the report of The Law Commission and the Scottish Law Commission (Law Com no. 196 and Scot Law Com no. 130) *Rights of Suit in Respect of Carriage of Goods by Sea* (1991) para 5.4. It has also been discussed in relation to the difficulty of using bills of lading electronically. See: Clarke M ‗Transport Documents: their transferability as documents of title; electronic documents' 2005 *LMCLQ* 356 at 359. For other general discussions see: Guest AG (ed) *Benjamin's Sale of Goods* 3 ed at 1433,Colinvaux R (ed) *Carver's Carriage by Sea* 3 ed at 1113 and Francis op cit note 18 at 29.

[27] Law Com no. 196 and Scot Law Com no. 130 pg 40, para 5.6

[28] This follows as a matter of common law (see Law Com no. 196 and Scot Law Com no. 130, pg 41, para 5.7 *The Rafaela S*, [2003] 2 Lloyd's Rep. 113 at 133, [2005] 1 Lloyd's Rep. 347; *Peer Voss* v. *APL Co. Pte. Ltd*, [2002] 2 Lloyd's Rep. 707, 722) but also falls within the voluntary contractual regime provided by the CMI Uniform Rules for Sea Waybills 1990 which states in subrule 7(i): ‗The carrier shall deliver the goods to the consignee upon production of proper identification.'

[29] The carrier's liability for wrongful delivery is discussed further below.

[30] Law Com no. 196 and Scot Law Com no. 130 para 5.6 – 5.7. Also see Aikens, Bools & Lord op cit note 11 para 2.15

[31] *Peer Voss v APL Co. Pte. Ltd* [2002] 2 Lloyd's Rep 707 per Chao Hick JA at [16] and [53]

[32] Laryea ET ‗Paperless Shipping Documents: An Australian Perspective' (2000) 25(1) *Tulane Maritime Law Journal* 255 at 267 stating that the rise in the use of sea waybills is likely to continue because they are easy to ‗dematerialise' i.e. use electronically.

[33] Schoenbaum *Admiralty and Maritime Law* at 551

as stamping the waybill _NO DISP' [34] and such provisions are regulated by Rule 6 of the Uniform Rules for Sea Waybills[35] when those rules are contractually incorporated.[36] By contrast the shipper under a bill of lading cannot vary the delivery instructions unless he surrenders all original bills of lading to the carrier for cancellation and the issue of fresh bills of lading.[37] Once one or more original bills of lading has been transferred the consignee, or subsequent holder, has control of the goods by virtue of holding the original document.[38]

Thirdly, the named consignee under a sea waybill has no right to transfer the document to any other person by endorsement or delivery of the document.

Thus of the three legal functions of the bill of lading the sea waybill can only be said conclusively to perform the first two: it is a receipt for the goods and evidence of the terms of the contract of carriage but it is not regarded by any authors as a document of title[39] and is, regarded as non-negotiable.[40]

3.4 *The Straight Bill of Lading : Form and Functions*

A bill of lading made out to a named consignee and not marked _to order' will be a straight bill of lading.[41] To make matters clear such a bill of lading may be marked _non-negotiable' or _not-negotiable', and in the US[42] and many countries in Europe[43] it is required by law to be so marked.

---

[34] Tiborg H, _Legal Qualities of Transport Documents' (1998) 23(1) *Tulane Maritime Law Journal* 1 at 41
[35] The Uniform Rules for Sea Waybills were drafted by the Comité Maritime International (_CMI') (Available at http://www.comitemaritime.org/Uniform-Rules-for-Sea-Waybills) (Accessed on 20.10.2013)
[36] The rules expressly provide in art. 1 ii that they apply when adopted in a contract of carriage _which is not covered by a bill of lading or similar document of title'.
[37] This practice is described in *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* supra note 10 para [17] per Wallis J
[38] Girvin S.D. _Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' (2003) 119 *SALJ* 317 at 322 fn 55, citing *Mitchell v Ede* (1840) 11 Ad & El 888 [113 ER 651], *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep 548 and *Numill Marketing CC v Sitra Wood Products Pte Ltd* 1994 (3) SA 460 (C) at 475.
[39] Ibid. Also see Law Com no. 196 and Scot Law Com no. 130, pg 41, para 5.7
[40] Aikens, Bools & Lord op cit note 11 para 2.20. See also Girvin op cit note 38 at 322 and Yiannopoulos *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems* 19.
[41] Treitel & Reynolds op cit note 1 at 1-014
[42] USC §80103 a(1)
[43] *The Rafaela S* [2005] 1 Lloyd's Rep. 347 para [13] per Lord Bingham

It can be particularly difficult to distinguish a straight bill of lading from a negotiable bill when liner shipping companies use a _hybrid' bill of lading form capable of being converted to either use. In such cases omission of the words _to order' after the consignee's name, or failure to specify a _notify party' can render the bill _non-negotiable', despite contrary statements elsewhere on the face of the bill of lading.[44]

Whilst a straight bill of lading is not always easy to distinguish from a negotiable bill of lading, it is usually easily distinguishable in form from the sea waybill. A straight bill of lading calls itself a bill of lading throughout[45] and contains all of the terms found in a classic _order' bill of lading. In short a straight bill of lading _looks and smells' like a bill of lading.[46] A sea waybill on the other hand can look very different. It is usually not in the same format as a bill of lading,[47] and it is never headed _bill of lading', but instead will normally be clearly marked _sea waybill' or _non-negotiable receipt'.[48] It may even contain an express statement that it is *not* a bill of lading and *not* a document of title.[49] It can be blank on the reverse[50], or may contain only a reference to the carrier's standard trading terms, [51] although this is no longer always the case.

Other differences point to a distinction between the legal functions of the documents. A straight bill of lading is issued invariably in a set of three originals whereas a sea waybill is not.[52] A straight bill of lading usually contains an express term requiring production of the bill of lading and ends in the _time-honoured'[53] attestation clause indicating that it has been signed by or on behalf of the Master and that upon production of one original the others are to stand void.[54] These provisions are probably what Rix LJ was referring to as the _language' of

[44] Also see for considerations of whether a bill is or is not negotiable in more recent times, *Melissa (HK) Ltd v P & 0 Nedlloyd (HK) Ltd* [1999] 3 HKLR 674 and *The Chitral* [2000] 1 Lloyd's Rep 529 at 533.
[45] This factor is only one of many and is not decisive in and of itself, but has played a part in the decisions in *The Ship Marlborough Hill v Alex Cowan and Sons Ltd* [1921] AC 444 (where the document was called a bill of lading) and *The Maurice Desgagnes* [1977] 1 Lloyd's Rep. 290 at 296 (where it was not).
[46] *The Rafaela S* supra [2003] 2 LR 113 at 121 [32]
[47] *Peer Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep. 707 at [49]; *The Rafaela S* supra [2003] 2 LR 113 at 141 [126]
[48] This express notation on the sea waybill is included to comply with Art. VI of the Hague and Hague Visby Rules.
[49] Genwaybill, and BIMCO Blank Back Liner Waybill form, respectively, cited in *The Rafaela S* supra [2003] 2 Lloyd's Rep 113 at 141 [126]
[50] *The Rafaela S* supra [2003] 2 Lloyd's Rep. 113 at 141 [126]
[51]Gaskell, Asariotis & Baatz *Bills of Lading: Law and Contracts* paras 22.34ff.
[52] *Peer Voss v APL Co Pte Ltd* supra note 47 para [49]
[53] *The Ship Marlborough Hill v Alex Cowan and Sons Ltd* supra note 45at 453.
[54] Absence of a signature was regarded as a key distinguishing feature in *The Maurice Desgagnes* supra note 45

a bill of lading.[55] A sea waybill on the other hand does not need to be produced to obtain the goods and will often state expressly that production is *not* required.[56]

Nevertheless, despite these differences the _traditional view'[57] was that the documents were _synonymous' [58] with one another in their legal nature and effect, and that the differences were mere matters of form, in themselves unremarkable[59] or superficial.[60] Thus the sea waybill has been described as _broadly similar' to a straight bill of lading[61] and as having _virtually identical functions'.[62] In fact some American authors do not distinguish between them at all, expressly describing the waybill as a _non-negotiable bill of lading' subject to the provisions which attach to such bills of lading in the United States of America under the Federal Uniform Bills of Lading Act, 1916 (the Pomerene Act) and the Harter Act, 1893.[63]

It was therefore commonly accepted in common law jurisdictions prior to the *Rafaela S* decision that like sea waybills the straight bill of lading was a receipt for the goods and evidence of the contract of carriage, but it was not a document of title[64] and was not negotiable.[65]

---

[55] *The Rafaela S* supra [2003] 2 Lloyd's Rep 113 at 132 [85]
[56] E.g. the BIMCO Blank Back Form of Liner Waybill cited in t*he Rafaela S* supra [2003] 2 Lloyd's Rep. 113 at 141 [126]
[57] Aikens, Bools & Lord op cit note 11 para 2.47
[58] Ibid.
[59] Schoenbaum 551
[60] The term used in the reasons furnished by the commercial arbitrators who first decided the case, cited in the Court of Appeal judgment. See *The Rafaela S* [2003] 2 Lloyd's Rep 113 at 122 [21]
[61] Law Commission Report no. 196 and Scottish Law Commission Report no. 130, pg 46, para 5.8. See also Sing TK _Of Straight and Switch Bills of Lading' LMCLQ [1996] 416, 417
[62] Ibid, pg 37, para 4.11
[63] Schoenbaum *supra* 551 and Tetley W _Waybills: The Modern Contract of Carriage of Goods by Sea' J. Mar. L. & Com.(1983) vol. 14 pg 465
[64] See Raoul Colinvaux, (ed) *Carver's Carriage by Sea (13*th ed, 1982), 1115; Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading (1 ed,* 2001) 249; John F Wilson, *Carriage of Goods by Sea* (4th ed, 2001)137. Also see the discussion in Girvin *supra* 321 and 326 fn 106.
[65] Schoenbaum op cit note 33 at 550, although the American law position relies heavily on the words _not negotiable' appearing on the face of the bill of lading.

3.5 *Re-thinking the Role of the Straight Bill of Lading :* The Rafaela S

The decision in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (*The Rafaela S*)*[66] has required a careful reconsideration of the traditional view. In this sub-section the role of the bill of lading as a document of title (in all three senses) is considered, and in chapter four the case is considered again in relation to the interpretation of the terms ‗transferable' and ‗negotiable'. The case arose in this way.

JI MacWilliam Co Inc (‗MacWilliam') had purchased a cargo of printing machinery to be shipped in four containers from Durban, South Africa, to Boston, USA. The shipper supplied MacWilliam with a bill of lading issued by Mediterranean Shipping Co SA (‗MSC') as carrier. The bill of lading evidenced the shipment of the goods on the *Rosemary* from Durban to Felixstowe, United Kingdom, and as a term of the contract of carriage MSC was to arrange the on-carriage to Boston as agents. In the event the cargo was carried to Boston by MSC on the *Rafaela S*. Ultimately it was held on appeal that there were two separate contracts of carriage, and that the journey from Felixstowe to Boston would have been covered by a second bill of lading issued in the same form, but naming Felixstowe as the port of shipment.

Since the cargo had been damaged beyond economic repair on the Felixstowe – Boston journey, MSC relied upon a contractual term applying the package limitation of $500 per package applicable under US COGSA 1936. MacWilliam countered that the much higher package limitation applicable under the Hague-Visby Rules applied in terms of UK COGSA 1971, which makes the Hague-Visby Rules applicable to all shipments out of ports in the United Kingdom.

Therein lay the crux of the dispute. The bill of lading was a straight bill of lading. Although the document was on a hybrid form capable of being used for a classic, negotiable bill of lading it contained the following words next to the consignee box: ‗(B/L not negotiable unless ‗ORDER OF')'.[67] The words ‗order of' were omitted making the bill ‗not negotiable'. Thus it happened that the court had to decide whether a straight bill of lading is ‗a bill of lading or similar document of title' for the purposes of article 1(b) of the Hague and Hague-

[66] [2003] 2 Lloyd's Rep. 113 (CA); upheld on appeal [2005] 1 Lloyd's Rep. 347 (CA)
[67] *Rafaela S* supra [2002] 2 LR 403 at 404 [8]. The case was distinguishable in this respect from the *Happy Ranger* supra where the bill of lading contained contradictory indications on its face.

Visby rules.[68] If it was indeed a bill of lading, properly speaking, or at least a *similar* document of title, then the Rules would apply compulsorily and the lower package limitation would be rendered null and void in terms of Article 3 Rule 8 of the Rules.

The arbitrators[69] and the Commercial Court[70] held in line with the traditional view that a straight bill of lading is non-negotiable, and equivalent to a sea waybill, and that for this reason (and this reason alone) it is not a document of title. The Court of Appeal however held that a straight bill of lading is a _bill of lading or similar document of title' for the purposes of article 1b of the Hague-Visby rules, and is distinguishable from a sea waybill.

Rix LJ reached this conclusion following upon an exhaustive consideration of the travaux préparatoires to the Brussels Convention[71], cases[72] and authoritative textbooks,[73] in which he demonstrated that the traditional view was not in fact as uniform and clear as might have previously been believed.

Whilst, pursuant to the traditional view, straight bills of lading and sea waybills are equated in UK COGSA 1992 (which will be discussed in chapter five), Rix L.J. held that there is no reason why they should not be treated differently in UK COGSA 1971, a separate statute, predating COGSA 1992, and furthermore giving effect to an international instrument, and thus requiring an interpretation in keeping with the interpretation of the Convention internationally. The House of Lords upheld that decision.

The distinctions drawn by the Court of Appeal and the House of Lords between the two types of document can be reduced to the same four broad points considered above:

---

[68] The expression _similar document of title' is not included in the official French text, where what is referred to is merely a document possession of which evidences the right to claim delivery of the goods from the carrier *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (The Rafaela S) [2005] 1 Lloyd's Rep. 347, 359.

[69] *Rafaela S* supra [2002] 2 LR 2 403 at 405 – 406 refers to the decision of the arbitrators that because the bill of lading was non-negotiable it _was not a document of title in the accepted sense'. By _accepted sense' the arbitrators are, it is submitted, referring to the traditional view that only a negotiable bill can be a document of title.

[70] *Rafaela S* supra [2002] 2 LR 2 403 at 406 [21] per Langley J where the learned judge held that: _[a] _document of title' in this context is, I think, the antithesis of a document which can evidence the title of only one person. It is general not specific to one person. It is a document by which goods can be transferred by endorsement and delivery of the document itself.'

[71] *Rafaela S* supra [2003] 113 at 126 [56] –130 [75]. Also see the discussion of the cases decided before and after the rules came into force.

[72] *Rafaela S* supra [2003] 113 at 130 [76] – 139 [116].

[73] *Rafaela S* supra [2003] 113 at 139 [117] –142 [133]

1. Their distinctive form [74]and use of the name ‗bill of lading'[75], which the court gave express approval as an important consideration by stating that it would be slow to reject the description applied by the party issuing a bona fide mercantile document.[76]
2. The fact that the bill of lading is issued in sets of three originals whereas the sea waybill is not;[77]
3. The fact that the original bill of lading is transferred to the consignee whereas the sea waybill is not;[78] and
4. The fact that the bill of lading must be presented to the carrier in order to obtain delivery of the goods.[79]

As to which of these differences is most important, undoubtedly it is the last one. It had long been clear law that in the case of a ‗negotiable' bill of lading the carrier could only deliver the goods against surrender of an original bill of lading.[80] Whether this was the case with a straight bill of lading was an open question before the *Rafaela S.*[81] Both the Court of Appeal and House of Lords gave a clear indication that in their view presentation of a straight bill of lading is required,[82] regardless of whether the bill of lading contains an attestation clause or not.[83]

The House of Lords emphatically stated that whereas a straight bill of lading is in the hands of the consignee *his* document of title ‗a sea waybill is never a document of title. No

[74] *The Rafaela S* supra [2003] 2 LR 113 at 142 [128]
[75] The House of Lords in the *Rafaela S* noted, with reference to earlier cases, the importance of a document calling itself a bill of lading. *The Rafaela S* supra [2005] 1 LR 347 at 352[9] per Lord Bingham and at 359 [43] per Lord Steyn.
[76] *The Rafaela S* supra [2005] 1 LR 347 at 350 [5] per Lord Bingham
[77] This it is submitted is a distinction without consequence. See Aikens et al *Bills of Lading* at 21 [2.47]. Also see the discussion in para 2.3 on the origins of this practice and its decline in some trades.
[78] Caution should be exercised here as saying that a sea waybill does not need to be transferred is not the same as saying that it cannot be transferred, without investigation of whether it is ever used in such a way that transfer is required, e.g. as part of a documentary credit transaction under a CIF sale.
[79] Typically bills of lading contain an express attestation clause requiring presentation of the original, and this is thus a contractual term. In the *Rafaela S* the bill contained such a clause although the House of Lords expressed the view that this was an inherent requirement in any event, a rule which has the advantage of commercial certainty to commend it. *The Rafaela S* supra [2005] 1 LR 347 at 354 [20] per Lord Bingham
[80] The Sormovskiy 2068 [1994] 2 Lloyd's Rep 266, and *The Motis* [1999] 1 Lloyd's Rep. 837 and [2000] 1 Lloyd's Rep. 211 (CA)
[81]See the survey of the law set out in the *Rafaela S* [2003] 2 LR 113 at [117] – [133]. Also see the *obiter* comments of Scrutton LJ in *Thrige v United Shipping Co Ltd* (1924) 18. Ll.L.Rep.6 at p.9,
[82] The rule obviates the potential difficulties a carrier would face in determining whether bills of lading were negotiable or not-negotiable when they were issued on pre-printed forms suitable for either, and contained ambiguous or contrary indications of effect. See the discussion in Aikens et al *Bills of Lading* at 19, 2.40
[83] *The Rafaela S* supra [2005] 1 LR 347 at 354 [20] per Lord Bingham; *The Rafaela S* supra [2003]2 LR 133 at 143 [145] per Rix LJ

trader, insurer or banker would assimilate the two.'[84] Here Lord Steyn is referring to the essential distinguishing feature, namely that a straight bill of lading must be presented to the carrier by the consignee to obtain delivery of the goods.[85] Arguably, this feature renders the bill of lading a workable symbol of the goods, capable of transferring constructive possession of the goods, and marking the bill of lading readily acceptable to banks as a form of security in the goods.[86]

Although strictly speaking the finding that the bill of lading was _in principle a document of title' was obiter[87] the judgments are highly persuasive given the depth of analysis, and the experience of the judges concerned. The advantage of a rule that distinguishes between bills of lading and sea waybills on the basis of the form of the document is that it is _simple to apply'[88] and is also the law in the Netherlands[89], France[90], Australia,[91] China,[92] Singapore[93] and Hong Kong.[94] A contrary finding in *The Brij*[95] was decided before the *Rafaela S*, and its comment that the carrier under a straight bill of lading was obliged to deliver to the consignee without production of the bill of lading[96] was *obiter,* and distinguished in the *Rafaela S* based on the unusual facts in the case.[97]

---

[84] *The Rafaela S* supra [2005] 1 LR 347 at 358 [46] per Lord Steyn

[85] *The Rafaela S* supra [2005] 1 LR 347 at 360 [46] per Lord Steyn, citing D'Arcy et al *Schmitthoff's Export Trade: The Law and Practice of International Trade* (10 ed) (2000) at p 281, para 15-033

[86] Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* (Interlegal, 1997), xvii. *London & South Africa Bank v Donald Currie & Co* (1875) 4 Buch 29; *Birkbeck & Rose- Innes v Hill* 1915 CPD 687, *Barlows Tractor & Machinery Co v Oceanair (Transvaal) Ltd* 1978 (3) SA 175 (W)

[87] See Treitel GH –The Legal Status of the Straight Bill of Lading" (2003) 119 *LQR* 608

[88] *Peer Voss v APL Co Pte Ltd* [2002] 2 Ll Rep 707 at [51]

[89] The Duke of Yare (ARR-RechtB Rotterdam, 10 April 1997, referred to in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 LR 113 at 136 [103]

[90] The MSC Magallanes, a decision of the Court of Appeal of Rennes of 16 May 2002, referred to in the *Rafaela S* supra at 139 [115] .

[91] *Beluga Shipping GmbH & Co v Headway Shipping Ltd* [2008] F.C.A 1791 and *Hilditch Pty Ltd v Dorval Dauin KK (No 2)* (2007) 245 ALR 125 at 133 [25]-[31]

[92] *American President Lines v Guangzhou Feida Electrical Apparatus Factory of Wanbao Group*, 4th Civil Div. Unreported, June 25, 2002

[93] *Peer Voss v APL Co Pte Ltd* [2002] 2 Ll Rep 707 at para [53]

[94] *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* – a decision of the High Court of Hong Kong Special Administrative Region Court of Appeal which declined to follow *The Brij* [2001] 1 Lloyd's Rep 431.

[95] [2001] 1 Ll Rep 431. The plaintiff's claim failed in that it was not a party to the contract of carriage. It failed to proved that the named shipper, a freight forwarding company, was acting as its agent. The facts showed that the freight forwarder issued his own bill of lading to the plaintiff. It in turn received a bill of lading from the shipowner, but those bills had been kept by it in a drawer and never delivered to anyone. Insofar as those bills evidenced a contract of carriage with the shipowner, the plaintiff had failed to establish that it was a party to the contract and thus lacked title to sue.

[96] At 434

[97] *The Rafaela S* [2003] 2 Lloyd's Rep. 113 at 137 [108]

Following the decision it has been suggested that the straight bill of lading is now in a _legal no man's land'[98] being at once a sea waybill for the purposes of UK COGSA 1992 and a bill of lading for the purposes of UK COGSA 1971. Furthermore, even though the *Rafaela S* decision drew a clear distinction between straight bills of lading and sea waybills, authoritative English textbooks have continued to express doubts about the validity of that distinction, at least without further evidence of how the documents are used in practice.[99]

3.6 *Origins and Commercial Use of Straight Bills of Lading and Sea Waybills*

The origins of the straight bill of lading are unclear. Aikens, Lord and Bools[100] indicate that as late as 1924 it was regarded as very unusual, at least such was the comment of Scrutton J in *Thrige v United Shipping Co Ltd.*[101] In contrast, the House of Lords concluded their survey of the law in the *Rafaela S* case with the statement that straight bills of lading were _a familiar mercantile phenomenon in the early 1920s and, ... not ignored in the Hague Rules negotiations.'[102]

Even if they were uncommon, straight bills of lading appear to be ancient in origin. In 1794 in *Lickbarrow v Mason,* the landmark decision on the negotiability of bills of lading made out _to order', there is reference to another form of bill of lading – namely one made out to a named consignee only.[103] By this means, it was argued, the shipper could protect himself against the prospect of a third party acquiring property in the goods before the shipper was paid.[104]

The waybill, or consignment note was first used in road and rail transportation[105] and air carriage[106], where a _negotiable document is not required',[107] as the goods are not sold in transit, which even if it was desired would be impractical given the relatively short transit times involved with these modes of transport.

---

[98] Aikens et al *Bills of Lading* at 21, 2.48
[99] Aikens et al, *Bills of Lading*, 21 at 2.47
[100] Aikens et al *Bills of Lading* at 20 2.44
[101] (1924) 8 Ll. Rep. 6, 8
[102] *The Rafaela S* supra [2005] 1 LR 347 at 353 [16] per Lord Bingham
[103] *Mason v Lickbarrow*, in the Exchequer Chamber, in Error 126 E.R. 209 (Court of Common Pleas) at 216
[104] Ibid.
[105] Adolfsson, J *Legal qualities of straight bills of lading - a comparative study of Scandinavian and English law Master's thesis in Maritime law*, University of Uppsala (2006), Chapter 2.2 citing Grönfors, *Inledning till Transporträtten*, 2 ed., Norstedts, 1989, p89. Also see Tiborg _Legal Qualities of Transport Documents' TMLJ 37. For general background Schoenbaum, *supra*, 551
[106] Proctor op cit 86
[107] Ibid, fn 20. Article 15(3) of the Warsaw Convention makes provision for the issue of a negotiable air waybill

It is not clear exactly when the sea waybill first came into use. It is stated, without authority, that sea waybills had not been _invented' when the 1855 Bills of Lading Act was enacted,[108] and Reynolds states categorically that the Act did not apply to _non-negotiable sea waybills' (which he may mean to include straight bills of lading).[109]

Several judgments in the early twentieth century recognised the well-established and long-standing use of documents other than bills of lading for carriage in the coastal trades. Although referred to as _consignment notes' rather than as sea waybills they appear to have the same features.[110] It seems likely that they were used in the coastal trade for the same reason that consignment notes are used in road, rail and air transport: short transit times mean it is unnecessary to sell the cargo in transit and impractical to use a bill of lading which might arrive after the goods.[111] There is no need for concern that arose on long sea journeys that the cargo should not _*remain en dehors commerce while they are in course of shipment'*.[112]

These reasons also explain the increase in the use of sea waybills in the containerised trades, where shorter transit times and seamless multi-modal transport, mean that the fact that goods can be delivered without production of an original bill of lading prevents delays and has become the _main advantage to their use'[113] and explains why they have become _increasingly popular'[114] and are recommended for use where goods are not required to be sold in transit.[115] By contrast the requirement that an original bill of lading be presented to

[108]Law Com no. 196 and Scot Law Com no. 130, pg 42, para 5.10
[109] Reynolds FMB _The Carriage of Goods by Sea Act 1992' LMCLQ (1993) 436, 438
[110] *Hugh Mack & Co. Ltd. v. Burns & Laird Lines Ltd.*, (1944) 77 Ll.L.Rep. 377 at 383 where the negotiability of the document is said to be that by indorsement and delivery it can transfer property in the goods.
[111] *Harland & Wolff v. Burns & Laird Lines* [1931] Sess. Cas. 722, at p. 728-9 and *Hugh Mack & Co. Ltd. v. Burns & Laird Lines Ltd.*supra at 383
[112] *Halsbury's Laws of England, vol. 29, pp. 210 - 211, paras. 280 - 1 (2nd ed.)*cited in *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) at 820
[113] Law Commission Report no. 196 and Scottish Law Commission Report no. 130,pg 46, para 5.7; Schoenbaum op cit note 33 at 551; Girvin *supra* 322
[114] Laryea ET _Paperless Shipping Documents' Tulane Maritime Law Journal (2000) 267; Lloyd _The Bill of Lading: Do we Really Need it?' [1989] LMCLQ 47. Yiannopoulos op cit note 40 at 19. Academic statements to this effect should be treated with caution. The 2003 UNCTAD (United Nations Conference on Trade and Development) Report _The Use of Transport Documents in International Trade' found that while sea waybills were used by 51% of respondents they were not used by those respondents in the majority of transactions (p17). Use of a negotiable bill of lading for security as part of a documentary credit transaction was a reason given by 75% of respondents for using such documents. UNCTAD/SDTE/TLB/2003/3 - 26 November 2003 (Available at http://unctad.org/en/Docs/sdtetlb20033_en.pdf) (Accessed on 27 October 2013). There does not appear to be any more recent UNCTAD report. (http://unctad.org/en/Pages/DTL/TTL/Legal/LegalDocuments.aspx) (Accessed on 27 October 2013)
[115] United Nations Economic Commission for Europe (UNECE) and U.N. Centre for Trade Facilitation and Electronic Business (CEFACT) Recommendation No. 12, Second Edition, UN Doc ECE/Trade/240 (2001);

obtain delivery is often superfluous (when the bill of lading is not being used as security for payment) and _hangs now like an albatross around its neck'.[116]

Likewise a straight bill of lading can be used when *further* transfer of the bill of lading by the consignee is not necessary or desirable for some reason. Although, following the *Rafaela S*, such a bill of lading does not enjoy the advantage of delivery of the goods without production of the original bill, it does offer protection against fraudulent transfer of the bill of lading to third parties. Whether it could also be used as security for payment, and to transfer constructive possession and ownership of the goods appears to be yet unsettled, and is discussed in the following sub-section.

3.7 *Changing Trade Practices*

Three aspects of changing trade practices in the twentieth century indicate that the legal functions of straight bills of lading and sea waybills may be changing. First they have acquired wider recognition under international cargo liability regimes, secondly, they have become recognised as permissible tender in certain circumstances under CIF sales and thirdly they can be specified in documentary credit transactions.

3.7.1 *Application of Cargo Liability Regimes*

The use of documents that did not call themselves bills of lading, and which were expressly stated to be non-negotiable was thought not to fall within the compulsory application of the Hague Rules. This is not obvious from the rules themselves. Article 6 purports to prevent parties avoiding the rules by simply issuing a document that is not called a bill of lading. The rules will thus not apply to a document marked _non-negotiable receipt', but the proviso to article 6 restricts the use of such documents to situations _where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement'. Article 6 excluded

---

which remains the case following revision of Recommendation 12 in 2010 by the International Trade Procedures Working Group (ITPWG) –TPG 15, _Revisions of Recommendation 12, Measures to Facilitate Maritime Transport Documents' (Available at www.unece.org/trade)(Accessed on 27 October 2013).

[116] Lloyd A _The bill of lading: do we really need it?' LMCLQ [1989] 47,49.

from its ambit _ordinary commercial shipments made in the ordinary course of trade'. That did not immediately suggest that straight bills were to be excluded.[117] Nor for that matter does it appear to exclude sea waybills since they are invariably issued in the _ordinary course of trade'.

However matters took the course they did in England as section 4 of the 1924 Carriage of Goods by Sea Act[118] excluded the application of the rules to documents marked _non-negotiable receipt' in all coasting voyages between ports in the British Isles including all of Ireland, without the proviso that they be in respect of an extraordinary shipment. Cases of this era have to be understood against the background of this legislation.[119]

The concept of _a receipt which is a non-negotiable document and is marked as such' reappeared in article 1(6)(b) of the Carriage of Goods by Sea Act 1971[120] (_UK COGSA 1971') and in section 1(1)(c) of the Carriage of Goods by Sea Act 1 of 1986 (_SA COGSA'). However now it was included as a means for the parties to provide expressly for the application of the Hague-Visby rules to the contract represented by a non-negotiable receipt by agreement. [121]

The position regarding contractual incorporation of cargo liability regimes is similar in Canada[122] and the United States of America.[123] The United States Court of Appeals (9th

---

[117] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 Lloyd's Rep 113 para [53] per Rix L.J., although he declined to decide the point and expressed great reticence about the proper interpretation of art.6.

[118] 14 & 15 Geo. V.C. 22

[119] In *Hugh Mack & Co. Ltd. v. Burns & Laird Lines Ltd.* (1944) 77 Ll.L.Rep. 377 at 383 per Lord Chief Justice Andrews it was held that the rules did not apply to a document marked _not negotiable'. It was not decided whether the document was a document of title, merely that it was not _similar to' a bill of lading. In some respects the document was very different to modern sea waybills as it did not acknowledge the goods to be shipped on board at all, let alone on a particular ship. *The Maurice Desgagnes* [1977] 1 Lloyd's Rep 290 at 293 concerned a shipment between two Canadian ports which was excluded from the compulsory application of the Hague Rules under section 7(4) of the Carriage of Goods by Water Act R.S.C. 1970 c.C-15, it was held that the document that was not signed by the carrier, and only required production of a copy was not a bill of lading for the purpose of the Bills of Lading Act R.S.C. 1970 c. B-6

[120] c.19

[121] As was applied in relation to a document called a _commercial vehicle movement order' in *McCarren & Co. Ltd v Humber International Transport Ltd. and Truckline Ferries (Poole) Ltd* (The Vechscroon) [1982] 1 Ll Rep 301 and a _consignment note/waybill' in *Browner International Ltd v Monarch Shipping Co Ltd* (The European Enterprise) [1989] 2 Ll Rep 185

[122] *Cami Automotive Inc v Westwood Shipping Lines Inc* (The Westwood Anette) 2009 FC 664 (Fed. C. Can.), upheld on appeal 9 2012 FCA 16, 428 N.R. 382, 216 A.C.W.S. (3d) 271. The case was decided under the Hague-Visby Rules enacted by the Marine Liability Act, part 5 SC 2001 c.6. This was previously held to be the position when Canada applied the Hague Rules in *Canadian General Electric v. Les Armateurs du St-Laurent* (The Maurice Desgagnes) [1977] 1 F.C. 215 (Fed. C. Can.) (reversed on appeal on different grounds), [1977] 2 F.C. 503 (Fed. C.A.). See Pamel and Wilkins _Bills of Lading vs Sea Waybills, and the Himalaya Clause' a paper presented at the NJI/CMLA, Federal Court and Federal Court of Appeal Canadian Maritime

Circuit) has said of US COGSA 1936 that _as a practical matter, contractual extension of the COGSA is now routine in the shipping industry.'[124] Rule 4(i) and Rule 8 of the CMI Uniform Rules for Sea Waybills provide for such incorporation on the basis that the contract of carriage governed by the waybill _will be subject to any international or national law which would have applied compulsorily to the carriage had it been undertaken under a bill of lading or similar document of title'.

The *Rafaela S* decided that straight bills of lading do fall within the ambit of the Hague Visby Rules, whilst sea waybills do not. The rules accordingly apply compulsorily regardless of any contractual incorporation to straight bills of lading, but not to sea waybills. This appears to also be the position in Europe.[125]

The inclusive trend has continued in proposed replacements of the rules. The Hamburg Rules[126] apply to straight bills of lading and sea waybills[127] although this Convention has not been signed by South Africa nor entered into force in any of its major sea trading partners.[128] The Rotterdam Rules[129] similarly apply to contracts of carriage, whether carried under bills of lading or not,[130] although the rules may have added further confusion as the bill of lading can be a negotiable transport document, a straight bill of lading (but only if it contains an express presentation clause) or a non-negotiable transport document (in other words, a sea waybill).

Law Association Seminar on April 15, 2011 (Available at http://www.cmla.org/papers/006B%20Pamel_Bills%20of%20Lading_Paper_ENG.pdf) (Accessed on 27 September 2013)

[123] *Starrag v Maersk Inc* 486 F.3d 607, 612 note 5, 2007 AMC 1217, 1221, note 5 (9 Cir. 2007) cited in Pamel & Wilkins op cit. The position in the USA is considerably more complicated when COGSA is extended contractually to inland transit in conflict with the US statutory regime. In this regard Starrag v Maersk supra has been distinguished in *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd* 557 F.3d 985 but the finding does not alter the position that for sea carriage non-negotiable seawaybills are not governed by the mandatory application of COGSA.
C.A.9 (Cal.),2009.

[124] *Starrag v Maersk Inc* 486 F.3d 607, 614

[125] *The Duke of Yare*, (ARR-RechtB Rotterdam, Apr. 10, 1997) cited in The Rafaela S [2005] 1 Lloyd's Rep. 347 para [21] per Lord Bingham

[126] United Nations Convention on the Carriage of Goods by Sea 1978

[127] Aikens et al *Bills of Lading* par 2.16

[128] Status of Convention (Available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html)(Accessed on 27 September 2013)

[129] United Nations Convention of Contracts for the International Carrying of Goods Wholly or Partly by Sea 2008

[130]Rotterdam Rules Article 1(1) separately defines negotiable and non-negotiable transport documents, but Article 5 read with the definition of Contract of Carriage in article 1 makes it clear that the convention applies to all transport contracts wholly or partly by sea. (Availalbe at http://www.rotterdamrules.com/sites/default/files/pdf/convention.pdf) (Accessed on 26 September 2013)

3.7.2 *Tender under CIF Sales*

At one time any document other than a negotiable bill of lading recording the goods to have been shipped on board a particular vessel was not good tender under an international sale contract.[131] Nevertheless, there are indications that this position is changing.

In *Gardano & Giampieri v Greek Petroleum George Mamidakis & Co*[132] goods were sold on C&F terms to the Greek Ministry of Commerce, which was issued with a straight bill of lading. The contract expressly provided that ownership of the goods was to pass at the loading installation, however it appears that had it not been for the existence of this term the court would have found that ownership passed in the usual way when the bill of lading was taken up by the consignee.[133]

Kum v Wah Tat Bank Ltd[134] concerned the use of negotiable mate's receipts in a particular trade and the court was prepared to recognise a local custom that such receipts were documents of title[135]. In an obiter remark Lord Devlin said that _... it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all' although the court stated that ordinarily in such cases shipment serves as delivery.[136] Thus, _as between seller and buyer it does not usually matter whether the bill of lading is a document of title or not.'[137]

In the *Rafaela S* Rix L.J. said that:

> _[He could] see no reason why as between a seller and a buyer under a cif sale the usual principle ... does not apply, even in the case of a straight bill. The seller does not wish to part with property unless the buyer pays for the documents, and the seller/shipper who is left with

[131] *Diamond Alkali Export Corp v Bourgeois* [1921] 8 Ll.L.Rep 282, 284; 3 K.B. 443 at 452. Also see *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171 at 194 – 195 per De Villiers JA, where it was held that reference to a _bill of lading' in a documentary credit entitled the buyer ot reject presentation of a _through bill of lading', recording the goods to be _received for shipment' at an inland rail station. There was, the Court held, no evidence of clear agreement that such a document could be tendered under the documentary credit, nor was there proof that the through bill of lading operated as a _symbol of the goods' capable of transferring ownership of the goods by delivery of the bill of lading.
[132] [1961] 2 Ll Rep 259
[133] Per McNair J at 265
[134] [1971] 1 Ll Rep 439 at 446
[135] The particular documents in question fell outside the custom as they were non-negotiable.
[136] Lord Devlin is referring to the delivery required under the English Sale of Goods Act, 1893, s. 32(1) and to the unconditional appropriation of the goods referred to in s. 18, rule 5(2))
[137] [1971] 1 Ll Rep 439 at 446

both goods and documents wishes to be protected against losing his goods to a consignee who is allowed to take delivery of them from the ship without production of a bill of lading.'[138]

Tiborg is also of the view that straight bills of lading can serve as security for payment and can evidence the transfer of title (ownership of the goods).[139] Waybills are said to be in a different position.[140] Although no reasons are advanced for this view presumably it is because the shipper's only recourse in the event of non-payment is to vary the delivery instruction before the goods reach their destination.[141]

A 'high proportion' of containerised cargo is now carried under 'non-traditional' transport documents.[142] The International Chamber of Commerce's publication of International Trade Terms ('Inco terms') was amended in 1990 to refer to other forms of transport document, but twenty years later there is much that remains unclear about how they should be dealt with in sales contracts.

The usual terms of a CIF sale would appear to require the seller to tender a bill of lading, for the official ICC publication of Inco terms 2010 states that under all C-terms 'the transport document must show not only that the goods have been handed over to the carrier by the date agreed, but also that the buyer has *an independent right to claim the goods from the carrier at destination*'[143] [my emphasis].

This would exclude the sea waybill from the scope of 'usual' transport documents since the document does not evidence the right to claim the goods (except possibly when the right of control is relinquished and this is stated on the document).

Secondly, the ICC indicates that the usual transport document would be one that permitted 'transfer of rights'.[144] The term 'rights' is not clarified, but is possibly a reference back to the 'independent right to claim the goods from the carrier at destination'. In other words the first of the document of title functions. However, it is still not clear whether what is envisaged is the ability to effect unlimited transfers of this right by delivery of the

[138] *The Rafaela S* [2003] 2 Lloyd's Rep. 113, at 131 [80] per Rix L.J.
[139] Tiborg 'Transfer of Documents' LMCLQ [2002] 539, 541. Murray, Holloway and Timson-Hunt, *Schmitthoff's Export Trade*, pg 310 state that a shipper can transfer title to the goods referred to in a straight bill of lading by delivering the bill of lading to the consignee.
[140] Tiborg 'Transfer of Documents' LMCLQ [2002] 539, 542.
[141] ICC Guide to Incoterms 2010, pg 72
[142] Murray, Holloway and Timson-Hunt, *Schmitthoff's Export Trade*, pg 283
[143] ICC Guide to Incoterms 2010, pg 71
[144] ICC Guide to Incoterms 2010, pg 72

document, which would exclude both sea waybills and straight bills of lading. The straight bill of lading will enable the buyer to claim the goods from the carrier at the port of destination[145] but it does not permit transfer from the buyer/consignee to third parties.[146] The view in the authoritative textbooks is that usually a ‗negotiable' bill of lading is required, unless express agreement or custom in the particular trade permitted some other document.[147]

Thus sea waybills and straight bills of lading can be used, but only if permitted by custom of the port of destination[148] or by express agreement between the parties.[149] Even then Lorenzon advises considerable caution, suggesting that the courts may yet find that tender of such a document is incompatible with the nature of a CIF sale.[150] He refers to *The Julia*[151] in which it was held that the document tendered under the CIF sale had to be the ‗legal equivalent of the goods'. Tender of a document, which lacked this effect,[152] had the drastic consequence of changing the contract to one where risk did not pass upon loading but only on actual delivery of the goods.

Lorenzon also suggests that a CIF sale requires tender of a document that allows the buyer to sue the carrier for loss of or damage to the cargo during transit.[153] This could have drastic and unintended consequences for CIF importers and exporters using sea waybills and straight bills of lading whilst there is any uncertainty about whether the transfer of rights of suit is permissible under the STDA.

---

[145] Incoterms 2010 Rules CIF A8(d) – a sea waybill cannot do this.
[146] Lorenzon *CIF and FOB Contracts* (2012) 5-044 and 5-006. Incoterms 2010 Rules CIF A8(e) requires that the document enable the buyer to sell the goods in transit by transfer of the document, or notification to the carrier. Under English law neither a straight bill of lading nor a sea waybill can do this. Under the rules of civil transfer in Europe and in America this could be effected, but Lorenzon does not comment on this aspect.
[147] Murray, Holloway & Timson-Hunt *Schmitthoff's Export Trade*, pg 38. No reference is made by the authors to the presentation of sea waybills, nor do they clarify whether the bill of lading must be negotiable. Lorenzon *CIF and FOB Contracts* (2012) 5-088 indicates that unless expressly permitted the sea waybill is not valid tender under a CIF contract because it is not negotiable.
[148] ICC Guide to Incoterms 2010, pg 71 refers to ‗the usual transport document for the agreed port of destination'
[149] ICC Guide to Incoterms 2010, pg 185 states: ‗Unless the contract [of sale] contains specific stipulations as to the nature of the contract of carriage, the seller may [sic, the Incoterms say he ‗must'] contract ~~on~~ usual terms."
[150] Lorenzon *CIF and FOB Contracts* (2012) 5-089, citing *The Julia: Comptoir d'Achat et de Vente du Boerenbond Belge SA v Lousi de Ridder Limitada* [1949] A.C. 293
[151] *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Lousi de Ridder Limitada* [1949] A.C. 293. 322
[152] In that case it was a delivery order which was not addressed to the carrier, and thus possibly distinguishable from both a straight bill of lading and a sea waybill.
[153] Lorenzon *CIF and FOB Contracts* (2012) 5-074

3.7.3 *Use in Documentary Credit Transactions*

At one time a bill of lading which was not negotiable was not good tender for the purposes of the Uniform Customs and Practice for Documentary Credits (‗UCP'), which required the bills of lading to be in ‗negotiable or transferable form'.[154] However provision is made for non-negotiable sea waybills in UCP 500, article 24, and in the latest amendment, UCP 600, article 21.[155] UCP 600, article 19 also recognises multi-modal transport documents. Thus currently both sea waybills and straight bills of lading are not automatically excluded from use in documentary credit transactions.[156]

The terms of the documentary credit require strict compliance and thus if the letter of credit specifies that a negotiable bill of lading is required, straight bills of lading and sea waybills cannot be used.[157] Conversely such documents can be used if specified in the credit,[158] and if they comply with the terms of the credit, which will include the relevant article of UCP 600 where the credit incorporates the UCP, then the bank cannot reject the document.[159]

Whether a non-negotiable document is acceptable would also depend on the requirements of the banks involved in the transaction. They may wish to hold a negotiable bill of lading as security in which case a sea waybill would not be regarded as satisfactory and the bank may refuse to open the credit on such terms.[160] Although at one time regarded as very important it appears that more recently banks have come to view the bill of lading ‗as

---

[154] *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep. 367 per McNair J

[155] Todd *Bills of Lading and Bankers' Documentary Credits* at para 3.8 and 8.1 indicates that the banking community was responding as early as 1974 to changes in transport documentation.

