

CHAPTER I

NATURE, VALIDITY AND CONSTRUCTION OF THE CONTRACT

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Article 1—Contracts of Affreightment

WHEN a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by sea, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a contract of affreightment (or a contract for the carriage of goods by sea) and the sum to be paid is usually called freight. 1-001

Depending on the manner in which the ship is employed, the contract of affreightment may be contained in a charterparty¹ or contained in, or evidenced by, a bill of lading.² But the classical division into charterparties and bills of lading is not exhaustive. Contracts of affreightment may be contained in or evidenced by documents which do not strictly fall into either category: e.g. freight contracts,³ mate's receipts,⁴ non-negotiable receipts,⁵ sea waybills,⁶ ship's delivery orders,⁷ and through transportation documents.⁸

¹ See Art. 3.

² See Art. 2.

³ See, e.g. *Associated Portland Cement v Cory* (1915) 31 T.L.R. 442; *Bolckow, Vaughan v Cia Minera* (1917) 86 L.J.K.B. 439; *Pacific Phosphate Co v Empire Transport Co* (1920) 36 T.L.R. 750; *Cork Gas Consumers Co v Whibernon & R. Everett* (1920) 36 T.L.R. 599; *Larrinaga v Soc. Franco-Americaine* (1923) 29 Com.Cas. 1; *Cie Naviera de Navigation SA v Cie d'Armement Maritime SA* [1971] A.C. 572.

⁴ See Art. 104.

⁵ See para 20-107.

⁶ See para 1-008.

⁷ See para 1-009.

⁸ See Arts 194-196.

Article 2—Bills of Lading

1-002 A bill of lading⁹ is a type of transport document that may be issued in respect of the carriage of goods by sea by or on behalf of the owner, or less commonly the charterer, of the carrying ship. Bills of lading are commonly used when a vessel is employed as a general ship, being put up for a particular voyage to carry the goods of any persons. The several legal properties of a bill of lading outlined in this Article reflect the commercial function of the document in relation to the trading of cargoes. Particular issues arise where a bill of lading is issued by a shipowner in favour of a charterer.¹⁰

A bill of lading serves as a receipt for the goods entrusted to the carrier in respect of both the quantity and the condition of the goods received.¹¹ A “shipped” bill records goods that have been loaded on board the carrying vessel. A “received” or “received for shipment” bill records goods received into the carrier’s care and custody before loading. An “on-board notation” may be added to a received bill to record the fact and date of subsequent shipment.

1-003 A bill of lading made out either without naming the consignee but in favour simply of “bearer” or “holder” or in blank (known as a “bearer bill”) or in favour of a named consignee “or order” (known as an “order bill”) is said to be “negotiable”. This denotes that the bill and various rights in respect of the goods covered by the bill are transferable simply by the physical transfer of the bill, accompanied, in the case of an order bill, by endorsement in favour of the new holder or in blank.¹² In contrast, a “straight” bill of lading is made out in favour of a named consignee without contemplation of negotiation. Such a bill is transferable by simple delivery from the shipper to the named consignee, but not otherwise. A standard form bill of lading may be printed in hybrid form, to take effect as a negotiable or straight bill depending upon how it is completed.

1-004 In *Lickbarrow v Mason*,¹³ judicial recognition was granted to the custom and practice of merchants that a shipped, negotiable bill of lading was a “document of title”, so that a transfer of the bill effected a transfer of “property” in the goods covered by the bill. It is, however, clear that the reference to property must be understood as denoting such proprietary or possessory rights as it is intended shall be transferred.¹⁴

1-005 Further, a carrier that issues a bill of lading assumes a fundamental obligation to deliver the goods at destination only against presentation of the bill.¹⁵

⁹ Also once called a *bill of lading*; the first use given in the N.E.D. is in 1599. A bill of lading, like a charter party, used to be by “indenture”. See an example of 1538 (“This bylle indented and made, etc.”) in *Mason v Lickbarrow*, *Pleas of the Admiralty Court* (Selden Society, 1892), Vol. I, p.61.

¹⁰ See Ch.6.

¹¹ See further, Ch.8.

¹² For the inefficacy of endorsement without delivery, see *Mitchell v Ede* (1840) 11 A. & E. 888, 903. For endorsement, see further Art.107. A bill of lading is not, however, a true negotiable instrument in the strict legal sense that applies to bills of exchange: see *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033 at p.1037, per Devlin J. (“in the popular sense a negotiable instrument”).

¹³ (1787) 2 Term Rep. 63.

¹⁴ See further Arts 108–117.

¹⁵ See further Arts 164–166.

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common law, therefore, possession of a bill of lading identifies the beneficiary of the carrier’s duty under the contract of carriage of delivery at destination. However, at common law, transfer of a bill of lading does not carry with it a transfer of the right to enforce the contract of carriage.¹⁶ The remote holder of a bill of lading may be the only party to whom will discharge the carrier’s delivery obligation under the contract of carriage, and may under its contract of sale be at risk in respect of post-loading loss of or damage to the goods, but it will not be entitled to sue for breach of contract in the event that the carrier delivers to another party or fails to exercise due care of the goods in the course of the voyage. This dislocation of contractual risk and enforcement right is today cured by the Carriage of Goods by Sea Act 1992, by virtue of which rights of suit, together in certain circumstances with liabilities, under the contract of carriage pass upon the transfer of a negotiable bill of lading to the new lawful holder of the bill.¹⁷

A bill of lading serves also as evidence of the terms of the contract of affreightment. As between the immediate parties to that contract, namely the carrier and the shipper, the evidence provided by the bill is not conclusive and may be supplemented or even overridden by extraneous evidence.¹⁸ Once the bill has been transferred however, the bill provides conclusive evidence as between the carrier and the new holder as to the terms of the contract of affreightment. In this sense the bill may be said to “contain” the contract.¹⁹

Finally, the Hague-Visby Rules, to which effect is given in English law by the Carriage of Goods by Sea Act 1971, apply as a matter of law to contracts of carriage “covered by a bill of lading or any similar document of title”. That a contract of affreightment contemplates the issuing of a bill of lading serves, therefore, to attract the application of the Hague-Visby Rules.²⁰

Shipping documents other than bills of lading may be used. Sea waybills are generally used for short journeys, where it is not contemplated that the goods will be sold in transit and where time is short to transmit the document to the intended receiver of cargo for presentation to take delivery. A sea waybill functions as a receipt for goods and evidences the terms of the contract of carriage. It is non-negotiable and is not a document of title. It may identify the beneficiary of the carrier’s delivery obligation or may provide for the beneficiary to be nominated by the shipper. Even where the beneficiary is named, the waybill may entitle the shipper to issue fresh delivery instructions to the carrier, nominating a new consignee. In any event, a sea waybill is not a presentation document: it is generally retained by the shipper, and the carrier is entitled to deliver the goods against production of proof of identity as the beneficiary of the delivery obligation as originally nominated in the document or as subsequently nominated

¹⁶ *Thomson v Dominy* (1845) 14 M. & W. 403.

¹⁷ See further Arts 18–20, 23.

¹⁸ See further Arts 45, 47.

¹⁹ *Lochin & Co v Ward* (1888) 20 Q.B.D. 473; see para.2–016.

²⁰ See paras 20–012, 20–031.

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by the shipper in accordance with the terms of the contract as evidenced by the document.²¹

1-009 A further type of shipping document is the ship's delivery order, a document containing an undertaking from the carrier in respect of the delivery of goods. It is generally employed to split bulk cargoes shipped under one bill of lading: the bill of lading will be surrendered in exchange for the issue of a number of ship's delivery orders.²² These may be originally drawn up by the carrier, or by the holder of the bill of lading and addressed to and adopted by the carrier.²³

The provisions of the Carriage of Goods by Sea Act 1992 that transfer to third parties rights of suit (and sometimes liabilities) under the contract of carriage apply not only to bills of lading but also, with slight modifications, to sea waybills and ship's delivery orders.²⁴

1-010 Some awkwardness is occasioned by the "straight" bill of lading. By definition non-negotiable, it is clear that it nevertheless constitutes a bill of lading within the meaning of the Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules. This was so held by the House of Lords in 2005.²⁵ However, the Carriage of Goods by Sea Act 1992 was drafted on the mistaken assumption that a straight bill of lading did not attract the applicability of the Hague-Visby Rules, but rather was to be assimilated to a sea waybill. This both affects the detailed rules relating to the transfer of rights of suit under the 1992 Act and excludes the applicability of a statutory estoppel under the 1992 Act relating to the document's receipt function.²⁶ Otherwise, however, it now appears that a straight bill of lading is to be treated as a bill of lading. In particular, a straight bill of lading would appear to embody status as beneficiary of the carrier's delivery obligation and to operate as a presentation document.²⁷

1-011 The advance of multimodal transportation of goods, fuelled especially by containerisation, has rendered it increasingly common for liner companies and others to issue documents addressing the full transit regardless of the mode of transportation for any given stage of the journey. Such documents are often entitled bills of lading, possibly accompanied by an epithet such as "through", "combined transport", "intermodal" or "multimodal", expressions that are not terms of legal art. Such documents present special problems, and it is doubtful to

²¹ The possibility of issuing fresh delivery instructions in accordance with a liberty contained in the document is reflected in the Carriage of Goods by Sea Act 1992 s.5(3).

²² *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470 at p.493.

²³ *Waren Import Gesellschaft Krohn & Co v Internationale Grannhandel Thegra NV* [1975] 1 Lloyd's Rep. 149 p.155. A more specific definition is employed by the Carriage of Goods by Sea 1992 s.1(4). See para. 1-009.

²⁴ See below.

²⁵ *MacWilliam (J I) Co Ltd v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 A.C. 423.

²⁶ For discussion of transfer of rights of suit under the 1992 Act, see Arts 19, 21; the statutory reinforcement of the receipt function is discussed in Art.72.

