

DOCUMENTS OF TITLE IN CARRIAGE OF GOODS BY SEA UNDER ENGLISH LAW: LEGAL NATURE AND POSSIBLE FUTURE DIRECTIONS¹

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UDK 347.795
Original scientific paper
Received: 7/04/2004
Accepted by publisher: 16/06/2004

Transport documents in carriage of goods by sea may serve as evidence not only of the contract of carriage, but also of the receipt of goods. Some transport documents have also the status of documents of title, which means that they are able to represent the goods and entitle their holders to demand delivery from the carrier. This function of transport documents plays an important role in overseas sales, enabling the seller to sell the goods in transit while the physical delivery is not yet possible. Transport documents acting as documents of title also represent an essential element of letters of credit. The law has defined the characteristics and functions of transport documents, and hence which documents can qualify as documents of title. In principle, a document can be recognized as document of title only by statute or by general custom. Presently, under English law, among transport documents only bills of lading are recognized as documents of title. Other transport documents presently used in sea carriage are of modern invention and no custom of merchants relating to them has been established.

The purpose of this paper is to examine first the notion of a document of title; secondly, the rights which are transferred by the transfer of the bill of lading, as the only transport document with undisputed status as document of title; and thirdly, to investigate the prospect that under English law, in addition to bills of lading, other transport documents can be recognized as documents of title.

Key words: *transport documents, document of title, negotiability, transfer of possession, transfer of property, transfer of contractual rights, bill of lading, straight bill of lading, mate's receipt, received for shipment bill of lading, ship's delivery order, multimodal transport document, sea waybill, electronic bill of lading.*

¹This article is an amended and updated version of the article "Documents of Title in Carriage of Goods By Sea: Present Status and Possible Future Directions", published in the Journal of Business Law (2001) 461, and dedicated to the memory of the late Professor Branko Jakasa of Zagreb University, my former doctoral supervisor.

1. INTRODUCTION

Carriage of goods by sea is carried out on the basis of a contract of carriage between the carrier and the consignor. This contract usually follows the contract of sale and serves to enable delivery of the goods between seller and buyer. A contract of carriage is not necessarily concluded in writing, but normally requires evidence. In practice, a contract of carriage is usually evidenced by a transport document issued after the goods have been delivered by the consignor to the carrier.

Transport documents contain particulars about the parties to the contract of carriage, the goods, and the terms and conditions of carriage. They may serve as evidence not only of the contract of carriage, but also of the receipt of goods. However, the role of transport documents can be more complex than simply acting as evidence. Some transport documents have the function of documents of title, which means that they are able to represent the goods and entitle their holders to demand delivery from the carrier. This function of transport documents plays an important role in overseas sales, enabling the seller to sell the goods in transit while the physical delivery is not yet possible. The document of title ensures the buyer that the goods will be delivered to him once the ship arrives at the port of destination. On the other hand, the document of title enables the seller to retain control over the goods until the buyer pays the price, since the payment is usually effected "against documents". Under letters of credit the banks also accept to pay the price to the seller as beneficiary in exchange for a document of title which serves as a security for debt.

Documents of title are one of the most sophisticated legal inventions. The law has defined their characteristics and functions, and hence which documents can qualify as documents of title. In principle, a document can be recognized as document of title only by statute or by general custom. Presently, under English law, among transport documents only bills of lading are recognized as documents of title.

Bills of lading are ancient mercantile documents and are well established as documents of title both by the statute and by the custom of merchants, while other transport documents are of modern invention and no custom of merchants relating to them has been established. The traders have sought to secure the creation of more documents of title, which shall have the same attributes under law as those possessed by the bill of lading. On the other hand, since the use of documents of title involves various risks of fraud, the legislators are reluctant to allow more documents of title.

The purpose of this paper is to examine first the notion of a document of title; secondly, the rights which are transferred by the transfer of the bill of lading, as the only transport document with undisputed status as document of title; and thirdly, to investigate the prospect that, in addition to bills of lading, other transport documents can be recognized as documents of title.

2. THE NOTION OF A DOCUMENT OF TITLE

The phrase “document of title” is a common term used to denote documents issued by a carrier or by a warehouseman acting as a bailee.² The document of title is a written description, identification or declaration of goods issued by or addressed to a bailee which evidences that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. The main purpose of documents of title is to facilitate transfer of rights in goods while they are in the custody of a carrier or warehouseman. After receiving the goods in his charge, the carrier or warehouseman acting as a bailee must issue a document which serves as a receipt for the goods and enables the person who produces the document to receive the goods. The document of title is transferable, which enables the goods to be disposed of while still in the bailee’s custody. The bailee is obliged to deliver the goods to the lawful holder of the document, whether he be the original holder or a transferee of the document. After delivery is made, the document ceases to be a document of title and it can only serve as evidence in case of dispute between the bailee and the bailor. By returning of document into the hands of the bailee who has issued it the circle is closed and the document has completed its role.

Among different national laws there are differences as regards the features of documents of title and documents which are recognized as documents of title. Under English law, the shipped bill of lading has been recognized as the only document which always has the status of a document of title in sea carriage. Other documents can become documents of title on proof of custom of merchants which must establish that the document is being used as a document of title.³ This means that the document, which is actually used in trade, must be negotiable and it must enable its lawful holder to obtain physical delivery of the goods by producing the document, as well as to dispose of the goods by transferring the document.

In civil law too, there are documents corresponding to documents of title. “*Wertpapiere*” in German law, “*titres*” in French law, “*titoli di credito*” in Italian law, “*yuka shoken*” in Japanese law etc., can be defined as “documents of value” which embody certain rights (e.g. the right to obtain delivery of the goods specified in the document, or the right on payment of a certain sum of money).⁴

² The term “document of title” was first defined by section 1 (4) of the English Factors Act as follows: “The expression ‘document of title’ shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery, the possessor to transfer or receive goods thereby represented”.

³ Todd, P. *Bills of Lading and Bankers’ Documentary Credits*, 3rd ed. (LLP 1998) p.117.

⁴ In case of the terms used to denote bills of lading in French (*titres de creance*) and Italian (*titoli di credito*), the more appropriate translation is “documents of credit” rather than “documents of title”.

They confer upon the holder the right to transfer these rights to third parties by transferring the documents. Under civil law, the bill of lading is considered as a negotiable document, on the same footing as the bill of exchange, provided that it is made out to order.⁵

Bills of lading to order, bearer and to a named person are all considered as bills of lading, all of them are documents of title and require surrender in exchange for the goods. They, however differ in the way and effect of their transfer. With respect to the way of transfer, the bills of lading to order are transferred by indorsement, bills of lading to bearer are transferred by physical delivery, while straight bills of lading are transferred by a written assignment (*cession*) in accordance with civil law rules.⁶

These rules are so cumbersome that straight bills of lading are actually never transferred in practice.⁷

3. BILL OF LADING AS A NEGOTIABLE DOCUMENT OF TITLE

The bill of lading is a typical document of title. Thanks to its character as a document of title, the bill of lading is invested with particular attributes of great practical importance commercially. This enables it to become one of the key instruments in international trade.

The bill of lading is often referred to as a negotiable document of title, and there is some confusion as to whether the bill of lading is really a negotiable or is merely a transferable document. That is especially the case in English law. According to English law, although the bill of lading possesses some of the characteristics of negotiable documents, e.g. transferability by endorsement, it is not a truly negotiable document in the full legal sense.⁸ Bills of lading are not considered negotiable documents,

⁵ R. De Wit, *Multimodal Transport* (LLP 1995) 267.

⁶ G. Ripert, *Droit maritime*, 4th ed. (Paris, 1950) Vol. II No.1862.

⁷ For example, under Article 2022 of the Italian Civil Code, the transfer of negotiable documents issued to a named person is effected by entering the name of the transferee on the document and on the registry of the issuer, or by issuance of a new document registered in the name of the new owner and by notation of such an issuance in the registry. However, since a sea carrier cannot be expected to have his own registry of issued bills of lading, Article 464(3) of the Italian Code of Navigation provides for an exemption of the bills of lading to a named person from the general rules applicable to the transfer of documents of title to a named person, specifying that no annotation of the issuance and transfer of nominative bills of lading is required.

⁸ *Gurney v. Behrend* [1854] 3E. & B. 622, *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429, *Kum v. Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep 439, *The Future Express* [1993] 2 Lloyd's Rep 542; *Benjamin's Sale of Goods*, 6th ed. (Sweet & Maxwell) 2002) para. 18-047, *Carver's Carriage by Sea*, 13th ed. (Sweet & Maxwell 1982) para. 1597, *Scrutton On Charter Parties*, 20th ed. (Sweet & Maxwell 1996) art.94.

even if they are described as negotiable; in fact, what is meant is that they are transferable. The bill of lading does not have the essential characteristic of a negotiable document: the transferee of the bill cannot acquire a better title than that of a predecessor. If a bill of lading is stolen or endorsed without the shipper's authority, a subsequent *bona fide* transferee cannot acquire the rights to the goods represented by the bill. The rule that a *bona fide* holder of a lost or stolen bill of exchange endorsed in blank or payable to bearer is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading. A finder or thief can give no title to bills of lading even in the case of a bill endorsed in blank.

English law is based on the concept that the bill of lading represents the goods and therefore its transfer should not have greater effect than the transfer of what it represents. Since the goods themselves are not negotiable, there is no reason why the bill of lading should be. Possession of a bill of lading cannot have a greater force than the actual possession of the goods.⁹ If a buyer has acquired the bill of lading without having paid the price, and has endorsed the bill of lading to a third party, such third party, even if it has acquired the bill of lading acting in good faith for value, cannot acquire a valid title to the goods.

It is obvious that in English law there is some confusion in the use of the terms "transferable" and "negotiable".¹⁰ The distinction between transferable and negotiable documents is that a document is transferable when it can be transferred by one person to another, passing to the transferee the rights of the original holder but no more, while a negotiable document can give to the transferee rights that are better or greater than the rights of the transferor, provided that consideration is given for the transfer. Therefore, only negotiable documents are an exception to the rule that nobody can transfer to another person more rights than he has ("*nemo plus iuris ad alium transferre potest quam ipse habet*").

The bill of lading therefore lacks the most important and characteristic element of negotiability: it may not give to a transferee a better title than that possessed by the transferor. The question which logically arises is whether this means that the bill of lading is not a negotiable document. This is impossible to answer without an explanation of the character and functions of the bill of lading.

The transferee for value, who takes a negotiable instrument in good faith and without notice of any defect in the title of his transferor, acquires an indefeasible right to the property in the instrument and to the benefits represented thereby. He

⁹ *Gurney v. Behrend* [1854] 3E. & B. 622, *Lickbarrow v. Mason* [1787] 2 T.R. 64.

¹⁰ Goode, R. *Commercial Law*, 2nd Ed. (Penguin Books 1995) p.54 (n.143).

acquires not merely possession but property.¹¹ However, the bill of lading is not a negotiable document of title in the sense that it is able to carry title with it. Unlike a bill of exchange or promissory note, the bill of lading is not a negotiable instrument which is able to pass a good title to a *bona fide* transferee, regardless of the title of the transferor. The sole fact that the bill of lading is issued to the shipper does not enable him to give any title to a transferee. In fact, the shipper can be an agent of the seller or the buyer.

There is one point where it is possible to say that the transferee has even better rights than the transferor: the transferee may have better rights against the carrier than the transferor. The bill of lading in the hands of a transferor is only *prima facie* evidence against the carrier, while against a transferee of the bill the carrier is precluded from denying accuracy of its content.