[156] It is not clear which provisions of UCP 600 apply to straight bills of lading. See Treitel GH ‗The Legal Status of the Straight Bill of Lading' LQR (2003) vol. 119, 604 at 617, referring to UCP 500, he argues that it is not clear if they fall under Marine/Ocean Bill of Lading or Non-Negotiable Sea Waybill. Also see Todd op cit note 155 at para 8.10 who concludes that the ICC may have regarded straight bills of lading as a species of waybill.

[157] *Soproma SpA v Marine & Animal By-Products Corporation* supra note 153 – the credit specified bills of lading marked ‗to order' and straight bills of lading were rejected. On the doctrine of strict compliance generally see Murray, Holloway and Timson-Hunt, *Schmitthoff's Export Trade*, pg 192. The author's do not discussion the position of sea waybills and straight bills of lading.

[158] Todd P, *Cases and Materials on International Trade Law*, 15-021, para 62. E.g. see: *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at para [52] where BHP paid for a consigment of galvinised steel coil purchased FOB by letter of credit specifying ‗Non-negotiable bills of lading'.

[159] *Loomcraft Fabrics CC v Nedbank Ltd and another* 1996 (1) SA 812 (A) at 819 I – J per Scott AJA (as he then was) concerning a combined transport bill of lading. Also see Lorenzon *CIF and FOB Contracts* (2012) 5-008

[160] Todd op cit note 55 at para 3.51—3.60 and also in chapter 8.

just another letter of credit document'.[161] If the bank has other adequate security it will be unconcerned if the parties decide to specify a straight bill of lading or a sea waybill under the terms of the credit, and such document might then offer attractive transaction cost savings.[162]

3.8 *Revisiting the Insistence upon a Distinction Between Sea Waybills and Straight Bills of Lading*

The *Rafaela S* was a decision concerned with the Hague-Visby rules, and to some extent constrained in its efforts to bring the straight bill of lading within the compulsory application of the rules, by the accepted view that sea waybills, or _non-negotiable receipts' were excluded. For this reason both the Court of Appeal and the House of Lords focussed upon distinguishing the two forms of document.

The authors Aikens, Bools and Lord commenting more generally on the judgment suggest that more detailed investigation of mercantile practices is necessary.[163] Furthermore, although it was said in the *Rafaela S* that _no trader, insurer or banker would assimilate the two [documents]'[164], it does appear that in certain cases where the sea waybill has most of the same features as the straight bill of lading there might be room for _considerable uncertainty'.[165]

Such views may reflect a reticence to overturn long-held views about the functions of the straight bill of lading, and discomfort with the disjunctive legislative status of the straight bill of lading in England. In the latest edition of *Carver on Bills of Lading* it is still maintained that a straight bill of lading is not a document of title at common law, that the transfer of it does not operate as a transfer of constructive possession, and that the carrier is bound to deliver to the consignee without presentation of the bill.[166] Although some support for this view is found in other textbooks[167] and in judgments of first instance in *East West*

---

[161] Kozolchyk B, _Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective *' J. Mar. L. & Com. (1992)* vol. 23 at pg 161 at pg 162
[162] Ibid.
[163] Aikens et al, *Bills of Lading*, 21 at 2.47
[164] *The Rafaela S* [2005]1 Lloyd's Rep. 347 at 358 [46] per Lord Steyn.
[165] Treitel and Reynolds, *Carver on Bills of Lading*, 1-018
[166] *at* paragraph 6–007
[167] Notably *Benjamin's Sale of Goods,* (5 ed, 1997) at p 900, para 18-014 – however as the Court of Appeal noted the principal editors of both works are the same so it is not surprising that they express similar views. See *The Rafaela S* supra [2003] 2 LR 113 at 140 [124]

Corp v DKBS 1912 [168] and *The Happy Ranger*[169], those views are not in keeping with the statements of the Court of Appeal[170] and the House of Lords in the subsequent *Rafaela S* decision.[171]

The learned authors of *Carver on Bills of Lading* indicate that the requirement of presentation of a straight bill of lading[172] is a ‗necessary' but not a ‗sufficient' condition for the document to be a document of title in the common law sense.[173] By which they mean that a document of title in the common law sense must fulfil the second and third of the ‗document of title functions' discussed above, namely transfer of constructive possession and, if intended, ownership of the goods. The authors refer to this as the ‗conveyancing function' and insist that there are ‗good reasons of policy' why such a function should only be attributed to non-negotiable documents if there is proof of a custom of merchants to that effect.[174]

That approach has much to commend it,[175] including the possibility of recognising purely local customs, or customs particular to specific trades, and does not exclude the possibility of such a custom in relation to straight bills of lading[176] and sea waybills being proved to exist at some future date. Support for such a view can be drawn from the fact that the learned authors of *Scrutton* confine themselves to remarking that a sea waybill[177] ‗has not *at present* been established as a document of title by mercantile custom...' [my emphasis].[178] Other authors have not considered the prospect of a future development of a document of title function for sea waybills, but neither have they ruled that out as a possibility.

---

[168] [2002] EWHC 83 (Comm) at para [24] per Thomas J

[169] [2001] 2 Lloyd's Rep 530, at 539, relying in turn on the decision of Bingham LJ in *The Captain Gregos* [1990] 1 LI Rep 310 at pp. 317–318 and *Hugh Mack & Co v Burns & Laird Lines* [1944] Lloyd's Rep 377 at 383

[170] *The Happy Ranger* [2002] 2 Lloyd's Rep 357 para [30-31] per Tuckey LJ and para [49] per Rix LJ.

[171] *The Rafaela S* supra [2003] 2 LR 113 at 137 [109] and [2005] 1 LR 347 at 363 at [64]

[172] Which they regard as being a result of express contractual terms

[173] Treitel and Reynolds, *Carver on Bills of Lading*, 6-024 (at pg 350)

[174] Treitel and Reynolds, *Carver on Bills of Lading*, 6-026.

[175] Although it probably creates problems in the majority of bills of lading marked ‗non-negotiable' or ‗not negotiable unless TO ORDER OF' and similar wording, since on the reasoning applied in *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439 , 445 (PC) this would nullify any custom rendering same a document of title.

[176] As to which see Thomas S ‗Transfers of documents of title under English law and the Uniform Commercial Code' [2012] LMQLC 573, at 577 referring to the conflicting views of Carver, op cit, and Todd P ‗Case Comment: Bills of lading as documents of title' [2005] JBL 762, 778

[177] They may well only have in mind a straight bill of lading which falls under the term ‗sea waybill' as defined in UK COGSA 1992

[178] Cited in *The Rafaela S* supra [2003] 2 LR 113 at 139 [120]

3.9 *Conclusion*

The fundamental question, which is logically antecedent to the above debate, is whether the quality of being a ‗negotiable or transferable' sea transport document is co-extensive with being a document of title in the common law sense, or in the sense intended in art. 1(b) of the Hague and Hague-Visby Rules. It is submitted that this is not necessarily so.

It has already been demonstrated in chapter 2 that a ‗negotiable' bill of lading does not always fulfil all three aspects of its document of title function (although depending on the intention of the parties it is capable of doing so). In chapter four the history of the development of these features is traced not as a linear progression, but as a slow evolutionary process, driven by an interplay between merchant practice and legal principles developed on a case-by-case basis.

In the final analysis:

> ‗The development of the bill of lading as a document of title in this manner has been very successful, so that it has developed to fulfil a tripartite role connecting the contract of carriage, the sale of goods in transit and the raising of financial credit. It is important to remember that the primary relevance of the bill of lading as a document of title is in relation to the contract of carriage, and that as regards the carrier, the other two functions are essentially 'parasitic'.' [179]

Thus although forming a matrix of related contractual obligations, the contracts of sale, marine insurance and carriage remain separate contracts. In any international sale between parties trading at arms' length the nature of the sea transport document used does not change the fact that:

1. if the buyer bears the risk of loss or damage to the goods then he (or his marine cargo underwriter) needs to be able to sue the carrier for damages if the goods are lost or damaged due to breach of the contract of carriage; and
2. the carrier needs to know who he is obliged to deliver the goods to and who can sue and be sued upon the contract.
3. Failure to permit an action to the consignee will be directly prejudicial where the loss is not insured, and could reduce insurance loss recovery ratios and thus

[179] N Francis, *supra*, 29 citing Wilson *supra*, 141

> increase insurance premiums in the trade, if insurers are unable to recover under rights of subrogtation.[180]

It does not matter at all in this enquiry whether the sea transport document also played a role in the transfer of possession and ownership of the goods from the seller to the buyer. Therefore it must be concluded that there is no sound reason to exclude such documents from the ambit of a statutory mechanism to permit the transfer of rights of suit under the contract of carriage. However, in the following chapter it will be examined whether the words _transferable' and _negotiable' can be applied to documents which do not fulfil a document of title function.

[180] Rose FD _Sea Carriage Rights' Case and Comment (1991) 50(3) *The Cambridge Law Journal* 394 at 395

CHAPTER FOUR: INTERPRETATION OF THE PHRASE 'NEGOTIABLE OR TRANSFERABLE'

4.1 Introduction

Whilst the considerations examined in chapters two and three point to the desirability of finding a legislative solution to the question of title to sue under straight bills of lading and sea waybills, the application of the provisions of the STDA is constrained by section 2(2).

The critical question to be answered in addressing the interpretation of section 2(2) is what the words _negotiable' and _transferable' mean. In essence, the question is whether they have the same meaning, in which case the expression is a tautology, but can be understood in a sense that is consistent with much of the traditional authority. Alternatively, it must be considered whether _transferable' is capable of a wider meaning encompassing documents that are non-negotiable but can be transferred once from shipper to consignee. If this is to be so one must be able to give sense and meaning to the transfer thus envisaged, and this requires a consideration not only of the manner in which _transfer' is effected but also of the legal effects of _transfer'.

In this chapter the origin and development of the terms _negotiable' and _transferable' will be traced insofar as they came to be applied to bills of lading, and contemporary academic and judicial opinion as to the meaning of both terms will be examined. The purpose of the analysis will be to determine whether those terms have any application to straight bills of lading and sea waybills.

4.2 The Origins and Development of the Negotiable Instrument

During the long history of the reception and development of the concept of negotiability into English law, first through the admiralty court and from the seventeenth century onwards through the English common law courts, there was a series of obligatory writings that were transferable but never fully negotiable. This is outlined in the historical account offered by J

Milnes Holden[1] in which he illustrates two principles underlying the development of the law of negotiable instruments; principles which appear to have wider application to the development of common law generally:

a. Development is slow and faltering. The law unfolds as a story ‗oscillating between success and failure ... progress ... and conservatism', [2] and not as a linear development always following strict logic.
b. Development of the law merchant follows a purpose, which is to be found in the needs of the merchants conducting trade. ‗[T]he transmission of an institution does not in itself explain its emergence at a given place and time. An institution is not transmitted unless it has a definite purpose to serve in its new home.'[3]

The principles outlined by Milnes-Holden are closely aligned to the use of custom as a source of law. It is probably fair to say that it was Lord Mansfield who lit the path to the development of the law merchant in England by way of the guiding the principles of certainty and commercial common-sense. However, there is also often an irreconcilable tension between the dictates of legal certainty, and the changeable nature of mercantile custom. [4]

Du Toit, who traces the origins of the document of title function of the modern bill of lading, also concludes that the development was evolutionary, slow and determined by mercantile needs and practices.[5] The examination of that development in the subsequent sections will show that the courts' approach was guided by the principles of certainty and common sense, but that on occasion there were clashes between mercantile practice and principles laid down in the courts. It is likely that given their relatively modern introduction to international commerce the customs and practices related to sea waybills are still being shaped and developed in a similar way to the evolution of bills of lading, and the courts should be slow to clip the wings of commerce by developing doctrines that would restrict their utility as trade documents.

It emerges from Milnes-Holden's historical account of the development of negotiable instruments[6] that there were three great advances in legal understanding which completed the

[1] *The History of Negotiable Instruments in English Law* (University of London, 1955)
[2] Holden op cit note 1, 28—29
[3] Ibid 22
[4] Chorley ‗The conflict of law and commerce' (1932) 48 *LQR* 51
[5] Du Toit, SF ‗The evolution of the bill of lading' (2005) 11 *Fundamina* 24
[6] Holden op cit note 1

development of documents which were at first only ‗transferable' into documents which were regarded as ‗negotiable' in the fullest sense of the word. The first lay in the acceptance of the mechanism by which commercial paper was freely transferable ‗from hand to hand' either as a bearer instrument, or by endorsement and delivery.

The second major development lay in the concept that the holder of the commercial paper acquired the right to sue on the instrument, even though there might be no privity of contract between him and the drawer/acceptor/endorser being sued.

The third lay in the concept that the holder's title was indefeasible, even if he had received the instrument from someone who had stolen it or obtained it by fraud, provided the transferee had taken the instrument in good faith, for value and without notice of the fraud or irregularity.

The practice of endorsing bills of exchange, and of making bills of exchange payable to bearer and transferable by delivery, developed on the continent and was originally unknown in England where the more cumbersome forms of assignment of debts, or substitution of fresh bills were used.[7]

However, there was a clear dichotomy between the law and the custom of merchants. While the law may not have recognised the practice, English merchants engaged in foreign trade were exposed to commercial paper and used it for the settlement of foreign accounts[8] including the practice of transferring bills of exchange by endorsement and delivery.[9]

As regards the second major development, there is little account in Milnes Holden's history regarding the bearer's rights of action on the bill of exchange in Europe. This was a problem peculiar to the English common law[10] and it may be that the same problems did not arise in Europe, at least not to the same extent.[11] Originally the strictures of the English common law prevented competition by the common law courts with the admiralty court, as

[7]Holden op cit note 1, 67—69
[8] Ibid 22
[9] *Goodwin v Robarts,*(1874-75) L.R. 10 Ex. 337; (1876) 1 App. Cas. 476, 494 per Lord Selbourne
[10] There were problems, as outlined in Milnes-Holden's work that arose in framing a claim under such a document within the highly formalised forms of pleading available in English common law. There was also the developing doctrine of privity of contract that came to be applied strictly in English law, as discussed in chapter two of this thesis.
[11] Cowan notes that in many parts of Europe the holder had to sue as procurator or agent before the right of the holder to sue in his own name came to be recognised. Cowan and Gering *Negotiable Instruments in South Africa* 4ed, 4

no adequate remedy was offered in the common law courts.[12] The Mayor's Court in London on the other hand, recognised the bearer's right to sue on a bill of exchange in a very early case[13] and so did the Court of Admiralty.[14] In English common law however the doctrines of privity of contract and consideration prevented the free transfer of contractual rights and obligations, and necessitated development of the action of assumpsit, with complex (often fictitious) allegations of agency to accomplish the task of permitting an action by a payee or endorsee against an acceptor or drawer of a bill of exchange.[15] Development was only possible through the acceptance of merchant custom as part of the common law[16] by which it came to be accepted that the holder of a bill of exchange had title to sue on the contract evidenced by the document in the form of an _action on the case'. This was a momentous legal development, and one, which, as will be outlined in the next section, was never, achieved in relation to bills of lading.

However whilst the very early cases had decided that bills of exchange were transferable by endorsement and delivery, and that the holder had a right to sue upon the bill, the law had not yet developed the doctrine that the bona fide transferee for value takes the rights under the document free of equities. In other words that he acquires good title despite defects in the title of any previous holder of the document. This last development is the defining characteristic of negotiability[17] and the reason that bills of lading are not true negotiable instruments.[18]

In a decision identified as groundbreaking Holt CJ had decided in 1699 that the original owner of a bill of exchange that had been lost could not maintain an action in trover against a bona fide transferee for value of the bill _by reason of the course of trade, which creates a property in the assignee or bearer'.[19]

---

[12] Holden op cit note 1, 20
[13] *Burton v Davy* (1437) S.S. 49, p.117, cited in Holden op cit note 1, 23
[14] *Denaker v Mason* (1564) S.S. 11, p. 126, cited in Holden op cit note 1, 25. The Admiralty Court applied the civil law. The cession of rights in civil law is more simple than an assignment of rights under English law. Civil law is also unconstrained by the doctrine of consideration.
[15] Holden op cit note 1, 27 —29
[16] Ibid 32—35 describes the development in English common law of the action on the case upon the custom of merchants.
[17] Ibid 25, note 3 citing Jacobs, *The Law of Bills of Exchange* (4th ed.) p.9
[18] *Kum and Another v Wah Tat Bank Ltd* [1971] 1 Ll .L .Rep 439 at 446 per Lord Devlin
[19] *Anon.* (1699) 1 Salk. 126; 3 Salk. 71; 1 Ld. Raym. 738. Holden op cit note 1, at p. 64, surmises that it was an instrument payable _to bearer' probably in the form of a note issued by the newly formed Bank of England.

Commenting on the decision Milnes Holden says:

> _Here, then for the first time in history the Common Law Courts and the Court of Chancery recognised the claim of the bona fide holder for value of a bill. A chariot had been driven through the hitherto impregnable lines of the common law maxim *nemo dat quod non habet.* That chariot was driven by Holt C.J. and by Somers L.C. and the motive power was simply _the course of trade'; in other words, the custom of merchants.'[20]

If one laments that bills of lading never acquired the same characteristics as true negotiable instruments it is wise to note that the Courts of the time never accorded negotiability to promissory notes despite their widespread use in mercantile practice,[21] until a remedial statute was passed in 1704.[22]

The law of negotiable instruments is now codified in the Bills of Exchange Act 34 of 1964 in South Africa. Cowen[23] discussing the concepts of _transferability' and _negotiability' notes that the terms can be used in a wide and a narrow sense. _Transfer' in its widest sense encompasses any transfer of contractual rights that can be achieved _by ordinary cession under the common law'.[24] In its narrow sense _transfer' has the meaning ascribed in section 29(1) of the Bills of Exchange Act that a bill or note is _negotiated' _when it is transferred from one person to another in such a manner as to constitute the transferee the holder.'[25]

Used in this way the term _transferable' and the term _negotiable' have the same meaning. This is borne out by s6(5) of the Bills of Exchange Act which provides that _if a bill contains words prohibiting transfer it is valid as between the parties, but is not negotiable.' Thus Cowan states in relation to this section that _[t]here are some bills and notes which are not negotiable (i.e. transferable) at all; these may be not negotiable ab initio or they become not negotiable subsequently.'[26]

The definition of holder in section 1 of the Bills of Exchange Act refers to _the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.' It might thus be

[20] Holden op cit note 1, 64—65
[21] Chorley op cit note 4, 52—53, citing Holt CJ's objection that Lombard Street shall not give laws to Westminster Hall.
[22] The Promissory Notes Act (1704) 3 & 4 Ann. c.9
[23] Cowen and Gering op cit note 11
[24] Ibid at 113
[25] Ibid at 113-114
[26] Ibid at 115

thought that a bill can be transferred (i.e. negotiated), as those terms are used in section 29(1) of the Act, from the drawer to the payee. However, Cowan argues that when the bill is an order bill the delivery of the bill by the drawer to the payee constitutes _issue' of the bill and not negotiation of the bill.[27] This is because the Act defines _issue' in section 1 as _the first delivery of a bill or note, complete in form, to a person who takes it as holder'. By contrast a bearer bill is both issued and negotiated to the first holder.[28]

Finally, as Cowan makes clear, the Bills of Exchange Act uses the terms _negotiable' and _negotiation' and _negotiate' inconsistently. In the previous examples the term _negotiate' is used interchangeably to mean the same thing as _transfer', and would apply to the transfer of any bill or note, regardless of whether the holder acquired the rights of a holder in due course (that is to say title free of equities).[29]

However when dealing with cheques the term _not negotiable' applied to a crossed cheque in terms of section 80 of the Bills of Exchange Act means that the cheque can in fact be transferred (an unlimited number of times) but only subject to equities. This is the sense in which it was said in *Kum v Wah Tat Bank*[30] that a _negotiable' bill of lading is in reality only _transferable'. It is capable of being transferred like a _non-negotiable cheque', an unlimited number of times but without transferring title free of equities. A _non-negotiable' bill of lading on this analogy cannot be further transferred by the named consignee in the same way that a cheque marked _non-transferable' cannot be further transferred by the named payee.

However an analogy to the law of negotiable instruments breaks down at several levels. First, the words _non-negotiable' when applied to any other bill of exchange mean that the document is not transferable at all.[31] Thus the words _non-negotiable' only have the specific meaning attributed to them by virtue of section 80 of the Bills of Exchange Act, which obviously does not apply to bills of lading and has no common root with the law pertaining to bills of lading.

---

[27] Ibid at 114
[28] Ibid
[29] Ibid at 114 - 115
[30] supra
[31] Ibid 116. See *Hibernian Bank v Gysin and Hanson* [1939] 1 All ER 166 (CA). As to the meaning of such words when applied to cheques see *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A)

Secondly, when the word _negotiable' is used in this specialised sense to indicate transfer of title free of equities that is _one of the distinctive characteristics of a bill of exchange.'[32] The term _negotiable' never applies in this way in relation to any bills of lading, at least not under English law. The holder of a bill of lading who took in good faith and for value cannot acquire better title to the goods than his predecessor, unlike the holder in due course of a negotiable instrument, who is entitled to all the benefits of the instrument _free of equities'.[33]

Another fundamental difference (in English law) between negotiable instruments and bills of lading is the form in which the document must be cast to be _negotiable'.[34] In 1873 in the case of *CP Henderson & Co v The Comptoir d'Escompte de Paris*[35] the Privy Council remarked that _the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as –or order or assigns" ought to be in them.'[36] The problem had been settled far earlier by legislation in relation to promissory notes[37] and bills of exchange,[38] but the solution adopted was the opposite of that which applies to bills of lading. Thus true negotiable instruments are fully negotiable unless they contain words on their face restricting negotiation or transfer.

The analogy to the _issue' of a bill of exchange, as defined in the Bills of Exchange Act, cannot be extended to the bill of lading. A bill of lading is issued by the carrier to the shipper.[39] Transfer by the shipper to the consignee may require endorsement, as where the bill is made out to the shipper's order. On the other hand where the bill is made out to the consignee or order the shipper transfers the bill of lading to the consignee by delivery alone. No endorsement by the shipper is necessary. Even where the bill of lading is expressly said

[32] Per Corbett, J (as he then was) in *OK Bazaars v Universal Stores Ltd* 1972 (3) SA 175 (C) 179. Cowen op cit note 11 1—6. Also see *Standard Bank of SA Ltd v Sham Magazine Centre* op cit note 31, 493.
[33] Murray, Holloway and Timson-Hunt, *Schmitthoff's Export Trade* 11ed. 310 (_*Schmitthoff's Export Trade*'). See also Du Toit SF _Reflections on bills of lading and silo receipts used in the South African futures market' (2007) 2 *Journal of International Commercial Law and Technology* 105 at 106
[34] *Schmitthoff's Export Trade* op cit note 33, 310.
[35] (1873) LR 5 PC 253, 260
[36] Also see for considerations of whether a bill is or is not negotiable in more recent times, *Melissa (HK) Ltd v P & 0 Nedlloyd (HK) Ltd* [1999] 3 HKLR 674 and *The Chitral [2000]* 1 Lloyd's Rep 529, 533
[37] Holden op cit note 1,100
[38] The Bills of Exchange Act (1882) 45 & 46 Vict. c.61, s8(4). Prior to this the absence of express words of transferability meant that a bill of exchange was not transferable. See: Holden op cit note 1, 100, citing Chitty *Bills of Exchange* (1827) at p.66
[39] Du Toit SF _Comments on the Sea Transport Documents Act 65 of 2000' 2003 *J. S.Afr. L.* 731, 733, refers to the definitions of _issue' and _payee' in the Bills of Exchange Act 34 of 1964 in interpreting section 3(2)(a) of the STDA. In other words he equates the position of the shipper vis-a-vis the carrier to that of the _payee' vis-a-vis the _drawer' of a bill of exchange. However, on this analogy there is no accounting for the position of the named consignee in a bill of lading.

to be _not negotiable' the bill of lading is transferred by delivery to the named consignee. It was in this context that it was said by Rix J that the document is capable of transfer at least once by the shipper to the consignee.[40] To refuse to acknowledge that the transmission of the bill of lading by the shipper to the consignee (whether the bill is _negotiable' or not) would create a lacuna that cannot otherwise be filled. It must be the case that the bill is transferred by delivery alone in this instance.

4.3 The Early Practice of Transferring Bills of Lading

The first characteristic that developed in relation to the _negotiable instrument' was the concept of transferring the document by delivery, as a bearer instrument, or by endorsement and delivery. This practice was well-established by the middle of the seventeenth century and was of much earlier origin.[41]

Du Toit traces the work of the earlier scholars on the origins and development of the bill of lading, concluding that the bill of lading originated in the practice of Italian merchants and owed its development to the regeneration of sea-based commerce in the Italian city states from around the eleventh century.[42] The precise time and place of its emergence cannot be determined but scholars agree that the bill of lading developed out of the use of the ship's book of lading, or ship's register,[43] (akin to a modern day ship's cargo manifest) and the practice of handing a copy to the shipper.[44]

The earliest examples of bills of lading being used are traced to Italy in the fourteenth century.[45] However although such bills of lading might be transmitted by the shipper to his agent at the destination port there is no evidence that they were *transferable* by delivery or by endorsement and delivery. An early example, from 1390, has been described as containing _something like an endorsement'[46] in that it records that the goods _must be delivered at Pisa to Mr Percival de Guisulfis, and by order of the said Mr. Percival who shall deliver all this

[40] *The Rafaela S* [2003] 2 Lloyd's Rep. 113, 128 per Rix L.J.
[41] Du Toit, SF op cit note 5, 23
[42] Ibid, 16 and 18
[43] Ibid, 16
[44] Ibid. Also see Bools *The Bill of Lading as a Document of Title: An Anglo-American Comparison*, 2 and Proctor, C *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*
[45] Ibid.
[46] Du Toit op cit note 5, 18 and Bools, op cit note 44, 2, quoting Dr Enrico Bensa _The Early History of Bills of Lading' (Genoa, 1925)

things to Mercellino de Negro his agent'. Bools argues that the instruction to deliver to de Negro was not an endorsement by Percival, having been written in the same hand and apparently at the same time as the document as a whole.[47] Du Toit also takes the view that this early example was not negotiable or transferable being merely an instruction to the carrier by the original consignee about _how and to whom delivery should be effected.'[48] Their views are justified on the wording of the document, which recognises only delivery to the agent of the original consignee, is not made out to order or assigns, or to bearer, and does not appear to admit of the possibility of transfer to a third party by endorsement after the bill of lading was issued.[49]

These views may be criticised as unduly restrictive, in failing to consider whether the bill was not capable of transfer at least once to the named consignee Mr Percival. Such a transfer would not require an endorsement in the same way that the first transfer of a negotiable bill made out to a named consignee _or order', or the transfer of a straight bill of lading to the named consignee, do not require an endorsement by the shipper.

However Bools and du Toit are most probably still correct that this early bill of lading was not intended to be _transferable' as there is also no indication that the original document would be sent to the consignee or his agent in Pisa, or that the document would need to be produced in order to obtain delivery of the goods. Strictly speaking _although useful [transfer of the original bill of lading to the consignee] would at least not always have been an absolute necessity'[50] as the named consignee or his agent would be recorded in the ship's register.

Bools concludes that _transferability' developed in the sixteenth century, and reaches this conclusion after an examination of various examples of bills of lading presented in the English High Court of Admiralty around this time that made provision for delivery to the shipper or assigns, or a consignee or assigns.[51] Bools also notes that the use of bills made out _to assigns' was accompanied by the issue of multiple originals of the bill of lading and the

[47] Bools, op cit note 44, 2
[48] Du Toit op cit note 5, 18
[49] Bools op cit note 44, 3
[50] Du Toit op cit note 5, 19 at fn 59
[51] Bools op cit note 44, 4. Bools is not suggesting that transferability developed in England. On the contrary it appears almost certain that it developed in mercantile practices in Western Europe.

inclusion in the bill of lading of the now _time-honoured' attestation clause indicating that one bill of lading being accomplished, the others are to stand void.[52]

Although Bools argues that possession of the bill of lading does not give a right to delivery of the goods as against the carrier,[53] he does recognise that at least merchants regarded it in that way, and that the view that the holder had _some right against the carrier' was _a logical and important step in the document's development.'[54]

Although Bools later criticises various legal foundations for a right to delivery vesting in the holder of the bill of lading by virtue of possession of the bill[55], it remains the more widely-held view that this is the case. This position is endorsed by Bennett,[56] de Battista,[57] Carver,[58] and Du Toit[59]. Du Toit also cites a 1661 Dutch opinion that records that the consignee of the bill of lading had the right, as against the Master, to delivery of the goods,[60] although Du Toit does not indicate if the consignee was required to be in possession of the original bill of lading.

It is interesting to place these developments in the bill of lading's form and function into their historical context. Bools notes that the rise in the use of bills of lading in England only occurred after the British naval victory over the Spanish Armada in 1588 and the colonisation of America.[61] In other words one must conclude that the adoption of the practice of endorsement of bills of lading (and hence multiple sales of goods at sea) coincided with the growth in trade that must have accompanied England's rising maritime and mercantile strength.

This view is supported by Bools' observation that there was a change in trading practices in the sixteenth century in that goods came to be traded at sea.[62] Earlier bills of lading were consigned to an agent of the shipper and sold once they arrived at the destination port. In the sixteenth century the shipper very often still did not know the name of the

---

[52] ibid.
[53] Bools op cit note 44, chapter 6 generally, and his criticism of Bennet in chapter 1 at p.2—3
[54] ibid 4
[55] Ibid Chapter 6
[56] Ibid 2—3 and Du Toit op cit note 4, 22— 23
[57] Bools op cit note 44, 150, citing de Battista, *Sale of Goods by Sea*, 1989, p29
[58] Bools op cit note 44, 150, citing Colinvaux (ed) Carver, *Carriage of Goods by Sea*, 1984, para 1596
[59] Du Toit op cit note 5, 19
[60] Ibid, 21
[61] Bools op cit note 44, 3
[62] Ibid, 4

person who would ultimately buy the goods from him, but he could make out a bill _to order' or _assigns'. In this way the goods could be sold, sometimes several times, while they were at sea. A necessary corollary of this practice was the transfer of the original bill of lading to the buyer, who needed to be able to display the document to the carrier, as his name would not be recorded in the ship's register.

Bills of lading showing evidence of endorsement appeared in Genoa in the sixteenth century[63] and appear to have made their way to Northern Europe and England, although Du Toit dates the practice of endorsing bills of lading to the end of the seventeenth century, accepting that by the beginning of the eighteenth century it was _a well-known custom' in both Europe and England.[64]

As to the form of bills of lading used in Europe du Toit only mentions the issue of multiple copies[65] and does not indicate if such bills were expressly made out to order or assigns, and contained an attestation clause, which may indicate a departure point between English law and civil law. As indicated by Bools' analysis it appears to be a central tenet in his argument that unless made out _to order' a bill of lading was not capable of endorsement. As noted in chapter three, this is the law of England.[66] On the other hand even today in certain European countries and the United States a _straight' bill of lading (known as a _recta' bill of lading in Europe[67]) must be clearly marked non-negotiable[68] or _not to order'. Further in chapter five the laws of Europe and the United States will be examined which provide that a straight bill of lading is transferable[69] but is not negotiable in the sense that its transfer does not afford the transferee any greater rights than those of previous holders whereas negotiation of a negotiable bill of lading does.[70]

---

[63] Du Toit, op cit note 5, 19
[64] Ibid, 23
[65] Ibid, 20
[66] *CP Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253, 260
[67] Tiberg H _Legal qualities of transport documents _(1998) 23(1) *Tul. Mar. L.J.* 1, 26; UNCITRAL Working Group III (Transport Law) 17th Session: _Proposal by the Netherlands on bills of lading consigned to a named person' A/CN.9/WG.III/WP.68 (Available at http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html) (Accessed on 06.12.2013); Schelin J _Documents under the UNCITRAL Draft Instrument on Carriage of Goods by Sea' 192, published by Stockholm Institute for Scandinavian Law (Available at http://www.scandinavianlaw.se/pdf/46-9.pdf.) (Accessed on 06.12.2013)
[68] 49 USC §80103 b(2)
[69] The position is codified in the USA in 49 USC §80106 a. This is also the law in Germany and Scandanavia according to Tiberg op cit note 67, 26. The law is however far from uniform, as noted in the _Proposal by the Netherlands on bills of lading consigned to a named person' op cit note 67.
[70] This is discussed in more detail in the following chapter.

As to the manner in which the bill of lading was transferred, Du Toit[71] cites the Dutch text, Verver (1711),[72] in which it is indicated that a bill of lading may be transferred[73] _bij simpel *endossement,* ofte overschrijvinge achter op den rugge; met gelijke wijse ende effect als inde *Wisselbrieven'*, that is to say by an endorsement on the back of the bill of lading in a similar way and with a similar effect to a bill of exchange. Du Toit does not indicate whether the practice of endorsing bills of lading only applied to bills of lading made out _to order'. The statement about the legal effects of the transfer will be discussed further below in relation to developments in English law.

What one can conclude, although necessarily somewhat tentatively, is that by the beginning of the eighteenth century bills of lading were being transferred by endorsement and delivery of the original document. The form of such endorsement was identical to the endorsement of bills of exchange. In this respect the bill of lading had acquired the first characteristic of the negotiable instrument. What remained unclear was whether the bill of lading had to be made out to order or assigns, but this appears to have been the practice in the examples of the bills of lading before the English High Court of Admiralty.

However while the second and third defining characteristics of the negotiable instrument had also received judicial recognition by the beginning of the eighteenth century, this was not the case with the bill of lading. Although the consignee may have had a right to demand delivery of the goods, none of the writers examined draw any conclusions about the legal effect of transferring the bill of lading, other than to agree that it did not transfer possession or ownership of the goods represented by the bill.[74]

It also cannot be determined whether bills of lading were issued to a named consignee only, and if so, whether they were regarded as being transferable. It appears that at least originally it was not necessary to transmit the bill of lading to the consignee as his name appeared in the ship's book of loading. It further appears that the practice of making out bills _to order' to permit multiple sales at sea developed contemporaneously with the practice of transferring the bills of lading by endorsement and delivery. It is impossible to determine

[71] Du Toit op cit note 5, 21
[72] Verwer A *Nederlants See-Recthen; Avaryen en Bodemeryen* (Available on Google Books as a free e-book)(Accessed on 08.12.2003) quoted in Du Toit op cit note 5, 21
[73] It is not clear if the word _transferred' used in Du Toit's commentary is from the original text nor whether this was the only method of transferring a bill of lading referred to by the Dutch writers.
[74] Bools op cit note 44, chapter 7; Du Toit op cit note 5, 21

when the straight bill of lading came into use, and whether it was ever regarded by merchants as transferable at this early stage in the bill of lading's history.

Lastly, and most importantly, whatever the legal consequences of the endorsement and delivery of the bill of lading were at this early stage, it marked the recognition that physical transfer of a paper document vested the holder of the document with legal rights. The bill of lading is distinguished from other sea transport documents such as waybills by the fact that its transfer effects a valid transfer of legal rights to its lawful holder.[75] What those legal rights are will be explored further in the next sections.

4.4 Eighteenth Century Developments : *Lickbarrow v Mason*

The question of the role played by the bill of lading in transferring ownership of the goods, and the title of the holder of the bill of lading, arose in *Lickbarrow v Mason.*[76] It is in this case that one finds for the first time the description of the bill of lading as being "negotiable and transferable' by the custom of merchants.

A special verdict delivered by a Jury in the Kings Bench division[77] found that:

> "... by the custom of merchants, bills of lading, expressing goods or merchandise to have been shipped by any person or persons *to be delivered to order or assigns*, have been, and are at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, *negotiable and transferable* by the shipper or shippers endorsing such bills of lading with his, her or their name or names, and delivering or transmitting the same so endorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such endorsement and delivery, or transmission, the property in such goods hath been, and `is transferred and passed to such other person or persons.'[78] (my emphasis)

[75] See for example Todd *Bills of Lading and Bankers' Documentary Credits* 4 ed, para 3.4
[76] *Lickbarrow v Mason* 100 E.R. 35, (1787) 2 T.R. 63 (Kings Bench); 126 E.R. 209 , (1790) 1 H.Bl. 357 (Exchequer Chamber); 101 E.R. 206 , (1793) 5 T.R. 367 (Kings Bench); 126 E.R. 511, (1793) 2 H.Bl. 211 (Exchequer Chamber); 2 E.R. 39, (1793) IV Brown 57 (House of Lords); 101 E.R. 380, (1794) 5 T.R. 683, (*venire de novo* before Kings Bench); and 101 E.R. 473, (1794) 6 T.R. 131(costs).
[77] 101 E.R. 380, (1794) 5 T.R. 683
[78] Ibid , 381, 685-686

The action was one in trover[79] for a cargo bought by Lickbarrow, from a certain James Freeman, who was a merchant in Rotterdam. Freeman had acquired the cargo from a supplier in Zeeland, and it had been shipped from Zeeland to Liverpool on the *Endeavour* under a bill of lading made out to _order or assigns'. Two of the originals were endorsed in blank by the shippers in Zeeland[80], transmitted to Freeman with the commercial invoice and further transmitted by Freeman to Lickbarrow[81] together with a set of bills of exchange drawn upon Lickbarrow for the value of the cargo. Freeman was later declared insolvent and his Zeeland supplier, remaining unpaid, sought to sell the cargo to Mason. To this end they transferred the fourth bill of lading to Mason, and he obtained delivery of the cargo from the ship.

The effect of the decision was to vindicate the right of Lickbarrow, a bona fide endorsee for value of the original bill of lading, to recover possession of the goods from Mason, notwithstanding that the consignee had failed to pay the shipper for the goods. Thus the wide language in which the jury set out the custom of merchants the case has given rise to considerable confusion about whether bills of lading are negotiable, in the sense of transferring title free of equities, or at least quasi-negotiable, in that by transfer of the bill of lading the unpaid shipper's right of stoppage in transit was defeated.

Remarkably there was no judicial precedent for the purported custom and it had not been mentioned by any of the leading contemporary writers on mercantile law,[82] but the special jury would have comprised merchants who would have known the customs of merchants of the time. Any attempt to trace the origins of the concepts of _negotiability' or _transferability' as applied to bills of lading antecedent to *Lickbarrow v Mason* is fraught with difficulty. In the report of *Lickbarrow v Mason* Buller J remarked frankly upon the doubtful

[79] An action for recovery of goods based on ownership of the goods akin to the vindicatory action known to Roman Dutch law.

[80] The endorsement of a bill of lading follows the form of endorsement of other negotiable instruments. In this instance the shippers signed the bill on the reverse with their own name- thus by way of this blank endorsement entitling the holder of the bill to fill it up and acquire title to the bill, which is precisely what Lickbarrow did, by entering his own name upon the bill when he received it.

[81] It appears from the report of facts in the case note that the shippers in Zealand and the assignee, Lickbarrow, were both acting as agents of Freeman, but the precise details of the arrangement are not clear. The Court treated Freeman as the consignee and Lickbarrow as a third party assignee for value. This is made clear by the Court of The Exchequer: _The plaintiffs claim under Freeman, but though they derive a title under him, they do not represent him, so as to be answerable for his engagements, nor are they affected by any notice of those circumstances which would bar the claim of him or of his assignees.' See: *Mason v Lickbarrow*, in the Exchequer Chamber, in Error 126 E.R. 209, 211, (1790) 1 H.Bl. 357, 358–359.

[82] Argument on demurrer before the Kings Bench in *Lickbarrow v Mason* 100 E.R. 35, 36, 2 TR 63, 64–67

accuracy of earlier case records[83] and the failure to follow the guide of established principle,[84] and his comments make it plain that the doctrine of precedent was in its infancy.

By the eighteenth century it was settled[85] mercantile practice that the bill of lading could be transferred by endorsement and delivery, and it appeared to be accepted that such transfer gave the holder an independent right against the Master to demand delivery of the goods.[86] What remained to be fully developed was a concept of the bill of lading's role in transferring ownership and possession of the goods.

There had been much earlier cases, which had held that transfer of the bill of lading transferred ownership of the goods, both in the Court of Admiralty in the sixteenth century,[87] and in a number of judgments in the common law courts by Holt CJ,[88] Lord Mansfield[89] and later by Buller J himself.[90] When *Lickbarrow v Mason* was decided Buller J thus referred to the fact that transfer of the bill of lading transferred the property in the goods.[91]

These cases were apparently confined to situations in which a consignee was the owner of the goods and was transferring the bill of lading duly endorsed as necessary by delivery to an endorsee taking in good faith for value. Contrary decisions were

---

[83] *Lickbarrow v Mason* Lickbarrow v Mason 100 E.R. 35, 36; 2 TR 63, 65 (Kings Bench) per Buller J, although he may have intended to confine his comments to the courts of Equity.

[84] *William Nowell Lickbarrow, and another v Edward Mason, and others* 2 E.R. 39, 40, (1793) IV Brown 57, 63 (House of Lords) — all the evidence being 'thrown together' and 'left generally to a jury'.

[85] This is not accepted by Bools who disputes any legal foundation for such a view. See Bools op cit note 44.

[86] Du Toit op cit note 5, 19 fn 59

[87] Chorley op cit note 4, 57 at note 32, citing Holdsworth *History of English Law*, vol. vii, p257.

[88] *Evans v Marlett* 91 E.R. 1078; (1697) 1 Ld. Raym. 271 KB. Bools op cit note 44, at 13, criticises Holdsworth's view that the case decided that property passed by assignment of the bill of lading (HEL vol. IV. P257). Bools' view (at 14) is that property passed upon the consignment (shipment) of the goods, and that the bill of lading was merely evidence of how the goods had been consigned. According to Bools Holt CJ's statement that the 'consignee of a bill of lading has such property as that he may assign it over' meant no more than that the consignee, as owner of the goods, could assign his interest in the goods.

[89] The most notable of these being (according to Buller J) *Wright v Campbell* 98 E.R. 66 , (1767) 4 Burr. 2046. Lord Mansfield ordered a new trial, but only on the basis of a suspicion of fraud. Bools (op cit note 44, 14) makes an insightful criticism of submissions by counsel and the obiter remarks of Lord Mansfield, and concludes that the most that can be said of the case is that Lord Mansfield 'has accepted the *possibility* of the bill of lading transferring property in a cargo whilst at sea' but had not accepted that the transferee acquired any better rights than the transferor.