²⁷ *Voss v APL Co Pty Ltd* [2002] 2 Lloyd's Rep. 707 (Singapore Court of Appeal); *MacWilliam (J I) Co Ltd v Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556; [2004] Q.B. 702 at [145]; [2005] UKHL 11; [2005] 2 A.C. 423 at [45]-[46], [58]-[64], [78]; *Carewins Development (China) Ltd v Bright Future Shipping Ltd* [2007] HKLRD 396; *Beluga Shipping GmbH v Headway Shipping Ltd* [2008] FCA 1791. For discussion, see Treitel, "The Legal Status of Straight Bills of Lading" (2003) 119 L.Q.R. 608; Bennett, "Straight Bills of Lading" (2005) 121 L.Q.R. 555; Girvin, "Bills of Lading and Straight Bills of Lading: Principles and Practice" (2006) J.B.L. 86. See further paras 2-005-2-006, 2-023.

what extent they share the characteristics of the conventional bill of lading.²⁸ A document is not a bill of lading merely because it is so titled.²⁹

Article 3—Charterparties

1-012 When the shipowner contracts to place at the disposal of another the employment of the whole ship on a given voyage or voyages or for a given period of time, the contract is almost always contained in a document called a charterparty,³⁰ the person entitled to the use of the ship is called the charterer, and the ship is said to be chartered or under charter. There are three main types of charterparty, namely time, voyage and demise charterparties, but a number of variants have been devised.

1-013 Under a time charterparty, the owner retains possession and navigational control of the vessel, provides the master and crew, remains responsible for the vessel's fitness to trade, and continues to pay the vessel's normal running costs. For its part, in return for payment of the agreed hire,³¹ the charterer gains the right to exploit the income-generating capacity of the vessel by directing its use for the period of time fixed in the charter. The charterer will, therefore, enter into contracts for the use of the vessel. The vessel may be sub-chartered to another charterer, or the charterer may contract for the carriage of goods under a contract evidenced by a bill of lading or other carriage document.³² The charterer will have to pay costs associated with such use, such as port charges, fuel costs, and cargo handling expenses. Of the essence of the bargain is the allocation to the charterer of the risk of delay, a fall in freight rates or any other extraneous factors that may prejudice the vessel's earning capacity during the charter period.³³

1-014 Under a voyage charter, the shipowner, who again retains possession and navigational control of the vessel, agrees to carry cargo on one or more specified voyages in return for the payment of freight by the charterer. In contrast with a time charter, there is no transfer to the charterer of the right to exploit the vessel's

²⁸ See Art.94. Cf. "the similar document of title" referred to in Art.1(b) of the Hague-Visby Rules, below, para. 20-032.

²⁹ *Gagniere (A) & Co v Eastern Company of Warehouses etc Ltd* (1921) 7 L.L.R. 188 at p.189; *Carrington Shipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 N.S.W.L.R. 745 at p.753.

³⁰ The term "charterparty" derives from the medieval Latin "carta partita", meaning an instrument written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other (whence the term "indenture") and is now used only for this particular kind of shipping document. The first use given in the N.E.D. is in 1539. The phrase "chartre de freight ou endenture" is used as early as 1375. (Black Book of the Admiralty, *Manuscrits Juridica*, ed. Twiss, 1871, Vol. 1, p.136). See also *Cory (William) & Son v Denmun, Long & Co* (1936) 41 Com.Cas. 224 at pp.236 per Slessor L.J.: "A charterparty is an indenture of covenants and agreements made between merchants and mariners concerning their sea affairs (Termes de la Ley)". It does not follow, however, that historical origins should dictate modern formalities: see para. 1-018.

³¹ Although the term "hire" is used to denote the payment made by a time charterer, a time charter is not a contract for the hire, or lease, of the chartered ship. The time charterer has no possessory interest in the vessel: *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694 (equitable relief from forfeiture unavailable).

³² But note that in such a case, the carrier under such a contract of carriage is usually the owner, rather than the charterer: see Art.55.

³³ *Arnold Klaveness AS v Arni Maritime Corp (The Gregos)* [1994] 1 W.L.R. 1465 at pp.1468-9; *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 A.C. 638 at pp.641, 652. This is subject to contractual stipulation in the form of "off-hire clauses" (see Art.190) and the doctrine of frustration (see Art.16).

earning capacity and no concomitant transfer of risk.³⁴ However, the risk of damage in loading and unloading cargo at the contractual ports will be addressed by the contractual scheme of “laytime” (period of time allowed for loading and unloading included within the agreed freight) and “demurrage” (liquidated damages payable for delay beyond the agreed laytime).

1-015 A charter by demise is different. Also known as a “bareboat charter”, a charter by demise involves a transfer of possession of the vessel from owner to charterer. It is a contract of hire of the vessel. The owner supplies the vessel, while the charterer pays hire for the vessel, supplies its own crew and takes responsibility for all charges and expenses.³⁵ If the demise charterer then contracts with a third party for the carriage of goods, the owner will have no responsibility under the contract: as against that third party, the demise charterer is effectively in the position of a shipowner.³⁶ Demise charters are used particularly: (1) by governments requiring vessels, notably in time of war, (2) by shipowners who need to supplement an existing fleet and who want total control over the vessel subject to any limitations in the charterparty, but wish to avoid the commitments of ownership, or (3) as an instrument of ship finance with the charterer having full rights over the vessel subject only to ownership that remains in the owner or lessor by way of security while the charterer acquires the vessel by instalment payment.

1-016 In addition to the traditional three forms of charterparty, however, various others have been devised. A “slot charterparty” (or “space charter agreement”) is an agreement to make available part of a vessel’s cargo-carrying capacity. While the slot charterer runs the risk of not being able to exploit that chartered space profitably, it does not enjoy a time charterer’s right of control over the employment of the vessel.³⁷ A “trip time charter” is a charter of a vessel for a specific voyage but on time charter terms.³⁸ Consequently, instead of paying a fixed sum of freight for the voyage, the charterer pays hire for whatever the duration of the voyage happens to be. This basis for payment avoids disputes about laytime and demurrage and transfers the risk of delay (short of frustration) to the charterer.

Article 4—Formation of the Contract

1-017 The formation of a contract of affreightment is governed by the normal principles of general contract law. As a matter of legal principle no formalities are required, but an issue may arise as to the significance of a formal documentary record of

³⁴ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 A.C. 638 at p.638.

³⁵ *The Guiseppe di Vittorio* [1998] 1 Lloyd’s Rep. 136 at p.156.

³⁶ *Baumwoll Manufactur von Scheibler v Christopher Furness* [1893] A.C. 8 at p.17. See further para. 4-002, n. 42.

³⁷ *Meivale Ltd v Monsanto International Sarl (The MSC Napoli)* [2008] EWHC 3002 (Admlty); [2009] 1 Lloyd’s Rep. 246 at [11].

³⁸ For an unsuccessful attempt to argue that a charterparty in trip time charter form defined the charter narrowly as to import voyage charter principles on frustration by impossibility of performance, see *General Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm).

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the transaction. With respect to bills of lading, it is clear that the contract is routinely concluded before the issue of the bill by the advance booking of shipping space.³⁹ The bill of lading, when subsequently issued on receipt for shipment of the goods or on their shipment, provides, therefore, evidence of that pre-existing contract. It may be, however, that the contract of carriage is not concluded until the actual delivery of the goods to the carrier and their acceptance as evidenced by the bill.⁴⁰ Specific problems arise where a bill is issued in respect of non-existent goods.⁴¹

With respect to charterparties, formerly it was the practice to conclude the contract (generally known as a “fixture” and routinely concluded through chartering brokers) by deed,⁴² but no longer. Indeed, no legal principle precludes the conclusion of a charterparty by word of mouth,⁴³ although almost invariably the intention of the parties is to reduce the agreement to writing. Whether a binding charterparty contract has been concluded depends, first, upon whether the parties have reached agreement in accordance with the normal principles of contract law,⁴⁴ and, secondly, if prima facie they have reached agreement, whether they have nevertheless manifested an intention to postpone the moment of conclusion of a legally binding contract until a later point, typically either or both of the reaching of agreement upon further terms⁴⁵ or the acceptance by signature or otherwise of a formal written agreement.⁴⁶

1-018

³⁹ *The Ardemes* [1951] 1 K.B. 55; *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 Q.B. 402 at p.419.

⁴⁰ *Bushell v Continental Express Ltd* [1950] 1 All E.R. 1033.

⁴¹ See paras 4-004–8–015, 8–023.

⁴² “A charterparty is usually under seal”: *Chitty on Pleading* 1816, Vol. III, p.93. Still earlier, “Charterparties . . . are made before Notaries or Scrivenors”: Malynes, *Lex Mercatoria* (1686), p.99. As late as 1830 a report says that it was arranged “that the defendant’s attorney should prepare a charterparty”: *Read v Rann* (1830) 10 B. & C. 438.

⁴³ *Lidger v Williams* (1854) 14 L.J.Eq. 459 at p.466; *The Guiseppe di Vittorio* [1998] 1 Lloyd’s Rep. 136 at pp.138–9; *TTMI Sarl v Statoil ASA* [2011] EWHC 1150 (Comm) at [27]. Suggestions to the contrary (*Adamson v Newcastle Steamship Freight Insurance Association* (1879) 4 Q.B.D. 462 at pp.467–8; *Cory (William) & Son v Donnan, Long & Co* (1936) 41 Com.Cas. 224 at pp.235–6, 239) reflect the origins and history of the transaction rather than modern commercial contract law.