The better position of the transferee of the bill of lading in respect of the right to delivery of the goods, and stronger evidential value of the bill of lading in his hands, can be explained by the fact that the carrier serves as an intermediary in delivery of the goods between the seller and the buyer. The seller as shipper delivers the goods to the carrier and in exchange, as evidence, he receives the bill of lading from the carrier. By the contract of carriage evidenced by the bill, the carrier undertakes to deliver the goods as described in the bill to the consignee, i.e. to the buyer, to whom the shipper transfers the bill. After the bill has been transferred to the buyer, it represents the contract between the carrier and the buyer as a third party holder of the bill. The buyer as a third party bill holder of the bill has an independent right against the carrier, under the contract of carriage evidenced by the bill of lading, to demand delivery of the goods as described in the bill.

Under American law, on the basis of the provisions of Federal Bills of Lading Act (FBLA) and Uniform Commercial Code (UCC), bills of lading are clearly defined as negotiable documents, with the exclusion of straight bills of lading.¹² The purchaser of a bill of lading acting in good faith will have an indefeasible title to the goods, regardless of whether the bill of lading has been wrongfully transferred. The only situation that might defeat the right of a transferee is where the bill of lading has been wrongfully procured.¹³ Despite the clear intention of this legislation to make bills of lading fully negotiable, some American courts were reluctant to give the statutes this meaning. The reasoning is based on the idea that the bill of lading represents the

¹¹ Negus R.E. "The Negotiability of Bills of Lading" (1921) L.Q.R. 456.

¹² Federal Bills of lading Act 1916 ss.30, 31 and 37; Uniform Commercial Code s.7-104 and 7-502. Under U.C.C. s.7-104 (1) (b), even bills of lading to a named person or assignee are negotiable when recognized in overseas trade.

¹³ UCC sec.7-503. See, Boole, M. *The Bill of Lading* (LLP 1997) p.76.

goods, and possession of the bill of lading cannot have greater force than the actual possession of the goods.¹⁴

In civil law, the bill of lading is a negotiable document, on the same footing as the bill of exchange, provided that it is made out to order.¹⁵ This means that the *nemo dat* principle is not applicable to the transfer of bills of lading. The transferee of a bill of lading acquires all rights as stipulated in the bill, regardless of the rights of his predecessor. The only exception is the bill of lading to a named person, which is a transferable document of title, but is not negotiable. This means that the person named in the bill as consignee has to produce the bill in order to obtain delivery of the goods.

4. THE EFFECT OF THE TRANSFER OF A BILL OF LADING

The bill of lading as a document of title can have several functions:

- a) the bill of lading represents the goods so that possession of a bill of lading is equivalent to possession of the goods;
- b) under certain conditions, the transfer of the bill of lading may have the effect of transferring the property of the goods; and
- c) the lawful holder of a bill of lading is entitled to sue the carrier.

The effect of the transfer of a bill of lading depends on the intention of the parties, and on the applicable law. The only right that is indisputably transferred by the endorsement of a bill of lading is the right to demand and have possession of goods described in it. This right is guaranteed to a legal holder of the bill of lading in all

¹⁴ *Shaw v. Railroad Co.* 101 US 557, 25 L ed 892. In *National Bank of Commerce v. Chicago, B & N Ry. Co.* 44 Minn 224-236, 46 NW 342, 9 LRA 263, 20 Am St Rep 566, it was held that "the statute was not intended to totally change the character of bills of lading, and put them on footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself". See, Bools, M. *The Bill of Lading*, p.64-65.

¹⁵ De Wit, R. *Multimodal Transport*, London 1995, p.267 asserts that, unlike bills of exchange, bills of lading are 'concrete' documents of title. It is admitted that the bill of lading is issued under a contract of carriage, so that it cannot have an abstract character between the carrier and the shipper, as contracting parties. However, after the bill of lading is transferred to a third party, the bill of lading becomes an 'abstract' document of title, independent from the underlying contract of carriage, very much the same as a bill of exchange. The rights and obligations of the transferee are exclusively based on the bill of lading. For example, if the bill of lading states "freight payable at destination", the consignee will have to pay it, but his obligation to pay the freight does not exist if the bill of lading states 'freight prepaid'. It is also admitted that the consignee may not receive the goods as specified in the bill of lading, if they are lost and damaged by a *force majeure* event, and that in this respect the position of a bill of exchange holder is safer. However, the position of payee is not absolutely safe either, e.g. if the payor goes bankrupt.

jurisdictions. However, this is not the case in respect of the transfer of property and the transfer of contractual rights.

Transfer of possession

It is universally accepted that the transfer of a bill of lading operates as a transfer of possession of the goods described in it. By means of a legal fiction, the bill of lading is deemed to represent the goods so that possession of a bill of lading is equivalent to possession of the goods. The bill of lading acts as a symbol of the goods and its transfer represents a symbolic delivery of the goods with the same effect as a physical delivery of the goods. The right of possession naturally incorporates the right to dispose of the possession. Hence the bill of lading enables its holder to dispose of the goods in transit by transferring the bill. The right on delivery of the goods also derives from the possession. Thus, the lawful holder of a bill of lading can use the bill either to dispose of the goods or to obtain delivery of the goods.

The purpose of transferring a bill of lading is not to transfer the title, but the constructive delivery of goods during carriage. The only title that the bill of lading always carries is the right to demand the goods described in it from the carrier and to take those goods into possession. The transfer of the bill of lading constitutes the transfer of what the bill of lading actually represents: this is constructive possession, not the property.¹⁶

The effect of the transfer of a bill of lading is a result of the special character of the object of sale - goods carried by sea - such that it is impossible to make a physical delivery of the goods to the buyer. The delivery has to be carried out through the carrier as an intermediary, who receives the goods from the seller (the shipper) and is bound to deliver it to the buyer (the consignee) in exchange for the bill of lading. In fact, the seller performs the delivery of goods by transferring the bill of lading to the buyer, thereby transferring to the buyer the right to demand the delivery of goods from the carrier at the port of destination.

This right is based on the contract of carriage and not on the contract of sale. To perform his obligations from the contract of sale, the seller enters into the contract of carriage with the carrier and, following the delivery of goods for carriage, receives from him the bill of lading. When the seller transfers the bill of lading to the buyer,

¹⁶ In civil law terminology, the constructive possession is usually called "indirect possession", since in this kind of possession the possessor does not have physical detention, but is in position to exercise control over a thing and has intent to control it. This kind of possession is expressly regulated by several Civil Codes, e.g. section 855 of the German Civil Code and article 2228 of the French Civil Code.

the possession held by the carrier for the account of the seller is transmuted into possession for the account of the buyer. By acquiring the bill of lading, the buyer acquires the right to receive the goods from the carrier, who is bound by the contract of carriage to deliver the goods to the lawful holder of the bill of lading.

In order to understand the role of a bill of lading in a documentary sale it should be noted that the goods carried are movables and that in the case of movables the transfer of possession is of foremost importance in the transfer of property. The transfer of a bill of lading operates as a constructive transfer of possession, which is sufficient in a documentary sale, since the law of movable property is based on reliance upon appearances. The bill of lading as a document of title is perfectly suited for such a role. The bill of lading entitles its lawful holder to obtain physical delivery of the goods at the port of destination and also to dispose of goods which are not in his physical possession merely by transferring the bill of lading.

When the seller delivers the goods to the carrier, he can only have constructive possession of the goods. The seller can retain control over the goods after he has delivered them to the carrier, if the bill of lading is issued on his order, until the buyer pays the price or accepts the bill of exchange. Thus, the seller can be sure that the buyer who refuses to pay, or cannot pay the price, will not get the goods. The buyer cannot receive the goods from the carrier without the bill of lading, and he will not obtain the bill of lading before he pays the price, or accepts the bill of exchange. The seller will lose control over the goods and the right to dispose of the goods at the moment he transfers the bill to the buyer. By acquiring the bill, the buyer acquires the control over the goods and constructive possession. If he wishes so, the buyer may dispose of the goods by transferring the bill to a new buyer.

In law, possession consists of two basic elements: the physical control of the thing (“*corpus*”) and the intention of having control over such a thing as one’s own (“*animus possidendi*”). The first of these elements can be performed through another person and such possession is called constructive possession, i.e. possession where one does not have physical detention but is in a position to exercise control over a thing and has intent to control it.¹⁷

In respect of transfer of constructive possession, the old Roman law principle *traditio longa manu* applies, with some modifications. Under this principle, if the goods to be delivered are not being held by the possessor but are under custody of a third party, their possession can be transferred through an agreement between the transferor and the transferee and the notification concerning intended transfer of pos-

¹⁷ See, Black’s Law Dictionary, 6th. ed., 1990, p.314; see also, German Civil Code article 855 and French Civil Code article 2228. This kind of possession was known in Roman law: “*possessionem adquirimus, animo et corpore; animo utique nostro, corpore nostro vel alieno*”.

session to the custodian. The transfer of bills of lading is effected, however, without involvement of the carrier and the bill of lading represents the goods “against all” (*erga omnes*).¹⁸ The holder of the bill of lading is in the same position as if the goods were in his physical possession and he is entitled, to the exclusion of all others, to receive the goods from the carrier at the port of destination. The holder of the bill has the constructive possession before the ship’s arrival at the port of destination, but he can only obtain the actual possession after the ship’s arrival.¹⁹

Some authors use the term “symbolic possession”.²⁰ The use of this term should be avoided, because in law there is no such thing as symbolic possession. The possession is a real right, while the symbols are an abstraction. It can be said that the bill of lading symbolically represents the goods, but that is something quite different from the assertion that the transfer of a bill of lading operates as the transfer of a symbolic possession. In fact, it is better to say that the bill of lading is a surrogate rather than the symbol of the goods, because it serves as an instrument which enables delivery of the goods when physical delivery is not possible. In such cases the bill of lading serves as a substitute for the goods and its possession equals physical detention of goods. A bill of lading actually controls the possession of the goods, since a carrier will deliver the goods only against production of the bill of lading. The holder of a bill of lading does not have actual possession of the goods, but he has the right to obtain it upon the arrival of the goods at the port of destination and to exercise control over the goods through the carrier until delivery.

The carrier only has physical control over the goods and not possession, since he does not have the intention to have control over the goods as his own. After receiving the goods in his charge, the carrier has the goods in his custody and has a duty to carry and deliver them not to the seller, but to the lawful holder of the bill of lading. The carrier acts as a bailee in exercising control over the goods on behalf of the lawful holder of the bill of lading (*corpore alieno*), without the intention to have something which is not his and without right to dispose of it. The only right the carrier may have against the goods is a lien, in case he is not paid the freight or other charges due under the contract of carriage.

The holder of the bill of lading has constructive possession over the goods, which gives him the right to demand the goods from the carrier at the port of destination, or

¹⁸ De Wit R., *Multimodal Transport*, p.286 (n.302).

¹⁹ *Sanders v. Maclean* [1883] 11 Q.B.D. 327. In this case it was said that the bill of lading “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” (per Bowen L.J.).

²⁰ Bools M., *The Bill of Lading*, pp.180 -184.

to transfer this right to another person by transferring the bill of lading. However, the constructive possession is not a definitive one and it may represent a risk for bill of lading holders. Problems can arise if there are several bill of lading holders, or if the goods are lost or damaged during carriage.

If there are several bill of lading holders demanding delivery of the same goods at the port of destination, all of them cannot be possessors, since there can only be one right of possession on the object which excludes all others. This problem is resolved so that the right to delivery is given to the bill of lading holder who first presents the bill of lading to the carrier. As a general rule the delivery of the goods to a person entitled to them against production of one of the original bills of lading renders the other originals void.