[90] *Caldwell* v. *Ball (1786)* 1 T.R. 205 and *Hibbert* v. *Carter* (1797) T.R. 745 (but as to the unique facts of the latter see *Mason v Lickbarrow*, in the Exchequer Chamber, in Error 126 E.R. 209, 216, 1 H Bl. 357, 368 and *William Nowell Lickbarrow, and another v Edward Mason, and others* 2 E.R. 39, 43, (1973) IV Brown 57, 63 (House of Lords). The goods were consigned to a creditor of the shipper in discharge of a debt and thus the shipper no longer had any insurable interest. Bools (op cit note 44, 15) criticises both decisions as being premised on 'shaky foundations' but accepts that they recognised that at common law the transfer of the bill of lading transferred ownership of the goods.

[91] Ibid.

distinguishable on the grounds of the existence of fraud on the facts[92] or on the basis that they applied to actions against the carrier who was discharged where he delivered against an original bill of lading.[93] Thus in the ordinary course, where a bill of lading was made out ‗to order' (or ‗to bearer') transfer (by endorsement and delivery) to a third party transferred property in the goods.

However, as between the immediate parties to the contract of sale the position was different. It was said that property in the goods passed on consignment. This may have meant on shipment of the goods for which there is some support.[94] It may have meant by delivery of the bill consigned to him.[95]

This rule, clearly of ancient origin, had been ameliorated by the development in the English courts of Equity of the right of stoppage in transit. This was first applied in *Wiseman and Vandeputt.*[96] It permitted the shipper to recover the goods from the carrier before actual delivery to the consignee should the latter become insolvent and fail to pay for the goods.[97] It

[92]E.g. Lord Mansfield's decisions in *Wright v Campbell* 98 E.R. 66; (1767) 4 Burr. 2046 and *Savignac v. Cuff* (1778) 2 T.R. 66. The latter decision was on nisi prius and may have been explained by the endorsee having seen the letters of advice that accompanied the bills of lading, and thus not taking the bill in good faith since he had knowledge of the consignee's failure to pay for the goods. See *Lickbarrow v Mason* 100 E.R. 35, 41, (1787) 2 T.R. 63,74 (Kings Bench) per Buller J. Reference is also made in argument to *Snee v Prescot* 26 E.R. 157, (1743) 1 Atk.245, where again the plaintiffs were not innocent purchasers but assignees of a bankrupt who wished to obtain the goods without paying for them. The case was decided in equity. See *Lickbarrow v Mason* 100 E.R. 35, 38–39 and 41, (1787) 2 T.R. 63, 68–69 and 75 (Kings Bench).

[93] *The Assignees of Burghall v Howard* 32. Geo. 2, 1 H.Bl. 366 and *Fearon v Bowers* (1753), referred to in *Mason v Lickbarrow* 126 ER 209, (1790) 1 H.Bl. 357. Both cases concerned discharge of the carrier in the first case for refusing to deliver to the holder of the bill of lading, on the shipper's instructions, and in the second for delivery against an original bill of lading presented by the shipper's agent. The court held he was not required to examine who had the better title. It is interesting to note from the judgment in *Fearon v Bowers*, per Lee Ch.J, that intention to transfer the property was relevant. Thus it was said: ‗to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by endorsement: that the invoice strengthens that right by shewing a farther intention to transfer the property. But it appeared in this case, that Jones [agent of the shipper] had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods'.

[94] See Bools op cite note 44, 13

[95] *William Nowell Lickbarrow and another v Edward Mason and others* 2 ER 39,43, (1793) IV Brown 57, 63 (House of Lords) (contrasting the rights of the bailee and the vendee) held: ‗the vendee of goods consigned by a bill of lading has, by the delivery of the bill of lading, a possession which is *tantamount* to actual possession of the goods at land and he has the whole interest and property in the goods vested in him by the bill of lading'. Section 1 of the 1855 Bills of Lading Act also spoke of property passing to the consignee of a bill of lading ‗upon or by reason of such consignment'. It would be strange if this was the shipment of the goods and not the transfer of the original bill of lading to the consignee.

[96] 23 E.R. 732, (1690) 2 Vern. 203

[97] *Lickbarrow v Mason* 100 E.R. 35, 42, (1787) 2 T.R. 63, 76 (Kings Bench) per Grose J

is against this background that one can make sense of the latter statement in *Hunter v Beal* [98] that ‗as between the vendor and vendee the property is not altered till delivery of the goods'.

By the time of *Lickbarrow v Mason* the right of stoppage in transit as between the shipper and consignee was established beyond doubt and was not challenged by the plaintiff. Therefore the issue that fell to be decided for the first time by the case in *Lickbarrow v Mason* was thus not whether endorsement and delivery of the bill of lading passed the property in the goods to the transferee (as this had already been decided), but whether a shipper could still exercise his right of stoppage in transit against a third party who had acquired the bill of lading (duly endorsed and delivered) for a valuable consideration and in good faith. The case decided that he could not.

4.4.1 The Bill of Lading Distinguished From the Negotiable Instrument

The purpose of a separate examination of the development[99] of ‗negotiable instruments' and of ‗bills of lading' has been to show that although their development occurred contemporaneously, it followed a different path from a very early stage.

By the time *Lickbarrow* v. *Mason*[100] was decided the characteristics of bills of exchange as negotiable instruments, including transfer of the rights of suit on the instrument and their ability to convey indefeasible title to the holder in due course, were accepted law. *Anon* (1699)[101], *Miller v Race* (1758)[102] and a host of other decisions had already been decided on the application of these principles.[103]

It is evident from the arguments of counsel in *Lickbarrow v Mason* that they were fully aware of the attributes of negotiable instruments, but that there was no previous case law on point in relation to bills of lading.

---

[98] (1785) before Lord. Mansfield Ch.J. referred to by Buller J in *Lickbarrow v Mason* 100 E.R. 35, 41, 2 T.R. 63, 75

[99] This dissertation only considers the development in Europe and England, from where bills of lading spread to former colonies of the European powers and Britain. A more detailed examination of the early history and development of such documents in the East and Middle East was not within the scope of the research.

[100] 100 E.R. 35, 39, 2 T. R. 63, 71

[101] ibid

[102] ibid

[103] For a discussion of the decisions on negotiable instruments see Holden op cit note 1, 114 –122, but the author does not consider in this section the bill of lading.

Counsel for Mason argued that the bill of lading is not a negotiable instrument and is merely assignable. The transferee cannot acquire „greater rights or property in the goods to which such bill relates, than the original possessor or endorser of such bill had.“ Hence he argued that the right to stoppage should be recognised against such endorsee. [104]

Counsel for Lickbarrow countered with the argument that:

> „By the constant course and the universal consent and opinion of merchants, bills of lading are negotiable; it is highly convenient to trade that they should be so; and if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped; besides, it will be a hardship on an innocent vendee.“[105]

At the first hearing before the Kings Bench, Ashurst J expressed sympathy for the last point,[106] finding that a bill of lading was similar to a bill of exchange:

> „The assignee of a bill of lading trusts to the endorsement; the instrument is in its nature transferable; *in this respect therefore this is similar to the case of a bill of exchange*. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an endorsable instrument.“[107] (my emphasis)

Buller J did not discuss the same aspect of „negotiability“. He acknowledged that no action had yet been brought by the holder of a bill of lading on it[108] but restated emphatically that „a bill of lading does transfer the property“ in the goods.[109] Grose J concurred in Buller's judgment. [110]

In the Court of the Exchequer (which found for the defendant, Mason) the issue of the „negotiability“ of bills of lading was raised again. It was held by Lord Loughborough that the

---

[104] *William Nowell Lickbarrow, and another v Edward Mason, and others* 2 E.R. 39, 44, (1793) IV Brown 57,65 (House of Lords)
[105] *Lickbarrow v Mason* 100 E.R. 35, 38–39, 2 T.R. 63, 68–69 (Kings Bench)
[106] ibid 39, 71
[107] Ibid
[108] Ibid 41, 75 — in contrast to actions on negotiable instruments. The action brought against the carrier if goods were not delivered was in conversion, the action available against the person in possession of the goods was in trover (based on ownership of the goods), and the action against the consignor was one for goods sold and delivered.
[109] Ibid.
[110] Ibid.

propositions for both sides were stated too _loosely' and in the course of his judgment he set out two salient features that distinguish bills of lading from negotiable instruments:

First, bills of lading deal with goods, and possession of the bill of lading should not give the holder better rights than possession of the goods themselves. Secondly bills of lading can be transferred for any number of reasons, including but not limited to the transfer of title to the goods. Bills of exchange on the other hand concern only the sum of money represented by the bill, and are transferred only for transferring that money.[111]

Those views have been commended in more recent attempts to define the _negotiability' of bills of lading.[112] The essential character of true negotiable instruments as _money' rather than _goods' finds support in early judicial pronouncements such as *Miller v Race*[113] supporting the right of the holder in due course to take free of equity, as well as a contemporaneous judgment by Lord Mansfield in *Peacock v Rhodes*[114] given in 1781.

The House of Lords then granted a venire de novo but apparently only on a technical point and with the weight of opinion supporting the views of Lord Loughborough on the substance of the dispute.[115]

At the fresh trial[116] the special verdict of the jury found upon a custom of merchants that bills of lading were _negotiable and transferable'. However, Bools has suggested that when properly analysed the case is not authority for the proposition that bills of lading are negotiable, or even quasi-negotiable, in the technical sense. This is so since the right of stoppage in transit was a right that existed in the law of equity as between the original seller and buyer, and was defeated by the legal transfer of ownership to a third party. There was on Bools' analysis no need to examine the case as one concerning negotiability at all — used by Bools in the full sense of the ability to transfer better title to the transferee than that enjoyed by the transferor.[117] Further, Bools asserts that the decision of the merchant jury although using the terms _negotiable and transferable' to describe the bill of lading, _decides nothing

[111] *Mason v Lickbarrow* 126 E.R. 209, 211–212, (1790) 1 H.Bl. 357, 360–363 (Exchequer Chamber)
[112] R E Negus, *Negotiability of Bills of Lading* , 37 L. Q. Rev. 454 (1921)
[113] 96 E.R. 1151, (1758) 2 Kenyon 189. Also reported at 97 E.R. 398, (1758) 1 Burrow 452
[114] 99 E.R. 402, (1781) 2 Doug. 633
[115] C horley op cit note 4, 58
[116] *Lickbarrow v Mason* 101 E.R. 380, (1794) 5 TR 683 (venire de novo before Kings Bench)
[117] Bools op cit note 44, 9 – 10, and 15–17

more than that property in the goods described in the bill of lading can be transferred by its endorsement and delivery.'[118]

4.5 The Widening Gap : Nineteenth Century Developments

Academic opinion is consistent with the finding that bills of lading are not _negotiable' in the strict sense of the word. Several limitations apply to the finding in *Lickbarrow v Mason* that curtail what at first appears to be a very wide custom to:

1. shipped[119], _order'[120] bills of lading;
2. _after such goods have been shipped, and before the voyage is performed';[121]
3. insofar as they are endorsed by the shipper;[122] and
4. to the effect that _by such endorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons.'

The Jury's verdict was not discussed by the Kings Bench and judgment was entered for the plaintiff on an understanding that the matter would proceed again to the House of Lords.[123] For reasons known only to the parties themselves, it did not. _It is perhaps an accident therefore that the bill of lading won its privileged position ...'[124]

Many questions were left unanswered by the case, including the form of bill of lading regarded as _negotiable'. Ashurt J's finding that the bill of lading in question had _negotiability' appears to have been founded on the fact that it was endorsed. Counsel for the plaintiff had also emphasised the form of bill was taken _to order or assigns'. [125] The custom of merchants was expressed in similar terms.

---

[118] Ibid, 18
[119] I.e. recording goods to have been shipped on board a particular vessel. Received for shipment bills of lading are thus not covered by the custom. See Girvin _Carriage by sea: The Sea Transport Documents Act 2000 in historical and comparative perspective' (2003) 119 *SALJ* 317. They are treated as bills of lading for the purposes of UK COGSA 1992 if they are capable of transfer by endorsement or, as bearer bills, by delivery.
[120] i.e. expressed to be delivered _to order or assigns'.
[121] UK COGSA 1992 seeks to provide a solution to the problems that arise when bills of lading are transferred after the goods have been delivered.
[122] The custom expressly covers an endorsement to a particular person or in blank, in which case the holder could fill it up with his own name.
[123] *Lickbarrow v Mason* 101 E.R. 380, (1794) 5 TR 683
[124] Chorley op cit note 4, 58
[125] *Lickbarrow v Mason* 100 E.R. 35 at 38-39 [68-69]

The case of *Lickbarrow v Mason* did not deal with straight bills of lading at all, and thus again very little can be gleaned from an examination of the case about the practice concerning such bills. Counsel for the plaintiff indicated that ‗[a] bill of lading may be so framed by the shipper of goods as to avoid all risk; he may make them deliverable to the *vendee only* , in which case his own right to seize *in transitu* will in every event remain'.[126] On the facts of the case it was not necessary to decide what the effect would be of delivery of a straight bill of lading without endorsement.[127]

The only judicial comment made in relation to such bills was that to make the bill deliverable to the vendee only would ‗restrain the negotiability' of the bill.[128] One cannot draw firm conclusions from this statement as it was made in the context of arguments concerning the third characteristic of ‗negotiability', namely the ability to transfer title free of equities. Clearly as between the immediate parties to the bill of lading it could not enjoy ‗negotiability' in this sense. That is not to say that it was not regarded as being transferable in a wider sense, so that by transfer of the document to the consignee the right to claim delivery of the goods, and the ownership of the goods were transferred to the consignee. On the other hand it is possible if one accepts Bools' view that ownership transferred to the consignee upon shipment of the goods, and that as owner the consignee acquired a right to delivery on the basis of his right to immediate possession. On this analysis there would be no need to transfer the bill of lading, although there is no suggestion by Bools or any other writer that the straight bill was not transferred to the consignee.

Four further constraints apply to the reasoning in the judgment:

1. The transfer of property had not been authoritatively linked to the transfer of symbolic delivery of the goods, represented by delivery of the bill of lading, although this would come to be the case;

2. Property in the goods does not invariably transfer upon transfer of the bill of lading, such depends on the intention of the parties;

[126] *William Nowell Lickbarrow, and another v Edward Mason, and others,* 2 E.R. 39, (1793) IV Brown 57 at 63
[127] Ibid.
[128] *Lickbarrow v Mason* 100 E.R. 35, 39, (1787) 2 T.R. 63, 71 per Ashhurst J

3. Although the language of negotiable instruments is used when referring to a bill of lading, it would later be held that the bill of lading is not a negotiable instrument. Transfer of the bill cannot be separated from the underlying transaction.[129] Thus transfer of the bill of lading does not transfer to the holder better title than the transferee.

4. The transfer of the bill of lading did not transfer the shipper's contractual rights against the carrier.

It is the fourth issue that is central to this thesis, but for a full understanding of the position it is necessary to consider the first three issues briefly.

4.5.1 A Symbol of the Goods

The transfer of the bill of lading had been recognised by the time of *Lickbarrow v Mason* as transferring the property in the goods but it has been stated that the bill of lading's ability to transfer symbolic delivery of the goods was still _undeveloped'.[130]

This is a peculiar statement to a South African lawyer, as ownership of movables cannot pass under South African law without a transfer of possession (whether by actual or symbolic delivery of the goods), coupled with the requisite intention.[131] English common law, on the other hand, provides simply that property passes when the parties intend it to pass.[132] Transfer of ownership is not dependent upon delivery or upon a tender of payment.[133]

---

[129] Aikens, Bools & Lord op cit note 78, para 1.33
[130] Aikens, Bools & Lord op cit note 78, 8, para 1.34
[131] *Knight, Ltd. v Lensvelt* 1923 CPD 444 at 447
[132] Guest AG et al (eds) *Benjamin's Sale of Goods* 7 ed at 5-016 (*Benjamin'*). The position is now governed by the Sale of Goods Act, 1979 c.54

S17(1) _Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the paties to the contract intend it to be passed.

S17(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.'

[133] Ibid at 5-018. The position is now governed by the Sale of Goods Act, 1979, s28 which provides that unless otherwise agreed delivery and payment of the price are concurrent conditions to the passing of ownership.

Any anomaly in English law was resolved when it was decided that the bill of lading was a symbol of the goods,[134] the metaphorical _key to the floating warehouse' that is the ship,[135] and that transfer of the bill transferred possession of the goods. Henceforth the holder of a bill of lading could exercise a lien over the goods.[136]

The _development' [137] cannot be seen as the sudden emergence of a new characteristic of the bill of lading, but was rather an express judicial recognition of an existing principle within the law merchant that had been slowly emerging as a universally recognised principle of the law merchant[138] for at least a century.

That development had probably already begun before the decision in *Lickbarrow v Mason.*[139] Counsel for the plaintiff in *Lickbarrow v Mason* argued that _the vendee of goods consigned by a bill of lading has, by the delivery of the bill of lading, a possession which is *tantamount* to the actual possession of goods' (my emphasis).[140] It is hardly conceivable that such an argument would be advanced to the House of Lords if it did not have currency within the commercial and legal thinking of the day. Moreover Buller J is reported to have held in the same case:

> _That every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass *as absolutely* and as effectually as if the goods had been actually delivered into the hands of the consignee.'(my emphasis)[141]

---

[134] *Barber v Meyerstein* (1870) L.R. 4 H.L. 317, 330
[135] *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327 (Court of Appeal) per Bowen LJ at 341
[136] *Robey & Co's Persevereance Iron Works v Ollier* (1872) 7 Ch. App. 695, 699
[137] As put by Aikens, Bools & Lord op cit note 78, 10 para 1.41
[138] *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327 (Court of Appeal) per Bowen LJ at 341, emphasised that the symbolic function of the bill was universally recognised and derived from the law merchant. *Barber v Meyerstein*(1870) LR 4 HL 317, 330 referred to the symbolic function as a _mode of dealing' and _usage' to which bills of lading were put (by the merchants using them in trade).
[139] In *Sewell v Burdick (*The Zoe*)* (1884) 13 Q.B.D. 159 (Court of Appeal), at 174, Bowen LJ, refers to this function as _very old law', citing *Story on Bailments*, s. 297. The earliest edition that I have been able to access is the 7th ed. published in 1863 and thus possibly the edition referred to. See Bennet EH (ed) *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* 7 ed. (Available as a free e-book on google books) (Accessed on 23.05.2013). In it Bennet has expanded upon and revised the original work, and there is no indication of whether the statement appeared in earlier works, but the authorities cited are from the late eighteenth century. E.g. *Atkinson v Maling, Assignees of Burn, a Bankrupt* 100 E.R. 249, 251, (1788) 2 TR 462, 466, per Buller J. The case but does not discuss the position of the bill of lading as a document of title. The case concerned transfer of possession of a ship by transfer of the bill of sale, and was decided under the statutes 13 Eliz. c.5 and 21 Jac.1, c.1 which dealt with fraudulent transactions.
[140] *William Nowell Lickbarrow, and another v Edward Mason, and others* 2 E.R. 39, 43, (1793) IV Brown 57, 64 (House of Lords)
[141] *Sewell v Burdick* (The Zoe) (1884) 13 Q.B.D. 159 (Court of Appeal), citing a report of *Lickbarrow v Mason* that I have been unable to locate: 1 Sm. L.C.794, 7 ed. The statements are cited in Bowen LJ's dissenting

Thus Lord Diplock in *Kum v Wah Tat Bank*[142] stated that ‗the bill of lading obtains its symbolic quality from the custom found in *Lickbarrow v Mason*...'[143]

The symbolic function of the bill of lading came to be expressly recognised in the nineteenth century, but in a halting fashion, with contradictory judicial pronouncements, sometimes by the same judge, clouding the issue.[144] It is not possible, for example, to reconcile the early lien cases of the nineteenth century with any principle that the bill of lading transferred symbolic possession of the goods.[145]

Moreover the function of the bill of lading as a symbol of the goods had emerged, as a natural development, from the recognition of the bill of lading giving the holder control over the goods.[146] In the authoritative judicial pronouncement on the subject in *Sanders v Maclean*[147] the symbolic function of the bill of lading was linked to the transfer of the bill by endorsement.

> ‗A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. … It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.' [148]

That statement of the symbolic function of the bill of lading is now an integral part of modern law on bills of lading. Thus in *Lendalease Finance (Pry) Ltd v Corporacion de*

---

judgment. The majority judgment was overturned on appeal. Aikens, Bools & Lord, op cit note 78, make no reference to either decision.

[142] [1971] 1 Ll. L. Rep. 439, 446

[143] Bools (op cit note 44, 174) rejects this view arguing that the first time reference is made to the bill's possessory function is *Newsome v Thornton* 102 E.R. 1189, (1806) 6 East 17 (Court of King's Bench)

[144] For example, Lord Ellenborough recognised the symbolic function of the bill in obiter remarks in *Newsom v Thornton* 102 E.R. 1189, 1201–1202, (1806) 6 East 17, 36– 41 (Court of King's Bench), a case concerning a factor's right to sell the goods but not to pledge. Yet he dismissed the idea in *Patten v Thompson* (1816) 5 M. & S. 350, 356 -359, a case concerning liens. See *Sargent v Morris* 106 E.R. 665, 666, (1820) 2 B. & Ald. 277, 281 per Bayley J. Both cases are discussed in Aikens, Bools & Lord op cit note 78, 9, para 1.36

[145] Aikens, Bools & Lord op cit note 78, 8–9 and 19

[146] In an early decision of *Brown, Assignee of Roger Williams a Bankrupt v Heathcote and Martyn* 26 E.R. 103 , (1763) 2 Eden 169 (Court of Chancery), it was said of the bills of lading (which had been delivered to a creditor) that ‗everything which could shew a right to the goods was delivered over'. The case is not direct authority for a practice of giving symbolic delivery by delivery of the bills, as the bills of lading had not been endorsed. Nevertheless it shows a very early recognition that the bills of lading evidenced control over the goods.

[147] (1883) 11 QBD 327 per Bowen LJ at p.341

[148] Ibid 341

Mercadeo Agricola[149] it was held that where the bill of lading was issued to the seller as shipper, possession of it entitled him to demand delivery of the goods from the carrier and prevent delivery to the buyer until the goods were paid for.

The judgment in *Sanders v Maclean* is not authority for the view that a straight bill of lading would not perform the same symbolic function. The case concerned a sale on CIF terms of iron rail shipped from St. Petersburg to Philadelphia. The bills of lading issued were negotiable bills of lading in the traditional form.[150] It was thus unnecessary to consider the position of the straight bill of lading and the judgment made no pronouncement about such bills.

There is no reason why a similar function should not be recognised in relation to straight bills of lading, since if they must be presented to the carrier to obtain delivery of the goods, they afford the same control over the goods.[151]

The sea waybill is an altogether different animal. Ordinarily the shipper retains control over the goods until actual discharge, and thus the right to alter delivery instructions, regardless of whether the sea waybill is sent to the consignee or not. By contrast the shipper under a bill of lading only retains the right to disposal over the goods prior to the transfer of

[149] (1976) 4 SA 464 (A)

[150] *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327.The case arose because the seller had received only two bills of lading from the shipper, and tender of those two bills, duly endorsed, was rejected by the US endorsee. Subsequent tender of the full set of three bills was rejected on the grounds that the bills would not then arrive in time to permit timeous discharge from the ship, and the receiver would become liable for sundry costs as a result of the delay. The case was tried at first instance before a Jury who found that it was the practice of London merchants to tender only two bills of lading, and that provided due diligence had been exercised in forwarding the bills of lading to the buyer, the latter was obliged to take up the documents despite a delay. Judgment was nevertheless entered for the defendant, but reversed on appeal, with the appeal Court upholding the practice of merchants.

[151] For example Bools (op cit note 44, 183) sets of three factors which explain the possessory function of the bill of lading. The first of these is that the bill of lading ‗manifests the carrier's intention to deliver the goods to the presenter and not to interfere with the presenter's ability to obtain custody of the goods on arrival'. Secondly transfer of the bill indicates that the transferor relinquishes control and thirdly, that the transferee intends to exercise control over the goods. Also see Todd op cit note 75, para 7.6 where he describes the right of the holder of the bill of lading to demand delivery as the characteristic which makes it an effective symbol of the goods.

the bill of lading.[152] It therefore follows that transfer of a sea waybill does not operate to transfer constructive possession of the goods.[153]

Although there are situations where the shipper expressly relinquishes the right of control to the consignee, as provided for in the CMI Rules on Sea Waybills, in the absence of a requirement that the consignee present the document to the carrier there is nevertheless no basis for recognising *the document* as evidencing a right of control over the goods. Thus it cannot be regarded as a symbol of the goods.

However, a reading of the English and Scottish Law Commissions' Report introduces the curious term "documents of possession":

> "Bills of lading *and sea waybills* have been called documents of possession in that they indicate which party has the right to demand possession of the goods on discharge, the main difference being that whereas the bill of lading can transfer constructive possession more than once, the sea waybill cannot.[154] (my emphasis)

This statement is ambiguous. It is unclear whether the Law Commission means to say that a sea waybill can transfer constructive possession of goods, but only once. If so, it may simply be a reference to the fact that such documents are documents of title as statutorily defined in the Factors Act, 1889.[155] It has been argued that sea waybills are "negotiable" for the purpose of s1(4) of the Factors Act, 1889 as well as for the purposes of s24, 25 and 27 of the Sale of Goods Act, 1979.[156] However this argument is based on the provisions of UK COGSA 1992 which give the "holder" of a sea waybill the right of physical delivery of the goods, which is the equivalent of the "proof of ...control of goods" referred to in the Factors Act, 1889. There is tentative support for this view in Carver but it is based upon the statute

[152] In practice to effect changes to the bill of lading, all three originals must be surrendered by the carrier to the shipping line before an amended bill of lading is issued, sometimes coupled with an "express" or "telex release". Also see *Benjamin* op cit note 132, para 1438, *Mitchell v Ede*113 E.R. 651, (1840) 11 Ad. & El. 888; *Elder Dempster Lines v Zaki Ishag* (The "Lycaon") [1983] 2 Lloyd's Rep. 548, Debattista C *The Sale of Goods Carried by Sea* 2ed, 32-33 and 195-198. All cited in Law Com no. 196 and Scot Law Com no. 130, pg 43, fn 25

[153] Treitel and Reynolds *Carver on Bills of Lading*, para 6-003 ("*Carver on Bills of Lading*"), on the basis that it is usually marked "non-negotiable"

[154] Law Commission Report no. 196 and Scottish Law Commission Report no. 130,pg 46, para 5.6

[155] (1889) 52 & 53 Vict. c. 45 s1(4) refers to "any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorising or purporting to authorise, either by endorsement or by delivery, the possessor of a document to transfer or receive goods thereby represented. See Law Com no. 196 and Scot Law Com no. 130, pg 45, fn8.

[156] Debattista op cit note 152 para 3-27

and not upon a principle of common law.[157] These arguments, based only a foreign statute that is inapplicable in South Africa, have no bearing on the interpretation of the phrase _negotiable or transferable' in the STDA.

4.5.2 Passing of Ownership of the Goods

It has been emphasised above that the bill of lading developed primarily as a means of controlling how and to whom the carrier made delivery of the goods. By transfer of the document the right to receive the goods from the carrier could be transferred to the holder of the original bill of lading. Whether this would bring about a transfer of ownership of the goods _depended on the circumstances and the intention of the transferor and transferee'.[158]

Thus statements that ownership of the goods passed with the transfer of the bill of lading cannot be taken as applying absolutely and in all cases. In *Sanders Bros v Maclean & Co* it was held that:

> _Property in the goods passes by such endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods.'[159]

The decision in *Sewell v Burdick*[160] held that a pledge accompanied by the endorsement of the bill of lading over to the bank (the pledge) fell outside the scope of the 1855 Bills of Lading Act. The holder of the bills of lading[161] was a pledgee only, but unwittingly found himself sued by the carrier for outstanding freight. In the Court of Appeal Brett M.R. and Baggallay L.J. concluded that endorsement of the bill of lading had passed legal title to the goods to the holder, even though he had never taken or demanded possession of the goods.

---

[157] *Carver on Bills of Lading* op cit note 153, para 6-012
[158] *Borealis A.B. v Stargas Ltd and Others (The 'Berge Sisar')* [2001] 1 Lloyd's Rep. 663 at [18] per Lord Hobhouse
[159] *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327 (Court of Appeal) per Bowen LJ at 341
[160] (1884) 10 App Cas 74
[161] Sewell is referred to in the judgment as an endorsee but the bills were made out to the shipper or assigns and endorsed in blank before being delivered to Sewell as a pledge for monies lent and advanced.

The House of Lords reversed this finding. It considered the language in which the custom of merchants in *Lickbarrow v Mason* was expressed to be consistent with a more constrained interpretation than appeared from some of the sweeping statements made thereafter[162] about the passing of ownership absolutely upon the transfer of the bill of lading.

> ‗I do not understand it as necessarily meaning more than that ‗the property' which it might be the intent of the transaction to transfer, whether special or general, passes by such an endorsement, according to the custom of merchants. The finding must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration.'[163]

The judgment restricted the ambit of the 1855 Act to property in the sense of legal title to the goods (i.e. ownership).[164] Property in the sense of ownership does not pass to a pledgee. Secondly, the judgment after examining *Lickbarrow v Mason* and subsequent decisions in detail, held that ownership of the goods does not automatically pass when the bill of lading is transferred. It transfers if and when the parties intend it to pass,[165] not because of the endorsement per se but in terms of the contract between the parties.[166] The case thus illustrated the limitation of the 1855 Bills of Lading Act which had expressly linked the transfer of rights of suit to the passing of the property in the goods ‗upon or by reason of [the] consignment or endorsement'.[167]

Tetley recognises that a straight bill of lading and title to the goods can only be transferred once, that is from shipper to consignee.[168] In other words Tetley provides support for recognising the ability of a straight bill of lading to play a role in the transfer of ownership of the goods represented by the bill. These views are supported by the changes in Incoterms 1990, 2000 and 2010, and in the UCP 600, outlined in chapter three.

Sea waybills are in a different position. Although their use can be agreed between the parties to an international sale transaction, if that transaction is governed by South African

---

[162] The language of Buller J in *Lickbarrow v Mason* and the House of Lords' decision in *Barber v Meyerstein* was criticised.
[163] *Sewell v Burdick* supra note 160, 79-80
[164] The judgment held that the term ‗property' in the 1855 Bills of Lading Act referred to the ‗general property' in the goods (i.e. legal title) and not a ‗special property' in the goods (i.e. a right to possession of the property)
[165] *Sewell v Burdick* supra note 160, 102
[166] Ibid, 105
[167] Section 1, 1855 Bills of Lading Act
[168] Tetley *Marine Cargo Claims* 3 ed 184, cited in the *Rafaela S* supra [2003] 2 LR 113 at 142 [131]

law it would be difficult to establish that the sea waybill operates as a symbol of the goods to enable ownership to pass by the transfer of the sea waybill from the shipper to the consignee.

The predominant view remains that the sea waybill is a receipt for the goods but it is _non-transferable'[169] and is not a document of title[170] at common law (i.e. under English law).[171] _Unlike bills of lading, sea waybills do not change hands, because they are not usually used to pay for the goods.'[172] It has also been said that the sea waybill is _used when the negotiability of the document is not necessary',[173] although this statement might be a reference to the ability to facilitate multiple sales at sea.

Schmitthoff asserts that the function of the bill of lading as a document of title is logically separate and distinct from the negotiability of the bill of lading.[174] Todd asserts that the straight bill of lading is a document of title at common law, and can be transferred once, but is non-negotiable.[175] The treatises Carver and Benjamin on the other hand indicate that the expression _document of title' at common law derives from proof of the custom of merchants and is limited to negotiable bills of lading.[176] In their view the word _negotiable' means _transferable' in the sense that a document of title can transfer constructive possession of the goods,[177] and the authors' view is clearly that the document must be capable of transfer an unlimited number of times.

Treitel argues that the ability to transfer contractual rights by transfer of the bill of lading is _conceptually close'[178] to its function as a document of title,[179] because a _chose in

[169] The wording adopted in the joint report of the English and Scottish Law Commissions.
[170] Ibid. Also see the discussion at para 4.8, pg 37, on whether the provisions of Art III Rule 4 of the Hague and Hague Visby Rules should be extended to sea waybills. The Law Commission recommended that they should not stating, *inter alia,* that Art III.4 refers to the transfer of the bill of lading, and plainly does not apply to sea waybills which are not transferable. There does not seem to be any cogent reason why it should be the case that shippers under sea waybills do not have the protections of the Hague Visby rules, but this issue is discussed elsewhere.
[171] Gaskell N, Asariotis R and Baatz R *Bills of Lading : Law and Contracts* para 22:17, *Carver on Bills of Lading* op cit note 153, para 9-099 states that the phrase would not include sea waybills, ships delivery orders or mate's receipts, unless proof of a custom of merchants is adduced.
[172] Girvin op cit note 119, 322
[173] White MWD, *Australian Maritime Law, chap 4.9*
[174] *Schmitthoff's Export Trade* (10 ed) (2000) at 15-038, cited by the Court of Appeal per Rix LJ in the *Rafaela S* [2003] 2 LR 113 at 142 [129]
[175] Todd op cit note 75, para 3.17 and 7.123.
[176] *Carver on Bills of Lading* op cit note 153, at para 6-001/3, concluding at 6-007 with the statement that production of a straight bill of lading is not necessary for delivery. Also see *Benjamin* op cit note 132 at 18-007.
[177] Colinvaux R *Carvers Carriage by Sea* 13 ed (_*Carvers Carriage by Sea*') at 1598 fn 28
[178] Treitel GH _The legal status of straight bills of lading' (2003) 119 *LQR* 605, 609

action‘ is a species of property.[180] However it was precisely this link between the passing of property and the transfer of the bill of lading that made the 1855 Bills of Lading Act unsatisfactory.

In the final analysis, it is not the ability of the sea transport document to transfer ownership of the goods, nor its status as a _document of title‘, that should determine whether it is capable to transferring rights of suit under the contract of carriage. It has been held that to equate straight bills of lading and sea waybills, and distinguish them from negotiable bills of lading, in UK COGSA 1992 did not affect the _essence‘ of the Act[181] —namely the transfer of rights of suit was provided for in all cases. That is indicative of the fact that it would have been surprising to find that an Act remedying the problems of title to sue the carrier under the contract of carriage should deal only with sea transport documents that were intended to be used to transfer ownership of the goods, and provide no remedy in other cases.

To hold to the contrary would be in effect to say that because ownership of the goods cannot be transferred by delivery of the sea waybill, the rights under the contract of carriage cannot be transferred. To interpret the _negotiable or transferable‘ requirement in section 2(2) of the STDA in such a way would be a retrograde step. However it may be an inescapable consequence of the link between the _transferability‘ or _negotiability‘ of documents and their status as documents of title. It is, as stated earlier, because the transfer has the ability to transfer to legal rights (to receive delivery, to possession, and to ownership) by transfer of possession of the physical document that it is regarded as a _transfer‘ or _negotiation‘ at all.[182]

Aikens et al remark that it is _interesting‘ that although UK COGSA 1992 sought to sever the link between the passing of rights of suit and the passing of property the drafters of

---

[179] Ibid, Treitel uses the term to refer to the _conveyancing function‘ of transferring constructive possession and, if intended, ownership of the goods. The term is used in the same way in the most recent edition *Carver on Bills of Lading* op cite note 153, in chapter 6. Also see Lee DH _The straight bill of lading: past, present and future‘ (2012) 18 *JIML* 39, 53

[180] Treitel op cit note 178, 610

[181] Ibid

[182] A similar problem accompanies the recognition of electronic transmission of sea transport documents. Although the CMI Uniform Rules on Seawaybills, Rule 7(3) state that electronic transfer of a sea waybill has the same effect as transfer of a physical document, the parties cannot by contractual agreement make a document transferable. See Yiannopoulos *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems*, 38. Also see the UNCITRAL Model Law on Electronic Commerce, art. 16 and 17, and the UNICTRAL Guide to the enactment (1996) Chapter I, para [110] – [122]. Available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf accessed on 07. 12. 2013

that Act could ‗only define a bill of lading by reference to its ‗negotiable' quality, namely its ability to be transferred by endorsement and delivery, or as a bearer bill by delivery alone.[183]

It appears that the drafters of the STDA have in effect done the same insofar as section 2(2) expressly refers to transferable or negotiable documents. What this would mean is that the drafters of the Sea Transport Documents Act, 2000, have once more linked the ability to transfer the rights and liabilities under the contract of carriage to the ability of the document to transfer the right to receive delivery of the goods and/or constructive possession and/or ownership of the goods. However, unlike the 1855 Act it would not be necessary to demonstrate in each case that the transfer of ownership occurred at the same time as the transfer of the document.

4.5.3 Transfer of Title is Subject to Defects in the Title of the Transferor

The principle attribute of a negotiable instrument is that the holder in due course acquires good title notwithstanding defects in the title of the transferee. A bill of lading- even a so-called ‗negotiable' bill of lading - does not have this attribute in terms of English law.[184] The holder of the bill of lading takes the bill subject to equities; that is subject to defects in the title of previous holders.[185] In *Gurney v Behrend*[186] it was held that if a bill of lading is stolen or transferred without the authority of the holder a subsequent bona fide transferee for value will not acquire title to the goods. The ratio of the decision rested on the nature of the bill of lading as a symbol of goods, and the view that transfer of a bill of lading cannot be said to be more effective than a transfer of the goods themselves. UK COGSA 1992 does not purport to make any provision for a transfer of good title to the holder of the bill of lading.

---

[183] Aikens, Bools & Lord op cit note 78, para 8.28, fn39

[184] Boyd SC, Burrows AS and Foxton D (eds.) *Scrutton on Charterparties and Bills of Lading* 20 ed, (‗*Scrutton*') 185; *Carvers Carriage by Sea* op cit note 177, para 1599; *Kum Wah Tat Bank* [1971] 1 Lloyd's Rep. 439, at 446; *JI MacWilliam Co Inc v Mediterranean Shipping Co S.A. (*The Rafaela S) [2003] 2 Lloyd's Rep. 113, 131, par 79. Also see Girvin op cit note 119, 326 at fn 107; A M Tettenborn 'Transferable and negotiable documents of title -A redefinition?' 1991 *LMCLQ* 538; Debattista op cit note 152 para 2-03

[185] Francis N ‗Transferring rights of suit under bills of lading: the conflict of laws implications' (2006) 20 *A& NZMar.L.J.* 25, 29 citing *Carver on Bills of Lading* op cit note 153, 249 and Wilson JF *Carriage of Goods by Sea* 7 ed. 138

[186] 118 E.R. 1275, 1279, (1854) 3 E & Bl.622, 633–634 per Lord Campbell

The common law position is therefore unaltered: _The lawful holder of a bill of lading clearly cannot acquire under the 1992 Act rights which the transferor did not have.'[187]

Although many other aspects of the enquiry are unclear, what is beyond doubt is that no sea transport document (whether an _order' bill of lading or not) can be regarded as _negotiable' in the strict sense of the word.

4.5.4 Transfer of Rights of Suit Is Not Accomplished by Transfer of the Bill of Lading

It is not clear whether the admiralty court recognised bills of lading as giving a right of action to the holder of the bill. It is tempting to speculate that they did given the roots of the admiralty court in civil law, and the freedom of civil law from the strictures of privity of contract. Chorley cites Holdsworth[188] in support of the view that the admiralty court afforded bills of lading _full negotiability'. This statement must be treated with caution given Milnes- Holden's careful exposition of the slow development of this right in relation to bills of exchange. [189]

At common law the bill of exchange constitutes the only exception to the principle of privity of contract, permitted by custom of the law merchant.[190] The earliest example of such action was *Oaste v Taylor*[191] decided in 1612. The development of such a right of action did not occur in relation to bills of lading since the customary form of action was not on the contract of carriage itself[192] [193] but in trover,[194] or conversion.

---

[187] *East West Corp v DKBS 1912* [2002] 2 Lloyd's Rep. 182, at 193 [53] per Thomas J. Also see Claringbould M _Bills of Lading versus Sea Waybills: Documents of Title or Not?', in Boonk, H, *English and Continental Maritime Law,* 91 at 98.

[188] Chorley op cit note 4, 57, note 32 citing Holdsworth *History of English Law*, vol. vii, p257

[189] In Europe in the late 1500s the bearer of bills of exchange did not have a right to sue according to Holden, op cit note 1, 26, citing Holdsworth *History of English Law* vol. viii, 155. Two examples of such a right of action recognised in the Mayor's court of London and the Admiralty Court, respectively were: *Burton v Davy* (1437) S.S. 49, p. 117 and *Denaker v Mason* (1564) S.S. 11, p. 126, referred to in Holden op cit note 1, 23 and 25.

[190] Ibid.

[191] Cro. Jac. 306. See Holden op cit note 1, 32

[192] Aikens, Bools & Lord op cit note 78, 3 fn 18, referring to Simpson, *A History of the Common Law of Contract* (1987) at p.206

[193] *Assignees of Burghall v Howard* 32 Geo 2 may have been such an action. It is described in the report as an action on the case upon the custom of the realm, which echoes the form of pleading referred to by Holden op cit note 1, 31–33. The introduction of this simpler form of pleading had its origins in the conflict between the Court of Admiralty, and the Court of Common Pleas under Lord Coke. Under his guidance in actions in assumpsit pleading of an action on the case upon the custom of merchants became possible.

[194] *Lickbarrow v Mason* supra being the most famous example of such an action

In the nineteenth century when actions on the contract of carriage came to be recognised, repeated warnings were sounded of a reluctance of common law judges to admit another exception to the doctrine of privity of contract, in *Waring v Cox*[195], *Sargent* v *Morris*[196] *Berkley* v *Watling*[197] *Sanders* v *Vanzeller*[198] *and Newsom* v *Thornton.*[199]

In *Waring* v. *Cox*[200] an action of assumpsit was brought by the plaintiff, who as agent of the consignor received a bill of lading for which he gave no value. The endorsement and delivery of the bill of lading to the plaintiff was effected for the sole purpose of enabling him to exercise a right of stoppage and recover the goods. The action failed. No consideration had been given and therefore no property passed.[201]

Further, as to the action on assumpsit Lord Ellenborough stated plainly:

> No case has gone so far as to decide, that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods *prima facie* passes the property in them to the endorsee. Much confusion has arisen from similitudinary reasoning upon this subject. ... the action, if maintainable at all, should have been brought, not in the name of the agent, but of the consignor himself.'[202]

There was an interesting reporter's note to the judgment that records:

[195] 170 ER 989, (1808) 1 Camp 369

[196] 106 E.R. 665, (1820) 2 B. & Ald. 277, which permitted an action to the consignor, but on the basis that the consignee was his agent.

[197] 112 E.R. 382, (1837) 7 Ad. & Ell. 29 which permitted an action to the consignee but not the endorsee

[198] 114 E.R. 897, 911 (1843) 4 Q.B. 260, 297 where it was said that the contract is not transferred. The case involved a bill of lading issued pursuant to a voyage charterparty, but the judgment makes clear that even if this had not been the case, it is not implied by law that the contract is transferred from shipper to endorsee. The case distinguished earlier cases that had found that an endorsee might upon taking receipt of goods become liable for freight in terms of a *new* implied contract with the shipowner (*Cock* v. *Taylor* (1811) (13 East, 399)).

[199] 102 E.R. 1189, 1202, 6 East 17, 41,where Lord Ellenborough, C. J., says,—' I consider the endorsement of a bill of lading, apart from all fraud, as giving the endorsee an irrevocable, uncountermandable right to receive the goods; that is, when it is meant to be dealt with as an assignment of the property in the goods.'