⁴⁴ In general, a series of communications will eventually result, in an application of the normal principles regarding offer and acceptance, in a binding agreement: *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2011] EWHC 56 (Comm) at [50]–[51], [63]. For an example of absence of agreement, see *Scancarriers A/S v Aotearoa International Ltd (The Barranduna)* [1985] 2 Lloyd’s Rep. 419 (PC) (telex quoting freight rate until a specified date but without specifying cargo quantity or number and dates of shipments could not constitute an offer capable of acceptance). Cf *Grace Shipping Inc v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd’s Rep. 307 (PC) (nomination of vessel to perform first voyage under the charter did not constitute a condition precedent to a binding contract). In *TTMI Sarl v Statoil ASA* [2011] EWHC 1150 (Comm), erroneous identification of the disponent owner precluded a recapitulation email from constituting a binding contract on the ground of mistake as to identity (although on the facts a contract was created by subsequent performance of the charter). *Aliter* where the evidence establishes an intention to contract with whoever is the disponent owner: *Rhodian River Shipping Co SA v Halla Maritime Corp (The Rhodian River and Rhodian Sailor)* [1984] 1 Lloyd’s Rep. 373; *Front Carriers Ltd v Atlantic and Orient Shipping Corp (The Double Happiness)* [2007] EWHC 421 (Comm); [2007] 2 Lloyd’s Rep. 131.

⁴⁵ *Hossey v Home-Payne* (1879) 4 App Cas 311 at p.320; *Hofflinghouse & Co Ltd v C-Trade SA (The Intra Transporter)* [1985] 2 Lloyd’s Rep. 158; affirmed [1986] 2 Lloyd’s Rep. 132.

⁴⁶ *Van Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284 at p.288; *Sociedade Portuguesa de Navios Tanques Lisnava v Hvalfangerselskapet Polaris A/S* [1952] 1 Lloyd’s Rep. 71; affirmed [1952] 1 Lloyd’s Rep. 407; *Zoran S.S. Co Ltd v Frames Tours Ltd* [1955] 2 Lloyd’s Rep. 278; *Okura & Co Ltd v Navara Shipping Corp SA* [1982] 2 Lloyd’s Rep. 537; *Atlantic Marine Transport Corp v Coscol Petroleum Corp (The Pina)* [1992] 2 Lloyd’s Rep. 103. See also *Oceanografia SA de CV v DSN Subsea AS (The Bonica)* [2006] EWHC 1360 (Comm); [2007] 1 All E.R. (Comm) 28 at [78]–[82]: no contract where charterparty “subject to the signing of mutually agreeable contract terms and conditions”.

THE BILL OF LADING AS A DOCUMENT OF TITLE

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Article 107—Indorsement of the Bill of Lading

10-001 Goods shipped under a bill of lading may be made deliverable to a named person, or to a name left blank, or "to bearer", and in the first two cases may or may not be made deliverable to "order or assigns".

Bills of lading making goods deliverable "to order" or "to order or assigns" are by mercantile custom negotiable¹ instruments, the indorsement and delivery of which may affect the property in the goods shipped.² Bills of lading which are not negotiable instruments are sometimes known as "straight bills".³ Although not negotiable, a "straight" bill of lading is a "bill of lading or other similar document of title" within s.1(4) of the Carriage of Goods by Sea Act 1924,⁴ but not a bill of lading for the purposes of the Carriage of Goods by Sea Act 1924 by virtue of s.1(2)(a) of that Act. However a straight bill is a document of title at common law so far as the designated consignee of the goods is concerned.

¹ See Note 1, para.10-003.

² Custom of merchants, as found in the special verdict in *Lickbarrow v Mason* (1794) 5 T.R. 683, discussed by Lords Selborne and Blackburn in *Sewell v Burdick* (1884) 10 App.Cas. 74; and in *Blackburn on Sale*, 3rd edn, pp.343-347. As to whether through bills of lading, combined transport bills of lading or "received for shipment" bills of lading are negotiable instruments, see Art.196, below.

³ The issue of whether a bill of lading is a "straight" or "order" bill of lading can involve fine issues of construction, particularly where (as is often the case) the standard terms on the reverse of the bill of lading have been prepared to allow for the fact that the bill may take either form. For cases on this issue see *International Air and Sea Cargo GmbH v Chitral (Owners) (The Chitral)* [2000] 1 Lloyd's Rep. 529 (held to be a "straight" bill) and *Parsons Corp v C.V. Scheepvaartonderneming (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357; [2002] EWCA Civ 694 (held to be an "order" bill). On the characteristics of "straight" bills of lading see further *International Air and Sea Cargo GmbH v Apl Co Pte Ltd* [2002] 2 Lloyd's Rep. 707 (Sing.) For the power of parties to a straight bill to agree to amend the contract of carriage evidenced by the bill of lading and replace it with a new bill see *AP Moller-Maersk v Sonae Villas Cen Sad Fadoul and others* [2010] EWHC 355 (Comm); [2011] 1 Lloyd's Rep. 1, at [14].

⁴ *J.I. Macwilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 1 Lloyd's Rep. 347; [2005] UKHL 11. See generally Professor Sir Guenter Treitel, Q.C., F.B.A. "The Legal Status of Straight Bills of Lading" (2003) 119 L.Q.R. 608 (which explains the origin of the term "straight bill").

⁵ So far as the designated consignee is concerned, a straight bill identifies the person to whom delivery has to be made in fulfilment of the contract of carriage, and its production is the means by which the identity of that person is proved to the carrier. For this reason, it embodies constructive possession of the goods. See generally, Howard Bennett, "Straight Bills of Lading" (2005) 121 L.Q.R. 555 and Girvin, "Bills of Lading and Straight Bills of Lading: Principles and Practice" (2006) J.B.L. 86. See further para.1-010 and fn.27 thereto above. The contrary view was expressed at p.170 of the 21st edition of the work.

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Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an "indorsement in blank", or by his writing "Deliver to I [or order], F", which is called an "indorsement in full".

The shipper may, if he has retained the right of disposal of the goods, delete the name of the consignee and either leave the bill deliverable to a name left blank or insert the name of another consignee.⁷

So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be redelivered without any indorsement to the original holder, so as to affect the property in the goods.⁸

But the holder of the bill may at any time fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading.⁹ Thereafter, transfer of the bill will require special indorsement, unless the bill is subsequently indorsed in blank by a lawful holder.¹⁰

Example. A bill of lading which does not contain some such words as "to order" or "to order or assigns", or which is indorsed in full but without such words,¹¹ is not a negotiable instrument.¹²

Note 1. "Negotiable" as a term of art describes an instrument which can give to a transferee a better title than that possessed by the transferor. A bill of lading is not "negotiable" in this sense: the indorsee does not get a better title than his assignor.¹³ Indeed a bill of lading is "negotiable" only in a popular, and not in a technical, sense.¹⁴

⁷ This passage was cited with approval in *Keppel Tatlee Bank Ltd v Bandung Shipping Pte. Ltd* [2003] 1 Lloyd's Rep. 619 (Sing.).

⁸ *Ishag v Allied Bank International* [1981] 1 Lloyd's Rep. 92, 98-99; *Elder Dempster Lines v Ishag* [1983] 2 Lloyd's Rep. 548.

⁹ See Lord Selbourne in *Sewell v Burdick* (1884) 10 App.Cas. 74 at p.83. The inference that an assignment of property is contemplated will be weaker from an indorsement in blank than from one in full.

¹⁰ See fn.2, above.

¹¹ *Keppel Tatlee Bank Ltd v Bandung Shipping Pte. Ltd* [2003] 1 Lloyd's Rep. 619 (Sing.): a case in which bills indorsed in blank were transferred to K, who specially indorsed them in favour of S. S returned the bills to K, but without any special or blank indorsement. It was held that K did not become the lawful holder of the bills: the effect of K's prior special indorsement was that the bills ceased to be bearer bills, and there had been no subsequent special or blank indorsement which made K once more the lawful holder by virtue of the subsequent transfer from S. See also *East West Corp v DKBS 1912* [2003] 1 Lloyd's Rep. 239, [2003] Q.B. 1509; [2003] EWCA Civ 174.

¹² i.e. "deliver to A".

¹³ *Anderson v Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253 at p.260; see also *Soproma v Marine & Commercial By-Products Corp* [1966] 1 Lloyd's Rep. 367 at pp.373, 390; *International Air and Sea Cargo GmbH v Chitral (owners) (The Chitral)* [2000] 1 Lloyd's Rep. 529; *Melissa (HK) Ltd v P&O Nedlloyd (HK) Ltd* [1999] 1 H.K.L.R.D. 674 (Hong Kong); *The Brij* [2001] 1 Lloyd's Rep. 431; *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* [2006] 4 H.K.L.R.D. 131 (Hong Kong).

¹⁴ See *Lord Campbell, Gurney v Behrend* (1854) 3 E. & B. 622 at pp.633, 634. One case in which the indorsee gets a better title than the indorser has (whether it can be called "a better title" is a nice question) is in the case where a previous vendor's right of stoppage in transitu, valid against the indorser, is not available against the indorsee. Hence the phrase of that most learned judge, Sir James Shaw Willes, that negotiable instruments "includes bills of lading as against stoppage in transitu only" (*Fuentes v Montis* (1868) L.R. 3 C.P. 268 at p.276). Secondly, the indorsee of the bill of lading may get more favourable contractual rights than were possessed by the indorser, as in *Leduc v Ward* (1888) 20 Q.B.D. 475; *Hain S.S. Co v Tate & Lyle* (1936) 41 Com.Cas. 350; see also para.2-016, above. And thirdly, the assignor who has a defeasible title (e.g. one liable to be put aside on the ground of his fraud) may validly pass the property to an assignee, as in *Peuse v Gloahec* (1866) L.R. 1 P.C. 219. See also an article by R. E. Negus in 37 L.Q.R. 442.

¹⁵ *Keppel v Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 at p.446, per Lord Devlin (P.C.).

For it is "negotiable" to the same extent as a cheque marked "not negotiable", i.e. it is "transferable".¹⁵ The special verdict in *Lickbarrow v Mason*¹⁶ uses the words "negotiable and transferable".¹⁷

- 10-004 Note 2. As the Schedule to the Carriage of Goods by Sea Act 1971 is couched in popular language, Art.VI therein makes provision for a "non-negotiable document", which is not to be a bill of lading. "Non-negotiable" here probably means not transferable. See notes to Art.VI at paras 20-105 to 20-108, below.