In the case of loss of or damage to the goods, the bill of lading holder is prevented from obtaining actual possession of the goods as described in the bill of lading. Instead, he may sue the carrier for damages, but the eventual compensation may not correspond with the value of the goods, because of the right of the carrier to limit his liability. Indeed, he may even not obtain any compensation at all, if the loss or damage was caused by one of the excepted perils which exempt the carrier from liability.

The contract of sale may also serve as basis for preventing a bill of lading holder from obtaining actual possession of goods. Delivery of goods by a seller to a carrier, consigned for delivery to a buyer, represents a constructive delivery of the goods to the buyer. However, if the buyer fails to pay for the goods, the seller is entitled to regain the possession of the goods, under the condition that the goods are still in transit and have not yet been delivered to the buyer. In common law the seller is guaranteed this right by the right of stoppage in transit, while in civil law the seller may exercise the right of retention, with similar effect as stoppage in transit, both enabling the seller to claim and exercise a lien on the goods.²¹

In documentary credit, the bill of lading serves as collateral security for payment made under credit, acting as a pledge for the goods. The bill of lading will normally be endorsed to the bank but such endorsement will not be intended to transfer the property in the goods to the bank. The pledge effected in this way gives the bank a right to effect the sale of the goods in the case of the pledgor's default, i.e. if the buyer fails to repay its debt to the bank.²²

²¹ Sale of Goods Act sect.44-46, German Civil Code Art. 455, French Civil Code Art. 1613.

²² *Rosenberg v. International Banking Corporation* [1923] 14 Lloyd's Rep. 344.

Transfer of property

As a general rule, property cannot be transferred by the mere transfer of a bill of lading. A bill of lading does not evidence ownership, but only the right to delivery. This follows from the nature of a bill of lading, which is a document issued by the carrier evidencing the receipt of the goods for carriage. The issue of property is outside the scope of contract of carriage. The carrier issuing the bill of lading does not, by doing so, warrant the title of the shipper. The only assertion in the bill of lading is that the shipper has delivered the goods to the carrier, not that the shipper is the owner of the goods. The bill of lading is based on the contract of carriage between the carrier and the shipper and the only right which it gives to its holder is the right to demand the delivery of goods. The shipper can transfer this right to a third person by transferring the bill of lading, and the consignee, as last lawful holder of the bill, will be the person entitled to receive the goods from the carrier.

The property cannot pass merely by the transfer of a bill of lading, otherwise possession of the bill of lading would have more power than possession of the goods. The fact that the transferee is entitled to receive the delivery of goods does not mean that he has title to the goods. The right of transferee to receive the goods, which is what a bill of lading represents, cannot be defeated even if the transferor does not have good title, and the carrier will be discharged by such delivery. In a dispute which is likely to follow such a case, the transferee would have to return the goods, if it is proved that the transferor did not have a good title.

Although the bill of lading is a document resulting from the contract of carriage, it can involve other parties outside this contract. The contract of carriage is often concluded following a contract of sale and the transfer of a bill of lading is then based on the contract of sale. The seller uses the bill of lading as evidence that he delivered the goods for carriage in accordance with the contract of sale, while the buyer uses the bill of lading as evidence of his right to receive the goods. Neither shipper nor consignee are necessarily parties to the contract of sale, and they can simply be agents acting on behalf of the seller and the buyer.

In practice, the transfer of a bill of lading most often has the effect of transferring the property. However, in order to be able to transfer the property certain conditions must be fulfilled. The first is that the transferor has the good title to the goods so that he may lawfully transfer the bill of lading, in accordance with the principle *nemo dat*. If the bill of lading has been acquired by fraud the transferee does not obtain a good title. The transferor is not obliged to prove his title at the moment of transfer of a bill of lading, as it would be contrary to the trade usages. The title is presumed when the transferor has in possession a bill of lading issued on his order. The second condition is that the transferor and the transferee have agreed on transfer of property and the

conditions of this transfer. Strictly speaking, it is the contract of sale which operates the transfer of property, while the transfer of the bill of lading serves only as an instrument to facilitate the transfer of property. If the contract of sale does not exist or cannot be proved, the transfer of a bill of lading will not have any effect on the property rights.

The role of the bill of lading in the transfer of property is not the same under all national laws. The rules regulating the transfer of property are different in various national laws, and the answer to the question of whether property can be transferred by the transfer of a bill of lading depends on the applicable law. There are three main legal systems which treat this problem in different ways: English, French and German. These legal systems have served, more or less, as models for most national laws in the world.

In English law, property in goods is transferred when the parties to the contract intend it to be transferred (Sale of Goods Act section 17).²³ Therefore, property in goods will be transferred by a transfer of a bill of lading if the transfer of the bill of lading has been made by the owner with an intention of passing the property to the transferee.²⁴ It is the intention of the parties, predominantly of the transferor, which controls when and under what conditions the property can pass. If the bill of lading is made out to the name of the buyer, or to the buyer's order, it is almost decisive as to the seller's intention to part with the property. In this case the seller can retain the possession of the bill of lading until payment of the price, and the property in the goods will pass when the bill of lading is made available to the buyer. On the other hand, where the bill of lading is made out to the order of the seller, it is assumed that the seller intends to retain the property until payment of the price. In this case the property will be transferred to the buyer at the moment when the bill of lading is transferred to him by endorsement against payment of the price. If the transferor does not have the intention of transferring the property of the goods, but of some other right, the transfer of a bill of lading will not operate as the transfer of property. Thus the transfer of a bill of lading to an agent with the purpose of enabling him to collect the goods on behalf of the owner of the goods does not pass the property to the agent.

In French law, property in goods passes from the seller to the buyer at the moment when they have agreed about the goods and price (*solo consensu*), even though the

²³ In American law, the rules on transfer of property are very similar. The general rule is that property is transferred when the parties so intend (U.C.C. sec. 2-401 (1)). When there is an explicit agreement "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods" (U.C.C. sec. 2-401 (2)).

²⁴ *Lickbarrow v. Mason* [1787] 2 T.R. 64, *Sanders Brothers v. Maclean & Co.* [1883] 11 QBD 327, *Sewell v. Burdick* [1884] 10 A.C. 74, *The Aliakmon* [1986] A.C. 785.

goods are not delivered nor the price paid (Civil Code article 1583). The transfer of a bill of lading, therefore, operates as a transfer of the possession of the goods, while the property is transferred on the basis of the contract of sale. The seller carries out his contractual duty by transfer of a bill of lading to the buyer, while at the moment of the transfer of a bill of lading the property is already passed to the buyer. The importance of the transfer of a bill of lading lies solely in the fact that it enables the consignee to acquire physical possession of the goods at the port of destination.²⁵

In German law, there are two conditions for the transfer of property: the agreement of the parties and the delivery of the goods (Civil Code article 929). This system is based on Roman law, according to which property could be transferred if two conditions were fulfilled: the legal ground (“*iustus titulus*”) and the method of acquiring the thing (“*modus acquirendi*”). The legal ground is the contract of sale and the way of acquiring is delivery of the goods. Delivery of the goods can be performed symbolically by the transfer of a bill of lading.²⁶ The German Commercial Code in article 650 expressly provides that the delivery of a bill of lading has the same effect as delivery of the goods. This means that the transfer of a bill of lading effects both the transfer of possession and the transfer of property at the same time.

From this review of different legal systems, it can be concluded that under German law the transfer of a bill of lading has the greatest significance for the transfer of property. Under German law the transfer of possession represents a condition of the transfer of property, so that the transfer of the bill of lading performs the transfer of property, provided that there is a contract of sale. Under English law, whether the transfer of a bill of lading will effect the transfer of property depends upon the intention of the parties. Normally their intention will be that the property is transferred at the moment the bill of lading is made available to the buyer or his agent. Under French law the transfer of a bill of lading operates as a symbolic delivery of goods with the same effect as physical delivery, but with no effect on the transfer of property.

²⁵ Lyon-Caen et Renault, *Traite de droit commercial*, 5th ed., Paris 1931, Vol.V, No.713.G. Ripert, *Droit maritime*,

4th ed., Paris 1950, II No.1859. Smeesters-Winkelmolen, *Droit maritime et droit fluvial*, 2th ed., Bruxelles 1929, Vol. I, no.453; it is similar in Italian, Belgian, Portuguese and Russian laws.

²⁶ Schaps-Abracham, *Das deutsche Seerecht*, 4th ed., Berlin 1978, p.794, Wustendorfer, *Studien zur modernen Entwicklung des Seefrachtvertrags*, Dresden 1905, Vol. I, p.322-326. It is also similar in Spanish, Greek, Dutch, Swiss, Japanese, and Yugoslav law.

Transfer of contractual rights

If the goods are lost or damaged during carriage, the holder of the bill of lading might not receive the goods described in his bill of lading despite the fact he paid for them. If the risk for the goods has passed to him at the port of loading, there can be two possible remedies at his disposal to protect his interests. One is to claim compensation from the insurer on the basis of an insurance policy, if the goods were insured. Another is to claim damages against the carrier on the basis of the contract of carriage. Our attention here shall be mainly focused on the remedy based on the contract of carriage.

Under common law, in the past the contracts were not assignable, so that although the transfer of a bill of lading could effect a transfer of property in the goods, it did not transfer the rights and liabilities under the contract of carriage. Consequently, in accordance with the doctrine of privity of contract, the transferee of a bill of lading was not able to sue the carrier on the contract of carriage as he was not a party to it. This problem was partly solved by the Bills of Lading Act 1855. Section 1 sought to deal with this problem by providing that the transfer of a bill of lading has as effect the transfer of the contract of carriage. However, a transferee had a right of action under the bill of lading only if the property in the goods passed to him “upon or by reason of such consignment or endorsement”.²⁷ The linking of transfer of contractual rights under a contract of carriage with the passing of property by the transfer of a bill of lading is contrary to the nature of the contract of carriage. The carrier is liable for performance of the contract of carriage to the person for whose account he performs the carriage, and that is the last lawful holder of the bill of lading, i.e. the consignee.

The right of action against the carrier is connected with the right to delivery of the goods. In case of delay, damage or loss of the goods it is logical that the person who was entitled to receive delivery is entitled to claim damages against the person who has made delivery. The right of consignee, as the lawful holder of a bill of lading, to delivery of the goods includes the right to obtain compensation for damage, because it merely represents the value of the goods that the carrier failed to deliver. The consignee is entitled to claim damages against the carrier if the damage or loss occurred while the goods were in the custody of the carrier, regardless of whether he is the owner of the goods or whether he actually suffered the loss. The consignee’s right of action is based on the contract of carriage and the property in the goods is not relevant for the relationship of carrier and consignee. The property may only be relevant to the

²⁷ In American law, the situation with respect to transfer of contractual rights is different, since the Federal Bills of Lading Act 1916 (Pomerene Act) does not link transfer of contractual rights to the passing of property.

relationship under the contract of sale between the consignee, as a buyer, and the seller.

This linking of contractual rights with the property has given rise to inconvenient and unfair consequences in cases when the property did not pass by consignment or by endorsement of the bill of lading.²⁸ The Carriage of Goods by Sea Act 1924, by which the Bills of Lading Act 1855 was repealed, resolved these problems by abolishing the link between the passing of the property and the passing of rights and liabilities. This is achieved under section 2 (1) by assignment of the right to sue the carrier to the lawful holder of a bill of lading who may enforce the contract of carriage against the carrier irrespective of the passing of title to the goods.

