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Chapter 6

Bills of Lading

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Introduction

The bill of lading, as indicated in Chapter 1, plays a vital role in international commerce where sea carriage is envisaged. Its use is traceable to the 14th century.[1] In its primitive form, it was a receipt indicating the nature of the cargo and the quantity. Time, convenience and mercantile practice saw the incorporation of terms of carriage in the bill of lading and its elevation to a document of title, such that possession of the bill of lading was deemed constructive possession of the goods. Recognition of the bill of lading as a symbol for the goods made way for the sale of goods to a third party during transit (i.e., while they were on the high seas). Goods were symbolically delivered by endorsement and transfer of the bill of lading.[2] Transfer of the bill of lading to the third party did not, however, operate to transfer rights under the bill of lading to the third party because of the doctrine of privity.[3] To affect an automatic transfer of contractual rights to the endorsee, the Bills of Lading Act was enacted in 1855. Because of problems caused largely by poor drafting,[4] this statute was repealed in 1992 and replaced with the Carriage of Goods by Sea Act 1992.[5]

This chapter considers the nature of a bill of lading, the evidentiary effect of statements made on a bill of lading, and the rights and liabilities of the holder of a bill under both the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992. The latter part of this chapter focuses on the problems created by the Bills of Lading Act 1855 since it provides the necessary backdrop to assess and appreciate the changes instituted by the Carriage of Goods by Sea Act 1992. The concluding part of this chapter addresses electronic bills of lading, the CMI[6] Rules on Electronic Bills of Lading and the Bills of Lading in Europe (BOLERO)[7] Rules.

Nature of a bill of lading

Neither common law nor existing legislation affecting bills of lading[8] or the terms of carriage where a bill of lading is used[9] provide a definition of a bill of lading. Its essence is to be gathered from the various functions it assumes. It is a receipt, evidence of the contract of carriage, a contract of carriage and a document of title, depending on whether the holder of the bill of lading is the shipper, consignee or endorsee. The many roles are examined subsequently.

1 See Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods*, 1914, CUP for an excellent historical account. Also see McLaughlin, 'The evolution of the ocean bill of lading' (1926) 35 Yale LJ 548; Section II of Kozolchyk, 'Evolution and present state of the ocean bill of lading from a banking law perspective' [1992] JMLC 161.

2 See *Sanders v Maclean* (1883) 11 QBD 327, at p 341.

3 Note, however, that the Contract (Rights of Third Parties) Act 1999 enables a third party to sue on the contract provided the conditions laid down in the Act are met. However, by virtue of s 6(5), contracts of carriage by sea are excluded. See s 6(6)(b) for the definition of contracts for carriage of goods by sea. See also 'Liability in contract and in tort and availability of limitation', Chapter 8.

4 See for instance, Trietel, 'Bills of lading and third parties' [1982] LMCLQ 294.

5 The text of this Act is available in Carr and Goldby, *International Trade Law Statutes and Conventions*, 2nd edn, 2011, Routledge-Cavendish.

6 Comité Maritime International.

7 Bolero International Ltd, London, UK.

8 Section 1(2) of the Carriage of Goods by Sea Act 1992 refers only to transferable bills for the purposes of the Act. This reference only to a transferable bill has raised doubts as to whether a non-transferable bill of lading (also known as a straight bill of lading) can be regarded as a document. For example, in *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707, at p 720, the Singapore Court of Appeal said that confusion in respect of whether a straight bill of lading was a document of title (i.e., presentation of document for the purposes of taking delivery) was caused by the Carriage of Goods by Sea Act 1992, which requires the bill of lading to be transferable before it is a bill of lading for the purposes of the Act. See *The Rafaela S* [2003] EWCA Civ 556 for the approach in the English courts.

9 Carriage of Goods by Sea Act 1971 – legislation implementing the Hague-Visby Rules. See Chapter 8 for further on the Hague-Visby Rules. Note, however, the UN Convention on the Carriage of Goods by Sea Act 1978 provides a definition in its Art 1(7). See Chapter 9.

Bill of lading as a receipt

In the hands of the shipper, the bill of lading is a receipt for:

(a) the quantity of goods received;
(b) the condition of goods received; and
(c) leading marks.

The evidentiary weight of representations relating to quantity and condition of the goods, and leading marks, is not uniform. It is dependent on factors, such as whether the bill of lading is held by the shipper or an endorsee and whether it falls within the Carriage of Goods by Sea Act 1971, or outside of it.

Bills within the Carriage of Goods by Sea Act 1971

Under Art III(3) of the Carriage of Goods by Sea Act 1971, the carrier is obliged, on demand by the shipper, to issue a bill of lading that contains, among other things, the leading marks (marks on packaging necessary for identification of the goods), the number of packages or pieces, or the quantity or weight of the goods, and the apparent order and condition of the goods. Statements made on the bill of lading are regarded as *prima facie* evidence of the receipt of the goods as described under Art III(4). Proof to the contrary may, therefore, be provided by the carrier. Once transferred to a third party acting in good faith, however, the carrier cannot submit proof to the contrary. This change in the evidentiary weight of the statements is to protect the transferee, who purchases the goods relying on information contained in the bill of lading.[10]

Bills outside the Carriage of Goods by Sea Act 1971

Statements as to quantity

Common law regards a statement specifying quantity received in a bill of lading as *prima facie* evidence of the quantity shipped. The burden of proving that the cargo, as specified, has not been shipped falls on the carrier. This burden is an absolute burden in that the carrier must show that the goods were in fact not shipped. In *Smith v Bedouin Steam Navigation Co*,[11] the bill of lading stated that 1,000 bales of jute had been shipped, whereas only 988 bales were delivered. It was held that the carrier could successfully discharge the burden of proof only if he could show that, in point of fact, the goods were not shipped, not merely that the goods may not possibly have been shipped (at p 79).