Article 108—Effects of Indorsement

- 10-005 The indorsement and delivery of a bill of lading by the person entitled to hold it have effects depending partly on custom and partly on statute.

A. By mercantile custom¹⁸ such an indorsement and delivery of a bill of lading made after shipment of the goods and before complete delivery¹⁹ of their possession has been made to the person having a right under the bill of lading to claim them (exhaustion),²⁰ transfers such property²¹ as it was the intention of the parties to the indorsement to transfer.²²

B. By the Carriage of Goods by Sea Act 1992,²³ the lawful holder of a bill of lading has transferred to him all the rights and may become subject to liabilities under the contract evidenced in the bill of lading.²⁴

C. By the Carriage of Goods by Sea Act 1971, the indorsement to a third party of a bill of lading issued to a charterer may create a contract in different terms from the charterparty, even though the bill of lading expressly incorporates the charterparty.²⁵

Article 109—Effects on Property of Indorsement by Mercantile Custom

- 10-006 The presumed intention of the parties in indorsing a bill of lading may vary widely according to the circumstances.

¹⁵ But see *Hibernian Bank v Gysin and Hanson* [1939] 1 K.B. 483.

¹⁶ See fn.2, above.

¹⁷ This note was cited with approval in *J.I. Macwilliam Co Inc v Mediterranean Shipping Co SA (The Rafiki)* [2003] 2 Lloyd's Rep. 113; [2002] EWCA Civ 556.

¹⁸ As stated in the special verdict in *Lickbarrow v Mason* (1794) 5 T.R. 683. See fn.2, above.

¹⁹ i.e. complete physical surrender of the goods: *Barclays Bank v Customs & Excise Commissioners* [1985] 1 Lloyd's Rep. 81.

²⁰ *Barber v Meyerstein* (1870) L.R. 4 H.L. 317; *Barclays Bank v Customs & Excise Commissioners*, above (the bills of lading before delivery of the goods); *The Delfini* [1988] 2 Lloyd's Rep. 599, 609 on appeal [1989] 1 Lloyd's Rep. 252. Cf. *The Future Express* [1992] 2 Lloyd's Rep. 79; [1993] 2 Lloyd's Rep. 542. For a review of the authorities concerning the "exhaustion" of a bill of lading as a document of title, see, in particular, the judgment of Judge Diamond Q.C. at [1992] 2 Lloyd's Rep. 79, 96-100 doubting that a bill can become exhausted other than by delivery against one of the original bills. Wrongful delivery of the goods, apart from the bill of lading, does not render the bill ineffective as a symbol of property; and its indorsement, even after such wrongful delivery, may still pass the property: *Short v Simpson* (1866) L.R. 1 C.P. 248.

²¹ Strictly speaking, the property is transferred, not by the indorsement, but by the contract under which the indorsement is made: see per Lord Bramwell (1884) 10 App.Cas. 74 at p.105.

²² *Sewell v Burdick* (1884) 10 App.Cas. 74. The bill does not amount to an attornment by the shipowner, inasmuch as to any consignee or indorsee, regardless of whether the parties intended the property to pass: *The Future Express*, above.

²³ Below, App.1-01—App.1-06.

²⁴ Art.23.

²⁵ See Note to Art.I(b) and Art.III, r.3(4) at paras 20-034—20-036 and para.20-055, below.

It may be an intention:

- (1) To transfer absolutely the property in the goods,²⁶ subject only, if the price be unpaid, to the right of the unpaid vendor²⁷ to stop the goods in their transit to the vendee as a means of reasserting his lien on the goods for the price unpaid, known as the right of stoppage *in transitu*.²⁸
- (2) To pass the property on certain conditions, as on the acceptance of bills of exchange for the price.²⁹
- (3) To effect a mortgage of the goods as security for an advance.³⁰
- (4) To effect a pledge of the goods for the same purpose.³¹
- (5) To pass no property at all in the goods.³²

Note. The decision in *Sewell v Burdick*³³ made it clear that the effect of the indorsement of a bill of lading depends entirely on the particular circumstances of each indorsement and that there is no general rule that indorsement passes the whole legal property in the goods, as had been strongly contended by Brett M.R. in the court below,³⁴ and in *Glyn, Mills & Co v East and West India Docks*.³⁵ In the light of this decision, the special verdict in *Lickbarrow v Mason*³⁶ which recites that "the property is transferred by indorsement", must be read "the property which it was the intention to transfer is transferred"³⁷; and see obiter dicta on the subject, such as the statement of Lord Hatherley in *Barber v Meyerstein*,³⁸ that, when goods are at sea, assigning the bill of lading is parting with the "whole and complete ownership of the goods", and of Lord Westbury in the same case, that the transfer of the bill of lading for value "passes the absolute property in the goods", must be taken as overruled, or strictly limited to the circumstances of the particular case.³⁹

10-007

Article 110—Intention to Transfer the Whole Property by Indorsement of the Bill of Lading

Property in goods at sea may be completely passed by indorsement and delivery of the bill of lading under which the goods are shipped in exchange for payment of the price.

10-008

Note 1. The question of the passing of property in goods shipped is not of great importance to the shipowner, as he is safe in delivering to the holder of the first bill of

10-009

²⁶ See Art.110.

²⁷ See Art.111.

²⁸ See Art.114.

²⁹ See Arts 112, 115.

³⁰ See Art.115.

³¹ See Art.116.

³² See Art.117.

³³ (1884) 10 App.Cas. 74.

³⁴ (1884) 13 Q.B.D. 159 at p.167.

³⁵ (1882) 6 Q.B.D. 475 at p.480.

³⁶ (1794) 5 T.R. 683.

³⁷ As suggested by Lord Selborne (1884) 10 App.Cas. 74 at p.80.

³⁸ (1870) L.R. 4 H.L. 325 at p.335.

³⁹ See (1884) 10 App.Cas. 74 at pp.81, 104.

lading duly presented, if he has no notice or knowledge of other claims,⁴⁰ while if he has such knowledge, though probably in strict law he must either deliver at his peril to the rightful claimant or interplead,⁴¹ yet in practice he can almost always obtain in exchange for delivery of the goods an indemnity against legal proceedings, which will render him virtually safe.⁴²

10-010 Note 2. The property in goods shipped under a bill of lading may be passed without indorsement of such bill,⁴³ and it would seem that subsequent indorsement of the bill of lading to a different person will have no effect in passing the property, unless the circumstances of the case warrant the application of the Factors Act. The ordinary operation of the law as to the sale of goods which transfers the property in them is not affected by the existence of a bill of lading relating to those goods, by the indorsement of which, as one of the methods recognised by that law, the property may be passed.⁴⁴ And, in truth, "property does not pass by indorsement of the bill of lading, but by the contract in pursuance of which the indorsement is made".⁴⁵

10-011 Note 3.⁴⁶ In a contract for the sale of goods upon "c.i.f." terms,⁴⁷ the contract, unless otherwise expressed, is for the sale of goods to be carried by sea,⁴⁸ and the seller performs his part by shipping goods of the contractual description⁴⁹ on board a ship bound to the contractual destination,⁵⁰ or purchasing afloat goods so shipped,⁵¹ and tendering, within a reasonable time after shipment,⁵² the shipping documents, to the purchaser, the goods during the voyage being at the risk of the purchaser.⁵³ In such a contract of sale of

⁴⁰ *Glyn, Mills v East & West India Dock Co* (1882) 7 App.Cas. 591; see para.13-008 below.

⁴¹ per Lord Blackburn (1882) 7 App.Cas. 591 at p.611.

⁴² Unless the decision in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621 applies to such an indemnity.

⁴³ *Meyer v Sharpe* (1813) 5 Taunt. 74; *Nathan v Giles* (1814) 5 Taunt. 558.

⁴⁴ cf. per Parke B., *Bryans v Nix* (1839) 4 M. & W. 775 at pp.790, 791.

⁴⁵ per Lord Bramwell, *Sewell v Burdick* (1884) 10 App.Cas. 74 at p.105.

⁴⁶ McCordie J. referred to this Note with approval in *Manbre Saccharine Co v Corn Products Co* [1919] 1 K.B. 198 at p.202.

⁴⁷ "Not every contract which is expressed to be a c.i.f. contract is such"; per Lord Porter in *Comptoir d'Azores Luis de Ridder* [1949] A.C. 293 at p.309; see, also, para.10-013 below, fn.76.

⁴⁸ *L. Sutro & Co and Heilbut Symons & Co, Re* [1917] 2 K.B. 348.

⁴⁹ *Harland & Wolff v Burstall* (1901) 6 Com.Cas. 113. They must be of a fitness and quality to withstand the effects of normal transit to the port of destination: per Diplock J. in *Mash & Murrell v Emanuel* [1961] 1 Lloyd's Rep. 46; reversed [1961] 2 Lloyd's Rep. 326 (CA), without consideration of this point. Compare an article on "Deterioration of Goods in Transit" [1962] J.B.L. 351.

⁵⁰ *Lecky v Ogilvy* (1897) 3 Com.Cas. 29 (the two Tripolis). See also *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress) (No. 2)* [1996] 2 Lloyd's Rep. 319 (tender bad when bill of lading incorporated charterparty term requiring sellers to divert the carrying ship to a different destination in defined circumstances) and *Soules CAF v PT Transap of Indonesia* [1999] 1 Lloyd's Rep. 917 (tender bad when bill of lading provided for delivery at range of ports wider than range in sale contract). The seller must pay any expenses necessary to secure delivery at the contractual destination, e.g. lighterage to a wharf at the point of discharge in addition to the ocean freight when that wharf is the destination named in the c.i.f. contract: *Acme Wood Co v Subhan* (1904) 9 Com.Cas. 170. But of course the buyer, as indorsee of the bill of lading, must pay any demurrage at the port of discharge which the shipowner can claim under it and cannot seek to recover this back from the seller.