The transfer of a bill of lading has the effect of transferring contractual rights to a transferee, so that he becomes the party to the contract of carriage with the carrier, with the same rights and duties of the transferor as contained in the bill of lading.²⁹ As a result of the transfer of the bill of lading, the transferee “steps into the shoes” of the shipper, i.e. takes the same legal position as the shipper at the moment the bill of lading was issued to him. Actually, while between a carrier and a shipper a bill of lading is only *prima facie* evidence of the terms of the contract of carriage, the transferee as a *bona fide* holder of a bill of lading should be able to rely on the terms of the contract as stated in the bill of lading. This means that the carrier should be precluded from denying the accuracy of statements in the bill of lading, as in the case of description of the goods.

Under civil law, the transfer of a document of title does not only perform the transfer of rights to the goods but also the transfer of contractual rights. The transferee of a bill of lading therefore not only has the right to demand the goods from the carrier but also the right of action against the carrier for breach of contract. This principle is often linked to the concept of contracting for the benefit of a third party, which is well established in all civil law systems. Under this doctrine, the parties to a contract may agree that contractual rights can be transferred to a third party (*stipulatio alteri*). However, this doctrine cannot be applied to the transfer of bills of lading. The transferee of a bill of lading, besides the rights, has also liabilities arising from a bill of lading, e.g. the obligation to pay the freight. This is contrary to the nature of the contract for the benefit of a third party, which can transfer only the rights and not liabilities.³⁰

²⁸ *Brandt v. Liverpool* [1924] 1 K.B. 575, *The Sanix Ace* [1987] 1 Lloyd's Rep 321, *The Aramis* [1989] 1 Lloyd's Rep 213, *The Aliakmon* [1986] 2 W.L.R. 902, *The Captain Gregos (No. 2)* [1990] 1 Lloyd's Rep. 310, *The Delfini* [1990] 1 Lloyd's Rep. 252.

²⁹ *The Heideberg* [1994] 2 Lloyd's Rep 287.

³⁰ De Wit, *Multimodal Transport*, p.245.

In the case of the transfer of a bill of lading, the transferee of the bill does not derive his right from the contract between the shipper and the carrier, but rather from the document itself. The transfer of a bill of lading operates the transfer of contractual rights as evidenced in the bill, which need not be the same as the contract between the carrier and the shipper. Civil law makes a distinction between 'abstract' and 'causal' documents of title, 'abstract' being independent of the underlying contract and the relations between the original parties to the contract, while in the case of 'causal' documents of title the underlying contract may affect the relations of the parties under a document of title. Unlike bills of exchange, which are typical 'abstract' documents, bills of lading are 'causal' documents. A bill of lading is issued under a contract of carriage, so that it cannot have an abstract character between the carrier and the shipper, as contracting parties. However, after the bill of lading is transferred to a third party, the bill of lading becomes an 'abstract' document of title, independent from the underlying contract of carriage, very much the same as a bill of exchange (or negotiable documents in its full sense under common law). So the carrier is not entitled to invoke against the transferee of a bill of lading the terms of contract if they are not contained in the bill. The contractual rights and obligations of the transferee are based on the contents of a bill of lading, regardless of the position of the previous bill of lading holders. For example, if the bill of lading states "freight payable at destination", the consignee will have to pay the freight, while his obligation of payment would not exist if the bill of lading states 'freight prepaid'.

5. OTHER TRANSPORT DOCUMENTS

There are two basic types of transport documents: the bill of lading and the waybill, or the consignment note. Traditionally, the bill of lading is used in carriage of goods by sea, while the waybill is used in other kinds of transport. However, in modern practice the bill of lading or more precisely transport documents with characteristics of a bill of lading (negotiable multimodal transport documents) can also be used in carriage of goods by road, rail and air, while the waybill is used in sea carriage.

The main difference between the bill of lading and the waybill is that the bill of lading is a document of title, while the waybill is not. The bill of lading entitles its lawful holder to claim the goods against the carrier, or to transfer this right to a third person by transferring the bill. By contrast, the waybill does not give its holder any rights toward the carrier, nor can it be negotiated; instead it travels together with the goods and is handed over to the consignee at the place of destination. This difference is the result of the fact that sea carriage takes much longer so that the seller may need to sell the goods in transit, while in land and air carriage the journeys involved are so brief that such a need normally does not exist.

For centuries the only transport document used in the carriage of goods by sea was the bill of lading. However, in modern shipping other transport documents are used as well. So, in addition to bills of lading, the issue of documents of title can be raised in respect of several other documents used in carriage of goods by sea: straight bill of lading, mate's receipt, received for shipment bill of lading, ship's delivery order, multimodal transport document, sea waybill and electronic bill of lading.

Straight bill of lading

The bill of lading made out to a named consignee, so-called "straight bill of lading", is an American invention, at least with respect to its name; the document with such name was first regulated by the Federal Bills of Lading (Pomerene) Act 1916.³¹ With respect to its nature, the straight bill of lading is one of the most misunderstood transport documents in the carriage by sea.³²

The straight bill of lading has some peculiar features which makes the legal status of this document unclear. A straight bill of lading is, in fact, a bill of lading made out to a named person to whom delivery is to be made. This document can be made out to the name of the shipper if he is also the consignee, but in most cases it is made out to the name of the consignee.

While the "order" bill of lading is recognized as a document of title, capable of transferring the constructive possession and giving its holder the right to demand delivery of the goods against the carrier, a straight bill is a non-negotiable document and is not clearly recognized as a document of title. As result, a straight bill cannot be transferred by endorsement, and is not capable of transferring the constructive possession of the goods while in transit.

The status of straight bills lading differs in various jurisdictions, especially with respect to the status of document of title and the obligation of the consignee to produce the straight bill of lading at the port of destination. There are some obvious differences between the civil law and the common law concerning straight bills of lading.³³

The main confusion relates to the issue of whether the delivery can be made only against proper identification of the consignee, or the consignee must also produce the

³¹ The Pomerene Act 1916 was recodified last time in 1994. The format of the Act is expressed as 49 U.S.C.A. & 80102. This Act relates to the carriage by rail, road, air and water.

³² Carver *on Bills of Lading*, paras. 6-007 and 8-001; Tetley, W. *Marine Cargo Claims*, 3d. ed. (Blais Inc. 1988) at pp. 190-191, 950-951, 995-997; *Benjamin's Sale of Goods*, para. 18-124.

³³ It should be noted that article 1 (7) of the Hamburg Rules expressly recognizes that bills of lading to a named person have the same character as the bills to order, or to bearer, with respect the carrier's obligation to deliver the goods against surrender of the document.

straight bill against delivery of the goods? If the consignee proves that he is the person named in the straight bill, why should he also produce the document?

The straight bill of lading, as defined by the Federal Bills of Lading Act (FBLA), has some peculiar features which makes unclear the legal status of this document. The straight bills and sea waybills are treated in the same way; a straight bill falls in the category of not negotiable documents, same as waybills.³⁴ The part on straight bills of lading was substantially revised and simplified in the last version of the Act. Now instead of “order” and “straight” bills of lading, the Act makes a distinction between “negotiable” and “nonnegotiable” bills.³⁵ Negotiable bills are in fact previous order bills of lading, while nonnegotiable documents include previous straight bills of lading as well as sea waybills.

The non-negotiable bill is, in fact, a hybrid document which contains elements of both the waybill and the straight bill of lading. While nonnegotiable bills may be transferred, the U.S.C.A. gives little protection to the transferee. Under sect.80103(b) of the 49 U.S.C.A., the endorsement of a not-negotiable bill “does not give any additional right.” This may be construed in the way that, differently from a negotiable bill, the transferee of a not-negotiable bill does not acquire any rights that would be additional to those of the transferor.³⁶ In other words, the transferee “enters into the shoes” of the transferor and has the same rights against the carrier as the transferor had. This is the effect equivalent to the transfer of straight bills in civil law. The fact that the straight bill of lading is transferable and capable of transferring certain rights to the transferee indicates that it has some features of a document of title. In this respect, the non-negotiable bill differs from the waybill, which has not any features of a document of title, as its transfer does not operate as a transfer of any rights.

With respect to the delivery of the goods, under American law the position is clear: the carrier must deliver the goods to the consignee named in a straight bill.³⁷ The consignee named in the straight bill does not need to present the document to the carrier but only to identify himself, which indicates that the straight bill is not a document of title.³⁸ This is in accordance with the present text of the 49 U.S.C.A. The

³⁴ U.S. Transportation Code (Public Law 103-272: 5 July 1994; Chap. 801).

³⁵ 49 U.S.C.A. sect.80103.

³⁶ This effect of the transfer of nonnegotiable bills under U.S.C.A. is similar to the effect of the transfer of a straight bill of lading by assignment in civil law. Section 7-504 of the U.C.C. states, in Subsection (1), that a “transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which its transferor had or had actual authority to convey.”

³⁷ 49 U.S.C.A. sect. 80110

³⁸ *Chilewich Partners v. MV Aligator Fortune* 853 F Supp 744, 753 (SDNY 1994).

UCC, however, recognizes the possibility that straight bills of lading are negotiable “where recognized in overseas trade.”³⁹

Under English law, one of the problems related to the straight bills is the apparent confusion between straight bills and sea waybills. Before *The Rafaela S* case, an issue that was controversial and confusing was whether straight bills of lading were bill of lading at all and whether they fall in the category of “similar document of title”. Besides, until this case, there was no clear legal authority on whether a straight bill of lading must be surrendered in order to obtain the goods.

Dominant view expressed in the leading textbooks is that a straight bill of lading is not a document of title under common law. It is a not-negotiable document and the carrier is entitled and bound to deliver the goods without production of the bill.⁴⁰

In several cases the English courts held that the carrier was entitled to deliver the goods to the consignee named in a straight bill without production of the bill.⁴¹ This position was put in doubt by a number of cases. In *The Happy Ranger* the English Court of Appeal indicated that a different view on straight bills of lading might be possible, even though the Court took a view that the bills of lading in this case were not straight bills of lading. L.J. Tuckey, who gave the leading judgment, noted that “it would be unwise to assume that the statements in the textbooks are correct.”⁴²

The issue of the nature of straight bills of lading was reopened with several recent decisions related to the dilemma whether this document is a document of title. This issue especially attracted attention of legal scholars and practitioners after *The Rafaela S* case, which again put in the spotlight the legal nature of straight bill of lading.⁴³ The issue in this case was whether a straight bill of lading was a “similar document of title” for the purpose of applicability of the Hague-Visby Rules. The Court held that the straight bill in this case was “similar document of title”, as it had to be produced by the consignee in exchange for the goods. The Court held that a straight bill of lading should be regarded as a bill of lading within the meaning of the Hague Rules and that “the practice was that a straight bill of lading, unlike a mere sea waybill, was

³⁹ Uniform Commercial Code s.7-104(1)(b).

⁴⁰ *Carver* para. 6-007. *Benjamin* para. 18-059. For a contrary view, see, *Schmitthoff's Export Trade* (10th. ed., Sweet & Maxwell 2001) para.15-038.

⁴¹ *International Air & Sea cargo GmbH v. Pakistan National Shipping Co (The Chitral)* [2000] 1 Lloyds' Rep. 529. *East West Corp. v. DKBS 1912 and Utaniko v P&O* [2002] 2 Lloyds' Rep. 182. *The Rafaela S* [2002] 2 Lloyds' rep. 403. This is contrary to an older case: *Evans & Reid v. Cornouaille* [1921] Lloyd LR 76, in which the Court held that the master was not entitled to deliver the goods without a bill of lading even to “the consignees named in the bill of lading.”