[200] 170 ER 989, (1808) 1 Camp 369

[201] No distinction was drawn by the judge between an action on assumpsit or an action in trover, although plainly property is essential to the latter action but not to the former.

[202] Waring v Cox 170 ER 989, (1808) 1 Camp 369, 370, approved nearly 40 years later by Alderson B in *Thompson v Dominy* 153 E.R. 532,533, (1845) 14 M. & W 403, 405. Also see *Howard v Shepherd* 137 E.R. 907, (1850) 9 CB 297

_When an interest is transferred by the endorsement of a negotiable instrument, the endorsee may maintain an action upon it, though a stranger to the original consideration; but that depends upon the usage of merchants, or positive statute.'[203]

The reporter does not go so far as to state that bills of lading fall within this category. Plainly the learned judge thought that they do not.

The only faint note of dissent was an obiter comment in *Berkley* v. *Watling*[204] that if a consignee were to bring an action on the contract he would have to prove the original contract and the endorsement. The judge added _I should be sorry to destroy the negotiability of the instrument'. However the comments go no further in outlining what is meant by _negotiability'.

Then in *Thompson v. Dominy*[205] it was authoritatively decided that rights of suit cannot be transferred under a contract by endorsement of a bill of lading, and the endorsee of a bill of lading was thus not entitled to maintain an action upon it, in the same way as the endorsee of a bill of exchange.

Parke B expressed the view:

_I never heard it argued that a contract was transferable, except by the law merchant, and there is nothing to shew [sic] that a bill of lading is transferable under any custom of merchants.'[206]

...

_Yes; it is *transferable* from hand to hand, and it passes the property in the goods mentioned in it; but I never before heard of an action being brought upon it, and I think such an action quite untenable.'[207]

...

[203] The doctrine of contracts for the benefit of third parties is not part of English law. However the report notes two exceptional cases where a third party to the contract was permitted an action in assumpsit concerning his/her rights under the contract.
[204] 112 E.R. 382, 7 Ad. & Ell. 39 per Patteson J
[205] 153 E.R. 532, (1845) 14 M. & W 403
[206] ibid 532, 405.
[207] The court relied on the 1843 judgment in *Sanders* v. *Vanzeller* which held that: _Upon principle, it cannot be contended that the contract runs with the property in the goods and is transferred with it; and there is no decision to that effect'.

_[The endorsement and delivery of the bill of lading] where it is an endorsement for value, it transfers the property in the goods; but a bill of exchange is very different; it is a continuing contract to pay a certain sum of money. '[208]

...

'Because, in *Lickbarrow* v. *Mason* , a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word _negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only.'[209]

Moreover it would seem that the learned Judge was correct. A review of authorities canvassed in argument revealed that there had been no successful action instituted by an endorsee in his own name on the bill of lading contract[210] nor did the leading shipping work of the day refer to such a custom.[211] A later attempt by an endorsee to use the English action on the case also failed by reason that the contract of carriage was not transferable.[212]

The common law thus operated unjustly towards consignees and endorsees, for under certain circumstances they were liable under an implied contract to pay freight if they took delivery of the goods, but they were not permitted an action in contract against the carrier for loss of or damage to the goods. [213] They could sue in tort, provided they could establish that they were the owner or had possessory title to the goods (rather than simply risk) at the time when the loss occurred.[214] They could also sue for conversion against the carrier (and trover

---

[208] *Thompson v Dominy* 153 E.R. 532, (1845) 14 M. & W 403, 405.
[209] Ibid 534, 408 per Alderson B.
[210] It is most unfortunate that the case was presented in the manner in which it was. Had the same approach been adopted in *Lickbarrow v Mason* the matter would not have been referred to a special jury of merchants and the world would not have received judicial authority for the existence of the custom. Perhaps this would have been the better approach in *Thompson v Dominy*.
[211] 153 E.R. 532, 533 (1845) 14 M. & W 403, 406 citing Lord Tenterden's work on Shipping
[212] *Howard v Shepherd* 137 E.R. 907, (1850) 9 CB 297
[213] It was only in 1924 that the implied contract would be extended to encompass an obligation upon the carrier to deliver according to the terms of the bill of lading, and thus give rise to a suit on that implied contract for damages in *Brandt v Liverpool* [1924] 1 K.B. 575 Court of Appeal. Earlier decisions had been concerned only with the endorsee's liability for freight, demurrage or other charges, such as *Cock* v. *Taylor* (1811) (13 East, 399 and *Sanders v Vanzeller* 114 E.R. 897, (1843) 4 Q.B. 260. The implied contract was furthermore not a transfer of the original contract of carriage, and its limitations became evident in the late twentieth century. See: *The Aramis* [1989] 1 Lloyd's Rep 213 and *The Gudermes* [1993] 1 Lloyd's Rep 311
[214] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The Aliakmon)*, [1986] A.C. 785 at p. 809 per Lord Brandon of Oakbrook, followed in *Homburg Houtimport B.V. v Agrosin Private Ltd and others* (_The Starsin_) [2003] 1 Lloyd's Rep. 571. The rationale for the rule appears to be a aversion to permitting a recovery for pure economic loss. See the judicial remarks of Lord Hoffmann at [88], and the criticism of the *Aliakmon* supra in

against any possessor of the goods) where the carrier had delivered to someone other than the holder of the bill of lading, but again such actions rested on their establishing ownership of the goods rather than rights of suit under the contract of carriage.

It was left to the legislature to find a statutory remedy which was done by the promulgation ten years later of the 1855 Bills of Lading Act which sought to resolve the problem by linking the transfer of contractual rights and obligations to situations where the property in the goods passed by the transfer of the bill.

It appears from the above analysis that the development of mechanism to transfer rights of suit under a contract of carriage by sea has nothing to do with the limited negotiability of the document. The negotiable characteristics of order and bearer bills of lading never extended to encompass this function. In fact Parke B regarded the term _negotiable' as being used only to express the bill of lading's role in the transfer of ownership, a function that can apply to the use of a straight bill of lading, although it probably does not apply to a sea waybill under South African law.

The statutory solutions were created to remedy a practical problem that arose — namely that it made no sense for a consignee, or endorsee, to be non-suited when they were in all likelihood the party which had suffered the loss arising from being the party bearing risk in and to the goods, and possibly also the owner of the goods. Since the same reasoning applies with equal force to the consignees under straight bills of lading and sea waybills it is submitted that the statutory solution should include them.

4.6 Current Judicial and Academic Opinion

In *Glyn, Mills & Co. v. East and West India Dock Co.*[215] it was held, referring back to *Lickbarrow v Mason*, and other cases, that:

> _[The bill of lading is] a _transferable document of title, at least to the extent as was said by Lord Hatherley in *Barber v. Meyerstein*[216], that, when the vessel is at sea and the cargo has

Lloyd A _The bill of lading: do we really need it?' 6th Annual lecture of the Institute of Maritime Law of the University of Southampton. 1989 *LMCLQ* 47,50, Reynolds FMB _The significance of tort in claims in respect of carriage by sea' 1986 *LMCLQ* 97,98 and Treitel GH _Bills of lading and third parties' 1986 *LMCLQ* 294

[215] (1882) 7 App. Cas. 591 at 604. The Court held that a carrier is discharged from responsibility if he delivered in good faith against an original bill of lading.

not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself. '[217]

In considering the rights of a CIF buyer the Kings Bench division held in *Diamond Alkali Export Corp v Bourgeois,* with reliance on *Scrutton on Charterparties*, Art. 56, that the word 'negotiable' in the special verdict delivered in *Lickbarrow v Mason* 'really means no more than the word "transferable" or "assignable".'[218] It is interesting that the words 'transferable' and 'assignable' are used as synonyms here. Assignment is not necessarily established purely by the endorsement and delivery of the document evidencing the debt. In England notice to the carrier would be required which distinguishes an assignment from the simple mechanism by which a bill of lading can be transferred. This is further examined in chapter six.

Fifty years later Lord Diplock authoritatively stated that:

'It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.'[219]

Lord Diplock was thus also linking the 'transferability' (or 'negotiability') of the document to its ability to transfer legal rights (in this case 'title' or ownership.) Nothing in his statement expressly excludes the straight bill of lading, although by drawing an analogy with the cheque it might be argued that impliedly a bill made out to a named consignee only would not be transferable in the same way that a cheque marked 'not transferable' is valid as between payee and drawer but cannot be further transferred.

---

[216] (1870) LR 4 H. L. 317. The case turned on whether the bills had already become 'spent' when they were transferred to Meyerstein, since this occurred after the goods were landed, but while they were held in a warehouse subject to the carrier's lien for freight. It was held that the bills of lading remained the symbol of the goods until the cargo was delivered against surrender of the bills of lading. To hold otherwise would 'shake the course of proceeding between merchants' (at 326). Thus Meyerstein could enforce his security (as pledgee) against Barber, and demand possession of the goods. He would have had no action against the warehouseman or carrier, as delivery had been given to Barber against presentation of an original bill of lading.

[217] Other unqualified statements by the House of Lords in their judgment in *Barber v Meyerstein* to the effect that ownership passed absolutely on transfer of the bill of lading, were criticised.

[218] [1921] 8 Ll. L. Rep. 282

[219] *Kum v Wah Tat Bank* [1971] 1 Ll. L. Rep. 439, 446. The statement must be cut down slightly.

Thus other views have expressly said that _[t]ransferability means not only that the consignee receives the document, which entitles him to delivery of the goods, but that he can transfer that right (and transfer constructive possession of the goods) by transferring the document to a third party'.[220] It is not simply a symbol of the goods, it is a _transferable –key to the warehouse"'.[221] Used in this sense the word _transferable' is clearly being used to denote its ability to be transferred several times by endorsement and delivery, and not simply once.

In *Peer Voss v APL Co Pte Ltd*[222] the Singapore Court of Appeal also equate the concepts saying that a bill of lading is usually _negotiable (i.e. transferable)'. The case held further that whilst _the characteristic of transferability is absent' in a straight bill of lading, it still has the other defining characteristic of all bills, namely that delivery of goods by the carrier is only made on presentation of the original bill of lading.[223] Impliedly the court viewed the characteristic of _transferability' as the ability to be transferred more than once.

This is the same sense applied by the authors of *Scrutton*[224] in drawing an analogy between a negotiable bill of lading and a cheque marked _not negotiable' – both are transferrable in this sense, but neither can give the transferee better rights than those of the transferor.

This is also the sense in which the term _transferable' was used in the preamble to the 1855 Bills of Lading Act, which referred to bills of lading as being _transferable by endorsement'. When UK COGSA 1992 was drafted the Law Commission Report explained that a bill of lading must be transferable.[225] The authors of the report evidently viewed the term _transferable' as meaning transferable by endorsement. This meaning was adopted in section 1(2)(a) of UK COGSA 1992 which defines a _bill of lading' as a document capable of _transfer by endorsement or, as a bearer bill by delivery'. The provisions of that Act are discussed in more detail in chapter five.

[220] Debattista op cit note 152, para 3-08
[221] *Enichem Anic S.p.A. and others v Ampelos Shipping Co Ltd* (The _Delfini') [1990] 1 Lloyd's Rep. 252 at 268 per Mustill L.J
[222] [2002] 2 Lloyd's Rep. 707
[223] Ibid, para [49]
[224] *Scrutton op cit note 184,* 185
[225] Law Com no. 196 and Scot Law Com no. 130, pg 25, para 2.50

Likewise, the term ‗transferable' has been used in this way to describe how a bailment (to the consignee) or attornment of the goods, is ‗transferable' by the endorsement and delivery of the bill of lading in *The Berge Sisar.*[226]

> ‗The bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and *the consignee as bailor*[227] ... The contribution of the law merchant had been to recognise the attornment as *transferable* and therefore the endorsement and delivery of the bill of lading as capable of transferring the endorser's right to the possession of the goods to the endorsee.' [228] (my emphasis)

Thus the bill of lading was held to be a ‗transferable document of title'[229] in the first two senses in which the term document of title is used: namely as controlling the right to receive delivery of the goods and as constituting a symbol of the goods that is capable of transferring constructive possession of the goods.

The expression ‗transferable document of title' has been used exclusively in relation to negotiable bills of lading such as in *The Starsin*[230] referring to negotiable bills of lading held by endorsees and in *Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg and P.&O. Nedlloyd B.V.,*[231] referring to negotiable bills of lading in the hands of the named consignee. In *The Berge Sisar,*[232] the expression was used to refer to negotiable bills of lading not available at the discharge port when the ship arrives. The case concerned the application of section 5(2)(c) of UK COGSA 1992 (which applies only to negotiable bills of lading transferred at a time when they have ceased to give a right to possession of the goods). The short-hand term ‗transferable document of title' was also used by the Hon. Judge Diamond QC in *The Future Express*.[233] Even earlier in *The Delfini*[234] it

---

[226] [2001] 1 Lloyd's Rep. 663 at [18] per Lord Hobhouse
[227] The basis for this statement is not apparent.
[228] The House of Lords, at para [18], cites as authority the two decisions examined in depth in this chapter: *Lickbarrow v Mason* and *Kum v Wah Tat Bank Ltd* [1971] 1 Ll. L. Rep 439, 446–449, per Lord Devlin.
[229] *The Berge Sisar* [2001] 1 Lloyd's Rep. 663, para [27]
[230] *Homburg Houtimport B.V.v Agrosin Private Ltd and others* (‗The Starsin') [2003] 1 Lloyd's Rep. 571, 598 at [132] per Lord Hobhouse
[231] [2002] 2 Lloyd's Rep. 183, 191, per Thomas J
[232] *The Berge Sisar* [2001] 1 Lloyd's Rep. 663, 672 per Lord Hobhouse
[233] [1992] 2 Lloyd's Rep. 79, 88
[234] *Enichem Anic S.p.A. and others v Ampelos Shipping Co Ltd* (The ‗Delfini') [1988] 2 Lloyd's Rep. 599, 609 and [1990] 1 252. In *Ishag v Allied Bank International, Fuhs and Kotalimbora*[1981]1 Lloyd's Rep. 92 and *Elder Dempster Lines v Zaki Ishag* (The ‗Lycaon') [1983] 2 Lloyd's Rep. 548 also finding that the bill was a ‗transferable document of title' really concerned the question of whether on the wording of the document it even recorded the cargo as ‗received for shipment'.

had been held in similar circumstances (of the bills not being available at the discharge port) that by the time the bills of lading were received by the claimants they had ceased to be _transferable documents of title'.

There was no clear indication that the term applied to straight bills of lading, with judicial opinion to the contrary having been expressed.[235]

If the term _transferable' is only equated with negotiable bills of lading then the expression _transferable or negotiable' in the Sea Transport Documents Act, 2000, is a tautology and excludes both the sea waybill and the straight bill of lading.

However the *Rafaela S* requires a reconsideration of these views. A close reading of the *Rafaela S* decisions in the Court of Appeal and House of Lords reveals that insofar as the requirement of _transferability' is concerned there was no clear statement of law for the term was used in two entirely different ways.

The argument for the carrier was that _transferability' means _the ability to transfer the rights and liabilities under the bill of lading contract by endorsement or delivery to a succession of transferees'.[236] Used in this way the term _transferable' has the _well settled'[237] meaning ascribed to it in existing case law and academic opinion.

The converse argument made for the claimant was that the straight bill of lading was capable of being transferred once, to the named consignee.[238]

Since the case concerned a different issue,[239] in relation to which the characteristic of _transferability' was simply one consideration, the term was not given an authoritative interpretation. The Court's finding was premised largely upon the straight bill of lading's function as a document of title in the first sense, namely that the original bill of lading must be produced to obtain delivery of the goods from the carrier. However, Rix LJ did also emphasise that:

---

[235] *Parsons Corporation and others v C.V. Scheepvaartonderneming Happy Ranger and others* (The _Happy Ranger') [2001] 2 Lloyd's Rep 130, 536 per Tomlinson J, holding that straight bills of lading were not _negotiable or transferable documents of title'.

[236] *J.I MacWilliam Co. Inc. v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 LR 113 at 121 [31]

[237] *Kum and Another v Wah Tat Bank Ltd* [1971] 1 Ll .L .Rep 439, 446

[238] *The Rafaela S* [2003] 2 LR 113 at 121 [32]

[239] The case established that as a matter of English law the straight bill of lading is a _bill of lading or similar document of title' for the purposes of article 1(b) of the Hague and Hague Visby rules, and section 1(4) of UK COGSA 1971.

„In practice it [i.e. a straight bill of lading] is used, just like a classic bill, as a document against which payment is required and the transfer of which thus marks the intended transfer of property.“[240]

This reasoning endorses the argument of counsel for the plaintiff that „for the purpose of that limited transfer it performs all the functions of a transferable bill of lading. It is a „document of title" *both* for that reason and in any event because the consignee cannot obtain possession of the goods without its presentation.“[241] (my emphasis).

Mr Justice Jacob appears to have adopted a more cautious approach but still remarked that „a consignee who had been given the bill could demonstrate his title to third parties by its production. What he could not do is to transfer title simply by endorsing the bill. He could in principle transfer entitlement *as between him and the third party* by a separate arrangement“.[242]

Used in this „limited“ sense it is the transfer of the bill of lading *to* the consignee rather than its transfer *by* the consignee to third parties that is important. If so, this would indicate that the emphasis in previous decisions on „transferability“ referring not only to the right to claim delivery of the goods from the carrier (and possibly title to the goods), but also to the ability to transfer constructive possession to a third party, is misplaced.

The Commercial Court in the *Rafaela S* had stated that:

„A „document of title" in this context is, I think, the antithesis of a document which can evidence the title of only one person. It is general not specific to one person. It is a document by which goods can be transferred by endorsement and delivery of the document itself.“[243]

However, the Court of Appeal held as follows:

„Since a straight or nominal bill is by definition one made out to a named consignee only, what is the difference [to a negotiable bill of lading]? It could perhaps depend on the use to which the straight bill is put. Where it is not used with a contract of sale, as where the shipper and receiver are the same person, or perhaps two different companies within the same group, then there might be no question of any transfer of title. Where, however, the bill of lading is

[240] *The Rafaela S* [2003] 2 Lloyd‘s Rep. 113 at 121[32]
[241] Ibid
[242] Ibid, 144 [151]
[243] *The Rafaela S* [2002] 2 Ll. Rep. 403, para [21] per Langley J

> used as part of international trade, for instance under a c.i.f. sale under which title is not intended to pass save against payment for the documents, then although the bill, not being an —order" or bearer bill, is not negotiable in the full sense, i.e. repeatedly transferable, it is *transferable once*. It may be that —negotiable" is being used in these passages [in the Travaux Préparatoires to the Hague Rules] both in the sense of meaning fully transferable and in the sense of limited transferability.'[244]

The House of Lords upheld this decision but the opinions of the Lords are inconclusive on the transferability of straight bills of lading. Lord Rodger of Earlsferry appeared to accept that straight bills of lading were transferable:

> _Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally, a straight bill of lading shares all the principal characteristics of a bill of lading as already described.'[245]

Lord Steyn's comments appear to be to the same effect, but are clearly obiter,[246] so that little reliance can be placed upon them:

> _Except for the fact that the bill of lading was only transferable to the named consignee, it contained the usual terms regarding the matters relevant to the allocation of risks between the parties which are to be found in bills of lading.'[247]

On the other hand Lord Bingham's opinion suggests that he favoured the traditional view that a bill of lading is _negotiable' if it is _transferable by endorsement', but this appears to ignore the position of the consignee under an _order' bill, and the position of the holder of a _bearer' bill:

> _This document called itself a bill of lading. It was not a bill transferable by endorsement, and so was not —negotiable" in the somewhat inaccurate sense in which that term is used in this context ...[but was nevertheless a bill of lading]'[248]

The views of Rix LJ, Lord Rodger and Lord Steyn in the *Rafaela S* can be regarded as persuasive authority for the view that straight bills of lading enjoy a limited measure of

[244] *The Rafaela S* [2003] 2 Ll. Rep. 113, 128 per Rix L.J.
[245] *The Rafaela S* [2005] 1 Ll. Rep 347, 360 per Lord Rodger of Earlsferry
[246] Lord Bingham expressly acknowledged that the court was not concerned with the question of whether a straight bill of lading was a document of title at common law. *The Rafaela S* [2005] 1 Ll. Rep. 347, para [22]
[247] *The Rafaela S* [2005] 1 Ll. Rep 347, 356 per Lord Steyn
[248] *The Rafaela S* [2005] 1 Ll. Rep 347, 350 per Lord Bingham of Cornhill

transferability. If used in this way the term _transferable' can also be meaningfully distinguished from the term _negotiable'.[249] All bills of lading are transferable documents of title, capable of transferring rights from shipper to consignee but only an order or bearer bill of lading has the characteristic of _negotiability' used to mean the ability to transfer rights by endorsement and delivery to subsequent endorsees.[250] Thus in *Schmitthoff's Export Trade* it is stated that _[l]ogically, the function of the bill of lading as a document of title [i.e. capable of transferring title by the transfer of the document] is distinct from its negotiable quality'.[251]

Zekos concludes that if the sea waybill is identical to the straight bill of lading then it too must be a transferable document of title[252] as does Kozolchyk.[253] There is a certain logic to such an approach where the waybill is virtually identical in form and function.[254] Thus Tetley also equates the sea waybill and straight bill of lading. However Tetley's analysis is premised upon the fact that under the law of the United States straight bills of lading do not need to be presented to the carrier in order to obtain delivery of the goods[255] but do transfer title to the goods if agreed.[256] There is no similar statutory provision in common law countries, where the prevailing judicial view appears to be that straight bills of lading must be presented to the carrier to obtain delivery of the goods, whereas sea waybills never require presentation. [The position of a sea waybill which contained an express presentation requirement would create difficulty but is likely to be extremely rare as the ability to obtain delivery without production of the waybill is the main reason they are used.]

This explains why the view that a sea waybill can be a document of title is totally at odds with views expressed by English writers. Even Tiberg[257] (writing of the position in Europe) is of the view that the waybill is different to a straight bill of lading, whereas

[249] See Todd op cit note 75, para 7.123
[250] *The Rafaela S* [2005] 1 Ll. Rep 347, 354 para [21]
[251] *Schmitthoff's Export Trade* op cit note 33, 328
[252] Zekos G _Contractual role of documents issues under the CMI Draft Instrument on Transport Law 2001' (2004) 35 *J. Mar. L. & Com.* 99, 108
[253] Kozolchyk B, _Evolution and present state of the ocean bill of lading from a banking law perspective' (1992) 23 *J. Mar. L. & Com.* 161, 162
[254] That is not always the case. For example the data freight receipt in use by Atlantic Container Lines is described as a non-negotiable receipt only. Kozolchyk op cit note 253, 220
[255] 49 USC §80110 (b)
[256] 49 USC §80106 (a)
[257] Tiberg H _Transfer of documents' 2002 *LMCLQ* 539, 541-542

Tetley[258] (writing on the position in America) says in a later article that the straight bill of lading is a document of title[259] and only has _some similarities' with modern sea waybills.[260]

The *Rafaela S* has been the subject of academic criticism, with Benjamin[261] and Carver[262] both asserting that the judgment has created confusion, since straight bills of lading are not documents of title at common law.

When a similar issue arose for decision in Australia it was held *El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA*[263] that a straight bill of lading _is not capable of transfer'.

The earlier decision of *BHP Trading Asia Ltd v Oceaname Shipping Ltd*[264] was to a similar effect, rejecting any suggestion that the function of the document in the underlying transaction could determine its _negotiability', which had to be sought on the face of the document.[265] There is a compelling rationale behind such a simple approach supported both by the robust _common-sense' approach taken in *The Starsin*[266] to identity of carrier issues, and by the law of negotiable instruments which adopts the general principle that the merchant is to trust to the document.

However considerations of commercial convenience and common sense also weigh heavily in favour of the opposite conclusion in the present situation. For merchants are likely to expect that contractual rights under a straight bill of lading can be transferred to the consignee, and would not necessarily be placed on their guard that this is not so by the notation _not negotiable' on the face of the document.

---

[258] Tetley W _Waybills: the modern contract of carriage of goods by sea' (1983) 14 *J. Mar. L. & Com*. 465, 466
[259] Tetley W _Who may claim or sue for cargo loss or damage? (part 1) (1986) 17 *J. Mar. L. & Com* 153, 159
[260] Ibid 165
[261] *Benjamin* op cit note 132, para 18-008 and 18-067
[262] *Carver on Bills of Lading* op cit note 153, para 6-024 – 6-026
[263] [2003] FCA 588 para [23] per Keifel J
[264] (1996) 67 FCR 211 at [50]
[265] Ibid at [55]
[266] *Homburg Houtimport BV and Others v Agrosin Private Limited and Another* (The Starsin) [2003] 1 Lloyd's Rep. 571 (HL)

4.7 Conclusion

The use of the term negotiable is actually misleading and has properly been called an idiosyncrasy when applied to bills of lading.[267] The bill of lading may share a common root with the negotiable instrument but several differences were noted:

1. The form in which the document must be cast to be made ‗negotiable';
2. The term by which delivery of the document to the payee, and consignee respectively is to be described. In the case of the negotiable instrument the statute defines this as ‗issue', but absent such definition it would fall within the meaning of ‗transfer' set out in s29(1) of the Bills of Exchange Act 34 of 1964.
3. The fact that the common law never developed to recognise the right of the holder to sue on the bill of lading;
4. The fact that the bill of lading is not regarded as transferring title to the goods free of equities, whereas this is the defining feature of ‗negotiability' in the law of negotiable instruments (probably due to its representation of ‗money' rather than ‗goods').

The term ‗negotiable' when applied to bills of lading could thus have different meanings depending on the context in which it is being used. It could refer to any one or more of the following:

1. A document capable of being transferred by delivery, as a bearer instrument, or by endorsement and delivery, as an order instrument.[268] In this respect it shares a similarity to negotiable instruments, and the origins of the practice appear to have a common root. However in relation to bills of lading there is an argument to be made that transfer by delivery to the named consignee, who thereby becomes the holder, is also encompassed within the meaning. The opposite argument is that a ‗transferable' document is one that must be capable of transfer multiple times.

2. A document capable of transferring the right to receive delivery of the goods from the carrier; [269]

[267] *The Rafaela S* [2003] 2 Ll. Rep. 113, 115
[268] Francis op cit 185, 29
[269] Aikens, Bools & Lord op cit note 78, 19 para 2.37

3. A document capable of transferring symbolic possession and ownership of the goods; [270]

4. A document capable of transferring rights of suit (a function that could only be achieved in English law by statutory intervention).

It has been held that the term _negotiable' means _transferable', but it has also been held that the word _transferable' can be applied to non-negotiable documents. It therefore appears that the extent to which _transferable' means something different to _negotiable' is uncertain.

It is unfortunate in the extreme that the draftspersons of the STDA have introduced that uncertainty into the Act rather than simply identifying the types of documents being referred to, and the manner in which rights of suit will be transferred in respect of those documents.

In linking the transfer of the contract to the negotiability of the document they have tied the transfer of rights of suit to the ability of the document to effect a transfer of the right to delivery and/or constructive possession and/or ownership of the goods, when no such connection is necessary.

It may be possible, by adopting a wider interpretation of the term transferable to hold that straight bills of lading come within the ambit of the Act, as the document is transferable as a document of title in the limited sense. Thus it might be appropriate to speak of documents with full transferability (a negotiable bill of lading that can be transferred many times) and documents with limited transferability such as the straight bill of lading (which can only be transferred once).

Transfer of the document from shipper to consignee enables the consignee to obtain possession of the goods from the carrier, and can be used to transfer symbolic possession and ownership of the goods. The document cannot be transferred to a third party in order to transfer to that person either the right to claim delivery of the goods from the carrier or

[270] ibid

constructive possession (with or without ownership) of the goods. Nevertheless in the hands of the consignee it is „his document of title".[271]

A waybill is not transferable in this sense.[272] Whilst it may be highly desirable to find a statutory mechanism for the transfer of the contract under the sea waybill from shipper to consignee, and given their use within international trade, the wording of section 2(2) of the STDA refers plainly to transferable *documents* and not to transferable contracts. It would be stretching the language of the enactment to suggest that a sea waybill falls into this category, since one of the fundamental characteristics of the document is that it need not be transferred at all from shipper to consignee. Transfer in the sense of physically handing over the sea waybill (if it does occur) has no legal effect for the document is not required to obtain delivery from the carrier, and control of the document does not determine the shipper's right of disposal over the goods.

The term „transferable" in the Act must mean something more than simply handing over the document, since any document is capable of transfer in this purely literal sense and section 2(2) was meant to cut down the scope of application.

It has been said that Courts „should not strain established general principles to achieve an apparently acceptable result in the individual case."[273] Regrettably the only rational conclusion appears to be that there is a lacuna in the STDA as the terms „transferable" and „negotiable" do not apply to sea waybills, although it could be argued that the term „transferable" does apply to straight bills of lading.

[271] *The Rafaela S* [2005] 1 Ll. Rep. 347, para [46] per Lord Steyn
[272] The Lloyds of London Press Special Report *Modern Liner Contracts* (1984) at 80, in fact went further and stated that the sea waybill is a *non-transferable contract* with the shipper only.
[273] *The Kapetan Markos (No. 2)* [1987] 2 Lloyd's Rep. 321, 330 per Mustill LJ

CHAPTER FIVE: PROVISIONS FOR THE TRANSFER OF RIGHTS OF SUIT UNDER THE *SEA TRANSPORT DOCUMENTS ACT, 2000*

5.1 Introduction

In this chapter the provisions of the STDA which determine the mechanism by which rights of suit are transferred will be analysed. By virtue of section 2(2) the STDA has restricted the relevant provisions to sea transport documents that are ‗negotiable or transferable'. It is the interpretation of that phrase which determines whether the STDA provides a mechanism for transferring rights of suit from the shipper to the consignee under straight bills of lading and sea waybills. It has been concluded in chapter four that in English law the sea waybill is neither transferable nor negotiable. In this chapter the question of how the STDA is to be interpreted will be examined.

In approaching the question the approach to the interpretation of the statute will be considered first. The background to and purpose of the STDA will then be considered. The problematic 1855 Bills of Lading Act and the relevant provisions of UK COGSA 1992 will be examined before the relevant provisions of the STDA are set out and analysed. Finally the approaches taken in other jurisdictions will be compared to UK COGSA 1992 and the STDA.

5.2 Approach to Interpretation

The interpretation of the words of the statute in context, as part of an iterative process of interpretation, must be undertaken. It is an approach endorsed and explained by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] and has been followed and applied by a number of subsequent decisions.[2]

[1] 2012 (4) SA 593 (SCA)

[2] Including four of its own judgments and two judgments by the Constitutional Court although the latter court has adopted the slightly different expression: the ‗ordinary meaning in context' in *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC) per Cameron J at [96]

Although it may have been recently re-clothed as an _iterative approach' following English decisions such as *Chartbrook Ltd v Persimmon Homes Ltd and Another* [3], the origin of the principle of referring to the meaning of words in their context lies in the purposive approach to interpretation, an approach favoured by some of South Africa's eminent judges in the last century. In *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*[4] Schreiner JA said:

> '… the object to be attained is unquestionably the ascertainment of the meaning of the language in its context. …. Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and *vice versa,* the less clear it is the greater the part that is likely to be played by the context.'[5]

The doctrine has developed considerably in the last two decades, and does not emphasise the primacy of either language or purpose, but rather calls for a unitary or iterative approach that would pay due regard to the words of the enactment, but not at the expense of a consideration of the purpose of the statute, and commercial common sense. In line with this approach it is suggested that the interpretation of section 2(2) of the STDA must be consistent both with the purpose of the statute[6] and with the _business sense' that must be given to _business documents',[7] save that in doing so the Court will remain bound by the words used, and cannot _substitute what they regard as reasonable, sensible or businesslike'.[8]

In effect, since the words _negotiable or transferable' are neither capable of only one clear and obvious meaning, nor utterly absurd and meaningless, the Court is faced with the task outlined by the Supreme Court of Appeal in the following terms:

---

[3] *Chartbrook Ltd v Persimmon Homes Ltd and Another* [2009] UKHL 38
[4] 1950 (4) SA 653 (A)
[5] Ibid, 664B – F
[6] Or the mischief at which it is aimed. See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 1, [21]
[7] *Homburg Houtimport B.V.v Agrosin Private Ltd and others* (_The Starsin') [2003] 1 Lloyd's Rep. 571, 577 at [10] per Lord Bingham. Also see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and the cases cited therein. Although these decisions involved contractual interpretation, they have been relied upon by South Africa's Supreme Court of Appeal as setting out principles equally apposite to statutory interpretation. See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 1.
[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 1, [18]

_In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'[9]

A second important principle is that since the expression _transferable or negotiable' is an expression used in a South African statute it must be interpreted in accordance with South African law, in line with the approach that has been taken in Supreme Court of Appeal decisions dealing with the interpretation of other maritime statutes.[10]

In the light of this approach it would be wrong to regard the Court as bound by English law as at 1 November 1983, in terms of section 6(1) of the Admiralty Jurisdiction Regulation Act, 105 of 1983, (_AJRA') since such law cannot derogate from the provisions of the South African statute.[11]

The dictum in the *Andrico Unity*[12] which decided the meaning of the term _maritime lien' in section 3(4)(a) of AJRA in accordance with English law, including English conflict of laws rules, must therefore be treated with caution, notwithstanding that it has been followed and applied in other decisions.[13] The finding is the subject of trenchant criticism that section 6(1) of AJRA only has relevance in determining the law to be applied to a dispute over which admiralty jurisdiction under the Act has already been settled.[14] That argument was addressed and dismissed in the judgment, but not entirely satisfactorily.[15] It applies however with even greater force to the STDA as claims in which the STDA may be applied will not always be

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 1, [26]
[10] mv Stella Tingas*; Transnet Ltd t/a Portnet v Owners of the* mv Stella Tingas *and Another* 2003 (2) SA 473 (SCA) at [6]. Also see mv Cape Courage *Bulkship Union SA v Qannas Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) at [12] where the same approach was taken to interpretation of the expression _when the claim arose' in section 3(7)(a) of the Admiralty Jurisdiction Regulation Act, 105 of 1983.
[11] Section 6(2) of Admiralty Jurisdiction Regulation Act, 105 of 1983.
[12] *Transol Bunker BV v The Andrico Unity* 1989 (4) SA 325 (A) per Corbett JA at 334H- 335D and 339B-340C
[13] In particular in the SCA in *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd And Others* 1995 (3) SA 663 (A) at 667C per Corbett CJ and mt Argun *Sheriff of Cape Town v* mt Argun*, Her Owners And All Persons Interested In Her and Others; Sheriff of Cape Town and another v* mt Argun*, Her Owners And All Persons Interested In Her and another* 2001 (3) SA 1230 (SCA) at [14 -15] per Scott JA
[14] Wallis *The Associated Ship and South African Admiralty Jurisdiction* 312 - 315
[15] Ibid. Also see Hofmeyr G *Admiralty Jurisdiction Law and Practice in South Africa* 2ed 100, fn 34

maritime claims,[16] in which instance they would fall outside of the ambit of the admiralty jurisdiction conferred by section 2(1) of AJRA, and thus outside the ambit of section 6.

The expression _South African law' used in the *Stella Tingas*[17] refers to our modern law. Although rooted in Roman-Dutch common law it is not inexorably bound by the old Dutch writers. This is not only because they are unlikely to be helpful in resolving complex mercantile disputes of the modern day,[18] but because wider regard can and should be paid to a broad range of sources, including European sources, since the shipping laws developed in the whole of Western Europe _fed the English practice as it in turn grew to fame'.[19] The principle has been expressed in the following terms:

> _Were we bound to follow Dutch writers and them alone, there would be no point in consulting French, Italian, German, Spanish and Belgian authorities; these are constantly quoted in our courts and rightly, for Roman-Dutch law is really a misnomer: that system was for centuries the common law of Western Europe'[20]

Thus attention has been given in this thesis to the position that prevails under European civil law regarding the transfer of rights of suit under contracts for the carriage of goods by sea, and it is submitted that such practices can and should be regarded as informing South African law on the transfer of rights of suit.

The use of similar terms that have a specific meaning defined by, or determined according to the provisions of another statute, do not serve as a useful aid to interpretation.[21] For example, it is neither necessary nor helpful to use as a starting point the constrained meaning of _bill of lading' under UK COGSA 1992, in interpreting the STDA.

---

[16] As to the circumstances in which claims relating to carriage of goods by see will not be maritime claims see *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D), 906 E-H (a claim for payment under an international sale contract) and *The Galaecia* unreported judgment of DCLD Case No. A19/2006 delivered on 23 March 2006 per Combrinck J (a claim for damages for loss of fish caught on the mfv Carran and detailed by US Customs).

[17] Supra note 10, [6]

[18] *London and South African Bank v Donald Currie & Co* (1875) 5 Buch 29, 34

[19] BR Bamford, commenting upon the approach to interpretation of the Merchants Shipping Act, 57 of 1951, in the preface to *The Law of Shipping and Carriage in South Africa* 2ed.

[20] Van den Heever FP *Partiarian Agricultural Lease in South Africa* (1943) 7 discussed in Fagan E _Roman-Dutch Law in its South African Historical Context in Zimmermann R & Visser DP (eds) *Southern Cross: Civil Law and Common Law in South Africa* at 42. The author notes that narrower views have been expressed frequently even by Van den Heever himself.

[21] *MV* Forum Victory*: Den Norske Bank ASA v Hans K Madsen CV and Others (Fund Constituting the Proceeds of the Sale of the MV* Forum Victory*)* 2001 (3) SA 529 (SCA) [11] per Scott JA, referring to the expressions _when the claim arose' in section 3(7) and section 11(4)(c) of the Admiralty Jurisdiction Regulation Act, 105 of 1983.

What must however be considered is that it is desirable in the interests of uniformity that careful consideration is paid to the laws of other nations with whom South African merchants are likely to engage in trade. Maritime law has been described by Allsop J[22] as a field _ripe' for consideration of the relationship between national (_municipal') law and international commercial law and conduct[23] since _[f]ew maritime ventures are undertaken without a complex interconnection of international participants' which in turn makes _problems of contract, insurance, loss, security, and enforcement of rights matters of common interest to the international commercial community'.[24] The international sale contract has in turn been described as _one of the most inherently international contracts lawyers come across'.[25]

The principle of striving for international uniformity in interpretation has been approved of many times when domestic statutes giving effect to international conventions are interpreted.[26] While no international convention governs the title to sue issue dealt with in the STDA, it has been said of _negotiability' that it is _a sort of *ius gentium* – in broad outline although not in each detail everywhere the same.'[27] Thus it is salutary practice to prefer an interpretation that brings South African law into harmony with other countries' laws rather than one which introduces a discordant note to the ears of South African merchants and their foreign trading partners.

For example, in 1946 in *The Tolten*[28] the question arose whether the English admiralty court had jurisdiction in an action in rem against a ship which had caused damage to a port installation in Lagos, Nigeria. The court was required to interpret section 7 of the Admiralty Court Act of 1861, read with section 22(1)(a) of the Supreme Court of Judicature (Consolidation) Act, 1925, which invested the Court with jurisdiction over _any claim for damage done by a ship'. In doing so the Court of Appeal prayed in aid the _general law of

[22] President, New South Wales Court of Appeal
[23] Allsop JJ _Maritime law – the nature and importance of its international character', 2009 William Tetley Lecture at Tulane University law School, delivered on 15 April 2009, reprinted in (2010) 34(2) *Tulane Maritime Law Journal* 555 -589
[24] Ibid.
[25] Lorenzon F *C.I.F and F.O.B Contracts* 5ed, 1-005
[26] *Stag Line v Foscolo, Mango and Co* [1932] AC 328, 350 per Lord Macmillan. approved in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 Lloyd's Rep. 113 (CA), [56]
[27] Gilmore & Black *The Law of Admiralty* 2ed 75
[28] [1946] P. 135 (Court of Appeal) per Scott LJ

the sea'[29] and reiterated the desirability of uniformity amongst the maritime laws of various nations, not least because of the importance of uniformity to maritime commerce.

In this regard the Court said that:

> _The question is, however, one of far-reaching importance and calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea.'[30]

These principles do not overshadow the national competence to diverge from _the general law of the sea'. The Court referred to _*British* admiralty law', although this in itself recognised the _supra-national' character of maritime law.[31] In an earlier series of English decisions on the validity of bottomry bonds the existence of differences in national maritime laws had to be faced. In *The Gaetano and Maria*[32] the bond was binding on cargo owners under Italian law (the law of the flag of the vessel) but not under English law (the lex fori).[33] It was held by Sir Robert Phillimore at first instance that the matter was to be governed by the _general maritime law as administered in the English Courts', [34] or _the ordinary maritime law', that is to say English maritime law.[35] The decision upheld on appeal _without the

[29] The term has its origins in earlier judgments of the admiralty court. For example, notably *The Bold Buccleugh* 7 Moo. P. C. 267. Also see the statement of Lord Mansfield in *Lyke v Lyde* (1759) 2 Burr. 882, 887, that maritime law is the _general law of nations' (approved in *The Tolten* supra note 28). Also see Gilmore & Black op cit note 27, 1, fn 1, where the authors discussion of the origins of _the admiral' give _a glimpse of the interconnections of the Mediterranean world in which modern maritime law took form'. The term _Mediterranean' is not exclusively referring to Western Europe as we know it today. The authors' reference to the Arabic origins of _admiral' illustrates this. As to the wider roots of maritime law see the references collected by Allsop JJ op cit note 23, 556 at fn3.

[30] Ibid

[31] See *Currie v. M'Knight (The Dunlossit)*[1897] A. C. 97, 155–6, where English and Scottish maritime law are regarded as _British' maritime law [approved in *The Tolten* supra note 28]

[32] (1881) 7 P.D. 1

[33] The judgment in turn refers to earlier decisions on similar facts by Dr Lushington, in *The Hamburgh* Br. & L. 253, Lord Stowell's judgment in *The Gratitudine* 3 W. Rob. 240 and Lord Justice Knight-Bruce's judgment in *The Buonaparte* 8 Moo. P. C. 459. According to the corrected report of the latter: _That it is an universal rule that the Master, if in a state of distress or pressure, has not been alleged, and is a position that could not be maintained.' This report is set out in the judgment of the Privy Council (on appeal from the Supreme Court of Ceylon) in *Kleinwort, Cohen, & Co. v. The Cassa Marittima of Genoa* 2 App. Cas. 156. From the quoted excerpt however it seems that the Court was concerned to outline the circumstances in which a Master is required to communicate with owners under English law, rather than referring to a universal rule in the sense of an invariable internationally recognised practice. See *Lloyd v. Guibert* 1 Q. B. 115, 125 concerned what law should govern the matter when the cargo owners were party to a contract of affreightment with the Master, and held, distinguishing *The Hamburgh* supra on the grounds that the case concerned act of necessity, held that the question was governed by the law of the contract, which in the present circumstances was the law of the flag of the vessel. A similar question was decided on the basis of the law of the flag of the vessel by Justice Story in the US Circuit Court in *Pope v. Nickerson* 3 Story, 465 but not followed in England.

[34] _though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty' See *Lloyd v Guibert* L.R. 1 Q.B. 115, 124.