⁵¹ The decision on service out of the jurisdiction of the House of Lords in *Johnson v Taylor* [1920] A.C. 145 rendered obsolete, see now C.P.R. 6.20(6), seems to overlook this possibility. A seller who has not shipped goods may yet perform his c.i.f. contract of sale: see also, *Vantol v Fairclough, Dodd & Jones* [1955] 1 Lloyd's Rep. 546 at p.552. The point was mentioned, but not dealt with in the HL: [1956] 2 Lloyd's Rep. 437 at p.447.

⁵² *Groom v Barber* [1915] 1 K.B. 316. If the first tender is bad the seller can make a second tender which may be good, if he can do so within the time required by the contract for performance: *Borrowman v Free* (1823) 3 Q.B.D. 500; *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Ltd (The Niizuru)* [1996] 2 Lloyd's Rep. 66.

⁵³ *Tregelles v Sewell* (1862) 7 H. & N. 574; *Groom v Barber*, above.

"unascertained goods"⁵⁴ the property probably passes to the purchaser only when the bill of lading is indorsed to and accepted by him.⁵⁵ The sending of a notice of appropriation, although it will make the goods the subject-matter of the contract ascertained, is not an "unconditional appropriation" so as to pass the property to the buyer if the seller retains the bills of lading against payment of the price and thus reserves the *ius disponendi*.⁵⁶

The term "shipping documents" in such a contract of sale ordinarily means (1) a bill of lading; (2) a policy of insurance; (3) an invoice.⁵⁷ They may be tendered even though at the date of tender the seller knows that the goods have been lost and can never receive.⁵⁸

(1) The bill or bills of lading⁵⁹ must be in a form⁶⁰ usual in the trade,⁶¹ and must cover the whole transit of the goods from the port of shipment to the port of arrival,⁶² so that the buyer in possession of the bill of lading may not only be able to get delivery of the goods if they arrive, but also will be able to sue the carrier for loss or damage occurring at any stage of the transit. It must be for the contractual quantity and not for a larger quantity⁶³ and must be signed within a reasonable time after shipment.⁶⁴ A delivery order or a ship's release will not suffice unless, as is common, the contract expressly so provides.⁶⁵ The bill of lading must be effective at the time of tender, e.g. must not have been avoided or frustrated by war at that time though valid when issued.⁶⁶ Where the sale contract requires the bill of lading to be on liner terms, there will be a right of rejection of documents if the contract does not so provide.⁶⁷

10-012

⁵⁴ Sale of Goods Act 1979 ss.16-18 which in the case of unascertained goods forming part of an identified bulk must now be read subject to the Sale of Goods (Amendment) Act 1995 on which see *Benjamin's Sale of Goods* 5th edn (London, Sweet & Maxwell, 2010) paras 18-328 to 18-350.

⁵⁵ *Wol v Baker* (1848) 2 Exch. 1; *The Miramichi* [1915] P. 71 at p.78. Cf. Kennedy J., *Ryan v Ridley* (1902) 8 Com.Cas. 105 at p.107. If the bill of lading is indorsed to the buyer and posted to him, probably the property would pass on its being put into the post. Cf. *Badische Anilin v Basle Co* [1898] A.C. 200 at pp.203, 204. There are however, dicta to the effect that the property may pass upon shipment of the goods. See *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at p.409; *Biddell v E. Clemens Horst & Co* [1911] 1 K.B. 934 at p.956; *Comptoir D'Achat v Luis de Ridder* [1949] A.C. 293 at p.309. Cf. *Groom v Barber* [1915] 1 K.B. 316 at p.324. Though the property passes, payment may by the terms of the contract be postponed: *Dupont v British S. Afr. Co* (1901) 13 T.L.R. 24. See generally *Benjamin's Sale of Goods*, 2010, paras 19-099 to 19-110.

⁵⁶ *Bailey v Ross T. Smyth* (1940) 45 Com.Cas. 292 (HL), where the question of passing of property under a c.i.f. contract is elaborately discussed.

per Blackburn J. in *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at p.406; *Bailey v Ross T. Smyth*, above. Blackburn J., loc. cit., also mentioned the charterparty as one of the necessary documents. But neither in *Biddell v E. Clemens Horst & Co*, above, nor in *Johnson v Taylor* [1920] A.C. 144, is the charterparty mentioned; and in *Finska Cellulosa v Westfield Paper Co* (1941) 46 Com.Cas. 87 at p.91, Caldecote L.C.J., doubted whether the charterparty need be tendered. It is probably not required, even if some of the terms have been incorporated into the bill, unless necessary to determine whether or not the tendered documents comply with the terms of the contract of sale (as in *SIAT di dal Ferro v Tradax Overseas SA* [1990] 1 Lloyd's Rep. 53). Additional documents and details are frequently required by the contract: the provision of these will usually be obligatory, but the contract may on its true construction be directory only as to some of the additional requirements: *John Martin Taylor* [1953] 2 Lloyd's Rep. 591.

⁵⁷ *Manbre Saccharine Co v Corn Products Co* [1919] 1 K.B. 198.

⁵⁸ For a detailed discussion see *Benjamin's Sale of Goods*, 2010, paras 19-025 to 19-041.

⁵⁹ As to whether a through bill of lading, combined transport bill of lading or "received for shipment" bill of lading may be tendered, see Art.182.

⁶⁰ e.g. whether the vessel must be a steamer or may be a sailing vessel: *Ranson v Manufacture d'Engrais* (1922) 13 L.L.R. 205; or as to route: *Shipton v Weston* (1922) 10 L.L.R. 762; but see *Tsakiroglou v Noble* [1962] A.C. 93; the route must be a reasonable one at the time of shipment; or as to the inclusion of a special war risks clause: *Finska Cellulosa v Westfield Paper Co* (1941) 46 Com.Cas. 87. See *Burstall v Grimsdale* (1906) 11 Com.Cas. 280.

⁶¹ See fn.60, above.

⁶² *Kaighle, Maxted Bryan & Co, Re (No. 2)* (1894) 70 L.T. 155.

⁶³ *Forsman & Ellams v Blackburn* [1928] 2 K.B. 60.

⁶⁴ *Heilbut Symons v Harvey* (1922) 12 L.L.R. 455.

⁶⁵ *Kaighle v Blythe* [1916] 1 K.B. 495; *Baxter, Fell & Co v Galbraith & Grant* (1941) 70 L.L.R. 142.

⁶⁶ *Shan Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep. 398.

10-013

(2) Ordinarily an actual policy⁶⁸ must be tendered,⁶⁹ and an insurance broker's cover note or certificate that an insurance has been effected will not suffice.⁷⁰ It must be tendered even if the goods have arrived in safety,⁷¹ and may be tendered even though the seller knows that before the tender the goods have been lost.⁷² It must cover only the goods mentioned in the bill of lading and invoice, and cover them for an amount at least reasonably equivalent to the value of the goods at the port of shipment, though not necessarily their whole value at their destination.⁷³ It must be made "upon the terms current in the trade"⁷⁴ as regards such points as the perils insured against (e.g. as to the f. c. & s. clause) and the quantum of the risk (e.g. as to the f.p.a. franchise) covered.

The best way of approaching the consideration of all questions on c.i.f. sales is to realise that this form of the sale of goods is one to be performed by the delivery of documents representing the goods,⁷⁵ i.e. of documents giving the right to have the goods delivered on the possible right, if they are lost or damaged, of recovering their value from the

⁶⁸ For a detailed discussion see *Benjamin's Sale of Goods*, 2010, paras 19-042 to 19-052.

⁶⁹ per Blackburn J. in *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at p.406. In *Wilson, Holgate & Co v Baiting Grain Co* [1920] 2 K.B. 1, Bailhache J. was unable to find that since the decision in *Ireland v Livingston*, any custom had arisen obviating the necessity for a tender by the seller of an actual policy if the buyer required it, and decided that a broker's cover note or certificate of insurance would not suffice. He considered, however, that American certificates of insurance stood on a different footing and were equivalent to policies, "being accepted in this country as policies". But McCordie J. in *Diamond Alkali Export Corp v Bourgeois* [1921] 3 K.B. 443, held that an American certificate which did not purport to be a policy and did not contain all the terms of the insurance was a bad tender. And in *Scott v Barclays Bank* [1923] 2 K.B. 1, the CA, reversing Santos J. (1922) 12 L.L.R. 502, held that an American certificate in similar terms was not an "approved policy" and could be refused. In practice, certificates of insurance are constantly accepted and some forms of c.i.f. contracts expressly provide that they shall suffice; see *Burstall v Grimsdale* (1906) 11 Com.Cas. 280; *John Martin & Co* [1953] 2 Lloyd's Rep. 591. We suggest that where the contract is silent as to the form of insurance, and in the absence of evidence as to custom or course of dealing, the insurance document, in order to constitute a good tender, (1) must profess to be a policy, (2) must be capable of being sued upon, and (3) must incorporate all the terms of the insurance either in the document itself or by reference to some well-known or readily accessible document. See *Malmberg v Evans* (1924) 30 Com.Cas. 107. It may be possible to prove either by custom or by the course of dealing between the parties that a document not conforming with these tests must be accepted. This, however, is doubtful; see per Atkin L.J. in *Malmberg v Evans* (1924) 30 Com.Cas. 107, and per McCordie J. in *Diamond Alkali Corp v Bourgeois* [1921] 3 K.B. 443 at p.458. Quære, whether an English c.i.f. buyer can complain if the policy tendered is in the currency of the country from which the goods are exported and not in sterling. See *Malmberg v Evans*, above, at p.116.