⁴² *Parsons Corporation v. C.V. Scheepvaartonderneming (The Happy Ranger)* [2002] EWCA Civ 694.

⁴³ *JT MacWilliam v. Mediterranean Shipping Co. (The Rafaela S)* [2002] 2 Lloyds' rep. 403.

written on the form of an otherwise classic bill and required production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery". The Court held that a named consignee, under a straight bill of lading, was intended to be protected by the Hague-Visby Rules in the same way as a third party indorsee of an order bill of lading. L.J Rix also expressed the view that even if a straight bill of lading did not expressly require presentation for delivery of the goods, in his view, that would have made little difference to the decision in this case.

This decision is a turning point in English law with respect to the status of straight bills of lading. By concluding that the straight bill is a document of title, the Court has finally clarified the position and has taken the view that the carrier must deliver the goods against an original straight bill. The result of this judgment is that the Hague-Visby Rules are made applicable to the straight bills of lading and the production of this document is now clearly established as a requirement for the consignee to obtain delivery of the goods from the carrier. There is no doubt that after *The Rafaela S* case the dominant view in the textbooks will also be reconsidered.

It is interesting to note opposite views in some jurisdictions that are based on common law. For example, the Courts in Hong Kong have taken similar stance to the Chinese Courts.⁴⁴ On the other hand, the Courts in Singapore have taken the opposite view.⁴⁵

Prevailing opinion in civil law countries is that the straight bill of lading is a not negotiable document, but it can be transferred by written assignment. There is also a difference with respect to the effect of the transfer between the bills of lading to order and bearer on one side, and the transfer of straight bills of lading, on the other: The difference is that in the case of bills of lading to a named person, the transferee acquires the same rights the transferor had against the carrier, which derive from the right of the transferor (*ex iure cesso*), and can exist independently from the bill of lading. The assignee acquires the right to notify the carrier of the transfer to him of the bill of lading and thereby to become the party of whatever rights and obligations have existed between the carrier and the assignor before such notification. On the other hand, the carrier will have the right to invoke against the transferee all rights

⁴⁴ *The "Brij"*, Hong Kong Admiralty Court 14 July 2000 [2001] 1 Lloyd's Report 131. In this case, J. Waung found that the carrier was not liable for delivery of the goods without production of a straight bill of lading.

⁴⁵ *APL v. Peer Voss*, October 8, 2002, the Singapore Court of Appeal. [2002] 3 SLR 176 (available at: http://www.onlinedmc.co.uk/apl_v_voss_peer.htm (last visited: March 12, 2004)). The Court held that "although a straight bill could not be indorsed to transfer constructive possession of the cargo, it did not necessarily follow that the straight bill of lading did not impose contractual term obligating the carrier to require its production to obtain delivery. There had to be clear words present to imply that the parties intended the instrument to be treated in all respects as if it were a sea waybill and that its presentation by the named consignee was not necessary. By issuing the instrument as a bill of lading, the parties must have wished to retain all other features of a bill of lading."

and exemptions he had against the transferor (*ex persona cedentis*), even if the bill of lading provides something differently. For example, when the bill of lading states the freight “to be paid”, if this freight is lower than the freight the shipper and the carrier have agreed, the carrier will be entitled to claim against the consignee the freight as agreed with the shipper.

With respect to delivery of the goods, the general rule is that the person named in the bill as consignee cannot obtain delivery of the goods without production of the bill. In this respect, the straight bills are not different from order bills. In fact, these documents serve as an evidence of the right of its holder to delivery, rather than representing a condition for acquiring such a right. The holder of such a bill of lading to named person is entitled to delivery not because he produces the bill of lading to the carrier, but because he is the person named as consignee in the bill. The carrier is usually obliged to require the surrender of such bills as a condition for the delivery of the goods. In some civil law jurisdictions, however, the courts sometimes recognize the right to delivery to the person named in the bill of lading without production of the bill.⁴⁶ Some of civil law jurisdictions have even changed their original position in later cases. For example, Chinese courts initially considered that production of a bill of lading is required in order to receive the goods from the carrier, even in the case of a bill of lading to a named person.⁴⁷ However, later the Beijing Supreme Court has taken a different view founding a carrier not liable for delivery of the goods without production of a straight bill of lading.⁴⁸

Mate's Receipt

A mate's receipt is not a transport document; its main purpose is to serve as evidence about the goods loaded aboard the vessel. After the loading is completed, on

⁴⁶ *Ap. Firenze March 4, 1987*(1988) Dir.Mar. 1141. This decision has been criticized by. P. Manica, “Polizza di carico nominative e riconsegna della merce” (1988) Dir.Mar. 1141 See also, F. Bonelli, “Responsabilita del vettore per riconsegna dell amerce senza restituzione della polizza di carico” (1978) Dir.Mar. 277. In some other cases, the courts in civil law countries held that presentation of a straight bill is not necessary to obtain the goods: *Ap. Firenze July 22, 1987* (1989) Dir.Mar. 171 (applying American law), *Supreme Court (Spain) February 17, 1997* (1999) Dir.Mar. 949. *Trib. Civitavecchi. February 22, 2001* (2002) Dir.Mar. 1002.

⁴⁷ *Yuanchen International Carriage Ltd. V. Hengxing Ltd.,The Shangdong High Court 2002* (cited from <http://www.ccmt.org.cn/>(last visited: March 12, 2004), *Yuehai v. Cangma, the Supreme Court of China* (1996) *Gazette of Supreme Court* (10) (also available at: [http://www.ccmt.org.cn/english/text\\$typical\\$4.htm](http://www.ccmt.org.cn/english/text$typical$4.htm) (last visited: March 12, 2004), *The Eagle Comet*, Guangzhou Maritime Court, no. 66 (1994).

⁴⁸ *The Beijing Supreme Court June 25, 2002. Zim IsraelL Navigation Company Ltd. V. Sun Hing Shipping Co. Ltd.* (available at: <http://www.ccmt.org.cn/english/case/show.php?sId=2324> (last visited: March 12, 2004).

the basis of the mate's receipt and the draft of a bill of lading prepared by the shipper, the ship's agent issues the bill of lading.

Before a bill of lading is issued, the shipper can transfer the mate's receipt to a third party. If the shipper does not return the mate's receipt to the carrier when a bill of lading is issued, it is possible for the shipper to transfer the bill of lading to a third person and to keep the mate's receipt for himself, or to transfer it to a third person. In such a case the carrier can face liability toward both the bill of lading holder and the mate's receipt holder. So, the carrier should issue a bill of lading in exchange for a mate's receipt, so that he is responsible only to the bill of lading holder.

In principle, the mate's receipt does not have the character of a document of title and its transfer does not have the same effect as the transfer of a bill of lading. The mate's receipt is not supposed to perform the function of a document of title, even though it might be considered as document of title by the trade customs.⁴⁹ The mate's receipt has a temporary character and it is presumed that it will be substituted by a bill of lading. The mate's receipt would be able to qualify as a document of title only if the trade customs establish that the mate's receipt is able to act as a document of title in its own right.

Received for Shipment Bill of Lading

The "received for shipment" bill of lading is considered as a document of title in civil law, while in common law its legal status is not quite clear.⁵⁰ The main distinction is that a "received" bill represents the goods as they are received for shipment, while the shipped bill represents the goods as loaded aboard the vessel. It is submitted that this does not prevent the "received" bill from being a document of title.⁵¹

A contrary view is expressed by the learned authors of *Benjamin's Sale of Goods*.⁵² The argument put forward is that it is impossible or extremely difficult to deal with the goods physically, once the goods are loaded, and that it was this difficulty which originally led to the recognition of shipped bills as documents of title, while the same level of impossibility or extreme difficulty does not exist before the goods are loaded, so there was "correspondingly less need to regard documents relating to them as

⁴⁹ *Kum v. Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep 439.

⁵⁰ *The Marlborough Hill v. Cowan & Sons* [1921] 1 A.C. 444, *Diamond Alkali Export Corporation v. Fl. Bourgois* 3 K.B. 443, *Ishag v. Allied Bank International* [1981] 1 Lloyd's Rep 92.

⁵¹ *Todd Bills of Lading and Bankers' Documentary Credits* p.119.

⁵² *Benjamin's Sale of Goods*, para.18-045.

documents of title". Arguably, however, this is not relevant for the status of the "received" bill as a document of title. Actually, the seller's need for disposal of the goods by the transfer of a bill of lading may even be greater in the case of a "received" bill, especially when it is expected that the period between delivery of the goods into the charge of a carrier and their loading will be protracted.

A "received" bill arguably has weaker evidential value as compared to a "shipped" bill, since the goods may be lost or damaged after a "received" bill is issued. Besides, a "received" bill does not contain the date of shipment which is usually required by the contract of sale. This is why a CIF buyer or a bank usually does not accept "received" bills, not because the "received" bill is not a document of title.

There is little doubt that the "received" bill is capable of representing the goods and that its transfer can transfer constructive possession. It is true that the goods may perish after a "received" bill is issued, but even a "shipped" bill does not represent an absolutely secure document, e.g. if a "shipped" bill is wrongfully issued for the goods which have never actually been shipped. If the goods delivered at the port of destination to a consignee do not correspond to the description in the "received" bill, the consignee will be entitled to sue for damages the carrier who issued the bill. Actually, the main risk associated with "received" bills is that under the Hague Rules the carrier may not be liable for any damage which occurs before the goods are loaded.

Ship's Delivery Order

The ship's delivery order has some similarities to bills of lading: it is issued by or on behalf of the carrier and it confers on their holders rights against the carrier which are nearly the same as those of bill of lading holders. The main distinction is that ship's delivery order is not a transport document *stricto sensu*. Ship's delivery orders are issued after the carriage has started or even when it is finished. They do not necessarily contain a duty to carry the goods but only to deliver them. The contract of carriage may provide for issuance of delivery orders, but their legal basis is the contract of sale, not the contract of carriage.

Article 1 (4) of the Carriage of Goods by Sea Act 1992 (COGSA 1992) defines the delivery order as a document which includes "an undertaking by the carrier to the person identified in the document to deliver the goods to which the document relates". The COGSA 1992 obviously fell short of fully recognizing the status of a document of title to the ship's delivery order, since it implies the carrier's liability against the "person identified in the document" and not against the holder of the document.

It is not clear why ship's delivery orders were denied the status of documents of title, since the holders of a delivery order may also have an interest to dispose of the

goods in transit. In order to grant the status of a document of title to the ship's delivery order it would be sufficient to replace the expression "the person identified in the document" by the expression "the lawful holder of the document": This is simpler, more practical, legally feasible and in accordance with other national legislation which regulates delivery orders.⁵³

Multimodal Transport Document

The multimodal transport of goods is transport performed by at least two different modes of transport under one contract of carriage, one transport document and one freight. In order to meet the needs of commercial practice, a new type of party in the carriage of goods was created, called the multimodal transport operator, who undertakes contractual liability for the carriage performed by several carriers and issues the multimodal transport (MT) document which covers the entire carriage.

In practice, different kinds of MT documents with different forms, contents and characteristics are used. Some of those documents expressly state that they are negotiable, which implies that they are documents of title and that those documents are qualified to play a role in international trade similar to that played by the bill of lading. However, there are some doubts as to whether the MT document can have the character of a document of title.

In English law, the objections to the MT document are that it is issued by the freight forwarder and not by the carrier; that it is a received for shipment document; and that it is not issued on shipment in the English sense.⁵⁴ In order to perform the functions of a document of title, the MT documents must overcome the obstacles put on them by law in the form of the above objections. These objections shall be dealt with one by one in order to see whether MT documents can qualify as documents of title.