[35] *The Hamburgh* supra note 34

smallest doubt'.[36] The case faced head on the fact that such issues are governed _in a great measure upon national policy and economy' and that a general, much less universal maritime law, was _easier longed for than found'.[37]

Nevertheless what the judgments indicated was that the law to be applied was British *maritime* law.[38] South African courts have recognised the same principle, holding that the law applicable in the erstwhile Colonial Courts of Admiralty[39] was _the general *maritime* law or the law of the Court of Admiralty',[40] (my emphasis)[41] or _that special body of legal principles and practice which is known as English *maritime* law'(my emphasis).[42] Maritime law differs markedly from English common law, [43] requiring due regard to international law and the _comity of nations'[44] [45] [46] There is therefore a _subtle, but real, relationship' between the municipal law and the general maritime law.[47]

Thus whilst it is probably correct that nineteenth century judicial statements reflect the growing strength of nationalism,[48] nevertheless the common roots of English *maritime* law in the general maritime law were still recognised. For example, in *The Gas Float Whitton, Number* 2[49] it was held that English maritime law was to be ascertained by reference to principles and practices contained in the judgments in English admiralty cases, but the court recognised that those principles were moulded from the old sea codes, the *Digest,*[50] and the French and other Ordinances.

---

[36] *The Gaetano and Maria* supra note 32, 143
[37] ibid
[38] *The Gaetano and Maria* supra note 32, 143 per Brett L.J.
[39] Established under the Colonial Courts of Admiralty Act (1890) 53 and 54 Vic, c. 27
[40] *Crooks & Co v Agricultural Co-operative Union Ltd* 1922 AD 423, 440-441, and further discussed at 450-451
[41] An emphasis that is validated by the view that it is the maritime subject matter of such laws which give them a _separate coherence' - Allsop JJ supra note 23, 563
[42] *Crooks & Co v Agricultural Co-operative Union Ltd* supra note 40, 429, per Innes CJ
[43] Ibid, 432 per Juta JA
[44] Ibid, 441 - 442 per Juta JA
[45] *The Tolten* supra note 28, 143. Also see Bennet WP *The History and Present Position of the Bill of Lading as a Document of Title to Goods,* 1.
[46] Even after the Doctors Commons were closed, common law judges deciding admiralty matters did so upon a review of principles and practices in admiralty. See *The Dictator*, [1892] P304 ([1891 – 4] All ER Rep 360, and *mv Alina II (No 2) Transnet Ltd v Owner of mv Alina II* 2011 (6) SA 206 (SCA) [20].
[47] Allsop J supra note 23, 558, discussing the American jurisprudence.
[48] Bennet WP supra note 45, 2, describes trade in the earlier feudal societies as _inter-municipal' rather than _inter-State', and says that _it was natural that the seas and rivers which linked the towns together should also form a channel by means of which the common stream of Custom should circulate throughout the civilised world.'
[49] 1896, Pr. 42 per Brett L.J.
[50] The Roman civil law as codified by the Emperor Justinian

On the basis of this analysis it is submitted that when there is doubt about the content of the STDA preference should be given to an interpretation which would be in harmony with the _general maritime law'[51] and foreign law on the _negotiability' and _transferability' of sea transport documents. It may even be incumbent upon Judges to adopt a more inquisitorial role in bringing to bear upon such matters of interpretation their own knowledge of that law. [52]

In summary the approach that will be followed is iterative, which involves considering the words _negotiable' and _transferable' in their context from the outset. The words are to be interpreted as a matter of South African law, meaning that our courts are not bound to the meanings that might be ascribed to such terms in English law. Foreign statutes are considered for comparative purposes, noting that the definitions contained therein are not binding, but mindful that uniformity in such an international field is desirable and that if principles of general acceptance emerge South African law should be shaped in conformity with those principles.

Before considering the words of the statute the background and purpose of the enactment will be examined.

5.3 Background and Purpose of the Sea Transport Documents Act

It is clear from records of the Maritime Law Association that the members of the association, and the legislative committee that worked on the draft at various times[53] wanted it to deal with the problem of title to sue.

The Long Title states the purpose of the Act as being:

> _To regulate the position of certain documents relating to the carriage of goods by sea; and to provide for incidental matters.'

[51] *The Tolten* supra note 28, 140. & 147 – 148.
[52] See the discussion in *The Tolten* supra note 28, 148–9. Scott LJ took judicial cognisance of the general maritime law referred to in earlier judgments. In doing so he did not confine himself to submissions of the litigants and made fairly wide-ranging reference to international developments and conventions in which the Judge had himself personally been involved, on the basis that it was his judicial duty to set out what he knew of the _general maritime law' as illustrated in these instruments.
[53] Primarily the late Mr DJ Shaw QC of the Durban Bar, Mr MWH Posemann and the late Mr R Greenhalgh

This has been described by Professor Staniland as _an understatement couched in cryptic terms'.[54] The writer suggests that _the true import of the Act is impliedly[55] to repeal and replace the English Bills of Lading Act 1855'.[56] He adds that its purpose is _to introduce substantial changes to title to sue in respect of goods carried under a bill of lading,' and _to provide unique provisions dealing with the delivery of goods carried under a bill of lading'. No mention is made by Professor Staniland of the position pertaining to title to sue under sea waybills and straight bills of lading.

The Memorandum on the Objects of the Sea Transport Documents Bill records the purpose of the Bill as follows:

> _The Sea Transport Documents Bill seeks to clarify and modernise the law relating to the various documents, including bills of lading, commonly used in connection with the carriage of goods by sea.'

The Memorandum goes on to state that the 1855 Bills of Lading Act was applicable in South Africa by statute and that the 1855 Act was out-dated and unsatisfactory and had been replaced in England.

Whether the drafters of the memorandum were correct that the 1855 Bills of Lading Act applied in South Africa by statute is unclear. There was no authority for such a widely stated view[57] and where it had been applied this was on the basis that the law of the contract was English law.[58] The 1855 Act was not generally applicable,[59] and was undoubtedly not

---

[54] Staniland H _Maritime Law' 2003 *Annual Survey of South African Law*, 856

[55] The 1855 Act was not expressly repealed. It is unusual, but by no means impossible, for a statute to be repealed impliedly. It is a conclusion which is _neither presumed nor favoured', unless there is a _manifest inconsistency' rendering the enactments contradictory or repugnant to one another. See *New Modderfontein Gold Mining Co v Transvaal Provincial Administration*, 1919 AD 367, 400. Also see *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 459 A-B per Centlivres CJ and the further cases cited therein.

[56] For further discussion see Du Toit *The Bill of Lading in South African Law* (LL D thesis RAU 2000) 133-136; Girvin _Third party rights under shipping contracts' 1997 *SA Merc LJ* 97 111-112, Also see Girvin _Carriage of goods by sea: the Sea Transport Documents Act 2000 in historical and comparative perspective' 119 *SALJ* 317, 327–330; Reynolds FMB 'Reform of the Bills of Lading Act' (1990) 106 *LQR* 1, 'The Bills of Lading Act: Reform nearer?' (1991) 107 *LQR* 355 and 'Bills of lading: Do they have a future?' (1994) 10 *MLAANZ J 35*

[57] 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'. See *First National Bank of Southern Africa Ltd in re Bank of India v Kien Hung Shipping SA (Pty) Ltd*, delivered by McArthur J on 11 January 1994. The judgment has been included in M Stranex, *Commercial Law Reports* 1994 (W) 98.

[58] *Mitchell Cotts & Co v Commissioner of Railways* 1905 TS 349 at 356 per Innes CJ – a case concerning a negotiable bill of lading issued under a charterparty.

applicable in the Natal Supreme Court,[60] but was likely the law in the Cape [61] and probably also in Colonial Courts of Admiralty sitting in Natal[62] since it would have applied to disputes under bills of lading as a matter of English maritime law.[63] The point is nevertheless one of some difficulty. [64]

Presumably the drafters of the memorandum were of the view that following the enactment of the Admiralty Jurisdiction Regulation Act, 105 of 1983, the 1855 Bills of Lading Act did apply in South Africa to disputes under bills of lading.[65] Even if that was the case the 1855 Act had no relevance whatsoever to sea waybills,[66] and although it has been said by the House of Lords that the Act did apply to straight bills of lading this was an *obiter* contemporary gloss rather than an authoritative judicial statement.[67]

Ultimately however, that is a question of subsidiary importance in establishing the *purpose* of the Sea Transport Documents Act. For whether the Bills of Lading Act, 1855, was properly speaking part of South African law or not, its shortcomings were well-known amongst South African legal practitioners, and so too were the remedial legislative measures

---

[59] The 1855 Act was a British Act, which was not expressly made applicable to the colonies, and therefore did not restrict colonial legislative powers in terms of the Colonial Laws Validity Act (1865) 28 & 29 Vict. c.63. Its provisions were never enacted into South African law. In other colonial jurisdictions it had been specifically enacted, and was thus expressly repealed in due course. By way of comparision see Girvin op cit note 56, 119 *SALJ* 317, 327 fn 227 & 228, referring to the position in Queensland, Australia, in ss 5-7 of the Mercantile Act 1867 31 Vic No 36 and section 13 of New Zealand's Mercantile Law Act, 1908.

[60] Bamford op cit note 19, 2. The Supreme Court would have applied Roman Dutch law to the same dispute. An unfortunate state of affairs which persisted until the enactment of the Admiralty Jurisdiction Regulation Act, 105 of 1983.

[61] English law applied by virtue of s 1 of The Cape General Law Amendment Act 8 of 1879. See Bamford op cite note 19, 2 and the analysis in relation to the Merchant Shipping Act 1894 in *Rex v Mcgrath and Others* 1949 (4) SA 207 (C) at 210.

[62] Strangely, considering the continued existence of Colonial Courts of Admiralty until 1 November 1983, Bamford does not comment on this.

[63] In *Crooks & Co Appellant v Agricultural Co-operative Union Ltd Respondents* supra note 40, 428 per Innes CJ it was confirmed that Colonial Courts of Admiralty would apply English maritime law and not Roman Dutch law.

[64] Causes of action on bills of lading formed part of the jurisdiction of the Admiralty Court in terms of section 6 of the Admiralty Court Act (1861) 24 Vict. c.10. The 1855 Bills of Lading Act was not an exclusively _maritime' statute. It has been described by the House of Lords in *Sewell v Burdick (*The Zoe*)* 1884) 10 App. Cas. 74, 85, as a _general mercantile law'. Decisions of the Admiralty Court indicate that the 1855 Act was applied there. See : *The Figlia Maggiore* Law Rep. 2 A.&E. 106 and *Owners of the Ship Freedom v Simmonds, Hunt, & Co* (1869-71) L.R. 3 P.C. 594. However reference to the Bills of Lading Act to interpret the Admiralty Court Act was criticised in *Sewell v Burdick* supra, 94–95.

[65] There was no enactment of the statute into South African law, and therefore the drafters of the memorandum presumably are referring to matters falling under S6(1) of the Admiralty Jurisdiction Regulation Act, 105 of 1983. See the analysis in S.D. Girvin op cit note 56, 119 *SALJ* 317,319. Also see Staniland op cit note 54.

[66] As the title of the Act indicates it was concerned only with Bills of Lading. Sir Anthony Lloyd _The Bill of Lading: do we really need it?' 1989 *LMCLQ* 47, 51, advances a similar view, but notes that Professor de Battista has argued to the contrary.

[67] *The Rafaela S* [2005] 1 Lloyd's Rep. 347 (HL) , 358 [41] per Lord Steyn.

taken in the United Kingdom and other jurisdictions to make provision for the transfer of title to sue, and to extend those remedial steps to sea waybills and straight bills of lading.

Against this background it is thus not surprising that the question of a ‗Bills of Lading Act' was first formally minuted in the records of the Maritime Law Association of South Africa in 1992. A draft Act was tabled which it was said had been prepared ‗with particular reference to the difficulty associated with title to sue'.[68]

The chairman of the Association stated in the 1998 Report that ‗[t]he Act will put to rest the doubts concerning the ability of a claimant other than the original shipper to sue the carrier'.[69] However it is not indicated whether this was only to be in relation to classic bills of lading, made out ‗to order' or as bearer documents.

After circulation of the draft Bills of Lading Act, and amendments in line with comments received, it was noted at the close of 1994[70] that:

> ‗An aspect that still needs some consideration is the extent to which non-negotiable receipts and sea waybills, which are by definition non-transferable documents, are covered by the proposed Bills of Lading/Title to Sue Act.'

Whether the drafting committee had in mind straight bills of lading when they referred to ‗non-negotiable receipts' and what they conceived the meaning of ‗non-transferable' to be, cannot be ascertained. It seems likely that the former was a reference to the use of the term ‗any receipt which is a non-negotiable document' in section 1(1)(c) of the Carriage of Goods by Sea Act, 1 of 1986 (and section 310(2) of the Merchant Shipping Act 57 of 1951 prior to its repeal by Act 1 of 1986). However as indicated in chapter four there is no South African case law on these sections, and the categorisation of documents is one of considerable difficulty. The records of the Association do not record the outcome of the discussion.[71]

---

[68] The draft was prepared by the late D.J. Shaw QC, who had also been instrumental in the drafting the Admiralty Jurisdiction Regulation Act, 105 of 1983. The tabling of the draft Bill is recorded in item 11 of the minute of the 21st meeting of the executive committee of the Maritime Law Association of South Africa held on 28 May 1992 at the Wild Coast Sun where the association was holding its annual conference and Annual General Meeting.

[69] MLA Presidents Report 1998

[70] Item 4.7 of the minutes of the 27th Meeting of of the Executive Committee of the Maritime Law Association held at Safmarine on 9 December 1994.

[71] The final word on the drafting process appears to be that legislation for a ‗multimodal transport legal regime' was to be addressed at a future date. Item 5.3 of the minutes of the 37th Meeting of the Executive Committee of the Maritime Law Association held on 29 August 1997. Whether this was conceived as an entirely separate

A finalised draft, now referred to as the _Sea Transport Documents and Title to Sue Act' was tabled at the end of 1995, after circulation to members with no comment[72]. However subsequent proposals were received at the 1996 Annual General Meeting[73] and the Bill was revised[74], retabled[75] and finally submitted to the Department of Transport on 23 May 1997[76]. A draft Bill was published for comment in the Government Gazette on 12 December 1997[77]. The process from that point to the final coming into force of the Act can only be described as tortuously slow[78], and the Act finally came into effect on 20 June 2003[79] with little further fanfare.

It is clear from the above synopsis that the purpose of the STDA was remedial. Although it cannot clearly be discerned from the contemporaneous records whether the position of sea waybills and straight bills of lading was considered, there is no reason why they should not fall within the remedial purpose of the statute, particularly given their increasing importance in modern trade (outlined in chapter three).

Furthermore, although unarticulated in the Memorandum accompanying the draft bill there are important policy considerations underlying such reform: failure to deal adequately with the transfer of rights of suit under sea transport documents could threaten shipping and insurance business and the national economy, and lead to the loss of litigation and arbitration

---

project, or as one which would address problems of title to sue under the forms of document used in multi-modal transport is unclear.

[72] Item 7.7 of the minutes of the 30th Meeting of the Executive Committee of the Maritime Law Association held at Shepstone & Wylie, Durban, on 13 December 1995.

[73] The AGM was held on 21 June 1996 at Cathedral Peak. The workshop on the Act was tape recorded, although no transcript appears alongside the minute in the records of the Association.

[74] Item 7.2 of the minutes of the 33rd Meeting of the Executive Committee of the Maritime Law Association held on 30 August 1996, and Item 5.3 of the minutes of the 35th Meeting of the Executive Committee of the Maritime Law Association held on 21 February 1997 record no details of the nature of the required amendments.

[75] Minutes of the 36th Meeting of the Executive Committee of the Maritime Law Association held on 16 May 1997.

[76] Minutes of the 37th Meeting of the Executive Committee of the Maritime Law Association held on 29 August 1997

[77] Explanatory Memorandum on the Objects of the Sea Transport Documents Bill published in Government Gazette no. 21158 of 8 May 2000.

[78] The final draft Bill was still awaiting translation into Afrikaans fourteen months later. Item (c) of the minutes of the 40th Meeting of the Executive Committee of the Maritime Law Association held at Adams & Adams on 24 July 1998. The Bill was only introduced in the National Assembly by the Minister of Transport a further two years later on 8 May 2000 (published in GG21158).

[79] Proc R 50 *GG* 25096 of 20 June 2003

to other jurisdictions.[80] Bradgate and White[81] outline seven policy considerations which should inform a remedial statute in this area:

1. It should _cure perceived defects in the existing law';
2. It should do so in a way that satisfies the dictates of _good sense and commercial certainty'[82] — as viewed by _the commercial community who use the law';[83]
3. It should _be brought into line with the law in other jurisdictions and internationally recognised rules governing carriage by other methods' insofar as that is possible;
4. It should not alter _established law and trading practices ... where they have been found to work satisfactorily';
5. It should permit recovery by the person who has actually suffered the loss;
6. It should discourage a multiplicity of actions and prevent double recoveries;[84]
7. It should facilitate recovery based on the contract subject to _contractual allocations of risk and limitations of liability' rather than recoveries in tort (delict).

These policy considerations undoubtedly apply with equal force to sea waybills and straight bills of lading. It cannot be anything other than a defect in the law if it does not provide a clear right of suit to the consignee under sea waybills and straight bills of lading. The problematic provisions of the 1855 Bills of Lading Act, and the provisions of the remedial statute that had been passed in England, UK COGSA 1992 will be considered next, before contrasting those statutes to the relevant provisions of the STDA.

5.4 The 1855 Bills Of Lading Act: The Mischief At Which The STDA Is Directed

It has been established above that although there may be doubt about whether the 1855 Bills of Lading Act applied as a matter of law in South Africa, its notorious shortcomings in relation to the issue of title to sue were the mischief which the STDA sought to remedy.

---

[80] Bradgate R and White F _The Carriage of Goods by Sea Act 1992' (1993) 56 (2) *MLR* 188 , discussing the motive for reform in England.
[81] ibid 188 - 189
[82] Law Com no. 196 and Scot Law Com no. 130 para 1.10
[83] Bradgate & White op cit note 80, 188–189
[84] There is an inevitable tension between this principle and the one preceding it. While the authors criticise UK COGSA 1992 for extinguishing the rights of suit of the shipper and immediate holder, as these parties may suffer a loss even if they have transferred the bill of lading to another, they also recognise the undesirability of multiple suits possible under sea waybill shipments.

The 1855 Bills of Lading Act[85] created a statutory provision for the transfer of rights of action and liabilities from the shipper to the consignee and the indorsee of the bill of lading. It did so in the following terms:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.'

The recital to the Act is also important as it places section 2 in context. It provided:

> '... by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property...'.

It was the understanding at the time it seems that property in the goods invariably passed upon the consignment or endorsement of the bill of lading.[86] However subsequent decisions, notably the House of Lords decision in *Sewell v Burdick,*[87] established that this is not always the case, as the transfer of ownership depended on the intention of the parties to the underlying transaction. This is leaving aside the extremely problematic issues raised in chapter two of determining where the transfer is to take place and what law is to apply.

Thus several instances could arise where it might be desirable or convenient that the consignee or endorsee should have an action on the contract in his own name, but he was non-suited by the fact that the ownership of the goods had not passed by reason of the consignment or endorsement of the bill of lading.

Less than thirty five years after its enactment a number of decisions had exposed lacunae in the 1855 Act, which merited incisive commentary by Carver in the Law Quarterly Review of 1890[88]. The thrust of the criticisms was directed at the misplaced requirement in

---

[85] 18 & 19 Vict. c111

[86] *Barber v Meyerstein* (1870) LR 4 HL 317; and *Glyn, Mills & Co v East and West India Dock Co*. (1882) 7 App. Cas. 591 being two decisions cited by Carver TG 'On some defects in the Bills of Lading Act 1855' (1890) 6 *LQR* 289

[87] 10. App. Cas. 74

[88] Carver op cit note 86

the 1855 Act that transfer of the bill of lading and transfer of ownership[89] should be linked in order to transfer rights of suit under the contract of carriage.[90]

_By 1980 the difficulties in the 1855 Act had assumed serious proportions and the Act was failing to meet the needs of the mercantile community and the changed pattern of international trade and carriage by sea.'[91] That summation of the position is important because it indicates that the legislative solution had to meet the needs of merchants, and be in line with current trade patterns.[92] The same purpose and policy imperatives apply to the STDA.

5.5 The Relevant Provisions of the Carriage of Goods by Sea Act, 1992

UK COGSA 1992 was enacted to replace the 1855 Bills of Lading Act in England, and it provides for the transfer of rights of suit under straight bills of lading and sea waybills in the following way. First the Act applies to three existing categories of carriage document, namely _any bill of lading', _any sea waybill' and _any ship's delivery order'. [93] Secondly, it excludes from the definition of _any bill of lading' any document that is _incapable of transfer either by endorsement or, as a bearer bill, by delivery without endorsement'.[94] Since a straight bill of lading cannot be transferred by endorsement and is not a bearer bill of lading, it does not fall within the definition of _bill of lading'

[89] It was decided in *Sewell v Burdick* supra note 87 that the reference to _property' in the 1855 Act meant the full or general property in the goods – that is, according to South African law, ownership of the goods.
[90] *Borealis A.B. v Stargas Ltd and Others (The 'Berge Sisar')* [2001] 1 Lloyd's Rep. 663 at [23 -24] per Lord Hobhouse. Numerous difficulties arose under the 1855 Act. It could not apply where ownership did not pass upon or by reason of the consignment of the bill of lading, either because the holder took as a pledgee (Sewell v Burdick supra note 87) or because ownership passed at some other time (The Aliakmon). It did not apply when goods were discharged against letters of indemnity because the bills of lading were delayed (*Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd's Rep 252). It did not apply in relation to bulk cargos delivered under delivery orders since ownership cannot pass in an undivided bulk by transfer of the bill of lading ((*In re Wait* [1927] 1 Ch 606; *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219, and *The Gosforth*, a decision of the Dutch Courts decided under English law: *S en S 1985 Nr.91),* nor did it apply to bulk cargoes not delivered at all (The Aramis [1989] 1 Lloyd's Rep. 213.)
[91] *The 'Berge Sisar* supra note 90, [26 -27] per Lord Hobhouse
[92] Specific mention is made at para [27] of the use of documents other than bills of lading.
[93] UK COGSA 1992 s1(1)
[94] UK COGSA 1992 s1(2)

_1(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

1(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.'

It is however clear from the definition in section 1(3) that the term _sea waybill' would include a straight bill of lading, because it functions as a receipt, contains or evidences the contract of carriage and names a consignee who is entitled to delivery of the goods.

_1(3) 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.

In the result straight bills of lading are in the curious position that they are _sea waybills' and not bills of lading for the purposes of UK COGSA 1992 (although they may be for other purposes, including the application of the Hague/Hague Visby Rules).[95]

Whatever the merits or demerits of including straight bills of lading under the rubric of sea waybills in UK COGSA 1992,[96] the singular advantage is certainty.[97] The Act contains clear provisions regarding the transfer of rights of suit under the contract of carriage in relation to each category of document.

[95] *Rafaela S* [2005] 1 Lloyd's Rep 347
[96] Bradgate & White op cit note 80, 206, criticise the UK COGSA 1992 approach as unduly limited.
[97] Law Com no. 196 and Scot Law Com no. 130, *supra*, part V, pg 44 para 5.2.

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.

Although contained within the same section UK COGSA 1992 thus provides for two separate mechanisms to transfer rights of suit under the contract of carriage.[98] When the document is a negotiable bill of lading a person establishes title to sue under section 2(1)(a) by proving that he is the lawful holder of the bill of lading. He acquires those rights of suit by virtue of becoming the holder of the bill, that is, when the bill is transferred to him.

The named consignee in a straight bill of lading will ordinarily have an original bill of lading transferred to him, but this will not trigger the transfer of rights of suit because the provisions of section 2(1)(a) relate only to a bill of lading as defined.[99]

If the consignee under a straight bill of lading, or a sea waybill is an original party to the contract of carriage rights of suit would vest in him as a matter of course. If not, then in terms of section 2(1)(b) he establishes title to sue by proving that he is the person entitled to delivery of the goods from the carrier under the terms of the carriage contract. This in effect means that from the point when the document is issued the named consignee has rights of suit. Should the shipper exercise a right to vary the delivery instructions, the new consignee

[98] The contract of carriage' as defined in section 5(1) (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill'

[99] Section 1 read with section 5(1)

would acquire rights of suit from the moment when the new instruction was given to the carrier.[100]

Such a provision appears incongruous with the fact that the shipper under a sea waybill retains a right of disposal over the goods until actual delivery. However section 2(5) preserves the shipper's rights of suit. The sub-section states that section 2(1) is _without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill'.

In the case of negotiable bills of lading on the other hand the shipper's rights of suit as an original party to the contract, and any subsequent holder's rights of suit, are extinguished by the transfer of the bill of lading to a new holder in terms of section 2(5) of the Act.

The section reads as follows:

> _2(5) 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;
>
> but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.'

Sections 1(3)(b) and 2(1)(b) must also be read with section 5(3) which provides that:

> _References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in

[100] For detailed discussion of UK COGSA 1992 see inter alia Aikens, Bools and Lord *Bills of Lading* and Treitel and Reynolds *Carver on Bills of Lading.*

section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.'

In this way, if the shipper exercises his right to alter the delivery instructions the consignee named on the sea waybill or straight bill of lading would lose all rights of suit, and the person who becomes entitled to delivery would acquire those rights of suit, despite not being named on the document.

The question of transfer of liabilities is not directly relevant to the issue of title to sue, but will have important ramifications for any party seeking to enforce rights under the contract of carriage, and becoming liable to the carrier in turn. In UK COGSA 1992 liabilities under the contract of carriage are not automatically transferred with the rights of suit, but only where the person in whom the rights of suit are vested does one of three things listed in section 3(1):

'a) takes or demands delivery from the carrier of any of the goods to which the document 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'

Thus in relation to the issue of title to sue, once the person makes a claim under the contract of carriage he will become _subject to the same liabilities as if he had been a party to that contract'. However, the original party to the contract will remain liable under the contract of carriage as well, by virtue of the savings provision in section 3(3). These provisions apply to bills of lading and sea waybills alike.

Finally, the Act contains a provision which makes it possible for the person having title to sue, to bring a claim to recover loss suffered by another. Section 2(4) provides:

_(4)Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.‘

This section prevents a situation arising where the rights of suit are transferred to a person who is unable to claim because they have not suffered any loss. Bradgate and White have noted that it remains permissive, and thus dependant upon the party with title to sue under the Act being willing to exercise the right. They also question whether risk is a sufficient _interest or right in or in relation to the goods‘ to satisfy the section.[101]

Thus UK COGSA 1992 has adopted a distinction between two types of bills of lading. Although the term _negotiable‘ is not used in the Act the reference to bills of lading as defined is a reference to a _negotiable‘ bill of lading in the traditional sense. Furthermore the Act does not use the word _transferable‘ but does impliedly restrict the meaning of the term since it defines bills of lading as documents _capable of *transfer’* (my emphasis), in the restricted sense of transfer by indorsement and delivery (when made out to order) and transfer by delivery alone (as a bearer bill). The word transfer is not used at all in relation to sea waybills, which by definition include straight bills of lading. This is explained by the fact that in relation to this category of documents the transfer of rights of suit is not linked to the transfer of the document. However, the word transfer is used again in the definition of _holder‘ in section 5(2) of the Act:

(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—

[101] Bradgate & White op cit note 80, 201. The authors do note that risk satisfies the requirement of an insurable interest : *Inglis v Stock* (1885) 10 App Cas 263.

(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) ....'

What is curious about this provision is that separate mention had to be made of a named consignee in section 5(2)(a), who is the holder by virtue of being identified in the bill as consignee and being in possession of the bill. The section makes no reference to how the bill came to be in his possession. On the other hand section 5(2)(b) defines all other holders as persons who have acquired possession of the bill of lading by *transfer* of the bill. Thus once again transfer is being used in the restricted sense in which that term applies to negotiable bills of lading. A curious anomaly arises. The consignee of a negotiable bill made out to the shipper's order is the holder under section 5(2)(b) since they have received transfer by endorsement and delivery. Conversely, section 5(2)(b) does not cover the transfer from shipper to the consignee of a negotiable bill made out to the consignee or order. Such a consignee is a holder in terms of section 5(2)(a). This rather cumbersome definition highlights the absurdity of not recognising that a bill of lading can be transferred by delivery alone to a named consignee.

Although UK COGSA 1992 has not been problem free[102] it is probably correct to say that traders are comfortable with UK COGSA 1992[103] 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. The manner in which it has dealt with the title to sue problem cannot lightly be disregarded, and will form the basis for a comparison to the provisions of the STDA.

[102] Girvin1119 *SALJ* 317, 335 refers to the fact that UK COGSA 1992 has generated a surprising number of cases.
[103] Du Toit SF _Comments on the Sea Transport Documents Act, 65 of 2000' 2003 *Journal of South African Law* 731, 737

5.6 The Relevant Provisions of the Sea Transport Documents Act

The STDA defines the term _sea transport document‘ in section 1 as follows:

> '[S]ea transport document' means-
>
> (a) a bill of lading;
>
> (b) a through bill of lading;
>
> (c) a combined transport bill of lading;
>
> (d) a sea waybill; or
>
> (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.‘

The Act thus expressly includes sea waybills in the definition. Straight bills of lading are not expressly referred to but would either be classified as _a bill of lading‘,[104] or _a sea waybill‘. At the very least they are a _similar document‘ since plainly they relate to the carriage of goods by sea. The Act expressly indicates that transferability or negotiability is not required for a document to be a _sea transport document‘.[105]

Section 2(1) provides for a wide application:

> _2(1) This Act applies-
>
> (a) to any sea transport document 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

[104] Following the name given to the document
[105] See the discussion of the _catch-all‘ phrase in relation to ship‘s delivery orders in Girvin 119 *SALJ* 317, 344 and Du Toit op cit note 103, 732

(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 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.'

The Act will apply in relation to goods consigned to the Republic, when carried under any sea transport document, including sea waybills and straight bills of lading. Furthermore pursuant to section 2(1)(c) the STDA applies to any proceedings, including court and arbitration proceedings instituted in the Republic after the commencement of the Act.

The Act also binds the State and organs of State as defined in section 239 of the Constitution.[106] The Act would thus not only govern a consignee's rights against the carrier under the terms of the sea transport document but it would be binding on Transnet SOC Ltd, should the need arise, for example to establish a right of delivery to goods that had been discharged into the custody of Transnet.

If one is not careful to read further it may appear as if the application of the Act is unfettered and that the Act thus provides a right of suit in respect of all sea transport documents. However, the provision that is the central concern of this thesis follows:

_2(2) Sections 3, 4, 5 and 6 apply only to sea transport documents that are transferable or negotiable, and any reference in those sections to a sea transport document must be construed accordingly.'

Section 2(2) refers to sea transport documents rather than to _categories' of sea transport document. There is thus scope for adopting a case-by-case approach that considers whether the document in question was intended to be negotiable or transferable. A straight bill of lading or sea waybill used as part of an international sale transaction could thus qualify as _transferable' (at least insofar as it evidenced a right to receive delivery/possession/ownership of the goods).

Furthermore section 2(2) adopts the disjunctive _or' which could be a textual indication that the term transferable has a different meaning to the term negotiable. If they did not have different meanings then it would have sufficed to use only one term.

[106] Act 108 of 1996

On the other hand, it may simply indicate that the draftspersons were aware of the judicial opinion expressed in England that the term _negotiable' meant no more than _transferable'. On such an argument the traditional term _negotiable' could have been included specifically to guard against the courts giving an interpretation to the term _transferable' that ignored the customary application of the term _negotiable' to bills made out _to order' or _to bearer'. Setting aside the disparate use of _and' and _or' the expression in the STDA bears a striking resemblance to the custom of merchants expressed in *Lickbarrow v Mason* that bills of lading are _transferable and negotiable'. If that is the proper interpretation of those words, this is a strong indication that the section excludes straight bills of lading and sea waybills, as neither document fell within the scope of the custom described.

This ambiguity cannot be resolved on a textual interpretatation alone. There is no magic in the choice of _or' or _and' as conjunctions, and associated rules of interpretation that the former is disjunctive (indicating alternatives),[107] although not always,[108] whilst the latter is conjunctive.[109]

The terms are not defined in the Act. Although the term _non-negotiable receipt' in used in the Carriage of Goods by Sea Act, 1 of 1986, it is also not defined and has not been the subject of any South African decision.

The dictionary meaning of the term _negotiate' means _get, give, money value for (bill, cheque)'. It clearly conveys a technical meaning if used in relation to negotiable instruments such as bills of exchange and cheques. The principal legal effect of the negotiation of a bill (or cheque) to a bona fide holder for value is that they take _free of equities'. This does not apply at all to sea transport documents. The second way in which the term _negotiate' or _negotiable' might be used is in the sense of permitting transfer by indorsement and delivery. However, as discussed in chapter four, one cannot draw a neat analogy to the law of negotiable instruments for the first transfer of a bill to the named payee is defined as the _issue' of the bill and not as a _negotiation' of the bill. As noted above in relation to the curious definition of _holder' in UK COGSA 1992 is unable to articulate a name for the process by which the named consignee comes to be in possession of the bill.

---

[107] *R v Ndete* 1951 1 SA 763 (SR) interpreting section 42(b)(iii) of the Southern Rhodesian Forests Act of 1949
[108] *Reeskens v Registrar of Deeds* 1964 4 SA 372 (N) interpreting s 102 of the Deeds Registries Act 47 of 1937, which provides that _notarial bond' means a bond attested by a notary public hypothecating movable property generally *or* specifically but the _or' is potentially cumulative, as in the awkward phrase _and/or'
[109] per Bristowe J in *Colonial Treasurer v Great Eastern Collieries Ltd* 1904 TS 719

However it is submitted that in reality this occurs by simple delivery of the original bill of lading.

The term ‗transfer' has two dictionary meanings that may be applicable. In its general sense it means to ‗convey, remove, hand over, (thing etc. *from* person or place *to* another)'. However in a technical sense it means to ‗make over possession of (property, rights, etc. *to* person)'.[110]

In its first ‗literal sense'[111] the term transfer could apply to any document at all, since every document is capable of being handed over to another person. That is plainly not the meaning intended in section 2(2), as it was evidently included to restrict the application of certain sections of the Act, and would not achieve that purpose if it applied to all forms of sea transport document. The second sense is closer to the meaning of ‗transferable document of title', in the sense in which that term has been used in case law and by academics.

Dictionary definitions alone are not instructive as to the meaning of the terms in context. Ultimately, what is required is to consider the evolution of those terms as they came to be applied first to bills of lading, and then to other forms of sea transport document, and their apparent use when viewed against the purpose of the present statute. It is important that although described as ‗non-negotiable' straight bills of lading have been recognised as functioning as a document of title, and as being capable of transfer at least once from the shipper to the consignee. Sea waybills however continue to be distinguished both in England and Europe from straight bills of lading, and to be described universally as non-negotiable and not a document of title in any sense.

Finally section 2(2) cannot be understood in isolation. The section was expressly meant to limit the application of the provisions of the STDA that are central to the title to sue enquiry, being sections 3(1), 3(2) and 4(1). It is therefore important to consider the provisions of those sections in order to determine if they are capable of being applied to straight bills of lading and sea waybills:

[110] Ibid
[111] Aikens et al, *Bills of Lading* para 8.28, not commenting directly on the point, but referring to the reasons for the restrictive meaning given to transfer in the definition of ‗bill of lading' in UK COGSA 1992.

_3 Transfer of sea transport documents

(1) A sea transport document may be transferred by the holder, either-

(a) by delivery of the document, endorsed as may be necessary; or

(b) subject to section 9 (1) (a), through the use of a telecommunication system or an electronic or other information technology system.

(2) A person is the holder of a sea transport document if that person is in possession of the original sea transport document, or possession of that 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 has been transferred in accordance with subsection (1).

...

(4) Transfer of rights and obligations

(1) 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

(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.

...'

The reference in section 3(1) of the STDA is to the document being _transferred' not _negotiated' (if there is a difference). Further _transfer' can be by delivery with or without

indorsement. The term ‗delivery' is not expressly restricted to delivery of bearer documents and reference is only made to a document being ‗endorsed as may be necessary'. This is markedly different to UK COGSA 1992, which does expressly limit those terms in a way that would exclude transfer of a straight bill of lading or sea waybill by delivery.[112]

The only implicit textual limitation contained in section 3(1) of the STDA is that the document must be capable of transfer *by* the holder. The term holder is defined in section 3(2) of STDA as one of three persons in possession of the original sea transport document:

> ‗(a) the person to whom the document was issued;
>
> (b) the consignee named in the document; or
>
> (c) a person to whom the document has been transferred in accordance with subsection (1).'

The definition plainly covers the shipper where the document has been issued to the shipper. Thus under section 3(1), read with s3(2)(a), a bill of lading made out to a named consignee can be transferred *by* the shipper, as holder, to the consignee by delivery. No indorsement would be necessary (whether the bill of lading was made out to a named consignee ‗or order' or only to a named consignee). By virtue of taking transfer of the original sea transport document the consignee would become the holder in terms of section 3(2)(b) whether the bill is a negotiable bill or a straight bill of lading.

In terms of section 4(1)(a) as holder the consignee would then be entitled to the same rights' against the carrier as if the holder were a party to a contract with the carrier on the terms of the sea transport document. In terms of section 4(1)(b) the consignee as holder would be regarded as ‗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'.

This is the provision that vests rights of suit in the holder of the original sea transport document. There is no indication anywhere in the text that it cannot apply to the ‗holder' of a straight bill of lading or sea waybill. For Rix LJ in the *Rafaela S*[113] it was ‗perfectly obvious why the more complicated case of the classic bill of lading has been dealt with separately, and the more simple case of the straight bill of lading and/or sea waybill has been addressed in

[112] SS 1(2)(a) and 5(2)(b) of UK COGSA 1992
[113] *The Rafaela S* [2003] 2 Lloyds Rep 113, 134 [92]

different terms although both to the same ends'. However, no reasons for this view were elaborated. One such reason may be the fact that sea waybills do not usually come into the possession of the consignee, and thus it would be impossible to apply the provisions of s2(1) of UK COGSA 1992. This reason does not apply to straight bills of lading, which would normally be transferred to the consignee to enable him to obtain delivery of the goods. It is also not a bar to the transfer of an original sea waybill if the parties so desire. Further, in their report the English and Scottish Law Commissions justified the position adopted in UK COGSA 1992 on the basis that the _shipper should be capable of retaining his contractual rights until the time of delivery' and retaining rights of suit would not _be a change in the law'.[114] This was the position in relation to sea waybills at common law, where shippers could sue in contract and consignees might sue in delict (tort), but it can be varied by the parties if the shipper relinquishes the right of control. In the case of a straight bill of lading such control is relinquished when the shipper parts with possession of the original bill of lading. A fortiori it is more logical that transfer of rights of suit should accompany transfer of the bill of lading than that they should be transferred ab initio (since in the shipper may have retained the bill of lading as his security for payment.) In this respect the provisions of the STDA would actually apply in a more simple and logical manner to straight bills of lading than the provisions of UK COGSA 1992.

The provisions of section 4(1) of the STDA provide that the holder of a sea transport document is entitled to the same rights as against the carrier as if he were a party to the contract of carriage with the carrier.[115] No express provision specifies the time when rights are acquired but it can only be when the document is transferred to him in the manner set out in section 3(1).

Section 4(1)(a) leaves the matter of the shipper's retention of rights under the original contract unclear, particularly since it does not refer to a _transfer' of the rights of suit under the original contract but merely to the same rights under a contract. However, section 4(1)(b) places it beyond doubt that the shipper retains no rights. As _cedent' the shipper would be divested of the rights which would vest exclusively in the consignee as holder.

The section is remarkably wide, since it covers all rights of action and not simply rights under the contract. Presumably the purpose of such a provision was to avoid a situation where contractual rights of suit were vested in the holder, but the shipper brought an

[114] Law Comm 196 at 46, para 5.23

[115] The provisions are lamentably somewhat convoluted, since section 4(2) also provides for a deemed cession of the rights of suit. Those considerations are not central to this dissertation and have been considered in some detail by other authors. See

action for loss outside of the limits of the contract, based upon his ownership, such as a claim in delict. This may explain the absence of any provision similar to UK COGSA 1992 s2(4). A review of the Law Commission Report[116] indicates that section 2(4) was enacted to ensure the workability of the simple rule that the person who will sue the carrier is the holder of the bill of lading, and to avoid a multiplicity of suits. However section 4(1)(b) is unlikely to be entirely effective. It is difficult to conceive that the courts will view section 4(1)(b) as bringing about a cession of the rights of ownership (at the time of transfer of the bill of lading) if ownership of the goods is not intended to pass (either at all or until some later point). On the other hand if ownership of the goods has already passed (upon transfer of the bill or at an earlier stage) a cession is redundant.

Another discrepancy between the STDA and UK COGSA 1992 is that if section 4(1) did apply to sea waybills and straight bills of lading there would be no mechanism for shippers to retain rights of suit, as provided in UK COGSA 1992 in relation to such documents. However, the distinction between the rights of a shipper under a sea waybill and the shipper under a bill of lading in UK COGSA 1992 has been criticised.[117] The inclusion of this provision was rationalised on the basis that the shipper under a sea waybill retains the right of disposal over the goods until they are actually delivered in accordance with the shipper's instructions.[118] This may not be the case where the documents are used in an international trade transaction where the consignee or the consignee's bank may require the shipper to relinquish this right of disposal.

In addition to dealing with the transfer of rights section 4(1) states that the holder of a sea transport document is _subject to the same obligations' as if he were a party to a contract of carriage with the carrier. This wording mirrors the wording of the 1855 Bills of Lading Act,[119] but the scope of the liabilities transferred under that Act was never _conclusively determined'.[120]

[116] Law Comm. 196 para 2.24 – 2.29
[117] Bradgate & White op cit note 80, 193. Also see Nossal S _The bills of lading and analagous [sic] shipping documents ordinance' [notes] (1994) 24 (2) *Hong Kong L. J.* 18 , 186
[118] J Beatson & J Cooper, _Rights of Suit in respect of Carriage of Goods by Sea' [1991] LMCLQ 196, 205
[119] The 1855 Bills of Lading Act, s1, provided that the consignee or indorsee was subject to _the same liabilities'
[120] Aikens et al, *Bills of Lading*, para 8.88. In addition to the cases cited there, the difficulties attending the phrase _subject to the same liabilities' in the 1855 Bills of Lading Act, were addressed in *Fox v Nott* (1861) 6 H & N 630, *Allen v Coltart & Co* 11 QBD 782, *Smurthwaite v Wilkins* (1862) 11 CBNS 842, *Sewell v Burdick* supra note 87, 87-88 and *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605, 615-618.

Whilst the transfer of liabilities is not determinative of the question of title to sue, it would clearly be of great importance to carrier, shipper and consignee to know which party is liable to the carrier under the terms of the contract – the fact that the contract may be evidenced by a straight bill of lading or sea waybill does not diminish the importance of this issue.