⁷⁰ If the contract requires an "approved policy" this imports an objective standard and requires a policy to which no "reasonable commercial objection can be taken", and which therefore ought to be approved: *Scott v Barclays Bank* [1923] 2 K.B. 1 at pp.14, 17. Cf. *Hodgson v Davies* (1810) 5 Camp. 530 at p.532, and *Smith v Meyer* (1867) L.R. 3 Ex. 51 at p.54, as to "approved bill".

⁷¹ *Orient Co v Brekke* [1913] 1 K.B. 531.

⁷² *Manbré Saccharine Co v Corn Products Co* [1919] 1 K.B. 198 at p.205. Cf. *Hickox v Adams* (1876) 34 L.J. 404.

⁷³ *Tamvaco v Lucas* (1861) 1 B. & S. 185. Contrast *Loders v Bank of New Zealand* (1929) 33 L.L.R. 70. See also *Strass v Spillers* [1911] 2 K.B. 759 (honour policies). As to the liability of the vendor, if policies turn out to be invalid or worthless, see *Cantiere Meccanico v Constant* (1912) 17 Com.Cas. 182 at pp.183, 188, 192. Surely the seller would be similarly liable if the bill of lading tendered was a forgery: with which position contrast that in *Leather v Simpson* (1871) L.R. 11 Eq. 398, and *Guaranty Trust v Hannay* [1918] 2 K.B. 623. As to insurance against all risks, see *Yuill v Scott-Robson* [1908] 1 K.B. 270, and *Vincentelli v Rowlett* (1911) 16 Com.Cas. 310.

⁷⁴ per Hamilton J., *Biddell v E. Clemens Horst Co* [1911] 1 K.B. 214 at p.220. If the seller has to pay advance freight on shipment, he may presumably insure the advance freight by a separate policy which he keeps himself and intimate to the buyer that on the arrival of the ship the amount of the advance freight should be paid to the seller in place of payment of freight to the shipowners. Or he may insure the goods for their full arrived value (thereby treating the advance freight as representing the enhanced value of the goods at destination), and tender the buyer for the full c.i.f. price.

⁷⁵ The difference between Scrutton J. in *Karberg v Blythe* [1915] 2 K.B. 379 at p.388, and Bankes L.J. and Warrington L.J., *ibid.* [1916] 1 K.B. 495, is one of language rather than of substance. Cf. *Manbré Saccharine Co v Corn Products Co* [1919] 1 K.B. 198 at p.203. See also *Soules CAF v PT Transap of Indonesia* [1999] 1 Lloyd's Rep. 917 at p.918 ("essentially a documentary transaction"); *Trasimex Holdings SA v Addax BV* [1992] 1 Lloyd's Rep. 28 at p.32; *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1995] 2 Lloyd's Rep. 524 affirmed [1998] 1 W.L.R. 461.

shipowner or from underwriters.⁷⁶ The seller performs his contract by tendering the documents and breaks it by failing to tender them. In order to be in a position to perform by so tendering it may be necessary for him to ship the goods, though not invariably, since he may buy documents for goods already afloat.⁷⁷ In holding that the seller breaks his contract by failing to ship the goods⁷⁸ did the House of Lords in *Johnson v Taylor* sufficiently distinguish between performance of the contract and the doing of something which is, or may be, a necessary step towards ability to perform the contract?

From the fact that the contract is performed by the delivery of documents it results that various rules in the Sale of Goods Act 1979, which is primarily drafted in relation to the sale and delivery of goods on land, can only be applied to c.i.f. sales mutatis mutandis.⁷⁹ And there may be cases in which the buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him, i.e. if the goods have been lost by a peril excepted by the bill of lading, and by a peril not insured by the policy, the bill of lading and the policy yet being in the proper commercial form called for by the contract.⁸⁰

Under a c.i.f. contract, "payment against shipping documents", the price is due upon, or within a reasonable time after, tender of the documents,⁸¹ irrespective of the arrival of the ship⁸² and notwithstanding that the buyer has had no opportunity of inspecting the goods to ascertain whether they are in accordance with the contract.⁸³ By paying against documents the buyer does not, however, lose his right of rejection on the grounds, e.g. of the goods being not of the contractual description. In such cases the buyer can, after inspecting the goods and rejecting them, recover the price previously paid against documents.⁸⁴ In other words the buyer has two possible grounds of rejection, one in respect of the documents and the other in respect of the goods.⁸⁵ If, however, the ground for rejecting the goods is one which is evident from the shipping documents themselves,

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⁷⁶ In some trades there is in use a form which is in terms expressed to be a c.i.f. contract, but also provides (i) for payment on landed weights; (ii) for payment as to any goods arriving damaged with an allowance; and (iii) for the contract to be void as to any portion shipped but not arriving. Except in name this is not a c.i.f. contract. The buyer will, however, be able to sue on the bill of lading in cases of damage, holding any sum recovered as trustee for the seller: *Paul v National S.S. Co* (1937) 43 Com.Cas. 68; *Obestain Inc v National Mineral Development Corp Ltd (The Sanix Ace)* [1987] 1 Lloyd's Rep. 465; *The Aramis* [1987] 2 Lloyd's Rep. 58; and probably also in cases of shortage: see *The Arpad* (1933) 46 L.L.R. 182 and 51 L.L.R. 115 at pp.117, 118; *Ministry of Food v Australian Wheat Board* [1952] 1 Lloyd's Rep. 297 at p.311, and cf. *Den of Airlie v Mitsui* (1912) 17 Com.Cas. 117.

⁷⁷ See, above, para.10-011, fn. 51.

⁷⁸ *Johnson v Taylor* [1920] A.C. 144. See now C.P.R. 6.20(6).

⁷⁹ Cf. *E. Clemens Horst Co v Biddell* [1912] A.C. 18. So in s.51 of the Act "the time when the goods ought to have been delivered" means, in regard to failure to deliver under a c.i.f. contract, the time when in the normal course the shipping documents ought to have been tendered, not the time when the goods would themselves have arrived: *Sharpe v Nosawa* [1917] 2 K.B. 814. Cf. *Produce Brokers Co v Weis & Co* (1918) 87 L.J.K.B. 472. In *Kwai Tek Chao v British Traders and Shippers* [1954] 2 Q.B. 459 at p.486, Devlin J. expressed the view that delivery of the goods under s.35 of the Act meant in the case of a c.i.f. contract transfer of possession by delivery of the documents of title.

⁸⁰ *Groom v Barber* [1915] 1 K.B. 316; *Weis v Credit Co* [1916] 1 K.B. 346; see also *Law v Brit. Am. Tobacco Co* [1916] 2 K.B. 605; and *Clark v Cox, McEuen & Co* (1920) 25 Com.Cas. 94.

⁸¹ If the buyer refuses to accept the documents, the seller's claim against him is for damages for breach of contract, not for the price: *Stein v County Co* (1916) 115 L.T. 215.

⁸² *Ryan v Ridley* (1902) 8 Com.Cas. 105. See also *Polenghi v Dried Milk Co* (1904) 10 Com.Cas. 42. Where the contract provides for payment "on arrival of the vessel", and the vessel is lost and so never arrives, payment, in the absence of anything to indicate the contrary, must be made at the time when she ought to have arrived. In short, "on arrival of the vessel" specifies the time when, and not a condition upon which, payment is to be made. Cf. *Fragano v Long* (1825) 4 B. & C. 219. Contrast the case of goods sold "to arrive". See *Benjamin's Sale of Goods*, 2010, paras 21-023 to 21-025.

⁸³ *E. Clemens Horst v Biddell* [1912] A.C. 18.

⁸⁴ *Polenghi v Dried Milk Co* (1904) 10 Com.Cas. 42.

⁸⁵ *Kwai Tek Chao v British Traders and Shippers* [1954] 2 Q.B. 459; *Berger & Co v Gill & Duffus SA* [1984] 1 Lloyd's Rep. 227 (HL).

the person liable may limit his liability in accordance with the Convention, and further loss caused by such measures.¹⁴⁷

19-047 Although the provisions of the Convention do not apply to claims for salvage or contribution in general average,¹⁴⁸ claims to recover damages from the owner in the amount of a salvage liability to a third party are subject to the Convention.¹⁴⁹ A person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.¹⁵⁰ The "damage" which "would probably result" need not be the actual damage which resulted, provided the damage complained of was the kind of damage which would probably result; "recklessly" connotes a decision to run the risk or indifference to its existence; and the requirement of knowledge involves proof of actual knowledge in the mind of the actor at the moment that the omission occurs that the omission is taking place and that it does involve probable damage of the sort contemplated in the Article.¹⁵¹

19-048 Any person alleged to be liable may¹⁵² constitute a fund with the High Court¹⁵³ representing the limit of his liability under the Limitation Convention, either by depositing the sum or providing an acceptable and adequate guarantee: the fund is available only for the payment of claims in respect of which limitation of liability can be invoked.¹⁵⁴ Where a fund has been properly constituted, any person having made a claim against the fund is barred from exercising any right in respect of such claim against any other assets of the person by or on behalf of whom the fund has been constituted,¹⁵⁵ and the court may stay any proceedings relating to any claim arising out of the occurrence in respect of which the fund has been constituted.¹⁵⁶

19-049 The English Court characterises laws limiting the liability of shipowners and others as procedural, and in any proceedings in England will apply the English limitation rules, without regard to the rules prevailing in any other jurisdiction.¹⁵⁷

¹⁴⁷ Art.2.1 of the Limitation Convention.

¹⁴⁸ Art.3(b) of the Limitation Convention.

¹⁴⁹ *The Breydon Merchant* [1992] 1 Lloyd's Rep. 373.

¹⁵⁰ Art.4 of the Limitation Convention.

¹⁵¹ *Goldman v Thai Airways Ltd* [1983] 1 W.L.R. 1186; *S.S. Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep. 288 (Aust.), decided on similar wording in the Warsaw Convention relating to International Carriage by Air as amended by the Hague Protocol 1955. See *The Captain San Luis* [1993] 2 Lloyd's Rep. 573 as to the costs of investigating the issues of recklessness and intent.