The first objection is that MT documents are issued by a forwarding agent and not by the sea carrier. This objection does not apply if the freight forwarder acts as a carrier assuming responsibility for the performance of carriage as a carrier. This is

⁵³ In American law, delivery orders are clearly defined as documents of title by U.C.C. section 1-201 (15). Also, Article 466 of the Italian Code of Navigation expressly recognizes delivery orders as documents of title on the same footing with bills of lading. Article 466 (3) states that delivery orders confer on the holders the same rights as bills of lading, such as the right to the delivery of the goods, the possession and the right of disposal of the goods by transfer of the document, while Article 466 (4) provides that "the provisions on the issuance and negotiation of the bill of lading are applicable to the delivery orders."

⁵⁴ *Benjamin's Sale of Goods*, para.21-074.

the case with MT documents based on the UNCTAD/ICC Rules (Article 2.2). The MT operator issuing the MT document acts as a principal and not as an agent. The fact that he is not the sea carrier is not relevant, since he is a new type of carrier responsible for the whole carriage involving different modes of transport, just as the sea carrier is responsible for the sea carriage. There is no reason why a freight forwarder, or other party who undertakes responsibility for performing the multimodal carriage should not be allowed to issue a document evidencing a multimodal transport contract. There is also no reason why such a document could not be issued in a negotiable form. This is supported by UCP Article 30, which provides that banks will accept a transport document issued by a freight forwarder, unless otherwise authorised in the credit, if the freight forwarder issues the document as a carrier or as a MT operator or as their agent acting on their behalf. Article 26(a)(i) provides that the document may be signed by a MT operator or his named agent.

The next objection is that MT documents are “received for shipment” documents, since they are issued before shipment, when the goods are received for carriage by the MT operators at inland terminals. The first thing to note is that English law is not clearly settled on the point whether only shipped bills of lading are documents of title.⁵⁵ Even if this is so, it does not have to disqualify the MT documents as documents of title. There is no reason why the status of documents of title has to be reserved for shipped bills of lading only, or why all documents of title have to be shaped according to the characteristics of bills of lading. The MT document is issued by the person who exercises control over the goods and who undertakes to deliver the goods to the lawful holder of the document upon its production. This should be sufficient to qualify the MT document as a document of title, provided that the obligation of the MT operator to deliver the goods in exchange for a MT document is recognized by the mercantile customs.

The objection that the MT document is not issued on shipment in the English sense is again based on the assumption that only transport documents of sea carriage can be documents of title. This objection is rejected on the basis of the arguments stated above.

One thing which must always be kept in mind when this problem is discussed is that the differences between the bill of lading and the MT document derive from the fact that the bill of lading is issued for sea carriage only, while the MT document is issued for several modes of carriage, usually (but not necessarily) involving sea carriage. There is no reason why the documents of title should exist only in carriage by sea and be restricted only to a shipped bill of lading. There is no doubt that commer-

⁵⁵ See, *supra* note 28.

cial practice needs a MT document which has the characteristics of a document of title, since the multimodal transport normally lasts longer than sea carriage; it should not be forgotten that the length of voyage was the original reason why the bill of lading was given the character of document of title. Of course, there are some conditions to be fulfilled first.

In order to determine whether the MT document is a document of title, the first thing to consider is whether the MT document is regulated by a statute or recognized by the custom of merchants. As already stated, a document can be recognized as document of title in either way. At present, multimodal transport is still not regulated by statute and a universally accepted MT document with clearly defined characteristics does not exist. The MT document is still not regulated by an international convention. The UN Convention on Multimodal Transport adopted in 1980 will most probably never enter into force. The Hague Rules obviously do not apply to MT documents, since their application is restricted to “contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea...”.

On the other hand, MT documents are in practice made acceptable by buyers and banks on the basis of the rules applying to documentary sale (INCOTERMS) and to documentary credit (UCP). INCOTERMS 1980 has introduced new terms adjusted to container transport where the MT documents can be used instead of bills of lading. Even in a traditional CIF sale there is no obstacle for MT documents to be used instead of bills of lading, if the parties so agree, since Rule A.8. only provides for the seller’s obligation to provide the buyer with the “usual transport document for the agreed port of destination”, which does not have to be a shipped bill of lading. The fact that the MT documents can be now considered as “usual” transport documents in container transport is supported by the UCP Rules 1983, which have recognized the use of MT documents. The 1993 Revision has opened even more space for the acceptability of MT documents by banks. Article 26 authorizes the bank to accept the MT document, unless otherwise agreed. If the banks advancing money under documentary credits are ready to accept MT documents, then there is little doubt that such documents are recognized as documents of title by customs of merchants, since the banks would not accept a document which is not capable of being subject of an effective pledge.

Instead of sticking to the shipped bill of lading as a “model” document of title, it is more appropriate to look at the proper meaning of a document of title to see whether the MT document can fit in it. The document of title can be defined as a document issued in the regular course of business by or addressed to a bailee which covers the goods in the bailee’s possession and evidences that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. In order

to acquire the legal status of a document of title a document must be recognized as such by the statute or mercantile custom. Consider, therefore, whether MT documents fulfill all these conditions:

a) The MT document is issued by the MT operator in the regular course of business;

b) The MT operator can be considered as a bailee, since the consignor as bailor entrusts the goods to him under the contract of multimodal transport;

b) The MT operator acknowledges having received the goods in his custody by issuing the MT document, which includes his obligation to deliver the goods to the legal holder of the MT document, on the condition that it is issued in negotiable form;

c) The holder of a MT document has possession and control of the goods and is entitled to dispose of the document and the goods it covers, provided that the MT document is issued in negotiable form. Here the main problem seems to be the fact that the holder of a MT document might not have a direct right to claim the goods from a performing carrier who has the goods in custody. However, this obstacle can be bypassed by his right of claim against the MT operator who is supposed to have a direct right against all performing carriers; and

d) The MT document is still not recognized by any statute as a document of title, but there are strong indications that it is recognized as a document of title by mercantile custom. These indications can be found in the widespread use of MT documents based on the ICC Rules in practice, these documents being accepted by banks in documentary credit under the UCP Rules.

It can be concluded that the MT document faces several problems concerning its status as document of title, but all can be solved. This can be attributed to the efforts made by the ICC, both by creating the rules for MT documents and by adjusting the rules applying to documentary sale (INCOTERMS and UCP). Even though the ICC sponsored rules have the force of contract and not of law, so that they cannot directly bestow the status of document of title to the MT document, they can provide evidence of the existence of a mercantile custom under which the holder of a MT document is entitled to delivery of the goods.⁵⁶

Sea Waybill

In modern sea carriage it often happens that the ship arrives at the port of destination before the bill of lading. This can cause serious problems because of the general rule that the carrier must not deliver the goods in any way other than against presen-

⁵⁶ De Wit R., *Multimodal Transport*, p.319.

tation of an original bill of lading. If this rule is strictly adhered to, that could cause numerous problems for both the carrier and the consignee, as well as for the shipper. One of the ways to avoid those problems is replacing the bill of lading by a sea waybill.

The sea waybill serves as a receipt for goods and as evidence of contract of carriage in much the same way as the bill of lading. The most significant difference between the sea waybill and the bill of lading is that the sea waybill is not, while the bill of lading is, a document of title. The main advantage of sea waybills, as compared to bills of lading, is the fact that the consignee does not need to produce the sea waybill to be able to obtain the goods. Since the sea waybill is not a document of title, delivery is made to a named consignee, regardless of whether he is able to present the sea waybill. He only needs to furnish evidence of his identity, i.e. that he is really the person named in the document. According to the article 7 of the CMI Uniform Rules for Sea Waybills 1990, the carrier will be discharged if he delivers the goods to the consignee upon production of proper identification, and if he proves that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party.

Unlike a bill of lading holder, the holder of a sea waybill derives no rights from the fact that he is holder of the document. The sea waybill is a non-negotiable document which cannot serve to transfer rights to the goods in transit, nor can it pass rights of suit. While a bill of lading is able to circulate as a kind of valuable asset independently from the goods it represents and is supposed to “meet” the goods at the port of destination, where its holder must produce it in order to receive the goods, the sea waybill can travel with the goods and is to be delivered to the consignee together with the goods. The consignee acquires contractual rights against the carrier merely on the basis of the fact that he is identified as consignee in the document. The possession of document may be relevant only to evidence the terms of the contract, but it is irrelevant for acquiring the rights under the contract.

Although the sea waybill is not a document of title, under the sea waybill it is still possible to keep control and dispose of the goods in transit. Under the common law of bailment the shipper may have a right to demand a redelivery of the goods to himself before the goods have reached their contractual destination. When the goods are shipped under an order bill of lading and the holder used the bill to dispose with the goods in transit, this right of the shipper has never been questioned. Otherwise, if the consignor would have such right to redirect the goods, the bill of lading could not perform its role of the “key to the warehouse”.⁵⁷

⁵⁷ That would be contrary to the Section 19 of the Sale of Goods Act 1979, which recognized the right of disposition by the holder of the bill of lading.

With the appearance of sea waybills and other non-negotiable transport documents, the topic of right of control in carriage by sea has become important. This issue has been addressed in the CMI Rules for Sea Waybills, 1990. Rule 6 of the Rules allows the shipper to transfer the right of control to the consignee provided that he does so before receipt of the goods by the carrier and that the exercise of the option is noted on the sea waybill or similar document.

The shipper using a sea waybill retains control over the goods, can reclaim them, convey them to a third party, or stop them in transit. He can dispose of the goods, not by the transfer of a sea waybill, but by giving instructions to the carrier as to the delivery of goods. Article 6 (2) (a) of the CMI Rules provides that the shipper is entitled to change the name of the consignee by notifying the carrier in writing to deliver the goods not to the consignee named in the sea waybill but to another person. The shipper can change the name of the consignee until the moment the consignee claims the goods upon their arrival at the port of destination. In this case the shipper has a duty to indemnify the carrier against any additional expenses caused by the change of consignee. If the shipper has changed the name of the consignee before the original consignee claimed the goods from the carrier, the carrier will be discharged if he delivers to the new consignee. In such a case, the original consignee would not be entitled to demand the goods or damages against the carrier under the contract of carriage; but only, and eventually, against the shipper under the contract of sale.

Article 6 (2) (b) of the CMI Rules provides a mechanism which enables the shipper to transfer the right of control over the goods to the consignee before the goods are delivered to the carrier. This transfer must be noted on the sea waybill, similar to a "no disposal" clause found in waybills used in other modes of transport. In this case the consignee is in the same position as the shipper in respect of the control of goods; he has the right of control over the goods during the voyage, including the right to direct the carrier to deliver the goods to another person.

The right of control over the goods, including the right to change the consignee, gives to the shipper a right similar to one conferred by a bill of lading. In fact, in different ways the bill of lading and the sea waybill achieve similar effect. In the case of a bill of lading, its holder has the right of disposal of the goods and this right is conditioned by the possession of the document. In the case of a sea waybill the person who has control over the goods also has the right of disposal of the goods. Therefore, the content of the right of control in the case of a sea waybill is similar to the constructive possession conferred by the bill of lading: the right of disposal of the goods. The main goal of both these rights is also the same: determining the person who is entitled to obtain delivery of the goods at the port of destination. One important difference is that in the case of a sea waybill it is not possible to transfer the right of disposal during the voyage, because the shipper can transfer the right of control to

the consignee “not later than receipt of the goods by the carrier”. Another difference is that disposal of the goods during carriage in the case of a bill of lading is carried out without notification to the carrier, while in the case of a sea waybill the carrier must be notified in writing regarding the change of the consignee. The fact that the right of disposal can be transferred to the consignee, as envisaged by Article 6 (2) (b) of the CMI Rules, does not mean that the sea waybill is a transferable document. In the case of a sea waybill, the right of disposal is transferred independently from the sea waybill, which cannot be transferred. Also, the right of disposal is limited to the period before the goods are delivered for carriage to the carrier. After the goods are delivered to the carrier it is only possible to change the consignee by giving written order to the carrier.