It must be added that the provisions of the STDA may give rise to surprising and unsatisfactory results.[121] Liabilities are transferred automatically to the holder. Since banks holding sea transport documents as security are ordinarily not concerned to enter into a contract of carriage with the carrier, or acquire liabilities towards the carrier,[122] the provisions of UK COGSA 1992, limiting the transfer of liabilities to situations where the holder takes up or demands delivery of the goods, or makes a claim under the contract of carriage, is preferable as it ‗respects the commercial reasoning' behind such transactions.[123]

Section 4(1) also does not take into account the potentially far-reaching and often unforeseen consequences that can arise for a consignee of dangerous goods as the liabilities may be ‗disproportionate to the value of the goods'[124] and not covered by insurance.[125] The holder of the sea transport document may also be ignorant of the liability when he takes the document.[126] Since the obligations automatically transfer with the document in terms of the STDA, rather than only in the limited circumstances envisaged by UK COGSA 1992, the consignee or indorsee of the sea transport document is exposed to considerably greater risk, and cannot avert the risk by refusing delivery of the goods. In this respect it may be an advantage to consignees under sea waybills and straight bills of lading if those documents are not covered by the STDA.

---

[121] See the discussion in Girvin op cit 119 *SALJ* 713

[122] *Sewell v Burdick* supra note 87, discussed in *The Berge Sisar* supra note 90

[123] *The 'Berge Sisar'* supra note 90, [32] –[33]. The Court had to decide the meaning of the terms ‗takes delivery' and ‗makes a claim'. It may be difficult on the facts of a case to establish exactly when that has taken place, but it is at least preferable to a blanket rule that liabilities automatically transfer, as this would operate unfairly in certain instances.

[124] Those were analysed in depth in *The Berge Sisar* supra note 90, [36] per Lord Hobhouse. Also see *The Ythan* [2006] 1 Lloyd's Rep. 456 where is was common cause between the parties that the shipper's liability for dangerous cargo would be transferred to the holder of the bill of lading. Further see Aikens et al *Bills of Lading* 7.75 citing *Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 as to whether the fob buyer can be held liable as the principal of the shipper.

[125] ibid

[126] ibid

Furthermore, whereas the original shipper remains liable to the carrier under section 2(5) of UK COGSA 1992[127] the position of the shipper is unclear under section 4 of the STDA. Section 4(1) echoes the wording of the 1855 Act, and it has been held under that wording that the shipper remained liable, as an original party to the contract, in addition to the consignee or indorsee.[128] However section 4(2) of the STDA further states that a holder who has transferred a sea transport document must be regarded as having delegated his obligations, save insofar as those obligations relate to a delectus personae in respect of that holder. The concept of delegation would imply that the shipper does not retain liabilities. The concept of a _delectus personae' is not defined. Holder, as defined in section 3(2)(a), may include the shipper if he is the party to whom the document was issued. Thus it is possible that it is only in exceptional circumstances that a shipper would remain liable, and that this may arise in respect of the obligation to pay freight or the warranty regarding the shipment of dangerous goods,[129] but it is then not clear whether the consignee or indorsee is liable in addition to the shipper or not at all, in such circumstances.

The remainder of sections 3, 4, 5 and 6 are not directly relevant to the question of title to sue. However, one cannot rely on section 4(1) of the STDA to establish title to sue under a straight bill of lading, or sea waybill, but at the same time contend that sections 3(2), 3(3), 5 or 6 are not applicable. An examination of those provisions indicates that this is not the case. On the contrary, the consignees under straight bills of lading and sea waybills might benefit from those provisions.

Section 3(2) expressly provides for the situation where someone has possession of the original document on the holder's behalf. When a straight bill of lading is not transferred physically, but it can be argued that the shipper, or the carrier holds the document on behalf of the named consignee, this would meet the requirements for constructive possession recognised in the STDA and the consignee could exercise the rights of a _holder' of the document. It is unlikely to have application to sea waybills as no legal consequences attach to possession of the document.

---

[127] The reasons are set out in *The 'Berge Sisar'* supra note 90, [25] and[31] per Lord Hobhouse
[128] Aikens et al, *Bills of Lading*, para 8.98 citing *The Giannis NK* [1998] A.C. 605, 616-617
[129] A view also suggested by Surjan M *Title to Sue at the Dawning of the Sea Transport Documents Act 65 of 2000, A Comparative Analysis*, at p 32. Dissertation (University of Cape Town, April 2002) (Available at http://webdav.uct.ac.za/depts/shiplaw/theses/surjan.pdf) (Accessed on 4 October 2013).

This section is also important because presently no regulations have been made pursuant to section 9(1), to set out the circumstances in which the STDA will apply to sea transport documents, including sea waybills and straight bills of lading (if the Act applies to the transfer of such documents), transmitted by means of a telecommunications service or an electronic or other information technology system. In the absence of appropriate regulations, the STDA cannot cover the position of a sea transport document generated electronically and never physically printed. However, by virtue of section 3(2) it might arguably cover the position where an original bill of lading is emailed by the shipper to the consignee (in circumstances where the shipper intends to hold the original on behalf of the consignee). For example, the parties may wish to avoid a delay at the discharge port by arranging a telex release of cargo. In such circumstances the original bill of lading would never physically be transferred to the consignee.

Section 3(2) also addresses the problems that arise when an agent is named in the document. For purposes of security a bank may take transfer of a sea transport document.[130] Freight forwarders are sometimes named on the sea transport document.[131] In each case, section 3(2) would require a factual enquiry into the capacity in which the person in physical possession holds the document (i.e. as agent or as principal) and the outcome of that enquiry will determine whether in law they are a holder or not. It is accepted that this may be difficult to ascertain in practice, and that situations may arise where a party is acting both as agent and as principal in relation to the same document, or where a party acts for joint principals. However in a majority of cases a determining of whether the possessor is holding on behalf of someone else will resolve the absurdities that would arise from having two people regarded as ‗holder' at the same time, and the injustice that might otherwise result from a blanket requirement that the holder be named in the document.[132] In the absence of a similar provision to section 2(1)(b) in the STDA the problems associated with documents being made out to agents can arise in South Africa in relation to both sea waybills and

[130] See for example, *East West Corp v DKBS 1912* [2002] 2 Lloyd's Rep. 182; upheld on appeal [2003] 1 Lloyd's Rep. 239.
[131] See for example *The Brij* [2001] 1 Lloyds Rep 431
[132] The suggestion by du Toit that a party must be named in the document (unless it is a bearer document) in order to be the party to whom it was issued, relies on an analogy to the Bills of Exchange Act, 34 of 1964. The Act does not apply to sea transport documents, and the analogy is problematic. Du Toit op cit note 103, 732 - 733. Also see Malan and Pretorius (assisted by Du Toit) *Malan on Bills of Exchange,Cheques and Promissory Notes in South African Law* (2002) 157. However this has been held to be the case in England. *East West Corp v DKBS 1912* op cit note 130, [16], per Mance LJ, held that where a bank held a bill under a special endorsement there was no room for an argument that the bank's client had constructive possession of the bill for the purposes of section 2(1)(a) of UK COGSA 1992. The position was left open in the case of bills endorsed in blank or issued ‗to bearer'.

straight bills of lading. This lends further support to the argument that the provisions should apply to such documents.

Section 3(3) relates to documents that are lost or which cannot be produced for any reason. Although the section has been criticised,[133] it appears to provide a solution, inter alia, for the problem of original bills of lading being delayed in postal or banking channels, and therefore unavailable for presentation at the discharge port. The section has also been used to counter problems arising from the fraudulent withholding of original bills of lading by the shipper. An order was obtained under section 7, read with section 3(3), to direct the carrier to release the goods to the person entitled to possession of the bill of lading.[134] Such problems can arise just as frequently under straight bills of lading as under negotiable bills of lading. When they do arise they will create the same problems, such as liability for damages arising from delay in discharge or delivery of the goods. There would appear to be no justifiable reason for excluding the consignee under such documents from the benefit of these provisions.

Section 4(3) provides for a saving of liabilities and section 5 provides for a saving of rights. Once again there is no reason why straight bills of lading and sea waybills should not be able to rely on these statutory provisions governing the parties' respective positions. UK COGSA 1992 provides a saving of rights and liabilities (in different terms).[135] The CMI rules for sea waybills do not provide such clarification, and are certainly not going to be incorporated in the contractual terms of straight bills of lading when those bills are issued on the ubiquitous hybrid form discussed in the *Rafaela S*.

Section 6 is of importance to cargo claimants for it strengthens the evidentiary value of the bill of lading in proving the quantity and condition of goods shipped. UK COGSA 1992 does not include sea waybills (and thus straight bills of lading) within the ambit of its similar provision.[136] There does not however appear to be any cogent reason why the holders of straight bills of lading and sea waybills should not enjoy the benefit of this provision, and an interpretation of section 2(2) that made the section applicable to such documents would be a positive legal development. In any event, where a sea waybill or

[133] Du Toit op cit note 103, 731
[134] *ProRoof Steel Merchants (Pty) Ltd v Topsheen Shipping Ltd, Transnet Limited and Tianjin Sino-Express International Logistics Co. Ltd* (unreported; order by Wallis J in the KwaZulu-Natal High Court Durban)
[135] UK COGSA 1992 s2(5) and s3
[136] UK COGSA 1992 s4 applies only to bills of lading, as defined, and thus excludes sea waybills and straight bills of lading.

straight bill of lading is subject to the Hague-Visby rules[137] the claimant would be able to rely upon the provisions of Article III rule 4, which provides as follows:

> _Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(*a*), (*b*) and (*c*).
>
> However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.'

Reference in the Hague-Visby Rules to the bill of lading being _transferred to a third party' includes transfer from the shipper to a named consignee.

Lastly, an issue which has received academic attention is the problem of conflict of laws.[138] South Africa's legislation contains a wide, and peremptory application clause of apparently extra-territorial effect. This is in contrast to UK COGSA 1992 which will only apply when English law is the proper law of the contract. [139] Problems would thus arise under the STDA if it does not provide for the transfer of rights of suit to the consignees under straight bills of lading and sea waybills. If the provisions relating to the transfer of rights of suit do not apply to straight bills of lading and sea waybills, that could lead to a situation where the Court finds that there is no mechanism for the transfer of rights of suit and the shipper remains the only party with title to sue the carrier. This would be a grievous result if the Court thereby excluded the chosen law of the contract, or the proper law of the contract and such law would have permitted a transfer of rights of suit to the consignee.[140]

---

[137] The provision is not part of the earlier Hague Rules

[138] E.g. Francis N _Transferring rights of suit under bills of lading: The conflict of laws implications' 20 *A& N.Z. Mar. L.J*. 25 2006 considers the case of *Starlink Navigation Ltd v The Ship* Seven Pioneer (2001) 16 PRNZ *55 (The Seven Pioneer)*. (Available at http://www.maritimelaw.org.nz/0201.html.) (Accessed 11 01 2013). The New Zealand court applied Indonesian law to determine the title to sue issue, as this law was the law specified in the contract of carriage. The Mercantile Law Amendment Act, 1994, s13(2) provides for the transfer of rights of suit only to the holder of the bill of lading. Since the plaintiff had never become the holder of the bill, it was ultimately immaterial whether the Court considered the provisions of that Act or not. Nevertheless, as the author points out, in matters where rights of suit are not transferred to the _holder' of the bill of lading in the law chosen by the parties, the issue would be of critical importance.

[139] In England UK COGSA 1992 neither expressly extra-territorial in effect nor mandatory in its application, and thus its provisions will be applied when English law is the putative proper law of the contract, as determined by English conflict of laws rules. This was determined to be the case in *The Ythan* supra note 124, 468 per Aikens J. The same approach was taken by the High Court of Singapore in *The Dolphina* [2012] 1 Lloyd's Rep. 303, 325 [113] – [122] and [155]

[140] For further discussion of the conflict of laws problem under UK COGSA 1992 see: Toh Kian Sing 'Conflict of laws implications of the Carriage of Goods by Sea Act 1992' [1994] *LMCLQ* 280

In summary, none of the provisions of the STDA clearly indicates that the provisions regarding transfer of rights of suit (and liabilities) should not be applied to straight bills of lading or sea waybills, subject to such documents being found to be ‗negotiable or transferable'.

5.7 The Law of Selected Foreign Jurisdictions that have followed UK COGSA 1992

5.7.1 Australia

The Sea Carriage Documents Act, a federal model statute enacted in each of the Australian states[141], is in all material respects identical to UK COGSA 1992.

One of the concerns of industry motivating the reforms in Australia was that the 1855 Bills of Lading Act did not make provision for sea waybills or ship's delivery orders, much less electronic forms of bills of lading[142]. It had been noted that the use of sea waybills would be more widespread if a mechanism were developed to permit the consignee to sue the carrier.[143]

The Australian legislation thus expressly applies to sea waybills[144], and like UK COGSA 1992 expressly provides for the transfer of rights under the contract of carriage evidenced by the sea waybill to any person, not being an original party to the contract of carriage, to whom delivery of the goods is to be made by the carrier in accordance with the contract[145]. In other words rights of suit transfer to the consignee of a straight bill of lading by virtue of him being the person to whom delivery is to be made under the document. [146]

---

[141] Sea-Carriage Documents Bill 1996 (ACT); Sea-Carriage Documents Act, 1996 (Queensland); 1997 (Tasmania); 1997 (Western Australia); 1997 (New South Wales); 1998 (South Australia); and 1998 (New Territories). The Sea Carriage Documents Act 1998 (Victoria) was repealed but its provisions have been incorporated into the Goods Act, 1958.

[142] Girvin, op cit 119 *SALJ* 317, 338 citing Explanatory Notes to the Sea-Carriage Documents Bill 1996 (Qld) 1.

[143] Livermore J ‗Australia' in Yiannopoulis AN (ed.) *Ocean Bills of Lading, Traditional Forms, Substitutes and EDI Systems*, 75

[144] Sea-Carriage Documents Bill 1996 (ACT) cl 5, Sea-Carriage Documents Act, 1996 (Qld) s3; 1997 (Tas) s4; 1997 (WA) s5; 1997 (NSW) s5; 1998 (Vic) s5; 1998 (SA) s4; 1998 (NT) s5.

[145] Sea-Carriage Documents Bill 1996 (ACT) cl 8(1)(b), Sea-Carriage Documents Act, 1996 (Qld) s6(1)(b); 1997 (Tas) s7(1)(b); 1997 (WA) s8(1)(b); 1997 (NSW) s8(1)(b); 1998 (Vic) s8(1)(b); 1998 (SA) s7(1)(b); 1998 (NT) s8(1)(b).

[146] *El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA* [2003] FCA 588 para [72] per Keifel J. The consignee thus had title to sue for loss sustained by the principal of the shipper. The named shipper had no title to sue as he had acted as an agent only. The case was taken on appeal (and cross-appeal) but not on the

5.7.2 New Zealand

The approach taken in New Zealand was _virtually identical' to that of UK COGSA 1992[147]. The Mercantile Law Amendment Act of 1994 has incorporated all of the same provisions save for a provision in UK COGSA 1992, section 4, which is not directly relevant.

5.7.3 Hong Kong

The Bills of Lading and Analogous Shipping Documents Ordinance 1993 enacted UK COGSA 1992 into Hong Kong law.

5.7.4 Singapore

The Bills of Lading Act[148], applies UK COGSA 1992 by virtue of the Application of English Law Act 1994[149]. Thus despite the title of the Act it governs straight bills of lading and sea waybills, on the same basis as the English statute.

5.7.5 Canada:

Canada is the only major commonwealth country that still applies the provisions of the 1855 Bills of Lading Act,[150] in its Bills of Lading Act, 1985, although that is likely to be reviewed before 2015.[151]

Section 2 of the Canadian legislation accordingly applies only to bills of lading (not sea waybills) and applies only to straight bills of lading insofar as it can be said that the named consignee acquired the property in the goods _on or by reason of the consignment' of the bill of lading to him.

---

issue of title to sue. The remarks of Allsop J indicate that he may have had some misgivings about the findng, but only on the basis of the consignee having rejected the goods. *El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA* [2004] FCAFC 202 para [132] – [133].

[147] Francis op cit note 138

[148] Cap 384, Rev Ed, 1994

[149] Cap 7A, Rev Ed, 1994. See Girvin op cit 119 *SALJ* 317

[150] Girvin op cit 119 *SALJ* 317 fn 6

[151] Pamel and Wilkins _Bills of Lading vs Sea Waybills, and the Himalaya Clause' at 16. A paper presented at the NJI/CMLA, Federal Court and Federal Court of Appeal Canadian Maritime Law Association Seminar on April 15, 2011 (Available at http://www.cmla.org/papers/006B%20Pamel_Bills%20of%20Lading_Paper_ENG.pdf) (Accessed on 27 September 2013)

5.8 United States of America

The Federal Bills of Lading Act (now contained in title 49 of the US Code §§80101 - 80116) was enacted in 1916 and has created a unique legal system which expressly defines negotiable[152] and non-negotiable bills of lading[153], but provides for the transfer of rights of suit under both forms of document[154]

US law does not require any express words to be used to render a bill of lading negotiable although a bill will be negotiable if it is made out ‗to the order of a named consignee' and is not marked non-negotiable.[155] If the bill is to be not-negotiable it must bear those words clearly on the face of the document.[156]

The Act distinguishes between negotiation and transfer of bills of lading. §80104 (a) sets out the general rules as to form and requirements for negotiation. The negotiation of the bill by indorsement and delivery passes title to the goods[157] and rights under the contract of carriage, including the right to sue the carrier:

> ‗§80105 a(2) the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person.'

Apart from the way a negotiable bill is created the law of America for transfer of title to sue under such bills operates in a similar way to the law of England[158] South Africa[159] and other countries around the world.[160]

However, the United States Act contains provisions which have no counterpart in English law, in that the validity of a negotiation is not affected by breach of duty, fraud,

---

[152] §80103 (a)(1)(A) and (B) provides that a negotiable bill of lading will be made out ‗to the order of a consignee' and will not contain on the face an agreement with the shipper that it is not-negotiable.
[153] §80103(b)(1) provides that a non-negotiable bill of lading will be made out to a consignee but in ss(2) requires that the bill, when issued by a common carrier, contains a notation that it is ‗non-negotiable' or ‗not negotiable'. If those words are absent the bill would be negotiable.
[154] Lloyd A ‗The bill of lading: do we really need it?' LMCLQ [1989] 47,50
[155] §80103 a(1)
[156] §80103 b(2)
[157] Such title as §80105 a (1)(A)' the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and (B) the consignor and consignee had the ability to convey to such a purchaser'.
[158] UK COGSA 1992 s2(1)(a)
[159] STDA S4(1) read with S3(1) as applied to negotiable bills of lading
[160] Winship P ‗United States' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,* 270

accident, mistake, duress, loss, theft, or conversion if the bill is negotiated to a holder who took in good faith, for value and without notice of the defect,[161] and such a holder is protected against any seller‘s lien or right of stoppage in transit[162] He acquires the title to the goods that the person negotiating the bill was able to convey to a purchaser in good faith and for value.[163] which Treitel states makes it possible to acquire title even when the transferor had no title because, for example, he acquired the bill by theft.[164]

On this basis there is a clear rationale under American law for distinguishing between negotiation of a bill of lading, and transfer without negotiation, which cannot transfer any additional rights than those of the transferor.[165]

> § 80106. Transfer without negotiation
>
> (a) Delivery and agreement.--The holder of a bill of lading may transfer the bill without negotiating it by delivery and agreement to transfer title to the bill or to the goods represented by it. Subject to the agreement, the person to whom the bill is transferred has title to the goods against the transferor.
>
> ...
>
> (c) Effect of notification.—
>
> (1) When a transferee notifies the common carrier that a nonnegotiable bill of lading has been transferred under subsection (a) of this section, the carrier is obligated directly to the transferee for any obligations the carrier owed to the transferor immediately before the notification. ...‘

Tiborg[166] thus equates the American position with assignment of rights, where the consignee would only be protected as against the seller‘s creditors once notification of the assignment of rights has been given to the carrier. There do not appear to be any formalities required as the transfer of a straight bill of lading is accomplished by delivery, provided the parties intended to transfer title to the bill.

---

[161] 49 USC §80104(b). For a general discussion of the law see Bools *The Bill of Lading as a Document of Title to Goods: An Anglo-American Comparison*
[162] 49 USC §80105(b)
[163] 49 USC §80105 (a)(1)(A)
[164] Treitel GH ‗The legal status of the straight bill of lading‘ (2003) 119 *LQR* 604, 624
[165] 49 USC §80103 (b)(1)(B)
[166] Tiberg H, ‗Legal Qualities of Transport Documents‘ 1998 (23) *Tulane Maritime Law Journal* 36

Tetley draws a similar conclusion stating that the straight bill of lading is not negotiable (in the sense that it cannot pass title to the goods _free of equities') but that it is transferable, in that right and title in the goods may be assigned, which he says is _generally analogous to the transfer of a waybill under common law'.[167]

5.9 European Countries applying Civil Law:

Commentators on the Sea Transport Documents Act shortly after its enactment expressed the view that it _should have been modelled closely on' UK COGSA 1992.[168] Certainty and uniformity were an important motivation to the drafters of UK COGSA 1992, and the bill was said to bring the law into line with the USA, Germany, the Netherlands and France and having a valuable _unifying effect',[169] although a comparative analysis of English law, European laws and US law suggests that there are important differences too.

English writers noting the existence of a difference practice and terminology regarding bills of lading in civil jurisdictions have indicated that the transfer of rights of suit is recognised and _the principle derives from the concept of contracting for the benefit of a third party'.[170] Professor William Tetley thus concludes that in such jurisdictions the consignee may bring his claim under a stipulatio alteri _if the waybill gave that right in only general terms' and that _the right might even be implied from the nature of the whole transaction'.[171]

Professor Tiberg[172] in his discussion of the legal qualities of transport documents uses the terms _debtor' and _creditor' respectively to describe the carrier and the person _entitled under the document of carriage'. In this regard he speaks of the consignee as the creditor entitled to receive the goods.[173] This does not clarify whether under the legal systems being discussed by Tiberg the consignee would be regarded as having title to sue the carrier for loss of or damage to the goods.

---

[167] Tetley W, _*Waybills: The Modem Contract of Carriage of Goods by Sea Part II'* (1984) 15 *J. Mar. L. & Com.* 41, 62
[168] Du Toit op cit note 103, 731
[169] Law Commission Report no. 196 and Scottish Law Commission Report no. 130 pg 11, para 2.21 and 2.22.
[170] Lorenzon *CIF and FOB Contracts* (2012) 5-077
[171] Tetley W _Waybills: The Modern Contract of Carriage of Goods by Sea' (1983) 14 *J. Mar. L. & Com* .465, 503
[172] Emeritus Professor of Maritime Law Gothenburg, Professor of Maritime Law Stockholm
[173] Tiberg op cit note 166, 3

However as part of a comprehensive legal report prefacing the enactment of the Contract (Rights of Third Parties) Act, 1999[174] the English law commission reviewed the laws of France, Germany, Italy, Austria, Spain, Portugal, the Netherlands, Belguim, Luxembourg, Greece and Scotland, and concluded that all of these countries permit the contracting parties to include stipulations for the benefit of third parties (i.e. persons who are not privy to the contract). The law commission was not concerned with the specific issue of rights of suit under sea transport documents as these had been dealt with by a statutory exception in UK COGSA 1992.

The rights created in favour of third parties are capable of being enforced by those third parties[175] _although the precise scope of these rights depends on the terms and circumstances of the contract itself'.[176] For example, discussing the position in France Whittaker notes that the content of the third party's rights is determined by what was agreed between the original contracting parties, and the third party's claim is thus subject to all defences that the promisor could have raised against the promisee.[177] An _early use' of the doctrine of stipulations for the benefit of the third party was in the field of contracts of carriage, to permit the consignee a right of action for loss of or damage to goods.[178]

In the area of sea transport the contract of carriage is between the shipper and the carrier, and the rights of the consignee are understood, under German and Dutch law at least, as being a stipulation in favour of a third party,[179] with decisions of the Dutch courts of Arnhem, Utrecht and Amsterdam being cited by Smeele as instances where the stipulation in favour of a third party doctrine was utilised to recognise the consignee's right to demand delivery of the goods and his title to sue for damages.[180]

---

[174] 1999 c.31
[175] Law Commission Report 242 _Privity of Contract: Rights of Third Parties, 42
[176] Ibid
[177] Whittaker S _Privity of Contract and the Law of Tort: the French Experience _(1995) 15 *Oxford J. Legal Stud.* 338
[178] ibid fn 107, citing a French decision of 1892.
[179] Smeele F _Bill of Lading Contracts under European National Laws: Civil law approaches to explaining the legal position of the consignee under bills of lading', 9. (Available at www.academia.edu) (Accessed on 26 September 2013) Smeele sets out that such a stipulation for the benefit of a third party is known under German law as a _Vertrag zugunsten Dritter', see: § 328 BGB), under Dutch law as a _Der-denbeding', see: art. 6:253 BW, and under French law as a _stipulation pour autrui', see : art. 1121 Code Civil.
[180] Smeele op cit note 179, citing: Hof Arnhem 29.5.1843 (confirmed but on different grounds by HR 28.2.1845), *W.* 601 [*The Stad Keulen*]; Hof Utrecht 4.3.1867, *W.* 2911; Hof Amsterdam 13.6.1879, R.B. 1880, Bijbl. 155 (Regtsgeleerde Bijdragen en Bijblad).

Dutch law deals carefully with the consignee's acquisition of liability, recognising that he cannot be bound by liabilities under the contract unless he accepts them. This was codified in 1991 in the New Burgerlijk Wetboek 8[181] but has always represented the position adopted by the Dutch courts.[182]

The contract was between the shipper and carrier and it is the consignee's act of demanding delivery triggers the acceptance of the benefits and the acquisition of liabilities under the contract.[183] These rights are without prejudice to the shipper's rights to sue for damage or loss.[184]

Under the German Code title to sue in relation to contracts for the benefit of third parties is dealt with in liberal and permissive terms:[185]

> 'If the goods have been delivered damaged or late or have been lost, the consignee may assert in his own name the rights against the carrier resulting from the contract of carriage; the shipper remains entitled to assert these rights. It makes no difference in this context whether consignee or shipper acts in his own interest or in the interest of a third party.'

When the shipper demands the issue of a bill of lading the ensuing „bill of lading contract"[186] is impliedly a contract for the benefit of subsequent holders and, citing two decisions of the Bundesgerichshof[187], is entirely distinct from any underlying contract of carriage.[188] When the consignee accepts the goods he becomes jointly and severally liable with the shipper for amounts payable to the carrier under the contract of carriage.[189]

---

[181] Article 6.251 BW, which reads: „A contract creates the right for a third person to claim performance from one of the parties or to invoke the contract in another manner against one of them, if the contract contains a stipulation to that effect and if the third person accepts it.)'. Article 6.253 BW, reads: „The party who has made a stipulation in favour of a third person may claim performance toward that third person, unless the latter objects.' Text and translation to English supplied by Smeele op cit note 179, 25

[182] Smeele op cit 179, 28

[183] Smeele op cit 179, 26 citing Rb. Amsterdam 1.10.1915, *NJ* 1915, p. 1230 [*The Engelina*] p. 1231 ff., Rb. Rotterdam 20.11.1922, W. 11041; Kg Haarlem 19.10.1923, *NJ* 1923, p. 1241; Kg Groningen 18.2. 1924, *NJ* 1924, p. 277; Hof Amsterdam 2.12.1924, *W.* 11300; Hof Arnhem 21.4.1925, *NJ* 1925, p. 1100; Kg. Rotterdam 25.3.1930, *NJ* 1930, p. 1282.

[184] Smeele op cit note 179, 31, citing Article 8:1126 BW

[185] § 421 HGB – text and translation to English supplied by Smeele op cit note 179, 14

[186] *Konnossement-Begebungsvertrag* (*contract for the issuance of a bill of lading*) Smeele op cit note 179, 17

[187] BGH 23.11.1978 (II ZR 27/77), BGHZ 73, 4-8 (*The Pia Vesta*) and BGH 10.10.1957 (II ZR 278/56), *BGHZ* 25, 300-311 (*The Anten*), cited in Smeele op cit note 179, 17

[188] Smeele op cit note note 179, 17

[189] Smeele op cit 14 and 18 citing HGB §614 and 656(1)

Whilst also previously the case in France, Whittaker[190] states that the position there is now different. Bills of lading are regulated as a tripartite contract or ‗contrat à trois personnes'[191] under the French commercial code,[192] in part at least, it appears, to avoid the prohibition under French law against conferring any liability upon the beneficiary, which could not be reconciled with the position that a consignee or holder who takes up goods under a bill of lading can become liable for freight and other charges.[193]

It thus appears to be the general position in Europe that:

> ‗[B]ased upon his lawful possession of the bill of lading, the consignee can exercise the rights contained in this document directly against the carrier and independently from the charterer/shipper. Most notable among these rights of the consignee are the right to take delivery of the goods and the right to sue for damages in case of cargo loss or damage.'[194] [195]

What introduces a measure of confusion is that a stipulatio alteri is not the same as an ordinary assignment of rights, which Tiberg discussed based on Scandanavian law.[196] Tiberg also distinguished forms of civil transfer from a transfer of rights by means of transfer of the document, and negotiability, implying the ability to sue free of defects in the title of the transferor (and consequently free of defences that could be raised by the carrier against the transferor).[197] Kozolchyk indicates that many early nineteenth century civil codes provided for a form of transfer of rights by endorsement, akin to an assignment, but this was different to negotiation by endorsement and delivery of an order or bearer bill of lading, which gave the holder better title than the transferee.[198]

According to Smeele[199] the French Cour de Cassation also rejected both agency, and assignment of rights, as an adequate legal basis for explaining the rights of a consignee under

---

[190] Whittaker op cit note 177
[191] Ibid.
[192] Article L 138-8 Code com, which reads: ‗The consignment note constitutes a contract between the shipper, the carrier and the consignee or between the shipper, the consignee, the freight forwarder and the carrier. The carrier has a direct action to receive payment for his services against the shipper and the consignee, who are liable for payment of the freight. Each clause which departs from this is considered non-written'. Text and translation to English supplied in Smeele op cit note 179, 23
[193] Smeele op cit note 179, 22 citing Article 1165 of the French Code Civil
[194] Smeele op cit note 179
[195] This view is confirmed in Lloyd A ‗The bill of lading : do we really need it?' LMCLQ [1989] 47,50
[196] Tiberg op cit note 166, 4
[197] Ibid
[198] Kozolchyk B, ‗Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective *'J. Mar. L. & Com. (1992)* vol. 23 at pg 161 at pg 171
[199] Smeele op cit note 179

a bill of lading.[200] There is some support for this distinction between transferability and negotiability in The Travaux Preparatoires of the Hague Convention.[201] On the continent there was a distinction between a _connaissement négociable' (negotiable bill of lading) and a _connaissement à personne dénommée' (bill of lading for a designated person). The latter were _[n]ot negotiable, but simply transferable under the rules concerning the transfer of civil obligations according to law'. This reference to there being a difference between transferability and negotiability was endorsed by Berlingieri. [202]

It is not clear how this transfer was effected under civil law. The statements of writers referred to above seem to indicate that it was accomplished by an endorsement and delivery of the document (even if it was not made out _to order') but that in that event it operated as an assignment of the rights of the transferor and conferred no greater rights on the holder.

However, it may mean no more than the common law[203] ability to transfer contractual rights by cession. Even rights under negotiable instruments can be transferred in this way, in contrast to _transfer' by endorsement (where necessary) and delivery of the document itself. [204]

Although there is no uniformity in European law, the Principles of European Contract Law, in article 6.110 and article 5.2.1- 5.2.4 of the Unidroit Principles (2004) are cited by Smeele as both recognise that a stipulation for the benefit of a third party can be created by express terms or necessary implication in the agreement, that the rights can be accepted by the beneficiary at his option, and can be revoked by the promisee prior to acceptance (unless notice has been given that the rights are irrocable).

Article 5.2.4 of the Unidroit Principles states that _[t]he promisor may assert against the beneficiary all defences which the promisor could assert against the promisee'.

---

[200] Ibid, 9

[201] Referred to in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 Lloyd's Rep 113, 127 [60] relying upon *The Legislative History of the* Carriage of Goods by Sea Act *and the Travaux Préparatoires of the* Hague Rules, edited by Prof Sturley and translated by Caroline Boyle, 1990. I have cross-referenced these with the CMI publication *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (Available at http://www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoires%20of%20the%20Hague%20Rules%20and%20of%20the%20Hague-Visby%20Rules.pdf) (Accessed on 10.12.2013)

[202] Ibid

[203] Reference is not to English common law but to South Africa's Roman-Dutch common law, which has its origins in the civil law.

[204] Cowen DV and Gering L *Cowen on the Law of Negotiable Instruments in South Africa* 4 ed, 113

Article 5 remains unchanged in the 2010 UNIDROIT Principles but additional commentary is helpful. Firstly, the _mere fact that a third party will benefit under the contract does not give that third party rights under the contract‘.[205] The term rights is to be interpreted _liberally‘ so that _in principle, a third party beneficiary will have the full range of contractual remedies, including the right to performance and damages‘.[206] The parties have full freedom of contract, and can thus stipulate that the beneficiary‘s position will be different to that of the promisee. The provision in article 5.2.4 that the beneficiary‘s rights are exercised subject to all defences available to the promisor against the promisee is thus simply a _default rule‘.

This resolves any potential conflict with Tiborg‘s view about the transferability and negotiability of sea transport documents, since by custom, statute or international convention, certain defences that the carrier might exercise against the shipper are not available against a consignee or a holder of the bill of lading.[207]

What one can conclude is that all European countries recognise legal mechanisms to transfer rights of suit to the consignee, whether the bill of lading is negotiable or not. What is less easy to ascertain is what is to be understood by the term _negotiable‘.

Tosi provides further clarity on the law in France. A bill of lading (called _un connaissement‘) serves the same three functions attributed to it under English law: receipt for the goods, evidence of the contract of carriage and document representing title to the goods. As to the latter:

> _il est négociable et sa transmission transfère leur possession, et donc le double droit d‘en disposer en cours de transport et d‘en prendre livraison à l‘arrivée‘.[208]
>
> [it is negotiable and its transmission transfers their possession [the goods], and thus the double right to dispose of them in the course of transit and to take delivery of them on the arrival] (my translation)

[205] UNIDROIT Principles of International Commercial Contracts, 2010, 161 (Available at http://www.unidroit.org/english%20/principles/contracts/principles2010/blackletter2010-english.pdf) (Accessed on 10.12.2013)
[206] Ibid, 163
[207] Smeele op cit note 179, 12
[208] Tosi JP _France‘ in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,142*

The author thus equates negotiability of a bill of lading with its function as a transferable document of title to the goods. This statement on its own is ambiguous for a straight bill of lading arguably performs both functions- although it would not be suitable for multiple sales at sea.

The author clarifies later that a straight bill of lading is regarded as non-negotiable:

> „En droit français, l'absence de la mention —à order" suffit pour que le connaisement soit à personne dénommée, et donc non négociable, non transmissible par endossement (il ne peut étre transmis que selon les Lourdes formalités de la cession de créance).'[209]

> [In French law, the omission of —to order" suffices to render the bill of lading one to a named person, and thus not negotiable, not transferable by indorsement (it may not be transferred otherwise than by way of the formalities of the cession of debt] (my translation)

The latter statement, namely that a non-negotiable bill can only be transferred by cession, contradicts Whittaker's discussion of the tripartite contract and the statements of other authors that an assignment of a non-negotiable bill of lading can be effected by endorsement and delivery.[210] However, in discussing the question of title to sue Tosi also outlines the shift in French jurisprudence from a position regarding the holder of the bill of lading as the only person with a right to sue the carrier to the current position where any party to the contract of carriage has the right to sue if he has suffered damage.[211] This suggests that both shipper, and consignee (holder) are regarded as being party to the contract of carriage with the carrier (although perhaps this is only in the case of a negotiable bill).

The sea waybill (called „la letter de transport maritime') on the other hand is non-negotiable, does not represent the goods, and thus it does not give its holder a right to take delivery of the goods and does not determine the persons entitled to sue the carrier.[212]

In Belgium a bill of lading made out to order can be transferred by endorsement, and a bill of lading made out to bearer is transferred by delivery of the document. A bill of lading

[209] Ibid, 143.
[210] Whittaker op cit note 177
[211] Tosi op cit note 207, 152 „désormais l'action est ouverte à toute partie au contrat de transport qui justifie subir seule le prejudice resultant du transport' [Henceforth the action is open to any party to the contract of carriage who proves that he has suffered the sole prejudice arising out of the carriage.'
[212] Ibid, 155

made out only to a named consignee is regarded as ‗negotiable' in Belgium.[213] However it is unclear to what extent this represents a substantive difference to the law of France or merely a difference in terminology for the author does not say such a bill of lading can be transferred merely by endorsement or delivery. It can be transferred in terms of Article 1690 of the Civil Code[214] which provides for assignment of rights. No indication is given of how such an assignment can be effected.

On the other hand a sea waybill and a bill of lading containing the words ‗non-negotiable' is ‗not negotiable and it is not a document of title'.[215] The author does not mention whether the non-negotiable bill must be presented to obtain delivery.

In Germany a bill of lading made out to a named consignee without the words ‗or order' is called a ‗rektakonnossement'[216] It is ‗non-negotiable', but is governed by §662 of the Germany Commercial Code (Handelsgesetzbuch – HGB) so that it must be presented to obtain delivery of the goods.[217] It is thus distinguishable from a sea waybill which does not have to be presented to obtain delivery.

In Greece a bill of lading must be made out ‗to order' (in which case it is negotiable) or to a named person. The latter is non-negotiable, does not represent possession of the goods and cannot be transferred by endorsement.[218] Thus with non-negotiable bills of lading the rights under the contract of carriage are transferred by assignment under articles 455 onwards of the Greek Civil Code.[219] Sea waybills are not provided for in the Greek legislation, and are not regarded as ‗commercial paper' or ‗documents of title'.[220]

In the Netherlands section 412 of Book 8 of the Civil Code provides that a bill of lading can be made out to a named person, or to order (either of the shipper or someone else) or to bearer.[221] Only a bill of lading made out to order is transferable by endorsement and

[213] Bernauw K ‗Belgium' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,* 93
[214] ibid
[215] Ibid 95
[216] Herber R ‗Germany' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,162*
[217] Ibid, 164
[218] Kiantou-Pampouki ‗Greece' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,162*
[219] Ibid, 201
[220] Ibid, 202
[221] Japikse RE ‗The Netherlands' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems, 229*

delivery.[222] However it would seem that a bill of lading made out to a named consignee is transferred by delivery alone. For the author goes on to discuss that the holder of a bill of lading (without distinguishing between order bills and other kinds of bills) has the exclusive right to demand delivery of the cargo and the right to sue the carrier for damages under section 441 of the Civil Code.[223] The author does not clarify whether the words _not negotiable' added to a bill of lading change the legal rights of its holder in any way.

Tiborg, writing about the position in Scandanavian law, distinguishes the English use of the term _negotiable' (which in English law is understood in the sense of transferable to any holder of the bill of lading), and argues that transfer must be understood in a wider sense that includes both the order bill of lading (termed a _running' bill of lading) and the straight bill of lading (termed a _recta' bill of lading).[224]

He argues that where a straight bill of lading requires presentation of the bill of lading to obtain delivery from the carrier[225] it is a document of title and operates in the same way as an order bill of lading in a transaction between seller (consignor and usually shipper) and buyer (consignee). The consignee's right to obtain the goods may thus be conditional upon his paying for the goods before receiving the bill of lading, as in a cash-against-documents transaction.[226] Therefore it operates as an _instrument of security and transfer'[227] and can play a useful role in financing international trade transactions, if the bank is the formal consignee.[228]

On such an argument the straight bill of lading is transferable. It is transferred from shipper to consignee to the same ends as an order bill of lading, and Tiborg concludes that whilst order bills of lading will be necessary in trades where multiple sales at sea are the norm,[229] the straight bill of lading _is proper for sale of goods to a known party and is apt to

[222] Ibid, 230
[223] Ibid, 231
[224] Tiberg, op cit note 166, 26
[225] Tiborg does not categorically state that this follows as a matter of law. It does in Scandanavia and Germany (32) but in the US the opposite is the case as set out below. However most straight bills of lading contain an express clause requiring presentation of the bill of lading and Tiberg restricts his analysis to such documents.
[226] Tiberg refers to this as paying for negotiation of the document.
[227] Tiberg op cit note 166, 26
[228] Ibid.
[229] He refers to _sales to unknown persons' – these are also referred to as _string' sales, and the identity of the person who will ultimately take delivery of the goods is not known to the shipper. Tiborg gives the oil trade as one such example - Tiborg op cit note 166, 43

serve as security against this intended buyer, who needs an orginal to get hold of the goods'.[230]

Sea waybills are distinguished by Tiborg from straight bills of lading because presentation is not required for delivery.[231] Therefore no special consequences attach to transfer of the document, whether as part of a sale transaction between shipper and consignee or as part of an assignment of rights by the consignee to another party. Waybills are also always non-negotiable,[232] and even if the consignee acquires better rights than the shipper under the document this is not as a consequence of possessing a document of title, but by virtue of a contractual incorporation of the Hague Visby Rules (at least in England, where it is clear that the rules do no apply to waybills unless so agreed.)[233]

Thus Tiberg argues that possession of the sea waybill, unlike the straight bill of lading, confers neither ostensible title nor substantive title, because the consignee always takes [the document] subject to equities.[234]

5.10 Negotiable Transport Documents under the Rotterdam Rules

Article 57 of the Rotterdam Rules, read with the definition of a negotiable transport document in article 1(15), provides for the transfer of rights in terms which exclude transfer to a named consignee unless the transport document is made out to the order of that consignee.

The provision was described in the Travaux Preparatoires as _non-contentious',[235] with _strong support',[236] primarily as a platform for standardised electronic transfer of such

[230] Ibid
[231] Ibid, 38
[232] ibid
[233] UK COGSA 1971, s1(6).
[234] Tiberg op cit note 166, 42, fn 184
[235] Working Group III (Transport Law) Twentieth session Vienna, 15-25 October 2007 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.96) (Accessed on 26 September 2013)
[236] Ibid.

documents. This is understandable since the focus of the Working Group was upon transfer of the right of control and the right to claim delivery of the goods.[237]

Even in the early discussions the terms negotiable and transferable were used interchangeably.[238] As regards non-negotiable documents there was no uniformity of opinion, with distinctions being drawn between nominative' transport documents, where the words _to order' are omitted, and bills of lading or sea waybills expressly stated to be _not to order' or _non-negotiable'.[239] The retention of the term _negotiable' occurred despite recognition that it was _problematic' with different legal systems according different characteristics to negotiability.[240]

In relation to straight bills of lading article 46 provides that if there is an express presentation requirement in a non-negotiable transport document delivery shall not be given unless at least one original has been surrendered to the carrier. However the Convention appears to compromise the judicial statements which indicated in England and various commonwealth countries that surrender of the straight bill of lading was required in all cases, irrespective of the existence or non-existence of such a clause.

The convention originally aspired to deal with the issue of rights of suit, and the Working Group noted that relevant national laws were _diverse', that there was _no consensus at the international level' and that any attempt to regulate this area required _a clear and carefully considered purpose and great attention to detail'.[241] From that early stage it was recognised that the issue was too complex to be easily included, and it does not appear in the final text of the Convention. The transfer of liabilities under such documents preoccupied the Working Group discussions and was eventually omitted from the final text.

[237] Working Group III (Transport Law) Ninth session New York, 15-26 April 2002 par 125 - 127 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.21/Add.1) (Accessed on 26 September 2013). Working Group III (Transport Law)
[238] Ibid, 19
[239] Working Group III (Transport Law) Sixteenth session, Vienna, 28 November-9 December 2005 Para 10 – 12 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.52) (Accessed on 26 September 2013)
[240] Working Group III op cit note 237, par. 21
[241] Working Group III op cit note 237, par. 8

The Convention has not yet entered into force, with twenty ratifications or accessions required.[242] South Africa has not signed the Convention. Furthermore the Convention does not deal with the issue of rights of suit.