¹⁵² Limitation may be invoked without constituting a fund: Art.10 of the Limitation Convention.

¹⁵³ Merchant Shipping Act 1955, Sch.7, Part II, para.11.

¹⁵⁴ Art.11 of the Limitation Convention.

¹⁵⁵ Art.13.1. The Limitation Convention makes provision for the release of a ship or other property once a fund has been constituted: Art.13.2. The shipowner is not required to show that there was no conduct barring limitation in order to obtain the release of the ship: *The Bowbelle* [1990] 1 Lloyd's Rep. 532.

¹⁵⁶ Merchant Shipping Act 1995, Sch.7, Part II, para.8(2).

¹⁵⁷ *Caltex Singapore Pte Ltd v B.P. Shipping Ltd* [1996] 1 Lloyd's Rep. 286.

THE CARRIAGE OF GOODS BY SEA ACT 1971

Introductory Notes

THE Carriage of Goods by Sea Act 1971 continued the process of legislative control over the mutual rights and responsibilities of ship-owners and parties to bills of lading which was initiated by the Carriage of Goods by Sea Act 1924. The history of this legislation may briefly be stated as follows.¹ At common law the shipowner, whether he carried the goods under a charterparty or under a bill of lading, could modify his prima facie liability as carrier as much as he wished, and in the course of years the protective exceptions in these documents increased both in number and complexity to such an extent that a careful scrutiny of the documents became necessary in order to ascertain what rights they conferred against the shipowner. So far as charterparties were concerned this was unobjectionable; the decreased liabilities enabled the shipowner to carry at a lower rate of freight and the charterer had ample opportunity of ascertaining the terms of his contract. With bills of lading, however, different considerations arose. Not only were they contracts of carriage but they were also documents of title, which by virtue of mercantile custom and the Bills of Lading Act 1855,² passed freely from hand to hand as part of the currency of trade conferring on their holder both rights and liabilities. Thus consignees, bankers and others who had not been parties to the original contract and had no effective control over its terms, became interested in the bill of lading without having had any real opportunity of examining its terms or assessing the value of the security it afforded.

In the years before and immediately after the 1914-18 War, as the terms of bills of lading became more diverse, the need for standardisation became more and more insistent and an increasing demand was made on the part of importers and exporters for the imposition by legislation, on the lines of the American Harter Act 1893, of certain minimum liabilities of sea-carriers who issued bills of lading. There existed, however, a contrary body of opinion which sought to find a remedy for the merchants' grievances in the preparation of a code of rules defining the rights and liabilities of the carrier and the merchant which might be

¹ Rather more extensive accounts of the history of the Hague Rules may be found in the 19th edn of this work, and also in R.P. Colinvaux, *The Carriage of Goods by Sea Act* (London: Stevens & Sons, 1954). A detailed description of the origins of the Hague-Visby Rules is contained in an article by Anthony Diamond Q.C., (1978) L.M.C.L.Q. 225, in which many aspects of the topic are extensively discussed. See also G.H. Treitel and F.M.B. Reynolds, *Carver on Bills of Lading*, 2nd edn (London, Sweet & Maxwell, 2005); N. Gaskell et al, *Bills of Lading: Law and Contracts* (Informa Law, 2000); R. Aikens et al, *Bills of Lading* (Informa Law, 2006); Girvin, *Carriage of Goods by Sea*, 2nd edn (Oxford, Oxford University Press, 2011).

² Repealed and replaced by the Carriage of Goods by Sea Act 1992.

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incorporated in bills of lading by voluntary agreement in the same way as the York-Antwerp Rules of General Average 1890. In the event, the arguments in favour of legislative intervention prevailed, and a series of negotiations and discussions culminated in the formulation, during October 1923, of a draft Convention intended to form the basis of domestic legislation. This Convention was the foundation of the United Kingdom Act of 1924. Subsequently, the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading" was signed at Brussels on August 25, 1924. This differed somewhat in its provisions from the draft Convention of October 1923, upon which the 1924 Act was based.³

20-003 In the main the Hague Rules were for many years accepted as providing a satisfactory basis for the relationship between shipowners and cargo interests and, although the language of the Rules was strongly criticised in some quarters, the number of occasions (at least in the United Kingdom) on which it became necessary to have recourse to the courts on matters of interpretation was remarkably small. Nevertheless, a consensus developed that in some respects the language called for improvement and that there were certain aspects in which the Rules did not strike a fair balance between the respective interests. Accordingly, proposals were made for the adoption of a modified regime, whereby the scheme of the Hague Rules would be retained essentially intact,⁴ subject to modifications introduced by an amending Protocol. A conference of the Comité Maritime International held at Stockholm in 1963 adopted a draft Protocol, which was later the subject of extensive amendment at sessions of the Brussels Diplomatic Convention on Maritime Law. These led to the signature of a Protocol at Brussels on February 23, 1968. The Hague Rules, as amended by the Protocol, are known as the Hague-Visby Rules.⁵

20-004 So far as concerns the United Kingdom, legislative effect was given to the Hague-Visby Rules by the Carriage of Goods by Sea Act 1971. This repealed the 1924 Act,⁶ and re-enacted the Hague Rules in their modified form. The new Act came into force on June 23, 1977, but did not apply to bills of lading issued before that day.⁷

³ Strictly speaking, therefore, a reference to "the Hague Rules" denoted the rules set out in the Brussels Convention, not those embodied in the 1924 Act. They were called the Hague Rules, because they represented an amended form of a body of rules, formulated at a meeting in the Hague, and originally intended for incorporation into bills of lading as a matter of contract.

⁴ This solution was far from achieving universal assent. A strong body of opinion held that the distribution of rights and responsibilities as between carrier and cargo-owner created by the Rules in their original and amended forms was outmoded and unduly favourable to the carrier. This opinion was reflected by initiatives taken first by the United National Conference on Trade and Development, and later by the United Nations Commission on International Trade Law, which culminated in the Hamburg Convention of March 31, 1978. The "Hamburg Rules" created by this Convention are set out and discussed in Appendix VI, below. It is impossible to say whether it will ever be given the force of law in the United Kingdom.

⁵ For the reasons why the name Visby appears in the title, see Diamond, *op. cit.*

⁶ Although the 1924 Act is no longer in force, reference to its contents is necessary for any understanding of many reported cases. In addition many countries which enacted legislation giving effect to the Brussels Convention of 1924 have not yet given statutory effect to the Brussels Protocol of 1968. Accordingly, we have for convenience set out the repealed Act in Appendix III, below.

⁷ The Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 (SI 1977/981).

Since the 1971 Act takes the shape of adjustments to the 1924 Act, rather than a complete reconstruction of the statute law on the carriage of goods by sea, much of the commentary on the earlier Act contained in the previous edition of this work is still germane to this legislation. The expression "the Rules" denotes the Hague-Visby Rules as enacted in the 1971 Act. References to "the Hague Rules" are to the body of rules in their original unamended form. Occasionally, for the sake of clarity, we refer to the Hague-Visby Rules as "the Amended Rules".

The Scheme of the Rules

The general scheme of the Rules is as follows: Article II provides that in every contract of carriage of goods as defined in Article I, with the exception of certain special shipments dealt with in Article VI, the carrier shall be subject to the responsibilities and liabilities contained in Article III and entitled to the rights and immunities contained in Articles IV and IV *bis*. In the result: (i) the Articles impose on the carrier certain minimum responsibilities which he cannot reduce, e.g. to exercise due diligence to provide a seaworthy ship and to issue on demand a bill of lading in a particular form; (ii) responsibility for performing other operations may be divided between the carrier and the shipper, charterer or consignee in whatever manner the parties may wish, provided that no term will be effective if it is inconsistent with the main object and intention of the particular bargain. In so far as the carrier does undertake to carry out the operations he must do so properly and carefully; (iii) the Articles confer on the carrier certain maximum exceptions, which he cannot increase; (iv) the defences and limits of liability provided for in the Articles apply not only to the carrier himself, but also to his servants and agents; (v) the carrier and his servants or agents will lose the benefit of the limitation of liability conferred by the Article upon proof that the damage resulted from an intentional or reckless act or omission; (vi) the Rules are intended to regulate the right and duties of the parties to the bill of lading contract, and between one of the parties and the servants or agents of the other. The Rules do not apply to non-parties, and accordingly do not apply *ex facie* to claims against the carrier by someone who is not party to the bill of lading contract⁸ albeit that the shipowner may nevertheless be able to rely on some of the defences set out in the Rules against such a claimant through the doctrine of bailment upon terms.

The Application of the Rules

Perhaps the most important single alteration brought about by the 1971 Act is that whereas under the 1924 Act the Hague Rules applied by statute only to

⁸ *Compania Portorafi Commercial SA v Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310.

outward voyages from the United Kingdom, under the new Act the Rules apply to a much wider variety of voyages.

Although the general scheme of the legislation is reasonably clear, there are a number of respects in which the application of the 1971 Act is open to doubt. These are discussed below.

To what Voyages do the Rules apply?

20-007 By virtue of the 1971 Act, the Rules apply to the following voyages—

- (1) Any voyage where the port of shipment is a port in the United Kingdom,⁹ whether or not the port of destination is in the United Kingdom: *s.1(3) of the 1971 Act*.
- (2) Any voyage from a port in a contracting¹⁰ state to a port in another state: *Article X(b)*.¹¹
- (3) Any voyage from a port in one state to a port in another state,¹² where the bill of lading¹³ is issued in a contracting state: *Article X(a)*.
- (4) Any voyage from a port in one state to a port in another state,¹⁴ where the contract contained in or evidenced by the bill of lading provides that the Rules or legislation of any state giving effect to them are to govern the contract: *Article X(c)*.¹⁵
- (5) Any voyage, whether or not between ports in different states, where the contract contained in or evidenced by the bill of lading expressly provides that the Rules shall govern the contract: *s.1(6)(a)*.
- (6) Any voyage, whether or not between ports in different states, where the contract contained in or evidenced by a non-negotiable document (marked as such) provides that the Rules are to govern the contract as if the receipt were a bill of lading: *s.1(6)(b)*.¹⁶

20-008 It may be noted that categories (2), (3) and (4) apply to the carriage of goods between ports in two different states. It is submitted that the test is whether the

⁹ i.e. Great Britain and Northern Ireland: Interpretation Act 1978, s.5, Sch.1. The application of s.1(3) of the 1971 Act may be extended by Order in Council to carriage from ports in the Isle of Man, the Channel Islands, Colonies, Associated States and certain other territories: *ibid.* s.5(1).