The right of control can be very important for the shipper, since it enables him as seller to prevent delivery to a buyer who failed to pay the price. In this respect, this right is similar to the stoppage in transit under common law, or to the right of retention in continental law. The consignee is deprived of the right to dispose of the goods, unless this right was transferred to him before the goods are delivered for carriage. This means that the consignee does not have any rights to the goods until he receives them, nor can he resell them during the voyage.

The fact that a sea waybill is neither negotiable nor a document of title represents a handicap which disables the sea waybill from playing a role in documentary sale similar to the one played by the bill of lading. Bearing in mind the nature of the sea waybill and the cases in which it is usually intended to be used, it can be presumed that this document is unlikely to be used in a documentary sale in the way the bill of lading is used. However, in some carriages there is a need for both a non-negotiable document and for the transfer of rights to goods during the carriage. The most typical case is oil carriage. In this kind of carriage there is a need for a non-negotiable document in order to avoid the problems of delivery without presentation of a bill of lading, since this kind of cargo is often resold several times during the carriage which causes the late arrival of the bill of lading in the hands of the consignee. But the very fact that the goods are resold several times during the carriage indicates a need for a negotiable document which gives its holder not only the right to receive the goods, but also to resell them in transit.

As stated above, in carriage under a sea waybill, it is possible to dispose of the goods in transit, and the disposal is performed through orders given to the carrier by the shipper, or consignee. This can be important for the seller in the case when the buyers become insolvent, so that he can order the carrier to change the port of destination. The buyer who pays the price before the goods are delivered to the carrier for carriage is entitled under CMI Rules as consignee to obtain the right of disposal from the seller as the shipper. The problem is that the CMI Rules do not provide for the

possibility of transfer of disposal after the goods are delivered to the carrier and in practice, especially in oil carriage, there is a need for disposal of the goods during the voyage. It is true that during the voyage it is possible to change the consignee, but this right is in the hand of one person: the shipper, or the consignee. Also, when the goods are supposed to be resold several times, then the inability of the sea waybill becomes apparent. That is why the sea waybill is unsuitable where the goods are to be resold during the transit, and in such cases the bill of lading is still the best solution.

The COGSA 1992 expressly acknowledges the right of the shipper to instruct the carrier to deliver the goods to a consignee that is different from one named in the document. In such a case, the original consignee ceases to be entitled to sue under the Act and, instead, under s.2(5)(b), the new consignee will have rights of suit. In case of sea waybills, the shipper is entitled to change the name of the first consignee, to insert the name of the new consignee, and to deliver the bill to the new consignee to enable him to take delivery. When the consignee has already paid for the goods, normally he should have the ownership on the goods and it is logical that the shipper has lost the right to control the goods during their carriage. Under s.2(5)(b), however, the shipper can still have control over the goods, despite transfer of the sea waybill to the consignee.

A dilemma that appears to exist relates to the issue whether the straight bill of lading and the sea waybill belong to the same category of not-negotiable documents? There are some obvious similarities between a straight bill of lading and a sea waybill, such as the obligation of the carrier to deliver the goods to a person named in the document; this carrier's obligation is equally applicable to both straight bills and sea waybills. In many jurisdictions, however, there is an important distinction: in case of straight bill the consignee must produce the document, while no such obligation exists in case of sea waybills.

The main distinction between a bill of lading and a sea waybill is that the bill of lading is document of title, and the consignee must produce it before delivery of the goods. On the other hand, a sea waybill is not a document of title and the consignee can obtain the goods on the basis of its identification, without production of the waybill. In the case of a sea waybill, the right of disposal is transferred independently of a sea waybill, which is a non-negotiable document.

The UNCITRAL Draft Instrument on the Carriage by Sea provides for distinction between "negotiable transport document" (Article 1(1)) and "non-negotiable transport document". The Draft Instrument defines negotiable transport document as "a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable"

or “not negotiable”.⁵⁸ The non-negotiable document is defined simply as “a transport document that does not qualify as a negotiable transport document.”⁵⁹ The not-negotiable documents are not transferable documents and do not have to be produced in the exchange for the goods.

Electronic Bill of Lading

For centuries the bill of lading has been issued on a piece of paper in standard A size format. The end of the “paper” age and the start of a new “paperless” age has been announced by the introduction of computers, which in combination with telecommunication systems has enabled development of a new kind of transmission of business data. This new way of creating and communicating information is something referred to as “electronic commerce”, and “includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form”.⁶⁰

Replacement of paper bills of lading with electronic bills of lading means that a paper bill of lading issued in a well defined standard form containing data on the parties, goods, conditions of carriage etc., signed by or on behalf of the carrier, issued in several originals which are delivered to the hands of shipper, who sends them by mail to the consignee, should be replaced by an electronic bill of lading. An electronic bill of lading does not mean simply that a bill of lading is generated by a computer and contains the same data as a paper bill of lading. An electronic bill of lading means something more: the data inserted in a computer is transmitted electronically using electronic messages, so that an electronic bill of lading is consisted of the series of electronic messages sent and received among a carrier, shipper and consignee. Obviously, an electronic bill of lading cannot be issued in several originals, nor can it be signed in the same sense as a paper bill of lading. However, the important question is: can it perform the same functions as a paper bill of lading?

Electronic messages are aimed at replacing paper documents, but not their functions. An electronic bill of lading is supposed to perform the same functions as its paper equivalent and the only difference should be in the manner of performance. It is well established that the bill of lading serves as: (a) a receipt for the cargo by the carrier, (b) an evidence of the contract of carriage, and (c) a document of title. The

⁵⁸ Article 1 (l).

⁵⁹ Article 1 (m).

⁶⁰ Section 5(1) of the English Carriage of Goods by Sea Act (1992).

functions of receipt and evidence do not represent any particular problem for an electronic bill of lading, since the information about the cargo and the terms and conditions of contract could be transmitted easily through electronic messages, provided the proper security and authentication procedures are applied.

The negotiability of paper documents, typical for documents of title such as bills of lading, represents a serious problem for an electronic bill of lading.⁶¹ Documents of title control the transfer of certain legal rights, such as constructive possession and the right to delivery of goods, which are based on physical possession of an original document. The electronic bill has an important handicap, which puts into doubt its capability of playing the role of a document of title: it is impossible to have it in physical possession. This means that it cannot be produced on delivery, nor endorsed to a new holder. Traditionally, the concept of transferability has been linked to paper documents, since only something tangible can be physically transferred from one party to another. In order to compensate for this handicap, it is necessary to find a way to imitate physical possession of a document, so that the negotiability of documents of title can be simulated.

The law has already made several attempts to create a new legal framework for the use of electronic transport documents. Some of these attempts have been the result of independent efforts of private companies, while some have resulted from the co-operation of various international organisations. The idea of a “bill of lading registry” was first put forward in 1985 by the Chase Manhattan Bank and INTERTANKO which had established Sea Dock Registry Ltd. This attempt only survived for about six months. The idea of the registry was further developed by the CMI Uniform Rules for Electronic Bills of Lading adopted in 1990. It is important to note that the CMI Rules provide that the carrier plays the central role in the transfer of right of control and transfer.⁶² It is also important to mention the UNCITRAL Model Law on Electronic Commerce adopted in 1996 which is aimed at eliminating many of the barriers which have prevented electronic documents from having the same legal effect as paper documents.⁶³

The attempts to create electronic transport documents are aimed at developing methods for cloning transferability of rights and liabilities electronically, with the

⁶¹ Van Der Ziel, *Main Legal Issues Related to the Implementation of Electronic Transport Documentation* European Transport Law (1997) 715; see also an excellent and extensive paper on the topic in the same issue: Chandler, *Maritime Electronic Commerce for the Twenty-First Century* European Transport Law (1997) 655.

⁶² There is some doubt whether the carrier is the appropriate party for the role envisaged by the CMI Rules. The carrier is specialist for transport of goods, not for transmission of information. More importantly, the carrier is not a neutral third party, since he is a party to the contract of carriage and he may have an interest in tampering the data entrusted to him. *

⁶³ *Report of the Working Group on Electronic Commerce, 34th Session, U.N. Doc. A/CN.9/457 (8-19 February 1999)*.

objective of creating electronic documents which will be able to perform all functions of paper documents.⁶⁴ All of these attempts are based on a “registry” system, where the parties agree to use a trusted third party as a registry for electronic messages. The basic concept is that all parties to a transaction should use a registry, which is responsible for the integrity of the messages and the identity of the parties with which it communicates. The registry acts as a depository for documents, while the rights to the goods are transferred by the communicating of authenticated messages between the registry and the parties who have an interest in the goods. The registry is responsible for transfer of title from one party to another, cancelling the first party’s title at the moment the title is transferred to the new holder.

The latest attempt based on the registry system is a project known as “Bolero”, whose name stands for Bill of Lading Electronic Registry Organisation.⁶⁵ The Bolero project has further developed the concept of the CMI Rules, but differently from the CMI Rules it employs a central registry as a trusted third party. The parties which decide to accede to Bolero are bound to accept that their relationship shall be governed by a so-called “Rulebook”, which defines the standardisation of messages, their evidential value and duties of the parties. The Bolero Rulebook is based on traditional concept of paper bills of lading, but it adapts them to the electronic commerce environment.

The Bolero has set up an electronic registry for bills of lading, which will register any change of interest in the goods bailed to the carrier. Bolero bills of lading are created, exchanged and delivered through title registry instructions. The carrier who creates a Bolero bill of lading sends the instructions to the title registry where the shipper is logged as holder of the Bolero bill. If the holder wishes to transfer the constructive possession to the goods to a subsequent holder, he can make this transfer by attornment (section 3.4 of Bolero Rulebook). The holder can attorn his constructive possession by sending to the registry instructions that identify the new holder. Upon receipt of this message, the registry sends a message confirming the new holder.

⁶⁴ Article 7 (d) of the CMI Rules provides that the transfer of an electronic bill “shall have the same effect as the transfer of such rights under a paper bill of lading”. This provision refers to the “right of control and transfer,” but it obviously relates to the negotiability and its effects. Basically same meaning has Article 17 (3) of the UNCITRAL Model which provides that “if a rights is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more messages, provided that a reliable method is used to render such data message or messages unique”.

⁶⁵ Bolero Operations Ltd. is a 50/50 joint venture between the Swift and Through Transport Club. The Bolero project was officially launched on September 27, 1999. More information is available on the Internet at <<http://www.bolerold.com.htm>>

The central registry employs security procedures to ensure that once there is a record of holdership, only the party recorded as holder can give message instructions to effect a transfer of rights in the goods. There can be only one electronic bill of lading in circulation and its holder is basically in the same position as the holder of a paper bill of lading: he can claim delivery of the cargo against the carrier, or dispose with the goods by transferring the title to a new party. The central registry also ensures that the holder can receive a paper bill of lading, if required. When the ship arrives at the port of destination, the registry surrenders the Bolero bill to the carrier, so that cargo can be delivered to the last holder of the bill.