An incisive criticism of the Convention is that _the average shipping agent or the average shipper' is not _likely to be able to distinguish on a regular basis between a negotiable and a non-negotiable bill of lading'.[243]

Accordingly it is submitted that it should not be afforded much, if any, weight in an interpretation of the terms negotiable and transferable in the STDA.

5.11 Conclusion

The above analysis seeks to demonstrate that although UK COGSA 1992 was already in existence when the STDA was drafted, and has been used as a model in other countries, its terms should not determine the meaning of terms such as _holder', _delivery', or _transfer' under the STDA, nor whether specific provisions should apply only to negotiable bills of lading or other types of sea transport document. Clearly the STDA does not follow the wording of UK COGSA 1992 and the provisions of the latter Act thus cannot be said to offer any direct guidance on the interpretation of the STDA.

As far as possible such terms should be interpreted in conformity with approaches adopted internationally, so that it could be argued that transfer means indorsement completed by delivery of an _order' bill or delivery of a bearer bill. Such an interpretation would be in keeping with UK COGSA 1992, and other similar legislation. However, it would be out of keeping with the recognition in England that straight bills of lading are documents of title and transferable once from shipper to consignee. It would also be out of keeping with the law in the USA and Europe that a non-negotiable bill of lading or sea waybill can be transferred, although with different legal consequences to the transfer of a negotiable bill of lading, and by a different mechanism, namely either a form of statutory assignment or a stipulatio alteri.

[242] Status of the Rotterdam Rules (Available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html) (Accessed on 26 September 2013).
[243] Diamond A _The Rotterdam Rules' (2009) *LMCLQ* 445

There is no reason why a limitation based on the approach taken in the English statute should be implied in the STDA. The better approach, it is submitted, is that if terms _transfer' _holder' and _delivery' had been intended to be qualified such restriction would have been included in express terms by means of an appropriate definition.

There are a number of internal textual considerations which indicate that straight bills of lading and sea waybills could be covered on the language used in the enactment. Section 3(1) is however subject to section 2(2) and thus is only able to include reference to the named consignee under a straight bill of lading or sea waybill if the document is also _negotiable or transferable'.

In summary, the provisions of section 4 of the STDA can apply to a sea waybill or straight bill of lading only if one can establish that:

a) Transfer by delivery, referred to in section 3(1)(a) is interpreted widely to include delivery of a document made out to a named consignee and not simply to the holder of a bearer bill or a duly indorsed bill;
b) The original document in question has been physically delivered to that person (in the absence of regulations making provision for electronic transfer of documents under section 3(1)(b) read with section 9(1)(a));
c) _negotiable or transferable' is interpreted in such a way that _transferable' has a wider meaning that _negotiable' and can accommodate use of a document that can be transferred only once from the shipper to the named consignee.

The STDA is unique in explicitly restricting the provisions relating to transfer of rights and liabilities under the contract of carriage to sea transport documents that are _negotiable or transferable'.[244] This is completely at odds with the approach in the other jurisdictions analysed. If the STDA excludes such documents from its provisions governing the transfer of rights of suit this is a highly undesirable position, and certainly not in keeping with the remedial purpose of the legislation and the imperative of certainty and business-like commonsense. No further statute has been passed to make separate provision for such documents and there is thus a lacuna in South African law which does not exist in other jurisdictions.

[244] Section 2(2)

However the conclusion drawn after a survey of the origin and development of bills of lading as _negotiable' documents, and the current judicial and academic opinions expressed is that straight bills of lading can be regarded as _transferable' (in the sense of being a transferable document of title) even though they are not negotiable. Sea waybills however are neither transferable nor negotiable.

CHAPTER SIX: ALTERNATIVE LEGAL MECHANISMS FOR TRANSFERRING CONTRACTUAL RIGHTS AND LIABILITIES

6.1 Introduction

This chapter examines whether South African common law offers a solution to the problem of transferring the contractual rights and liabilities to the consignee. Early judicial statements suggest that there is a basis for finding a solution in South African law. *Bache v South African Milling Co*[1] indicated that under South African law where a consignee takes delivery of goods carried under a bill of lading he is liable for the payment of freight, but the legal basis for the statement was not explained.

In *Mitchell Cotts & Co v Commissioner of Railways*[2] the South African law was briefly discussed, but the statements are obiter as the case was resolved by the application of English law. The bill of lading in question was issued to _shippers or assigns' and had been indorsed in blank and transferred to the Railways' agent. It was held by Innes CJ that:

> _The railway is clearly the assignee of the shippers, and the department, knowing of this clause in the bill of lading, acted upon and took advantage of it, and claimed through its agents delivery of the cargo; it could only do that by making itself liable for the freight.'[3]

The case appears to place great emphasis upon the words _or assigns' in the bill of lading, and upon the English concept of assignment, and is thus not authority for the position of a named consignee under a straight bill of lading or sea waybill.

If there is any concern about whether a plaintiff has title to sue on the contract of carriage, careful consideration must be given to whether he has an alternative claim in delict, or a legal means of acquiring the contractual rights of suit such as agency or taking a formal cession of the shipper's rights of suit. These are perfectly legitimate means of advancing a claim, but none of these alternatives are entirely satisfactory, and the reasons for that will be examined briefly.

---

[1] (1893) 10 SC 343 at 345 per De Villiers CJ
[2] 1905 TS 349 at 355 per Innes CJ
[3] Ibid

In England various legal devices were developed to evade the strictures of the privity of contract doctrine when applied to contracts of carriage. However those doctrines do not form part of South African common law. In any event, those devices are applicable in a very limited range of circumstances, and rest uneasily beside established legal principles.

The chief purpose of this chapter is therefore to consider whether the South African common law doctrine of stipulatio alteri can be developed to provide a simple mechanism for the title to sue problem. The first question that must be addressed however is whether South African common law can be applied to the determination of this question.

6.2 Law to be Applied to Disputes Concerning Sea Waybills

Prior to the enactment of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (–AJRA") it was accepted that the transfer of rights and liabilities under the contract of carriage would be determined by the principles of Roman Dutch law.[4] Even if one assumes that the 1855 Bills of Lading Act[5] should apply after the introduction of the Admiralty Jurisdiction Regulation Act[6] (_AJRA')[7] the application of that Act would have been restricted to claims on bills of lading, which fell within the jurisdiction of the English Admiralty Court, and thus within the jurisdiction conferred upon the South African Supreme Court when sitting as a Colonial Court of Admiralty.[8] It is therefore submitted that in all matters pertaining to sea waybills the law to be applied is South African common law, whether the dispute is being heard as an admiralty matter[9] or by the court exercising its ordinary jurisdiction.

[4] Du Toit SF *The Bill of Lading in South African Law* (LL D thesis RAU 2000) (Available at https://ujdigispace.uj.ac.za/handle/10210/6358) (Accessed on 25.10.2013)
[5] 18 & 19 Vict. c111
[6] 105 of 1983
[7] Discussed in chapter 4
[8] In terms of the 1890 Colonial Courts of Admiralty Act 53 and 54 Vict. c. 27
[9] In terms of section 6(1)(b) of AJRA Roman Dutch law must be applied to all matters which fell outside the jurisdiction of the Colonial Courts of Admiralty immediately preceding the enactment of AJRA on 1 November 1983.

6.3 Delict

It would, in all cases, be prudent to plead a claim in delict, as an alternative to the main contractual claim. However, there are two reasons why the existence of such an alternative claim should not be regarded as the answer to the problem posed by this thesis.

First the claimant must prove that he was the owner of the goods, or that he was in possession of the goods and bore the risk of loss or damage therein.[10] In the case of goods damaged at sea it is a difficult exercise to determine where they were first damaged. Subsequent damage could only be regarded as continuation of the cause of action which arose when the first damage was suffered.[11] In some cases this will lead to the result that the party with title to sue in delict is the seller (the shipper), who owned the goods at the time of the loss. The contractual risk of loss or damage to the goods, which passed to the buyer (the seller), is insufficient on its own to establish title to sue in delict. However, as the buyer is on risk and liable to pay the purchase price the seller may have little incentive to sue the carrier.

Secondly, it is undesirable that when the carrier has sought to regulate his obligations under a contract of carriage, it should be open to parties to circumvent the contractual terms and conditions by framing a case in delict.[12]

6.4 Agency

Agency is the solution to the title to sue problem adopted by the CMI Uniform Rules for Sea Waybills (1990). However, it is interesting to note that the European delegates regarded it as being entirely unnecessary,[13] and it may fairly be presumed that this is because the stipulatio alteri already provides an adequate legal mechanism under the laws of most European states for the transfer of contractual rights and obligations to the consignee.[14]

CMI Rule 3 reads as follows:

---

[10] Discussed in chaper 2
[11] This was a particular difficult in *Homburg Houtimport B.V. v Agrosin Private Ltd and others* (_The Starsin') [2003] 1 Lloyd's Rep. 571, discussed more fully in chapter 2.
[12] Discussed in chapter 4
[13] Lloyd A _The bill of lading: do we really need it?' 6th Annual lecture of the Institute of Maritime Law of the University of Southampton, reprinted in 1989 *LMCLQ* 47 at 50
[14] Discussed in chapter 4

_Agency

i. The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do.

ii. This rule shall apply if, and only if, it be necessary by the law applicable to the contract of carriage so as to enable the consignee to sue and be sued thereon. The consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title.‘

Several observations may be made. First the shipper contracts both on his own behalf and as agent for the consignee. This means that both the shipper and the consignee are parties to the contract of carriage from the outset. This could create unforeseen problems. It may be unclear whether all, or only some, of the rights and liabilities under the contract are enforceable by and against the consignee. If the consignee enjoys all the rights under the contract that is impossible to reconcile with the shipper‘s right to vary delivery instructions to the carrier at any time, by instructing delivery to a new consignee, although a similar conundrum plagues the provisions of UK COGSA 1992 in relation to the rights of consignees under sea waybills and straight bills of lading.[15]

On the other hand, unlike UK COGSA 1992 where the consignee does not acquire liabilities unless he _takes or demands delivery from the carrier of the goods‘,[16] or _makes a claim under the contract of carriage against the carrier in respect of the goods‘[17], under CMI Rule 3 the consignee could be held jointly liable with the shipper as an original party to the contract from the outset.

Subrule 3(ii) attempts to address the problem by stating that _the consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title‘. This suggests that the purpose of the section was that any obligations of the shipper under the Hague Rules or the Hague Visby Rules[18] are not transferred to the consignee, although the possible application of other laws cannot be

[15] UK COGSA 1992, s2(1) read with s2(5)
[16] UK COGSA 1992, s3(1)(a)
[17] UK COGSA 1992, s3(1)(b)
[18] International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), 1924, and the Hague Rules as amended by the Brussels Protocoal (Hague-Visby Rules) 1968

excluded.[19] The use of the problematic phrase ‗bill of lading or similar document of title', a term which originates in the English text of the Hague and Hague-Visby Rules, is unfortunate.[20]

CMI rule 3 will not apply if it is not necessary under the law applicable to the contract.[21] So for example, if the law applicable to the contract were English law then it would not be necessary to rely on Rule 3, as UK COGSA 1992 provides a mechanism for transferring rights of suit to the consignee under a sea waybill. This provision in Rule 3 is necessary to prevent the kind of circuitous reasoning that would result from trying to transfer rights of suit under UK COGSA to a party that was already an original party to the contract by virtue of agency, and the similar conflict that would arise between the transfer of liabilities under section 3(1) and the savings provision in section 3(3) in respect of the liabilities of any original party to the contract. This is thus sensible, but cannot be reconciled easily with an express or implied term of the sale agreement between the shipper and consignee (as seller and buyer respectively) that the shipper shall enter the contract of carriage on behalf of the consignee (or jointly on his own behalf and on behalf of the consignee).

If the CMI rules are incorporated into a contract of carriage to which South African law applies the position would yet again be different. If the STDA does not apply to sea waybills, and the contract of carriage was evidenced by a sea waybill which incorporated the CMI rules, then rule 3 would on its terms apply, and have the effect that the consignee is an original party to the contract of carriage. That result might present some difficulties if there was no express or implied agency contract between the shipper and consignee, although the difficulty could be overcome by the consignee ratifying the arrangement.

Secondly, it remains to be seen how the South African courts will resolve the conflict of laws problems that could arise when the chosen or proper law of the contract is the law of a country which provides a legal mechanism for the transfer of rights of suit. It is submitted that the chosen law should be applied.[22] However the resolution of this problem will not only

[19]For example, the Hamburg Rules and the Rotterdam Rules, discussed in chapter 3, would apply on their own terms to sea waybills, but make not reference to a ‗bill of lading or similar document of title'.
[20] The CMI Rules would not apply under Rule 1(ii) to a straight bill of lading. When the contract is already governed by the Hamburg Rules or Rotterdam Rules (which apply on their terms to sea waybills) there is the potential for conflict with the contractual terms of the CMI Rules, which would appear to require the application of those conventions as if the waybill were a ‗bill of lading or similar document of title'.
[21] CMI Rule 3(ii).
[22] *Mitchell Cotts & Co v Commissioner of Railways* supra note 2.

require consideration of whether the law in question is substantive or procedural in nature, but interpretation of the widely framed provisions of section 2(1) of the STDA.

Thirdly, the rules can be incorporated by agreement into the contract of carriage but do not have mandatory application. The CMI rules are adopted as part of BIMCO's Liner waybill form[23] but it not known to what extent they are incorporated into the contract terms of sea waybills used by shipping lines offering services on routes to and from South Africa.

Outside of the CMI rules the seller and buyer can agree that the shipper will contract as the buyer's agent. In such cases the carrier's agreement is not necessary as the shipper can contract as an agent for an undisclosed principal.[24] Similarly, some bills of lading include a definition of the ‗Merchant' who enters the contract of carriage,[25] and stipulate that the shipper warrants his authority to contract on behalf of the consignee and owner of the goods. It is doubtful whether such a term means that the contract can be enforced by or against the consignee if he did not in fact authorise the shipper to contract on his behalf (and it need not presently be considered whether the shipper can be held liable for breach of the warranty of authority, but this appears to be the intention of the clause).

In such cases the consignee is an original party to the contract of carriage able to enjoy the rights under the contract, but also be subject to the liabilities under the contract from the outset, without the ameliorating effect of CMI Rule 3(ii). Thus whilst the law of agency appears to provide a solution to the problem, it is not an altogether satisfactory solution for the reasons outlined above.

6.5 Cession and Delegation

Waring[26] asserts that the rights and liabilities under a contract of carriage evidenced by a bill of lading are transferred under South African law by means of an implied cession of rights,

[23] https://www.bimco.org/en/Chartering/Documents/Waybills_and_Cargo_Receipts/LINEWAYBILL/Explanatory_Notes_LINEWAYBILL.aspx (Accessed 7.01.2013)
[24] Christie RH *The Law of Contract in South Africa* 5ed at 202
[25] See the examples collected in Gaskell, Asariotis & Baatz *Bills of Lading: Law and Contracts* at para 4.88 – 4.93
[26] Waring, A *Charterparties: A Comparative Study of South African, English and American Law* at 285. The author's particular concern is with bills of lading issued under charterparties.

coupled with an implied contract between the shipowner and consignee under which the latter acquired the liabilities under the contract upon demanding delivery of the goods.

A cession can be accomplished in Roman Dutch law without the debtor's consent,[27] without formality,[28] and is completed by the delivery of the document evidencing the rights being ceded.[29] Cession is thus an attractive analogy to the way bills of lading are transferred, simply by delivering the bill to the new holder, who becomes entitled to claim delivery upon presentation of the original, without requiring the consent of the carrier to his substitution for the shipper as the original creditor. The debtor does not lose his right of action against the cedent, as the liabilities are not transferred,[30] but he can nevertheless raise as a defence to any claim by the cessionary any defence that would have been available against the cedent, save for personal defences that arose after the cession.[31] For example, if the shipowner is owed freight by the shipper, he can sue the shipper under the contract of carriage, but he can also exercise his lien over the goods when the holder of the bill of lading demands delivery.

The absence of such an explanation in English law is due to the fact that English law knows only the assignment of rights – which can accomplish the same purpose as a cession, but entails formalities and requires notice to the carrier on each assignment.[32]

However there are flaws in the use of cession too. First, in the context of a sea waybill it may be more difficult to establish the intention to cede the shipper's rights as there is no outward manifestation of such intention by transfer of an original document representing those rights. At the point when the goods are shipped the shipper may intend to retain his rights, including the right of disposal over the goods. At the point when the goods are delivered, the shipper takes no steps from which an intention to cede his rights against the carrier could be inferred.

Secondly the carrier would in fact be entitled to raise by set-off any debt owed by the shipper, even if not pertaining to the transaction in question.[33] Waring's reference to the

[27] Christie op cit note 24 at 464
[28] Ibid at 466
[29] Ibid at 467
[30] Ibid at 463–464
[31] Ibid at 469–470
[32] The English Law Commission and the Scottish Law Commission Report (Law Com No. 196) (Scot Law Com No. 130) *Rights of Suit In Respect of Carriage of Goods by Sea* (1991) para 2.13
[33] Christie op cit note 24 at 470. *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A)

shipowner being able to raise only defences in rem is now open to doubt,[34] and if the bill of lading was marked _freight pre-paid' but the shipper in fact owed freight, it is submitted that a consignee suing for damage to goods under a cession of rights from the shipper would not be able to resist a plea of set-off for the freight owing.

Thirdly a cession can only accomplish a transfer of rights.[35] In order for the shipper to be released from his liabilities under the contract the shipowner, shipper and consignee would have to agree to a delegation of rights and liabilities.[36] Since this would release the shipper altogether from his obligations,[37] it would be difficult to imply such agreement simply from the shipowner's action of delivering the goods to the consignee, as nothing in this action would signify the necessary intention of relinquishing his rights of recourse against the shipper for breaches by the shipper of the contract.

Waring states that _the undertaking of liability probably occurs only at the time of presentation of the bill of lading by the consignee to the shipowner for the purpose of obtaining delivery of the goods.'[38] However as Du Toit[39] points out, Waring's analysis was flawed, as this amounts in effect to an implied contract (the so-called *Brandt v Liverpool* contract). It is not only difficult to infer an intention to contract from the mere fact that delivery was demanded and given, but if such a contract were established it would also carry with it rights against the carrier and thus negate any need for a cession.

6.6 An Implied _Brandt v Liverpool' Contract

The eponymous case of *Brandt v the Liverpool, Brazil and River Plate Steamship Company Ltd* [40] concerned endorsees of a bill of lading who could not rely on the 1855 Bills of Lading Act to establish a right of suit in contract because ownership of the goods had not passed to them upon or by reason of the endorsement of the bill. It was held that the endorsee's acts of presenting the bill of lading to obtain delivery of the goods and paying the freight, and the

[34] Ibid.
[35] Ibid at 463–464
[36] Ibid at 463: delegation requires the common intention of all three parties.
[37] Ibid at 462: after delegation the creditor can sue the new debtor but has no right of action against the old debtor.
[38] Waring op cit note 26 at 285
[39] Du Toit op cit note 4 at 142
[40] [1924] 1 K.B. 575. There had been earlier decisions but it is not necessary for this discussion to analyse the history of the concept in English law.

reciprocal delivery and acceptance of goods specified in the bill of lading, gave rise to an implied contract between the carrier and the indorsee to deliver and accept the goods according to the terms of the bill of lading. The doctrine has however been restrictively applied in English law.[41]

Although the doctrine of implied contracts (or more accurately tacit contracts) is known in South African law,[42] it is tentative at best to suggest that such a contract can be implied in relation to sea waybills as there is no document presented to the carrier to obtain delivery, nor is it likely that the consignee would pay freight.[43] The reasoning of Bingham LJ in *The Aramis*[44] is apposite; one cannot imply a contract simply because to do so would be _ommercially convenient'.[45]

6.7 The _Dunlop v Lambert' Rule

In the case of *Dunlop v Lambert*[46] the shipper had consigned a puncheon of whiskey for shipment on board the defendant's vessel. Although ownership and risk had passed to the consignee the shipper was successful in recovering substantive damages under the contract of carriage. This case thus exists as a narrow exception within the general principle that a party cannot recover substantive damages if they have suffered no loss.[47]

In *The Albazero*[48] the reasoning in the judgment was described as _baffling', but the existence of the rule was affirmed on the basis that the shipper was taken to have entered into the contract for the benefit of all persons who might acquire an interest in the goods before they became lost or damaged (in much the same way as marine cargo policies were taken out for the benefit of all parties acquiring an interest in the goods). The _rule' was not applied in that case and its ambit was radically curtailed in that it can now only apply in English law _where no bill of lading has been issued, and ... [in] cases in which the rule would provide a

[41] Girvin S.D. _Third party rights under shipping contracts' 1997 *SA Merc. LJ* 97 at 111– 115 discusses the relevant English decisions.
[42] Christie op cit note 24 at 83 - 85
[43] Tetley W _Waybills: The Modern Contract of Carriage of Goods by Sea' (1983) 14 J. Mar. L. & Com. 465 at 500
[44] [1989] 1 Lloyd's Rep 213
[45] Ibid at 225
[46] (1839) 6 Cl. & Fin. 600
[47] Discussed in chapter 2
[48] *The Albazero* [1976] 2 Lloyd's Rep. 467 at 475 per Lord Diplock

remedy where no other would be available to a person sustaining loss.'[49] On this basis the rule could not apply to sea waybills since they are covered by UK COGSA 1992.

The 'rule' has no counterpart in South African common law, and does not provide a desirable solution to the title to sue problem as it relies on the shipper undertaking to sue[50] which he cannot be compelled to do[51]

6.8 Stipulatio alteri

The Roman Dutch law concept of a stipulatio alteri has 'proved to be a very useful legal instrument in modern times'.[52] Although none of the extant case law relates to contracts of carriage by sea that is no reason why the common law should not be developed to provide a remedy to the title to sue problems that may arise for consignees under sea waybills and straight bills of lading.

The doctrine was raised in argument but not relied upon by the court in *Santam Insurance Co Ltd v SA Stevedores Ltd*[53] to develop the doctrine of the 'Himalaya clause'[54] in South African law. The operation of the Himalaya clause was upheld on the basis that on the facts it met the requirements of agency as set out in the English case of *Scruttons Ltd v Midland Silicones Ltd.*[55] The possibility was left open that such a clause could also be enforced if it met the requirements of a stipulatio alteri in South African law.[56] However, the argument was abandoned by the defendant on the basis that the offer had been withdrawn before acceptance. It was also argued for the plaintiff that the benefit had never been

[49] Ibid.
[50] Aikens, Lord and Bools *Bills of Lading* at para 8.7. In *The Albazero* supra note 48 at 473 Lord Diplock raises the possibility of incurring irrecoverable legal costs which would be a disincentive to any shipper.
[51] Tetley op cit note 43 at 499, suggests that this is not the case, based on the authority of the Australian High Court in *Coulls v. Bagot's Executor and Trustee Co.Ltd* 1966-67) 119 C.L.R. 460, at 502.
[52] Van Rensburg ADR, Lots JG, Van Rhijn TAR (updated by Sharrock RD) 'Contract', para 425 in *Law of South Africa* vol. 5(1) (2ed.R). Also see Christie op cit note 24 at 263.
[53] 1989 (1) SA 182 (N) per Wilson J
[54] A clause permitting the servants, agents and sub-contractors of the carrier, to rely upon contractual benefits and limitations of liability in the contract even though they are not parties to the contract. The clause is named after the ship 'Himalaya' which gave rise to the litigation in *Adler v Dickson and Another* [1954] 3 All ER 397 (CA), where the doctrine was affirmed in English law with reference to earlier English, Australian and American case law.
[55] [1962] 1 All ER 1 (HL)
[56] Supra note 53 at 190

accepted.[57] The Himalaya clause has been enforced in other South African cases since, but not expressly on the basis of the stipulatio alteri.[58] Nevertheless, nothing in any of the reported judgments indicates that stipulatio alteri cannot be relied upon in appropriate circumstances.

Girvin suggested that the doctrine could be very useful in avoiding title to sue problems that arise in English law[59] but curtailed his analysis because he concluded that English law must be applied to disputes arising under bills of lading by virtue of section 6(1)(a) of AJRA.[60] Hare suggests that it is a ‗partial but not necessarily complete answer'.[61] Other writers have rejected stipulatio alteri as a mechanism by which rights and liabilities under the contract of carriage can be transferred to the consignee.

Waring's construction of the stipulatio alteri would transfer both rights and liabilities to the consignee, leaving the shipowner without recourse against the shipper, unless the consignee rejected the goods and the shipper and carrier had agreed that in such event the shipper could accept the benefits of the contract.[62] Du Toit, on the other hand, reasoned that a stipulatio alteri was unable to impose any positive duty on the consignee.[63] Malan and Fauls regard the stipulatio as unsatisfactory because it depends upon the establishing the intention of the shipper and carrier to contract for the benefit of the consignee, a ‗somewhat forced' construction according to the authors, and thus leaves the consignee with no claim if the stipulatio is invalid.[64]

However it is suggested that if regard is paid to the essential features of the concept as it exists in current South African law these criticisms are without foundation, and the doctrine does appear to offer a potential solution to the problem of a consignee who is unable to

[57] Supra note 53 at 194
[58] mv MSC Spain *Tebe Trading (Pty) Ltd v Mediterranean Shipping Co (Pty) Ltd* 2006 (4) SA 495 (N) at 512 although not on the express basis of a stipulatio alteri. The case was overturned on appeal but this aspect of the case was not decided, save that the Supreme Court of Appeal expressly indicated that its failure to do so was not an endorsement of the views of the court a quo. *Tebe Trading (Pty) Ltd v Mediterranean Shipping Co (Pty) Ltd* 2008 (6) SA 595 (SCA) at 605 para [19] per Scott JA
[59] Girvin op cit note 41 at 116
[60] Ibid at 119. The author was writing prior to the STDA, and his article was expressly restricted to a consideration of claims under bills of lading.
[61] Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed, 706
[62] Waring op cit note 26 at 287. Hare op cit note 61, 706, reaches a similar conclusion but reasons that the shipper can act as both principal and agent. The agency analogy is not apposite to a stipulatio alteri however.
[63] Du Toit op cit note 4 at 142
[64] Malan Fr & Faul W ‗Some Aspects of Bills of Lading' 1989 *South African Mercantile Law Journal* 322 at 332

establish title to sue in contract by way of the STDA. The requirements for relying upon a stipulatio alteri are as follows:

1. The third party is not an original party to the contract.

This is satisfied in the case of a consignee under a waybill where the original parties are the shipper and the carrier.[65]

2. The original parties to the contract must have intended to confer a material benefit of some kind on the third person, and to give the third person the power or opportunity to come in on a contract with the promisor'.[66]

The concept thus would bring the consignee into a contractual relationship with the carrier on the terms of the contract of carriage.[67] The rights conferred on the third party can be accompanied by obligations which must be accepted if the third party wishes to exercise the rights.[68] Du Toit's objection is thus misplaced.

Malan and Faul's concerns also appear to be somewhat overstated. Undoubtedly they are correct that the intention of the shipper and carrier to create a benefit for the third party must be established – the third party cannot simply adopt the contract because it would be advantageous to him to do so.[69] The intention to create the benefit does not need to be stated expressly in the contract of carriage, but then it must arise by necessary implication.[70] It has been said in this regard that:

[65] Discussed in chapter 2
[66] Van Rensburg op cit note 52 para 425
[67] *Wessels v De Jager* 2000 (4) SA 924 (SCA) at 928
[68] per Innes CJ in *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 206. See also *Crookes v Watson* 1956 (1) SA 277 (A) 291C per Schreiner JA, approved in *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 172 A-F (although in the circumstances of that case the intention to empower the third party to enter the contract was held to be absent).
[69] *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625D – G per Smalberger JA. Also see Christie op cit note 24 at 266.
[70] *Total South Africa (Pty) Ltd v Bekker NO* supra note 68 at 625H

> „[The contract] must contain some indication that it is made for the benefit of a third party, so as to warn the promisor of the possibility of adoption by the third party and of the obligations resulting from such adoption.“[71]

Such an indication need not be express if it is „apparent from the circumstances“.[72] In the case of a sea waybill, which is made out to a named consignee, under circumstances where the carrier would be aware of his obligation to deliver the goods according to the terms of the contract to the consignee, it is submitted that this would suffice to satisfy this requirement.

That the consignee was intended to be in a position to enforce the contract of carriage is a particularly strong inference where surrounding circumstances show that the consignee is the owner or the party bearing the risk of loss in and to the goods. It might be less clear that benefits were intended to be conferred when the consignee is a bank, or freight forwarder, unless it is clear that they act as agent only for the importer.

Waring‘s objection that the shipper could acquire no rights or liabilities under the contract also appears to be incorrect. Christie submits that it is not necessary that the contract should benefit the third party alone and not create rights and liabilities for the promisee.[73] The shipper in the waybill scenario could thus retain rights, such as the right to redirect the goods until such time as the consignee has been notified of their arrival.

The more difficult issue will be how to identify which rights were intended to benefit the consignee, or whether he becomes a party to the whole contract, and which liabilities accompany those rights. These are not easy questions, but similar difficulties arise when the shipper acts as the consignee‘s agent, and also, at least in respect of liabilities, under the STDA as certain liabilities remain personal to the shipper under section 4 of the STDA.

This also gives rise to the question of whether the rights and liabilities revert to the shipper if the consignee rejects the goods (and thereby declines to accept the benefits conferred by the contract). This question is not clearly answered by the existing case law which indicate that the promisee cannot demand performance to him where the third party declines the benefit.[74] That would be totally at odds with the requirements of carriers and

[71] *Goldfoot v Myerson* 1926 TPD 242 at 247 per Greenberg J, a case where the plaintiff had purchased land in his own name, and the contract contained no indication that it was intended to benefit a third party.
[72] Christie op cit note 24 at 262
[73] Christie op cit note 24 at 267, *Estate Greenberg v Rosenberg and Greenberg* 1925 TPD 924 per Tindall J
[74] *Semer v Retief & Berman* 1948 (1) SA 182 (C) at 194–195

shippers, who must have a mechanism for rights to be exercised by the shipper, if the consignee declines to accept delivery of the goods. Christie and Waring indicate that this principle is subject to any term to the contrary in the contract.[75] It is submitted that a strong argument could be made out for an implied term in the contract of carriage to this effect, permitting the shipper to redirect the goods in the event of the consignee rejecting them, and by that means transferring the benefit of the contract to himself or another party.

3. The benefit can be accepted or rejected by the third party.

In this aspect the application of stipulatio alteri would lead to a result that is contrary to the effect of section 4(1) of the STDA where rights and liabilities transfer automatically upon transfer of the sea transport document. From the consignee's perspective the ability to reject the benefit if he does not wish to accept the liabilities may be an advantage.

4. The third person is entitled to demand performance of the stipulation in his or her favour only if he or she has accepted it.[76]

No viniculum juris exists between the beneficiary and the promisor until the beneficiary has accepted the benefit and notified the promisor of his acceptance.[77] Once again in this respect the stipulatio alteri operates differently to a statutory transfer of rights and liabilities upon the mere transfer of the bill of lading, as in the latter instance no notice to the carrier is necessary.

The failure to accept the benefit is fatal to the third party's claim and thus may be raised by carriers as a defence. The requirement does not make the doctrine unworkable in this context however. Acceptance need not be given expressly and can be given tacitly[78] and _will not require strong evidence to support it'.[79] It is not a situation where the facts must be capable of an inference of an intention to form a new contract. Christie's view is that an oral

[75] Christie op cit note 24 at 270; Waring op cit note 26 at 287
[76] *Potgieter and Another v Potgieter NO and Others* 2012 (1) 637 (SCA) para [18]
[77] Hare op cit note 61, 706
[78] *Grime & Sutton t/a JGG Electrical Contractors v Cape Provincial Administration* 1988 (2) SA 602 (SE) at 609. – where it was held that the benefit had been accepted by the act of commencing legal proceedings to enforce the rights.
[79] Christie op cit note 24 at 268; *Estate Greenberg v Rosenberg & Greenberg* supra note 73 at 930

or written demand for performance would satisfy the requirement.[80] Thus it is submitted that simply by making a demand for delivery of the goods,[81] or lodging a formal claim to pursue rights of recovery against the carrier if goods are lost or damaged the consignee would, it is submitted, have communicated an intention to the carrier to acceptance the benefits under the contract of carriage. In this respect the stipulatio alteri would achieve a result in respect of the transfer of liabilities that is incompatible with the STDA but in harmony with the UK COGSA 1992 regime, which appears to have a sounder commercial rationale.[82]

5. Once the beneficiary has accepted the benefits, the contract can only be varied with his or her consent.[83] However until the third person has notified the promisor that he accepts the benefit there is no contract between them[84] and the promisor and promisee can agree to withdraw the benefit.[85]

Although this is a concern for the consignee, it reflects his position under a sea waybill where the shipper retains the right of disposal over the goods until the consignee has been notified of the arrival of the goods. At that point the consignee would have a reasonable time[86] to elect to accept or reject the goods (and the benefit under the contract).

Finally, the doctrine of stipulatio alteri must be distinguished from agency[87] but offers at least one important advantage; it does not require that the third party be in existence at the time that the contract was concluded.[88] This means that the doctrine is able to deal with the situation of a receiver of goods who is not the named consignee in the sea waybill, having become entitled to delivery by the shipper's exercise of his right to redirect the goods. This possibility cannot be dealt with under the law of agency, as one cannot act as agent for a non-

[80] Christie op cit note 24 at 269 as cited and approved in *Grime and Sutton v Cape Provincial Administration* supra note 78 at 609C-I. Also see *Aronson Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (T) at 448 E–G endorsing a _robust and common sense approach'.
[81] Hare op cit note 61 at 706
[82] For example if a bank were named as the consignee under a sea waybill or straight bill of lading they would be in the preferable position that they only acquire liabilities under the contract of carriage if they demand delivery of the goods.
[83] *Potgieter and another v Potgieter NO and others* supra note 76; *JR 209 Investments (Pty) Ltd v Pine Villa Estate (Pty) Ltd; Pine Villa Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA) para [15].
[84] *Crookes v Watson* supra note 68 at 288 *McCullogh v Fernwood Estate Ltd* supra note 68 at 206
[85] *Hofer v Kevitt* 1998 (1) SA 382 (SCA) at 386–387. Also see Christie op cit note 24 at 269.
[86] Christie op cit note 24 at 269. *McCullogh v Fernwood Estate* supra note 68 at 208
[87] Christie op cit note 24 at 265
[88] Christie op cit note 24 at 269. *McCullogh v Fernwood Estate* supra note 68 at 209

existent principal.[89] When the contract of carriage is concluded by the shipper as agent of the consignee (as where the CMI Rules, and rule 3 in particular, apply) then the consignee would sue on the contract as principal of the shipper, and need not rely on a stipulatio, although in cases of doubt this might be pleaded in the alternative.

6.9 International Uniformity

The use of a stipulatio alteri is the approach generally taken in continental Europe to the transfer of contractual rights and liabilities to the consignee under a sea transport document.[90] It is in harmony with the approach applied to waybills governing rail, road and air transport. Smeele offers the view that CMR, Cotif-CIM and The Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest 2000 (_CMNI') _have been strongly influenced by continental legal thinking in the field of transport law, which finds expression in the way these conventions regulate the position of the consignee under contracts of carriage.'[91]

South Africa would be out of step with the United Kingdom, and countries which have enacted legislation along the lines of UK COGSA 1992. However the STDA has departed in so many material respects from UK COGSA 1992 that to seek such uniformity would be an exercise in futility in any event. At the same time the use of stipulatio alteri is not a concept which would be unfamiliar to common law jurisdictions.

Lord Justice Denning stated in 1949 that the principle of strict privity of contract had only taken root in England in the late nineteenth century,[92] and had _never been able entirely to supplant another principle whose roots go much deeper', that is to say that contracts would be enforceable not only by the original party but _also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to

[89] Christie op cit note 24 at 268 - 269
[90] Discussed in chapter 4
[91] Smeele F _Bill of Lading Contracts under European National Laws: Civil law approaches to explaining the legal position of the consignee under bills of lading',8. (Available at www.academia.edu) (Accessed on 26 September 2013)
[92] Citing *Tweddle v Atkinson* (1861) 1 B. & S. 393 and *Dunlop v Selfridge* [1915] A. C. 847

entitle him to enforce it, subject always, of course, to any defences that may be open on the merits.'[93]

Contracts for the benefit of third parties were thus never altogether unknown to English law. Their scope was drastically curtailed in the case of *Midland Silicones Ltd. v. Scruttons Ltd*[94] and had in any event never applied to contracts of carriage by sea where statutory intervention was necessary to effect a transfer of the contract of carriage. Cases such as *Pyrene Co Ltd v Scindia Steam Navigation Co. Ltd*[95] must be treated with caution as good authority in English law,[96] but bear all the hallmarks of recognising the contract of carriage by its nature as a tri-partite contract, creating rights (and obligations) for shipper, carrier and consignee.[97] However the tide is turning once again in common law jurisdictions.

In their report on Rights of Suit the English and Scottish Law Commissions stated that:

> A sea waybill is a paradigm case of a contract for the benefit of a third party. Only the common law's insistence on the doctrine of privity prevents the consignee from suing the carrier.'[98]

In England the Contracts (Rights of Third Parties Act) 1999[99] has now been enacted, although it is not necessary to apply its provisions to sea waybills and straight bills of lading as they are catered for in UK COGSA 1992.

[93] *Smith and Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500 at 514
[94] Supra note 55
[95] [1954] 1 Lloyd's Rep. 321 at 331 per Lord Devlin
[96] *Hispanica de Petroleos S.A. and Compania Iberica Refinadera S.A. v Vencedora Oceanica Navegacion S.A., Same v. Same and the West of England Ship Owners MutualProtection and Indemnity Association (Luxembourg) The* Kapetan Markos *(No. 2)* [1987] 2 Lloyd's Rep. 321 at 331 per Mustill LJ
[97] Tetley op cit note 53 at 504
[98] Law Comm 196, Scot. Law Comm 130, at para 5.10
[99] c.31

6.10 Conclusion

It is submitted on the basis of the above analysis that whilst other legal mechanisms such as delict, agency, and cession may provide solutions to the title to sue problem in any individual case, the development of the doctrine of stipulatio alteri is desirable. It is capable of providing a simple mechanism for the transfer of rights and liabilities from the shipper to the consignee under sea waybills and straight bills of lading as a matter of law, in all cases where the consignee (named in the document or substituted by the shipper under his right of redelivery) takes or demands delivery of the goods or makes a claim against the carrier under the contract of carriage. Considering that the consignee will invariably be the party that bears the risk of loss or damage to the goods, where the underlying sale contract was on CIF or FOB terms, this is highly desirable. A fortiori the reasoning in *The Albazero* applies; namely that the legal should permit a recovery –w~~h~~ere no other remedy would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it." [100]

[100][1977] A.C. 774 at 848

CHAPTER 7 CONCLUSION

7.1 Introduction

The use of straight bills of lading and sea waybills in international trade is increasing and carries with it a number of advantages for traders, such as lower costs, and a lower risk of liability arising from delays where original bills of lading might not be available for discharge of the cargo. If their use by international traders is desired it should be facilitated by the law.

An analysis of the history of the bill of lading shows that its use in mercantile practice as a transferable document preceded any clear formulation of its legal functions. It has been said of the development of the bill of lading that it demonstrates _the manner in which the law, cumbersome and unplastic as it is, eventually bends and gives ground to keep pace with the developments of commerce to which it is, in its very essence, complementary.'[1]

It is suggested that the law must, in a similar way, adapt to accommodate the use of sea waybills and straight bills of lading and provide commercially sensible solutions to problems such as establishing title to sue the carrier for loss of or damage to the goods carried under the contract of carriage.

7.2 Conclusions on Each of the Key Research Questions

Key Research Question no. 1

To establish title to sue under South African law the cargo claimant must prove that he is both the party to the contract of carriage, and the party that has suffered the loss or damage. Traditionally this created problems for the establishment of title to sue under contracts for the carriage of goods by sea, as the party who entered into the contract of carriage with the carrier (i.e. the shipper) was divested of risk and/or ownership of the goods on shipment or during the ocean voyage, and thus would not suffer any loss.

[1] McLaughlin _The Evolution of the Ocean Bill of Lading' 35 Yale LJ 548

The STDA purports to remedy the problems that surrounded the transfer of title to sue from shippers to consignees under sea transport documents. However in section 2(2) of the STDA it restricts the operation of the relevant provisions to sea transport documents that are _transferable or negotiable‘.

Key Research Question no. 2

When their forms, functions and uses are analysed it is clear that neither sea waybills nor straight bills of lading are negotiable in the sense in which that term is applied to bills of lading, for neither document is made out _to order‘ and thus neither document can be transferred multiple times by endorsement and delivery, or as a bearer instrument by delivery alone.

However the original straight bill of lading must be presented to the carrier to obtain deliver of the goods. As between shipper and consignee it operates as a document of title. This is a significant difference to the sea waybill which does not need to be transferred and does not operate as a document of title.

However, both documents are used in international trade, with recognition being extended to the application of international carriage of goods conventions, Incoterms and the UCP. There is thus no commercial reason why the law should not provide a mechanism to transfer rights of suit from shipper to consignee in the case of both documents.

Key Research Question no. 3

No bill of lading is negotiable in the strict sense in which that term applies to negotiable instruments, to refer to transfer of rights free of equities. Bills of lading are said to be negotiable when they are made out to order (and thus transferable by endorsement and delivery) or to bearer (and thus transferable by delivery alone).

The proper interpretation of section 2(2) of the STDA would recognise that the term _transferable‘ means something different to _negotiable‘. A commercially sensible

interpretation would be that straight bills of lading are transferable, in that the original document is delivered to the consignee and operates as a document of title between the shipper and consignee, controlling the right to receive delivery of the goods from the carrier, and if intended transfers constructive possession and ownership of the goods.

The STDA might be capable of an alternative interpretation which recognises both straight bills of lading and sea waybills as transferable, if the term is given the even wider meaning of transferable by way of assignment. Such an interpretation would be a stretch of the language of the statute and would be placing the emphasis upon the transferability of the contract, whereas the enactment places the emphasis upon the transferability of the document. Since sea waybills do not need to be transferred to the consignee, and since possession of the document does not control the right to claim delivery of the goods from the carrier, it is likely that the document is not transferable in the same way as a bill of lading.

Key Research Question no. 4

In UK COGSA 1992 and similar legislation elsewhere express provision has been made for the transfer of rights of suit under sea waybills and straight bills of lading, but on the basis that they are the same species of document, and merit different treatment to the negotiable bill of lading. The statutes in question thus provide a different mechanism for the transfer of rights of suit, and the transfer of the document is thus not the point at which rights transfer.

However, analysis of the provisions of the STDA and the forms and functions of straight bills of lading indicates that there is nothing inappropriate about providing that rights should transfer when the document is transferred (by delivery) from the shipper to the consignee. The position of sea waybills presents more difficulty as they are not necessarily ever transferred to the consignee.