¹⁰ By s.2(1) an Order in Council may certify that a state specified in the Order is a contracting state, or that a place or territory forms part of a contracting state.

¹¹ The port of destination need not be in a contracting state.

¹² The termini of the voyage need not be in contracting states.

¹³ For a discussion of the expression "bill of lading", see commentary on Art.I, below.

¹⁴ See fn.12, above.

¹⁵ In practice, categories (4) and (5) overlap to such an extent that the former will rarely, if ever be important. It is submitted that the addition of the word "expressly" in s.1(6) was not intended to have the result that an implied incorporation is sufficient for Art.X(c). Unlike the 1924 Act (s.3), the 1971 Act does not require the document to contain an incorporating provision. An express choice of English law would not suffice: *Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komminos S)* [1990] 1 Lloyd's Rep. 541.

¹⁶ See para.20-022, below.

intended carriage is international and not the actual carriage. Thus, if the goods are discharged short of their destination, at a port in the country of shipment, the Rules will nevertheless apply if the port of destination was in another country.

The categories thus summarised are those in which the Rules will apply by statute. They may also apply, independently of statute, and irrespective of the termini of the voyage, by virtue of an express incorporation in the contract of carriage.¹⁷

Transshipment

20-009 Problems arise in relation to transshipment bills of lading. First, do the provisions of s.1(3), relating to outward voyages from the United Kingdom, continue to apply after the goods have been transhipped at a foreign port? The position is much less clear than under the 1924 Act, but in spite of the marked difference between the language of the two statutes¹⁸ we submit that once the rules have begun to apply, by virtue of shipment in the United Kingdom, they do so throughout the transit.¹⁹

Secondly, what is the position under Art.X, which relates only to carriage between ports in two different states, where goods destined for a foreign port are transhipped at a port in the same state as the port of shipment? It is submitted that since the Act is concerned with establishing the rights and liabilities of the parties under the contract of carriage (see Art.II), it is the termini of the contractual carriage which should determine whether or not the Act applies. Thus, if the bill of lading is a through document in the strict sense, under which the named carrier accepts responsibility for the whole of the carriage to the ultimate port of destination, then the requirements of Art.X are satisfied if the port of shipment and the port of ultimate destination are in different states. But if the document is of the type under which the shipowner assumes liability as far as the port of transshipment, and thereafter participates only as agent for the onward carrier, the Rules will not apply unless the port of transshipment is in a different state from the original port of shipment.²⁰

Where the contractual voyage is from a port in a non-contracting state, the Rules will not become applicable merely because there has been a transshipment in a port in a contracting state during the voyage.²¹

¹⁷ See below.

¹⁸ Section 1 of the 1924 Act read: "... the carriage of goods by sea in ships carrying goods from any port in Great Britain..." Section 1(3) of the 1971 Act reads: "... the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom..."

¹⁹ Thus, where goods were shipped at Shoreham under a contract for the carriage from an inland depot in the United Kingdom to Jeddah, and were subsequently transhipped at Le Havre pursuant to a contractual liberty, it was held that the Rules applied throughout the operation of transshipment: *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317. Cf. Art.VII, below.

²⁰ For a discussion of various types of through document, see Art.194.

²¹ *The Anders Maersk* [1986] 1 Lloyd's Rep. 483 (HK).

To which Documents do the Rules Apply?

20-010 The scheme of the 1924 Act was straightforward. The medium was entirely contractual. The legislation was directed at the responsibilities, liabilities, rights and immunities created by the contract of carriage. The Hague Rules, implemented by way of contractual implied terms, had no relation otherwise than to a contract of carriage (Art.II); nor indeed, apart from the special case of the non-negotiable receipt marked as such (Art.VI), to a contract which was not "covered by a bill of lading or similar document of title": Art.I(b).

The 1971 Act retains Articles I(b), II and IV in their existing form, but superimposes a number of additional requirements, which define when the Hague-Visby Rules are to have "the force of law". In order to ascertain whether these Rules apply, it is now necessary to look at seven distinct provisions, some in the Act, and some in the Rules. The language employed is not consistent. The application of the Rules is variously referred to "the carriage of goods by sea" (s.1(3) and Art.II); to "the contract of carriage" (ss.1(4) and 1(7), and Article I(b)); and to the document in which the contract is embodied (s.1(6)(a) and (b) and Art.X). It is not clear to what extent these differences in language reflect a real difference in intent.

Thus, for example, s.1(3) provides that the Rules are to have the force of law in relation to and in connection with the carriage of goods by sea where the port of shipment is in the United Kingdom. The Rules themselves, however, contain provisions which limit their own application by reference to the nature of the contractual document. It seems therefore that although s.1(3) is not expressed to be without prejudice to the Rules, the provisions of the Rules must be read back into the sub-section, so that carriage from a United Kingdom port is not sufficient in itself to make them applicable.

Again, when s.1(4) gives the primary definition of the type of document to which the Rules are to apply it adopts the language of Art.I(b), namely "bill of lading or any similar document of title". Yet s.1(6)(a) and 1(7) and Art.X refer simply to "a bill of lading". Does the latter expression tacitly comprise a "similar document of title"? With hesitation we suggest that it does, for otherwise Arts I(b), II and X cannot be reconciled.

20-011 Another problem concerns the type of "clause paramount" which is effective to make the Rules apply by operation of law, rather than contract, to contracts for voyages not made from ports in contracting states, where the bill of lading is not issued in such a state. Section 1(6)(a), dealing with bills of lading, requires an express provision that "the Rules shall govern the contract".²² Section 1(6)(b) calls for an express provision that "the Rules are to govern the contract as if the receipt were a bill of lading". Both sub-sections are stated to be without prejudice to Art.X, of which sub-section (c) requires the bill of lading to provide that

²² It was held in *McLarren & Co v Humber International Transport* [1982] 1 Lloyd's Rep. 301, that the words of incorporation need not provide that the contract shall be exclusively governed by the Rules, or that it is to be governed by the Rules without condition or qualification.

"these Rules or legislation of any State giving effect to them"²³ are to govern the contract. It seems that these three different expressions call for three different modes of incorporation.²⁴

If these views are correct, the position as regards various types of documents in common use is as follows: **20-012**

- (i) Bills of lading. The Rules apply by operation of law to all bills of lading²⁵ for shipment from United Kingdom ports, or for shipments falling within Art.X(a) and (b).²⁶ They also apply if the bill includes a clause which applies either the Rules *simpliciter* or the legislation of any state giving effect to them.²⁷ Bills of lading not conforming with any of these requirements are not subject to the Rules by operation of law, although as a matter of contract parts of the Rules (for example Arts III and IV) may be applied, if the contract so provides.
- (ii) A non-negotiable receipt, marked as such. If this includes a clause paramount providing that the Rules are to govern the contract "as if the receipt were a bill of lading", the contract will be subject to the Rules by operation of law, wherever the port of shipment is located. If the receipt contains a clause simply referring to the Rules (or enacting legislation) it will be subject to them as a matter of contract. In the absence of any incorporating clause, the contract will not be subject to the Rules,²⁸ since the document cannot be a "similar document of title" within s.1(4) and Art.I.²⁹
- (iii) A receipt not marked as being non-negotiable, incorporating a clause paramount. This would attract the operation of the Rules by operation of law, if the receipt were accepted as a document of title in the trade in

²³ It has been held that a reference to "the terms exceptions and immunities contained in the Brussels International Convention of April 25, 1924, and any subsequent amendments thereto", is sufficient for this purpose: *McLarren & Co v Humber International Transport*, above.

²⁴ Although *McLarren & Co v Humber International Transport*, above, is a decision to the contrary effect, so far as concerns the words "as if the receipt were a bill of lading".

²⁵ A "straight" bill of lading i.e. a bill of lading providing for delivery of goods to a named consignee and not to order or assigns or bearer, is a bill of lading or similar document of title within the meaning of s.1(4) and Art.1(b); *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 A.C. 423 HL. See also "Straight Bills of Lading in the House of Lords", McMeel, [2005] L.M.C.L.Q. 273.

²⁶ The bill of lading need not actually be issued; if the bill of lading is to be issued, the contract is "covered" by it or "provides for its issue" within the definition of Art.1(b) and s.1(4) of the 1971 Act: *Parsons Corp v C.V. Scheepvaartonderneming Happy Ranger* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep. 357.

²⁷ But not, we suggest, where the bill of lading refers to legislation giving effect to the unamended Hague Rules (as in the case with, for example, the United States clause paramount), since s.1(1) makes it clear that "the Rules" are the Hague-Visby Rules. See also *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep. 622 where a bill of lading included a "clause paramount" which stipulated that it was subject to the Hague-Visby Rules "if compulsory applicable".

²⁸ But see, per contra, *McLarren & Co v Humber International Transport*, above.

²⁹ *Chan Chen Kum v Wah Tai Bank* [1971] 1 Lloyd's Rep. 439. This passage was approved by Steyn J. in *Browner International Ltd v Monarch Shipping Co Ltd (The European Enterprise)* [1989] 2 Lloyd's Rep. 185. See also *R.G. Mayor t/a Glanville Coaches v P. & O. Ferries Ltd (The Lion)* [1990] 2 Lloyd's Rep. 144 in which a similar approach was taken to the Athens Convention 1974.