Bolero employs cryptography technology to provide high level of security for all transactions. Thanks to digital signatures, all messages are authenticated, no changes are possible, and all messages are secure from unauthorised access. It is important to note that all these parties can access the Bolero system via the Internet, which makes the use of Bolero system rather inexpensive compared to the services of closed network systems.

From the technical perspective, the registry system can electronically simulate the negotiability of a paper bill of lading. The problem is how to implement this concept in practice and how to give it legal validity.⁶⁶ The common law requires a document of title to be in tangible form and to be signed, so it is highly doubtful that electronic bills of lading can have the status of a document of title. Since electronic bills are of modern invention, and they are still not recognized as documents of title by the merchants custom, the best way they can achieve the status of documents of title is to amend existing legislation which should explicitly provide such recognition.⁶⁷

The essential feature of Bolero is that it is a close system, so its use is restricted only to the members. This leaves open the issue of third parties and possibility of making transactions involving transfer of bills of lading between Bolero members and third parties. In law, the legal title to the goods has effect against the whole world (*erga omnes*). This seems not to be the case with Bolero bills of lading, which may have effect only between the members. While in case of a paper bill of lading the carrier is protected after delivery of the goods to a lawful holder of a bill of lading, the situation may be more complicated in case of a Bolero bill of lading, when in addition to a Bolero lawful holder of a bill, it may appear a holder of a paper bill of lading who acquired the bill independently from Bolero system. Bolero may create a potential of fraud by allowing a dishonest party to transfer the rights to two parties using parallel transfer of a paper and electronic bills of lading.

⁶⁶ It should be noted that in case of electronic bills of lading the use of bills of lading to bearer will not be possible. However, this does not represent a serious problem, since the use of this kind of bills of lading in practice is extremely rare.

⁶⁷ Todd, P. *Bills of Lading and Bankers' Documentary Credits*, p.168

Between the members, the Bolero system should work based on the premise that the parties have agreed to its rules and the liberal character of the English rules on freedom of contract. If the parties have expressly agreed not to challenge legal validity of their transaction based on the fact that it is in electronic form, then such obligation is equally enforceable as any other. So, as between the Bolero members, it may be assumed that the functional equivalent of a paper bill of lading has been created.

The UNCITRAL Draft Instrument on Transport Law represents an important step towards accepting the use of electronic bills of lading.⁶⁸ This is obvious from the terminology used in the Draft. For example, instead of the term “possession” the Draft refers to a holder having ‘access to’ or ‘control of’ the electronic equivalent of a negotiable transport document.⁶⁹ The whole Chapters 2 and 8 are dedicated to electronic communication and electronic transport documents.

The Draft contains separate and parallel rules for both paper and electronic commerce practices. Each rule that is applicable to paper bills of lading has an electronic equivalent applicable to electronic bills of lading. Such approach is understandable, as paper bills of lading will not be replaced by their electronic equivalents overnight, so the transition period of such replacement imposes the need for such parallel rules.

The Draft addresses the issue of consent, which is, at least presently, of crucial importance for determining the legal effect of electronic communications. Article 3 provides that both carrier and shipper must consent to their use. With respect to this consent, it is important to determine whether such consent is presumed unless agreed otherwise, or the consent should be given prior to the transmission. When electronic transactions are performed by the business parties who perform their businesses in electronic way as a routine, such consent should be presumed, unless the contrary can be proven.⁷⁰

⁶⁸ In addition to the UNCITRAL Draft Instrument, the UNCITRAL has also adopted the Model Law on Electronic Commerce, 1996. The Model Law expressly deals with transport documents in article 17, which is aimed at creating functional equivalents to paper transport documents. The most significant part of this article are paragraphs 3 and 4, which deal with negotiability. These provisions are aimed at allowing the transfer of rights electronically, provided it is assured that a particular right can be held by only one person, same as in case of paper documents. These provisions are influenced by article 7 (d) of the CMI Rules on Electronic Bills of Lading, 1990, which relate to the negotiability and its effects. Basically same meaning has Article 17 (3) of the UNCITRAL Model which provides that ‘if a rights is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more messages, provided that a reliable method is used to render such data message or messages unique’.

⁶⁹ Article 1(f).

⁷⁰ P. Jones, *A New Transport Convention: A Framework for E-Commerce?* (2002) *Electronic Communication Law Review* Vol. 9, p.151.

6. CONCLUSION

Documents of title are widely discussed in legal theory, but it seems that there is still some confusion and misunderstanding. Among different national laws there are differences in respect as to what documents have the status of documents of title in carriage of goods by sea, as well as to what rights are transferred by the transfer of a document of title. English law has been more restrictive in both respects than most other national laws. By adopting the Cogsa 1992 a step in good direction has been made. The Cogsa 1992 has solved an important problem related to the transfer of contractual rights to the lawful holder of a bill of lading, which has also contributed to a greater uniformity of maritime law. However, the Cogsa 1992 has failed to address another important problem: the fact that under English law, the shipped bill of lading is the only transport document in sea carriage which is always recognized as a document of title.

The decision of the Court in *The Rafaela S* case exposed some problems in the existing English legislation with respect to the straight bill of lading. Possible solution of these problems lies in amending the legislation in order to reconcile the decision in *The Rafaela S* case with the COGSA 1992. The impression is that COGSA 1992, instead of making clear the distinction between a sea waybill and a straight bill, has blurred this distinction. This is one of main sources of the confusion, as bills of lading and sea waybills are essentially different documents. Looking through the civil law lenses, the definition of a bill of lading in s.1(2) is not only confusing, but it is clearly wrong. This definition excludes from the definition of a bill of lading even the bill of lading to bearer. If this document is not a bill of lading, then in which category of transport documents can be classified? A civil lawyer would certainly have a problem in understanding such definition of bills of lading and the reasons why there should be different rules for different kinds of bills of lading. Even from the perspective of a common law, this definition is not free of conceptual problems, unless the COGSA 1992 has envisaged creation of some new transport documents, or it has made this kind of definition of bills of lading for some particular purpose. The problem of the COGSA 1992 with respect to this particular issue of delivery of the goods is that this Act failed to clarify whether a straight bill of lading should be produced to obtain delivery of the goods. The COGSA 1992 was adopted for a different purpose to solve the problem related to the rights of suit, another serious problem of the English law. The issue of the legal nature of straight bills of lading, whether these documents are documents of title or not, remained unresolved. After reading the text of this Act, one can easily imagine difficulties that the Court faced in *The Rafaela S* case.

Before the law makes a decision whether to recognize as documents of title transport documents other than the shipped bills of lading, several questions should be answered. The first question is: what is the reason of law (*ratio legis*) for restricting the status of document of title to shipped bills of lading? Does it mean that other transport documents do not satisfy requirements for becoming a document of title, or is it because of a fear of the consequences if other transport documents are recognized as documents of title, or is it simply because there is no practical need for granting the status of a document of title to other transport documents?

This paper has hopefully shown that several transport documents can meet the conditions set by law for documents of title. In addition to “received for shipment” bills of lading, it is submitted that the straight bill of lading and the MT document satisfy the requirements for a document of title, while electronic bills of lading will have to first break down certain barriers which are mainly of a psychological nature.

The consequence of expanding the status of documents of title to other transport documents is not as great as it may seem. For example, even if the law clearly recognizes the status of a document of title to the “received for shipment” bills, this will not affect the position of bankers, who do not accept these documents not because they are not sure whether they are documents of title, but because of their weaker evidential value.

The crucial issue is perhaps whether there is a practical need for granting the status of a document of title to other transport documents. The best answer to this question can be found by asking the merchants. In the case of the MT document they are given an option between negotiable and non-negotiable documents. If they chose a negotiable document, it means that they need the MT document to be a document of title. The merchants should not be denied this option and the law should recognize such documents as documents of title if all interested parties agree. The same applies to other transport documents.

There is no reason why a transport document different from a classic bill of lading cannot be recognised as a document of title, if its characteristics satisfy the necessary requirements and it is shown to be necessary in practice. However, a document can constitute a document of title only if by general custom such documents are regarded as equivalent to the goods. It is a well known fact that trade customs take a long time to establish. Therefore, if transport documents other than bills of lading are to be recognized as documents of title, the best way to do so is to amend existing legislation which should explicitly provide such recognition. The arguments put forward in this paper at least raise doubts, if not prove definitively, that the bill of lading should not remain the only document of title among transport documents.

In addition to bills of lading, there are strong indications that the MT document is recognized as a document of title by mercantile custom. The fact that national laws

have not yet recognized the MT document as a document of title can be explained by the fact that the law is often slow to recognize changes in commercial practice. From the perspective of commercial practice, the law is expected to find a solution as to how the MT document can be given the status of a document of title, rather than preventing this from happening.

Another document which is still not recognized as a document of title, but which has the potential to replace all transport documents is the electronic bill of lading. Electronic bills of lading are a modern invention and the fact is that at the moment the law does not recognize an electronic bill of lading as a document of title. If electronic bills of lading are to be recognized as documents of title, the best way to do so is to amend existing statutory rules on documents of title to explicitly provide such recognition. The best way to convince legislators to undertake such action is to prove in practice the capability of electronic bills of lading to perform the function of a document of title.

At the national level, an increasing number of national law-making bodies have been engaged in reviewing national laws to accommodate the needs of electronic commerce. As a result of these efforts, some existing laws have been amended. Most of these changes are aimed at removing legal barriers to electronic commerce such as form requirements for writing and signature and rules of evidence that might exclude computer generated records. In addition, some countries have already adopted acts regulating certain aspects of electronic commerce, e.g. digital signatures, while a number of legislation is in process of enacting.

Sažetak:

VRIJEDNOSNI PAPIRI U PRIJEVOZU ROBE MOREM
PREMA ENGLESKOM PRAVU:
PRAVNA PRIRODA I BUDUĆE SMJERNICE

Prijevozne isprave igraju značajnu ulogu u pomorskom prijevozu i međunarodnoj trgovini. Pored uloge dokaza o teretu primljenom na prijevoz i sadržaju ugovora o prijevozu, zahvaljujući svojstvu vrijednosnog papira, prijevozne isprave igraju važnu ulogu u međunarodnoj trgovini, omogućujući prodaju robe dok se ona nalazi u tranzitu, predstavljajući ujedno jedan od ključnih elemenata dokumentarnog akreditiva.

Sve prijevozne isprave nemaju svojstvo vrijednosnog papira, već to svojstvo imaju samo one prijevozne isprave kojima je to priznato na osnovu zakona ili običaja. Najpoznatija među tim prijevoznim ispravama je svakako teretnica, koja prema engleskom pravu ima jedina jasno priznato svojstvo vrijednosnog papira. S pojavom novih prijevoznih isprava postavilo se pitanje da li tim ispravama treba priznati svojstvo vrijednosnih papira.

U ovom članku se u prvom dijelu obrađuju temeljna načela prijevoznih isprava kao vrijednosnih papira, prava koja se njima mogu prenositi, pri čemu se rasprava fokusira na teretnicu. U drugom dijelu članka analiziraju se potreba i izgledi da se u engleskom pravu svojstvo vrijednosnog papira prizna drugim prijevoznim ispravama.

Ključne riječi: prijevozne isprave, vrijednosni papiri, negocijabilnost, prijenos posjeda, prijenos vlasništva, prijenos prava iz ugovora, teretnica, teretnica na ime, časnička potvrda, teretnica primljeno za ukrcaj, naputnica izdata od prevoznika, isprava mješovitog prijevoza, pomorski tovarni list, elektronska teretnica.