Key Research Question no. 5

The transfer of the contract of carriage can be effected under South African law by other means, principally by the shipper contracting as agent for the buyer, or as stipulator for the

benefit of the buyer, alternatively by way of a cession. Any of these means will be effective to transfer the rights of suit, but those rights will be subject to all defences that could have been raised as against the original shipper.

7.3 Recommendations

Until section 2(2) of the Sea Transport Documents Act (_STDA')[2] is interpreted by the South African courts there will be no certainty about whether it applies to straight bills of lading and sea waybills. Lawyers handling cargo claims brought under contracts of carriage evidenced by such documents should therefore not rely exclusively upon the provisions of the STDA for the establishment of title to sue. In all cases the prudent course of action would be to:

1. Secure the co-operation of shipper and consignee to bring suit in the name of both parties, jointly or in the alternative, as appropriate on the facts of the specific case;
2. Plead from the outset both a claim in contract, and an alternative claim framed in delict.

The advantage of pleading comprehensively and clearly at the outset is that a carrier is less likely to take technical (but legally valid) objections to locus standii, a point which seems trite, but has occasioned judicial comment more than once.[3]

The STDA is on its own terms[4] of application to any litigation arising under straight bills of lading and sea waybills issued in South Africa (i.e. export shipments from the Republic) and for goods consigned to a destination in South Africa (i.e. import shipments) or landed, delivered, or discharged in South Africa (e.g. goods landed for transport to a final destination in another African country).

In all such cases, given the lack of clarity on the status of sea waybills and straight bills of lading under the STDA, the international sale contract should expressly stipulate:

1. That a non-negotiable bill of lading consigned to the buyer or a sea waybill will be acceptable tender under the chosen trade term;

[2] 65 of 2000
[3] *The Albazero* [1976] 2 Lloyd's Rep.467, 473, *The Kapetan Markos (No. 2)* [1987] 2 Lloyd's Rep. 321
[4] STDA s2(1)

2. That the named shipper in contracting with the carrier will do both on his own behalf and as agent of and/or stipulator for the benefit of the buyer.
3. That when required to do so by the other party, or their marine cargo underwriter, consent will be given to the use of the shipper or consignee‘s name in legal proceedings in whatever form may be necessary for a recovery against the carrier, against a suitable indemnity in respect of any legal costs thus incurred.

7.4 Conclusion

It is regrettable that there is no clear statutory mechanism for the transfer of rights of suit under sea waybills, and straight bills of lading, and the finding puts South African law at odds which the law in other countries. An interpretation of the Act which pays careful attention to its remedial purpose, may ameliorate this position by incorporating straight bills of lading within the ambit of the statutory transfer mechanism. Even so South Africa would remain out of step with the laws of commonwealth countries where transfer of rights under straight bills of lading is effected upon issue of the document (in a like manner to the transfer of rights under sea waybills) and not upon the transfer of the document.

However if it is held that the STDA does not apply to straight bills of lading and sea waybills it should not be thought that *stipulatio alteri* is an anachronistic legal solution. It is the simple basis for transfer of rights of suit used in most of continental Europe where civil law is applied, and is similar to the statutory transfer of rights permitted under the Pomerene Act in the United States of America. Ultimately it avoids the artificial distinction drawn between negotiable bills of lading, and straight bills of lading and sea waybills, under UK COGSA 1992. It is to be hoped that South African courts would be prepared to apply this useful principle of our common law to solve the title to sue problem in a commercially sensible manner.

BIBLIOGRAPHY

PART I PRIMARY SOURCES

(A) NATIONAL LEGISLATION

South African Legislation

1. The Admiralty Jurisdiction Regulation Act 105 of 1983
2. The Bills of Exchange Act 34 of 1964
3. The Carriage of Goods by Sea Act 1 of 1986
4. The Constitution of the Republic of South Africa Act 108 of 1996
5. The Electronic Communications and Transactions Act 25 of 2002
6. The Sea Transport Documents Act 65 of 2000

Cape Colonial Legislation

1. Cape General Law Amendment Act, 8 of 1879

South African Bills

1. Explanatory Memorandum on the Objects of the Sea Transport Documents Bill published in Government Gazette no. 21158 of 8 May 2000

United Kingdom

1. Admiralty Courts Act (1861) 24 Vict. c.10
2. Bills of Exchange Act (1882) 45 & 46 Vict. c.61
3. Bills of Lading Act (1855) 18 & 19 Vict. c.111
4. Carriage of Goods by Sea Act (1924) 14 & 15 Geo.V. c.22
5. Carriage of Goods by Sea Act 1971 c.19
6. Carriage of Goods by Sea Act 1992 c.50
7. Colonial Courts of Admiralty Act (1890) 53 and 54 Vict. c. 27
8. Colonial Laws Validity Act (1865) 28 & 29 Vict. c.63
9. Contract (Rights of Third Parties Act) 1999 c.31
10. Factors Act (1889) 52 & 53 Vict. c. 45
11. Sale of Goods Act 1979 c.54

Australia

1. Sea-Carriage Documents Act,
2. Sea-Carriage Documents Bill 1996 (ACT) cl 5
3. Sea-Carriage Documents Act, 1996 (Queensland) s3;
4. Sea-Carriage Documents Act, 1997 (Tasmania) s4;
5. Sea-Carriage Documents Act (Western Australia) s5;
6. Sea-Carriage Documents Act 1997 (New South Wales) s5;
7. Sea-Carriage Documents Act 1998 (Victoria) s5;
8. Sea-Carriage Documents Act 1998 (South Australia) s4;
9. Sea-Carriage Documents Act 1998 (New Territories) s5.

Canada

1. Bills of Lading Act, 1985

Hong Kong

1. Bills of Lading and Analogous Shipping Documents Ordinance 1993

New Zealand

1. Mercantile Law Amendment Act

Singapore

1. Bills of Lading Act Cap 384, Rev Ed, 1994
2. Application of English Law Act Cap 7A, Rev Ed, 1994

United States of America

1. Pomerene Bills of Lading Act 1916 [The Code of Law of the United States of America (_USC‘) Title 49
2. Uniform Bills of Lading Act, 1909 [Uniform Commercial Code (_UCC‘) art 7

B. INTERNATIONAL LAW

International Conventions

1. Convention for the Carriage of Goods by Inland Waterway (CMNI) Budapest, 2000
2. Convention for the International Carriage of Goods by Road, 19 May 1956
3. Convention for the Unification of Certain Rules relating to Bills of Lading („Hague Rules"), 1924,
4. Convention for the Unification of Certain Rules relating. to International Carriage by Air (Warsaw Convention) 1929
5. Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), 1999
6. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea („Rotterdam Rules"), 2008
7. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading („Hague Visby Rules"), 1968.
8. Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail („CIM"), Annexure B to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999
9. United Nations Convention on the Carriage of Goods by Sea („the Hamburg Rules'), 1978
10. United Nations Convention on Contracts for the International Sale of Goods („CISG"), 1980

Other International Instruments

1. Comité Maritime Internationale (CMI) Uniform Rules for Sea Waybills
2. International Institute for the Unification of Private Law (UNIDROIT) Unidroit Principles for International Commercial Contracts, 2010
3. UNCITRAL Model Law on Electronic Commerce and Guide to the enactment, 1996 (Available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf) (Accessed on 07. 12. 2013)
4. UNIDROIT Principles of International Commercial Contracts, 2010 (Available at http://www.unidroit.org/english%20/principles/contracts/principles2010/blackletter2010-english.pdf) (Accessed on 10.12.2013)

Travaux Preparatoires

1. *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules (Comite Maritime International)* (Available at http://www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoires%20of%20the%20Hague%20Rules%20and%20of%20the%20Hague-Visby%20Rules.pdf) (Accessed on 10.12.2013)

Working Group Papers on The Rotterdam Rules

1. Working Group III (Transport Law) Ninth session New York, 15-26 April 2002 par 125 - 127 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.21/Add.1) (Accessed on 26 September 2013).
2. Working Group III (Transport Law) Sixteenth session, Vienna, 28 November-9 December 2005 Para 10 – 12 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.52) (Accessed on 26 September 2013)
3. Working Group III (Transport Law) Twentieth session Vienna, 15-25 October 2007 (Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.9/WG.III/WP.96) (Accessed on 26 September 2013

C. CASES

South Africa

1. *Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein en 'n ander* 1980 (3) SA 917 (A)
2. *Aronson Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (T)
3. *Bache v South African Milling Co* (1893) 10 SC 343
4. *Barlows Tractor & Machinery Co v Oceanair (Transvaal) (Pty) Ltd* 1978 (3) SA 175 (W)
5. *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE)
6. *Cape and Transvaal Printers Ltd v Rennies Coasters (Pty) Ltd* 1980 (2) SA 982 (D)
7. *Chong Sun Wood Products Pte Ltd v Kt& TtTrading Ltd and Another*2001 (2) SA 651 (D)
8. *Colonial Treasurer v Great Eastern Collieries Ltd* 1904 TS 719
9. *Crooks & Co v Agricultural Co-operative Union Ltd* 1922 AD 423
10. *Crookes v Watson* 1956 (1) SA 277 (A)
11. *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A)
12. *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA)
13. *Estate Greenberg v Rosenberg and Greenberg* 1925 TPD 924
14. *First National Bank of Southern Africa Ltd v Kien Hung Shipping SA (Pty) Ltd* [1994] 3 CLD 98 (W)
15. *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W)
16. *Golden Meats & Seafood Supplies CC v Best Seafood Import CC and Another* 2011 (2) SA 491 (KZD)
17. *Goldfoot v Myerson* 1926 TPD 242
18. *Grime & Sutton t/a JGG Electrical Contractors v Cape Provincial Administration* 1988 (2) SA 602 (SE)
19. *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A)
20. *Hofer v Kevitt* 1998 (1) SA 382 (SCA)
21. *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV and Another*2008 (6) SA 606 (SCA)
22. *Intercontinental Export Co (Pty) Ltd v MV* Dien Danielsen 1983 (4) SA 275 (N)

23. *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A)
24. *Joel Melamed & Hurwitz v Cleveland Estates* (*Pty*) *Ltd*, *Joel Melamed & Hurwitz v Vorner Investments* (*Pty*) *Ltd* 1984 (3) SA 155 (A)
25. *JR 209 Investments (Pty) Ltd v Pine Villa Estate (Pty) Ltd; Pine Villa Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA)
26. *Knight, Ltd. v Lensvelt* 1923 CPD 444
27. *Lendalease Finance (Pry) Ltd v Corporacion de Mercadeo Agricola*(1976) 4 SA 464 (A)
28. *London and South African Bank v Donald Currie & Co* (1875) 5 Buch 29
29. *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A)
30. *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A)
31. *McCullogh v Fernwood Estate Ltd* 1920 AD 204
32. *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D)
33. *Mitchell Cotts & Co v Commissioner of Railways* 1905 TS 349
34. mt Argun *Sheriff of Cape Town v* mt Argun*, Her Owners And All Persons Interested In Her and Others; Sheriff of Cape Town and another v* mt Argun*, Her Owners And All Persons Interested In Her and another* 2001 (3) SA 1230 (SCA)
35. *mv Alina II (No 2) Transnet Ltd v Owner of mv Alina II* 2011 (6) SA 206 (SCA)
36. mv Cape Courage*: Bulkship Union SA v Qannas Shipping Co Ltd SA* 2008 SCOSA C124 (D)
37. mv Cape Courage*: Bulkship Union SA v Qannas Shipping Co Ltd SA* 2010 (1) SA 53 (SCA)
38. *mv* Cos Prosperity *: Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* 2012 (3) SA 381 (WCC)
39. *mv* Forum Victory: *Den Norske Bank ASA v Hans K Madsen CV and Others (Fund Constituting the Proceeds of the Sale of the mv* Forum Victory) 2001 (3) SA 529 (SCA)
40. mv MSC Spain *Tebe Trading (Pty) Ltd v Mediterranean Shipping Co (Pty) Ltd* 2006 (4) SA 495 (N)
41. mv MSC Spain *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA)

42. *mv* Pasquale Della Gatta*: mv Filippo Lembo Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA)
43. mv Stella Tingas*; Transnet Ltd t/a Portnet v Owners of the* mv Stella Tingas *and Another* 2003 (2) SA 473 (SCA)
44. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
45. *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC)
46. *New Modderfontein Gold Mining Co v Transvaal Provincial Administration*, 1919 AD 367
47. *Numill Marketing CC and another v Sitra Wood Products Pte Ltd and another* 1994 (3) SA 460 (C)
48. *OK Bazaars v Universal Stores Ltd* 1972 (3) SA 175 (C)
49. *Owners of Cargo Lately Laden on Board the mv* Menalon *v mv* Menalon 1995 (3) SA 363 (D)
50. *Pan American World Airways Inc v SA Fire and Accident Assurance* 1965 (3) SA 150 (A)
51. *Potgieter and Another v Potgieter NO and Others* 2012 (1) 637 (SCA)
52. *Prime Site Outdoor Advertising (Pty) Ltd v Salviati & Santori (Pty) Ltd* 1999 (1) SA 868 (W)
53. *ProRoof Steel Merchants (Pty) Ltd v Topsheen Shipping Ltd, Transnet Limited and Tianjin Sino-Express International Logistics Co. Ltd* (unreported; order by Wallis J in the KwaZulu-Natal High Court Durban)(2009)
54. *R v Ndete* 1951 1 SA 763 (SR)
55. *Raqa v Hofman* 2010 (1) SA 302 (WCC)
56. *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) SA 121 (A)
57. *Reeskens v Registrar of Deeds 1*964 4 SA 372 (N)
58. *Rex v Mcgrath and Others* 1949 (4) SA 207 (C)
59. *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA)
60. *Santam Insurance Co Ltd v SA Stevedores Ltd* 1989 (1) SA 182 (N)
61. *Semer v Retief & Berman* 1948(1) SA 182 (C)
62. *Smit v Saipem* 1974 (4) SA 918 (A)
63. *Smith v Banjo* 2011 (2) SA 518 (KZP)

64. *Standard Bank v Carter; Standard Bank v McKenzie* (1902) 19 SC 302
65. *Standard Bank of SA Ltd v Efroiken and Newman* 1924 AD 171
66. *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A)
67. *Swart v van der Vyfer* 1970 (1) SA 633 (A)
68. *The Galaecia* unreported judgment of DCLD Case No. A19/2006 delivered on 23 March 2006 per Combrinck J
69. *Thompson v Scholtz* 1999 (1) SA 232 (SCA)
70. *Transol Bunker BV v The Andrico Unity* 1989 (4) SA 325 (A)
71. *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A)
72. *Wessels v De Jager* 2000 (4) SA 924 (SCA)

England and Wales

1. *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] 3 WLR 946
2. *Allen v Coltart & Co* 11 QBD 782
3. *Anon.* (1699) 1 Salk. 126; 3 Salk. 71; 1 Ld. Raym. 738
4. *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul and others* [2011] 1 Lloyd‘s Rep. 1
5. *Assignees of Burghall v Howard* 32. Geo. 2, 1 H.Bl. 366
6. *Atkinson v Maling, Assignees of Burn, a Bankrupt* 100 E.R. 249, (1788) 2 TR 462
7. *Barber v Meyerstein* (1870) L.R. 4 H.L. 317
8. *Berkley* v. *Watling* 112 E.R. 382, (1837) 7 Adolphus & Ellis 29
9. *Borealis A.B. v Stargas Ltd and Others (The ‘Berge Sisar’)* [2001] 1 Lloyd‘s Rep. 663
10. *Brandt v Liverpool* [1924] 1 K.B. 575
11. *Brown, Assignee of Roger Williams a Bankrupt v Heathcote and Martyn* 26 E.R. 103 , (1763) 2 Eden 169
12. *Browner International Ltd v Monarch Shipping Co Ltd* (The European Enterprise) [1989] 2 Ll Rep 185
13. *Burton v Davy* (1437) S.S. 49
14. *Caldwell* v. *Ball (1786)* 1 T.R. 205
15. *Chartbrook Ltd v Persimmon Homes Ltd and Another* [2009] UKHL 38
16. *Cho Yang Shipping Co Ltd v Coral* (UK) Ltd [1997] 2 Lloyd‘s Rep. 641
17. *Cock* v. *Taylor* (1811) 13 East 399
18. *CP Henderson & Co v The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253

19. *Crooks v Allan* (1879) 5 QBD 38
20. *Currie v. M'Knight (The Dunlossit)*[1897] A. C. 97
21. *Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg and P.&O. Nedlloyd B.V* [2002] 2 Lloyd‘s Rep. 183
22. *Denaker v Mason* (1564) S.S. 11
23. *Diamond Alkali Export Corporation v F.L. Bourgeois* [1921] 8 Ll. L. Rep. 282
24. *Domett v Beckford* (1883) 5 B. & Ald. 521
25. *Dunlop v Lambert* (1839) 6 Cl. & Fin. 600
26. *Dunlop v Selfridge* [1915] A. C. 847
27. *East West Corp v DKBS 1912* [2002] 2 Lloyd‘s Rep. 182
28. *East West Corp. v. DKBS 1912* [2003] 1 Lloyd‘s Rep. 239
29. *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605
30. *El Amria and El Minia* [1982] 2Lloyd‘s Rep. 28
31. *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep 548
32. *Enichem Anic SpA v Ampelos Shipping Co Ltd* (The Delfini) [1990] 1 Lloyd's Rep 252
33. *Evans v Marlett* 91 E.R. 1078; (1697) 1 Ld. Raym. 271 KB
34. *Fearon v Bowers* (1753), referred to in *Mason v Lickbarrow* 126 ER 209, (1790) 1 H.Bl. 357
35. *Fox v Nott* (1861) 6 H & N 630
36. *Glyn, Mills & Co. v +East and West India Dock Co*(1882) 7 App. Cas. 591
37. *Goodwin v Robarts,*(1874-75) L.R. 10 Ex. 337; (1876) 1 App. Cas. 476
38. *Gulf Steel Co. Ltd v Al Khalifa Shipping Co.Ltd (*The Anwar al Sabar) [1980] 2 Lloyd‘s Rep 261
39. *Gurney v Behrend* 118 E.R. 1275, 1279, (1854) 3 E & Bl.622
40. *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC(HL) 157
41. *Hamilton* v *Mendes* (1761) 2 Burrow 1198; 97 ER 787
42. *Hibbert* v. *Carter* (1797) T.R. 745
43. *Hibernian Bank v Gysin and Hanson* [1939] 1 All ER 166 (CA)
44. *Hispanica de Petroleos S.A. and Compania Iberica Refinadera S.A. v Vencedora Oceanica Navegacion S.A., Same v. Same and the West of England Ship Owners MutualProtection and Indemnity Association (Luxembourg)*The Kapetan Markos (No. 2) [1987] 2 Lloyd‘s Rep. 321

45. *Homburg Houtimport BV and Others v Agrosin Private Limited and Another* (The Starsin) [2001] 1 Lloyd‘s Rep. 437 (CA)
46. *Homburg Houtimport BV and Others v Agrosin Private Limited and Another* (The Starsin) [2003] 1 Lloyd‘s Rep. 571 (HL)
47. *Howard v Shepherd* 137 E.R. 907, (1850) 9 Common Bench Reports 297
48. *Hunter v Beal* (1785) referred to in *Lickbarrow v Mason* 100 E.R. 35, 41, 2 T.R. 63, 75
49. *In re Wait* [1927] 1 Ch 606
50. *Ishag v Allied Bank International, Fuhs and Kotalimbora*[1981]1 Lloyd‘s Rep. 92
51. *J.I MacWilliam Co. Inc. v Mediterranean Shipping Co SA* (The Rafaela S) [2002] Lloyd‘s Rep. 403
52. *J.I MacWilliam Co. Inc. v Mediterranean Shipping Co SA* (The Rafaela S) [2003] 2 Lloyd‘s Rep. 113 (CA)
53. *J.I MacWilliam Co Inc v Mediterranean Shipping Co SA (*The Rafaela S*)* [2005] 1 Lloyd‘s Rep. 347 (HL)
54. *Kleinwort, Cohen, & Co. v. The Cassa Marittima of Genoa* 2 App. Cas. 156
55. *Kum and Another v Wah Tat Bank Ltd* [1971] 1 Ll.L.Rep 439
56. *Leigh and Sillivan Ltd v Aliakmon Shipping Co. Ltd* (The Aliakmon) [1986] 2 Lloyd‘s Rep. 1, [1986] A.C. 785
57. *Lickbarrow v Mason* 100 E.R. 35, (1787) 2 T.R. 63 (Kings Bench); 126 E.R. 209 , (1790) 1 H.Bl. 357 (Exchequer Chamber); 101 E.R. 206 , (1793) 5 T.R. 367 (Kings Bench); 126 E.R. 511, (1793) 2 H.Bl. 211 (Exchequer Chamber); 2 E.R. 39, (1793) IV Brown 57 (House of Lords); 101 E.R. 380, (1794) 5 T.R. 683, (*venire de novo* before Kings Bench); and 101 E.R. 473, (1794) 6 T.R. 131(costs)
58. *Lloyd v. Guibert* 1 Q. B. 115
59. *Lyke v Lyde* (1759) 2 Burr. 882
60. *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219
61. *McCarren & Co. Ltd v Humber International Transport Ltd. and Truckline Ferries (Poole) Ltd* (The Vechscroon) [1982] 1 Ll Rep 301
62. *Miller v Race* 96 E.R. 1151, (1758) 2 Kenyon 189. Also reported at 97 E.R. 398, (1758) 1 Burrow 452
63. *Mitchell v Ede*113 E.R. 651, (1840) 11 Ad & El 888
64. *Mitsui & Co Ltd v Novorossiysk Shipping Co (*The Gudermes) [1993] 1 Lloyd‘s Rep 311

65. *Motis Export Ltd v Dampskibsselkabet AF 1912 Aktiesekkab* [1999] 1 Lloyd's Rep 837
66. *Newsom v Thornton* 102 E.R. 1189, (1806) 6 East 17 (Court of King's Bench)
67. *Oaste v Taylor* Cro. Jac. 306
68. *Obestain Inc v National Mineral Development Corporation Ltd (*The ‗Sanix Ace') [1987] 1 Lloyds' Rep. 465
69. *Official Assignee of Madras v Mercantile Bank of India Ltd* 1935 AC 53 (PC)
70. *Owners of the Ship Freedom v Simmonds, Hunt, & Co* (1869-71) L.R. 3 P.C. 594
71. *Parsons Corporation and others v C.V. Scheepvaartonderneming 'Happy Ranger' and others* (The ‗Happy Ranger ‗) [2002] 2 Lloyd's Rep. 357
72. *Patten v Thompson* (1816) 5 M. & S. 350
73. *Peacock v Rhodes* 99 E.R. 402, (1781) 2 Doug. 633
74. *Pelly* v *Royal Exchange Assurance Co.* (1757) 1 Burrow 341; 97 ER 342
75. *Pyrene Co. Ltd v Scindia Steam Navigation Co. Ltd* [1954] 1 Lloyd's Rep. 321
76. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50
77. *Robey & Co's Persevereance Iron Works v Ollier* (1872) 7 Ch. App. 695,
78. *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327
79. *Sanders v Vanzeller* 114 E.R. 897, (1843) 4 Q.B. 260
80. *Sargent v Morris* 106 E.R. 665, (1820) 2 B. & Ald. 277
81. *Savignac v. Cuff* (1778) 2 T.R. 66
82. *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2007] 2 Lloyd's Rep. 341 (CA)
83. *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] 1 Lloyd's Rep. 462 (HL)
84. *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1 (HL)
85. *Sewell v Burdick (*The Zoe*)* (1884) 13 Q.B.D. 159 (Court of Appeal)
86. *Sewell v Burdick* (The Zoe) (1884) 10 App. Cas. 74 (House of Lords)
87. *Smith and Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500
88. *Smurthwaite v Wilkins* (1862) 11 CBNS 842
89. *Snee v Prescot* 26 E.R. 157, (1743) 1 Atk.245
90. *Stag Line v Foscolo, Mango and Co* [1932] AC 328
91. *Standard Chartered Bank v Dorchester LNG (2) Ltd* (*The* Erin Schulte) [2013] 2 Lloyds Rep. 338

92. *Texas Instruments v Nason* [1991] 1 Lloyd‘s Rep. 146
93. *The Albazero* [1976] 2 Lloyd‘s Rep. 467; [1977] AC 774
94. *The Aramis* [1989] 1 Lloyd‘s Rep 213
95. *The Ardennes* case, [1950] 84 Ll. L. Rep. 340
96. *The Athanasia Comninos and the Georges Chr. Lemos* [1990] 1 Lloyd‘s Rep 277
97. *The Bold Buccleugh* 7 Moo. P. C. 267
98. *The Buonaparte* 8 Moo. P. C. 459
99. *The Charlotte* [1908] P. 206
100. *The Chitral* [2000] 1 Lloyd's Rep 529
101. *The David Agmashenebeli* [2003] 1 Lloyd‘s Rep. 92
102. *The Dictator*, [1892] P304 ([1891 – 4] All ER Rep 360
103. *The Figlia Maggiore* Law Rep. 2 A.&E. 106
104. *The Future Express* [1992] 2 Lloyd‘s Rep. 79
105. *The Gaetano and Maria* (1881) 7 P.D. 1
106. *The Gas Float Whitton, Number* 2 1896, Pr. 42
107. *The Giannis NK* [1998] A.C. 605
108. *The Gratitudine* 3 W. Rob. 240
109. *The Hamburgh* Br. & L. 253
110. *The Ship Marlborough Hill v Alex Cowan and Sons Ltd* [1921] AC 444
111. *Thompson v Dominy* 153 E.R. 532, (1845) 14 Meeson and Welsby 403
112. *TICC Ltd v Cosco (UK) Ltd* [2002] C.L.C. 346
113. *Tweddle v Atkinson* (1861) 1 B. & S. 393
114. *Vallejo v Wheeler* (1774) 1 Cowp 143
115. *Waring v Cox* 170 ER 989, (1808) 1 Camp 369
116. *Wiseman v Vandeputt* 23 E.R. 732, (1690) 2 Vern. 203
117. *Wright v Campbell* 98 E.R. 66 (1767) 4 Burr. 2046

Australia

1. *Beluga Shipping GmbH & Co v Headway Shipping Ltd* [2008] F.C.A 1791
2. *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211
3. *Coulls v. Bagot's Executor and Trustee Co.Ltd* 1966-67) 119 C.L.R. 460
4. *El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA* [2003] FCA 588

5. *El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA* [2004] FCAFC 202
6. *Hilditch Pty Ltd v Dorval Dauin KK (No 2)* (2007) 245 ALR 125
7. *McKay Massey Harris Proprietary Ltd v Imperial Chemical Industries of Australia & New Zealand Ltd. and United Stevedoring Proprietary Ltd.* (The „Mahia‘ (no. 2).) [1960] 1 Lloyd‘s Rep. 191

Canada

1. *The Maurice Desgagnes* [1977] 1 Lloyd‘s Rep. 290

Peoples' Republic of China

1. *American President Lines v Guangzhou Feida Electrical Apparatus Factory of Wanbao Group*, 4th Civil Div. Unreported, June 25, 2002

France

1. *The MSC Magallanes* (2002) 631 DMF 952

The Netherlands

1. *The Duke of Yare* (unreported) 10 April 1997, ARR-RechtB Rotterdam
2. The Gosforth: *S en S* 1985 Nr.91

Hong Kong

1. *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* , Hong Kong Special Administrative Region Court of Appeal [2009] 3 HKLR 409
2. *Melissa (HK) Ltd v P & 0 Nedlloyd (HK) Ltd* [1999] 3 HKLR 674
3. *The Brij* [2001] 1 Lloyd‘s Rep 431

New Zealand

1. *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd* (The Pembroke*)* [1995] 2 Lloyd‘s Rep. 209
2. *Starlink Navigation Ltd v The Ship* Seven Pioneer (2001) 16 PRNZ *55 (The Seven Pioneer).* (Available at http://www.maritimelaw.org.nz/0201.html.) (Accessed 11 01 2013)Toh Kian Sing 'Conflict of Laws implications of the Carriage of Goods by Sea Act 1992' [1994] *LMCLQ* 280

Singapore

1. *Peer Voss* v. *APL Co. Pte. Ltd*, [2002] 2 Lloyd‘s Rep. 707
2. *The Dolphina* [2012] 1 Lloyd‘s Rep. 303

United States of America

1. *Coastal Seafood Processors, Inc. v. Orient Overseas Container*, decision of the United States District Court, Eastern Districts, Louisiana (2000); Unreported in F.Supp.2d (Available on West Law 235263).
2. *Mitsubishi v Mammoth Fir* 1979 AMC 2840 (S.D.N.Y.1979)
3. *Pope v. Nickerson* 3 Story, 465

D. OTHER PRIMARY SOURCES

Minutes and Records of the Maritime Law Association of South Africa

1. 21st meeting of the executive committee of the Maritime Law Association of South Africa held on 28 May 1992
2. 27th Meeting of of the Executive Committee of the Maritime Law Association held on 9 December 1994
3. 30th Meeting of the Executive Committee of the Maritime Law Association held at Shepstone & Wylie, Durban, on 13 December 1995
4. 33rd Meeting of the Executive Committee of the Maritime Law Association held on 30 August 1996

5. 35th Meeting of the Executive Committee of the Maritime Law Association held on 21 February 1997
6. 36th Meeting of the Executive Committee of the Maritime Law Association held on 16 May 1997
7. 37th Meeting of the Executive Committee of the Maritime Law Association held on 29 August 1997
8. 40th Meeting of the Executive Committee of the Maritime Law Association held on 24 July 1998
9. Minute of the Annual General Meeting held on 21 June 1996 at Cathedral Peak
10. MLA Presidents Report 1998

PART II SECONDARY SOURCES

A. BOOKS

1. Aikens R, Lord R & Bools M *Bills of Lading* (London: Informa, 2006, reprint 2010)
2. Bamford, BR *The Law of Shipping and Carriage in South Africa* 2 ed (Durban: Juta, 1973)
3. Baughen S, *Shipping Law* 3 ed (London: Routledge, 2004)
4. Bennet E.H. (ed) *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* 7ed (Boston: Little, Brown & Co, 1863) (Available as a free e-book on google books) (Accessed on 23.05.2013)
5. Bennet W.P *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge University Press, 1914)
6. Bernauw K _Belgium' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,* 93
7. Bools M.D. *The Bill of Lading A Document of Title to Goods An Anglo-American Comparison* (London: Lloyds of London Press, 1997)
8. Boyd SC, Burrows AS and Foxton D *Scrutton on Charterparties and Bills of Lading* 20 ed. (London: Sweet & Maxwell 1996)
9. Bruce, Mr Justice and Jemmett, CF, assisted by Phillimore, GG, *A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals being a Third Edition of Williams' and Bruce's Admiralty Practice* 3 ed (1902)

10. Burnett R and Bath V *Law of International Business in Australasia* (Federation Press, 2009)
11. Christie RH *The Law of Contract in South Africa* 5ed (Durban: LexisNexis Butterworths, 2006)
12. Claringbould M _Bills of Lading versus Sea Waybills: Documents of Title or Not?', in Boonk H *English and Continental Maritime Law* (Maklu, 2003)
13. Colinvaux R *Carver's Carriage by Sea* 3 ed (London: Stevens & Sons, 1982)
14. Cowen DV and Gering L *Cowen on the Law of Negotiable Instruments in South Africa* 4 ed (Cape Town: Juta, 1966)
15. Debattista C *The Sale of Goods Carried by Sea* 2ed (Lexis Nexis UK, 1998)
16. Fagan E _Roman-Dutch Law in its South African Historical Context in Zimmermann R & Visser DP (eds) *Southern Cross: Civil Law and Common Law in South Africa*
17. Force *Admiralty and Maritime Law,* (Washington,Beard Books, 2007)
18. Gaskell N, Asariotis R and Baatz R, *Bills of Lading, Law and Contracts* (London Lloyds of London Press, 2000)
19. Gilmore G and Black CL Jr. *The Law of Admiralty* 2ed (Foundation Press, 1975)
20. Goode RM *Commercial Law* (Harmondsworth, Penguin Books, 1982)
21. Guest AG *et al* (eds) *Benjamin's Sale of Goods* 7 ed (London: Sweet & Maxwell, 2006)
22. Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* (Cape Town: Juta & Co, 1999)
23. Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed (Cape Town: Juta & Co, 2009)
24. Herber R _Germany' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,162*
25. Hofmeyr G *Admiralty Jurisdiction Law and Practice in South Africa* 2ed (Cape Town: Juta & Co, 2012)
26. Japikse RE _The Netherlands' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems, 229*
27. Kiantou-Pampouki _Greece' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,162*
28. Laryea, ET, *Paperless Trade: Opportunities, Challenges and Solutions* (Kluwer Law International, 2003)
29. Lorenzon F *C.I.F and F.O.B Contracts* 5 ed (London: Sweet & Maxwell, 2012)

30. Malan and Pretorius (assisted by Du Toit) *Malan on Bills of Exchange,Cheques and Promissory Notes in South African Law* 4ed. (Durban: Lexis Nexis Butterworths, 2002)
31. Milnes Holden J *The History of Negotiable Instruments in English Law* (University of London, 1955)
32. Murray C, Holloway D & Timson-Hunt D *Schmitthoff's Export Trade The Law and Practice of International Trade* 11 ed (London: Sweet & Maxwell, 2007)
33. Proctor, C *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, (Interlegal CC, 1997)
34. Ramberg J, *ICC Guide to Incoterms 2010* (Paris: International Chamber of Commerce, 2011)
35. Schoenbaum T *Admiralty and Maritime Law* 4 ed (St Paul: Thompson/West, 2004)
36. Stopford M *Maritime Economics* 3 ed (Routledge 2009)
37. Tetley W *Marine Cargo Claims* 3 ed (1988)
38. Todd P *Cases and Materials on International Trade Law* (London: Sweet & Maxwell 2003)
39. Todd P *Bills of Lading and Bankers' Documentary Credits* 4ed (London: Informa 2007)
40. Tosi JP ‗France' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,142*
41. Treital G & Reynolds F.M.B. *Carver on Bills of Lading* 3 ed (London: Sweet & Maxwell, 2011)
42. Van Rensburg ADR, Lots JG, Van Rhijn TAR (updated by Sharrock RD) ‗Contract' in *Law of South Africa* vol. 5(1) (2ed.R).
43. Verwer A *Nederlants See-Rechten; Avaryen en Bodemeryen* (Amsterdam: Jan Boom, 1711) (Available on Google Books as a free e-book)(Accessed on 08.12.2003)
44. Wallis *The Associated Ship and South African Admiralty Jurisdiction* (Siberink, 2010)
45. Waring, A *Charterparties: A Comparative Study of South African, English and American Law* (Cape Town: Juta, 1983)
46. Wessels, The Hon. J.W. *History of Roman-Dutch Law* (Grahamstown: African Book Company, 1908)
47. White, MWD *Australian Maritime Law* 2 ed. (Sydney: Federation Press, 2000)
48. Wilson JF *Carriage of Goods by Sea* 7 ed. (Harlow: Pearson Education Ltd, 2010)

49. Winship P ‗United States' in Yiannopoulos AN *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems,* 270
50. Yiannopoulos, A *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (The Hague: Kluwer Law International, 1995)

B. JOURNALS

1. Allsop J ‗Maritime law – the nature and importance of its international character' 2009 William Tetley Lecture at Tulane University law School, delivered on 15 April 2009, reprinted in (2010) 34 (2) *Tulane Maritime Law Journal*, 555 - 589
2. Bradgate R and White F ‗The Carriage of Goods by Sea Act 1992' (1993) 56 (2) *The Modern Law Review* 188 -207
3. Carver TG ‗On some defects in the Bills of Lading Act 1855' (1890) 6 *Law Quarterly Review* 289
4. Cashmore C ‗Title to Sue on a Contract of Carriage in Anglo-American Law' (1994) 23 *Anglo-American Law Review* 488
5. Chorley RST ‗The conflict of law and commerce' (1932) 48 *Law Quarterly Review* 51
6. Clarke M ‗Transport Documents: their transferability as documents of title; electronic documents' 2005 *Lloyd's Maritime & Commercial Law Quarterly* 356
7. Diamond A ‗The Rotterdam Rules' (2009) *Lloyds Maritime and Commercial Law Quarterly* 445
8. Du Toit S.F. ‗Comments on the Sea Transport Documents Act, 65 of 2000' 2003 *Journal of South African Law* 731–737
9. Du Toit, SF ‗The evolution of the bill of lading' (2005) 11 *Fundamina* 24
10. Du Toit SF, ‗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* 105
11. Faria JAE, ‗Uniform law for international transport at UNCITRAL: New times, new players and new rules' 2009 (44) 3 *Texas International Law Journal* 277 – 319
12. Francis N ‗Transferring rights of suit under bills of lading: The conflict of laws implications' (2006) 20 *Australia & New Zealand Maritime Law Journal.* 25–51
13. Girvin S.D. ‗Third party rights under shipping contracts' 1997 *South African Mercantile Law Journal* 97 – 122

14. Girvin S.D. ‗Carriage by sea: The Sea Transport Documents Act 2000 in historical and comparative perspective' (2003) 119 *South African Law Journal* 317–351
15. Kozolchyk B ‗Evolution and present state of the ocean bill of lading from a banking law perspective' (1992) 23 *Journal of Maritime Law & Commerce* 161
16. Laryea E.T. ‗Paperless shipping documents: An Australian perspective' (2000) 25(1) *Tulane Maritime Law Journal* 255–298
17. Lee DH ‗The straight bill of lading: past, present and future' (2012) 18 *The Journal of International Maritime Law* 39
18. Lloyd A ‗The bill of lading: do we really need it?' (6th Annual lecture of the Institute of Maritime Law of the University of Southampton) 1989 *Lloyd's Maritime & Commercial Law Quarterly* 47
19. Malan Fr & Faul W ‗Some aspects of bills of lading' 1989 *South African Mercantile Law Journal* 322 - 333
20. Reynolds F.M.B. ‗The significance of tort in claims in respect of carriage by sea' 1986 *Lloyd's Maritime & Commercial Law Quarterly* 97
21. Reynolds F.M.B ‗Reform of the Bills of Lading Act' (1990) 106 *Law Quarterly Review* 1
22. Reynolds F.M.B. ‗The bills of lading act: reform nearer?' (1991) 107 *Law Quarterly Review* 355
23. Reynolds F.M.B. ‗The Carriage of Goods by Sea Act 1992' 1993 *Lloyd's Maritime & Commercial Law Quarterly* 436
24. Reynolds F.M.B. 'Bills of lading: Do they have a future?' (1994) 10 *Maritime Law Association of Australia & New Zealand Journal 35*
25. Tetley W ‗Waybills: the modern contract of carriage of goods by sea' (1983) 14 *Journal of Maritime Law and Commerce* 465
26. Tetley W ‗Who may claim or sue for cargo loss or damage? (part 1) (1986) 17 *Journal of Maritime Law and Commerce* 153
27. Tettenborn AM 'Transferable and negotiable documents of title -A redefinition?' 1991 *Lloyd's Maritime & Commercial Law Quarterly* 538
28. Thomas S ‗Transfers of documents of title under english law and the Uniform Commercial Code' 2012 *Lloyds Maritime and Commercial Law Quarterly* 573
29. 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* 17

30. Tiberg H _Legal qualities of transport documents‘ (1998) 23(1) *Tulane Maritime Law Journal* 1 – 44
31. Tiberg H _Transfer of documents‘ 2002 *Lloyd’s Maritime and Commercial Law Quarterly* 539
32. Toh Kian Sing 'Conflict of Laws implications of the Carriage of Goods by Sea Act 1992' [1994] *Lloyds Maritime and Commercial Law Quarterly* 280
33. Treitel G.H. _Bills of lading and third parties‘ 1986 *Lloyds Maritime and Commercial Law Quarterly* 294
34. Treitel G.H. _The legal status of straight bills of lading‘ (2003) 119 *Law Quarterly Review* 608
35. Von Ziegler A _Delay and the Rotterdam Rules‘ (2009) 14 *Uniform Law Review* 1003
36. Whittaker S _Privity of Contract and the Law of Tort: the French experience‘ (1995) 15 (3) *Oxford Journal of Legal Studies* 327-370
37. Zekos G _Contractual role of documents issues under the CMI Draft Instrument on Transport Law 2001‘ (2004) 35 *Journal of Maritime Law and Commerce* 99

INTERNATIONAL CASE NOTES AND COMMENTARIES

1. Greenhalgh R and Robinson A _Commentary on recent developments in South Africa‘ *The International Journal of Shipping Law* Part 4 (1997), 233
2. Macmillan C _The end of the exception in Dunlop v Lambert‘ (Case and Comment) 2001 *Lloyd’s Maritime & Commercial Law Quarterly* 338
3. Nossal S _The bills of lading and analagous [sic] shipping documents ordinance‘ (1994) 24 (2) *Hong Kong Law Journal* 18
4. Rose FD _Sea Carriage Rights‘ Case and Comment (1991) 50(3) *The Cambridge Law Journal* 394 – 397
5. Staniland H _Maritime Law‘ 2003 *Annual Survey of South African Law*, 856
6. Stewart A _Admiralty Law‘ 2007 *Annual Survey of South African Law* 58
7. Treitel G.H. _Bills of lading: liabilities of transferee. The Berge Sisar‘ (Case & Comment) 2001 *Lloyd’s Maritime & Commercial Law Quarterly* 344

NATIONAL LAW COMMISSION REPORTS

1. The English Law Commission and the Scottish Law Commission Report (Law Com No. 196) (Scot Law Com No. 130) *Rights of Suit In Respect of Carriage of Goods by Sea* (1991)
2. The English Law Commission Report (LC 242) *Privity of Contract: Contracts for the Benefit of Third Parties* (1996)

INTERNATIONAL REPORTS AND MEMORANDA

1. Special Report *Modern Liner Contracts* (London: Lloyds of London Press, 1984)
2. UNCITRAL Working Group III (Transport Law) 17th Session: _Proposal by the Netherlands on bills of lading consigned to a named person' A/CN.9/WG.III/WP.68 (Available at http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html) (Accessed on 06.12.2013)

INTERNET SOURCES

1. Schelin J _Documents under the UNCITRAL Draft Instrument on Carriage of Goods by Sea' 192, published by Stockholm Institute for Scandinavian Law (Available at http://www.scandinavianlaw.se/pdf/46-9.pdf.) (Accessed on 06.12.2013)
2. Smeele F _Bill of lading contracts under European national laws: civil law approaches to explaining the legal position of the consignee under bills of lading' (Available at www.academia.edu) (Accessed on 26 September 2013)

THESES

Du Toit S.F. *The Bill of Lading in South African Law* (LL D thesis RAU 2000) (Available at https://ujdigispace.uj.ac.za/handle/10210/6358) (Accessed on 25.10.2013)

Holloway P *Ownership, Risk and Title to Sue With Respect to the Carriage of Goods by Sea – The Perspective of a South African Attorney Acting on Behalf of Cargo Interests* (unpublished dissertation in fulfilment of the requirements of Postgraduate Diploma in Law, University of Cape Town, 1999) (Available at http://web.uct.ac.za/depts/shiplaw/holloway.htm) (Accessed on 07.12.2012)

Surjan M *Title to Sue at the Dawning of the Sea Transport Documents Act 65 of 2000, A Comparative Analysis* (unpublished dissertation in partial fulfilment of the requirements of the L.L.M, University of Cape Town, April 2002) (Available at http://webdav.uct.ac.za/depts/shiplaw/theses/surjan.pdf) (Accessed on 04.10.2013)