Where it is established that the goods were not in fact shipped, the carrier, at common law, is not liable even against a bona fide transferee of the bill for value. In *Grant v Norway*,[12] the master of the ship signed a bill of lading that stated that 12 bales of silk had been shipped. The cargo, in fact, had not been loaded. The endorsees had no remedy once the carrier had established that the cargo had not been loaded, on the grounds that the master had no authority to sign bills of lading for goods that had not been put on board the ship. The *Grant v Norway* decision does not favour the consignee or endorsee, who normally relies on statements made on the bill of lading, thus undermining the purpose of a bill of lading in international commerce.

10 See Documentary responsibilities Chapter 8, for further discussion.

11 [1896] AC 70.

12 (1851) 10 CB 665.

The *Grant v Norway* problem was addressed by s 3 of the Bills of Lading Act 1855, according to which:

> . . . every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board.
>
> Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

The solution offered in this provision was of limited use since it raised an estoppel only where the holder has an independent cause of action against the party signing the bill. It did not create a cause of action in favour of the party holding the bill. Further, the statement was conclusive evidence only against the master or other person signing the bill and did not extend to the carrier.

The Bills of Lading Act 1855 was repealed[13] and replaced by the Carriage of Goods by Sea Act 1992. According to s 4 of this legislation, which replaces s 3 of the Bills of Lading Act 1855), statements in bills of lading representing goods to have been shipped on board a vessel, or as received for shipment on board a vessel signed by the master of the vessel or by a person who has express, implied or apparent authority of the carrier to sign bills of lading will, in the hands of the lawful holder of the bill of lading, be regarded as conclusive evidence against the carrier of the shipment of the goods or the receipt of the goods for shipment. The focus of s 4 is bills of lading, which means that the *Grant v Norway* doctrine applies to straight bills of lading or waybills (i.e., bills of lading made out to a named consignee that are not transferable).

It would be open to the parties to agree that the statements on waybills are to be regarded as conclusive evidence in the hands of the consignee who takes it in good faith. The CMR Rules on Waybills[14] provides for such a possibility in Rule 5(a)(ii) as follows:

> In the absence of reservation by the carrier, any statement in a sea waybill or similar document as to the quantity or condition of the goods shall:
>
> (a) as between the carrier and shipper be *prima facie* evidence of receipt of the goods as so stated;
>
> (b) as between the carrier and the consignee be conclusive evidence of receipt of the goods as for stated, and proof to the contrary shall not be permitted, provided always that the consignee has acted in good faith.

However, for these Rules to apply, they must be incorporated into the waybill. If these Rules are in common use, however, it may be possible to argue that they have become part of mercantile custom, even in the absence of incorporation.

Endorsement of the bill of lading with statements such as 'weight and quantity unknown', and 'said to weigh 10 tons', is open to the carrier. Such endorsements are recognised by the courts, since information on quantity entered on a bill of lading is based on statements made by the shipper and are not normally verified by the carrier. Where the bill of lading contains statements such

13 See s 6(2) of the Carriage of Goods by Sea Act 1992.

14 Text available in Carr and Goldby, *International Trade Law Statutes and Conventions*, 2nd edn, 2011, Routledge-Cavendish.

as 'quantity unknown', alongside the gross weight entered by the shippers for the purposes of s 4, the weight entered is not a representation that the quantity was shipped.[15]

Statements as to condition

In the hands of a shipper, statements as to condition of the goods shipped are regarded as *prima facie* evidence. However, in the hands of the bona fide transferee for value, the statements provide conclusive evidence. In *Compania Naviera Vascongada v Churchill*,[16] timber awaiting shipment was stained by petroleum. The master issued a bill of lading that stated that the goods were shipped in apparent good order and condition. There was no reference to the bad condition of the goods. As against the transferee, the carriers were estopped from denying the veracity of their statement in the bill of lading.

This estoppel is effective only where the defects would be apparent to the carrier on a reasonable inspection of the cargo. In *Silver v Ocean Steamship Co*,[17] a cargo of Chinese eggs packed in tins were not covered with cloth or any other form of packing. No mention of the defective packing was made on the bills. On arrival, the goods were found to be damaged. It was also found that the tins had pinhole perforations. The carrier was estopped from denying the insufficient packing of the tins but could not be estopped from alleging the presence of the pinhole perforations since these would not have been apparent on a reasonable inspection. This suggests that the standard of care required of a carrier is no more than that of reasonable diligence.

The carrier can make reservations on the bill of lading with statements such as 'condition unknown'. Such phrases are construed strictly since statements as to condition are presumed to be made by the carrier only after a reasonable inspection of the cargo.[18]

It may not, however, be possible for the master to include a statement regarding the apparent order or condition of the goods if the description of the goods in the bill of lading makes reference to the less than perfect condition of the goods, as for instance, where the goods are described as damaged vehicles. In *Sea Success Maritime v African Maritime Carriers*[19] the cargo of steel was rusty. The charterer intended to incorporate in the bill of lading the apparent order and description of the cargo as found by the surveyors. In these circumstances, according to Aikens J 'there would be no need to qualify the statement of the apparent order and condition of the cargo as described in the bill of lading presented for signature by the master or his agent' (at para 35).

Statements as to leading marks

Where the carrier records leading marks on the bill of lading, he will not be estopped at common law from denying that the goods were shipped under the marks as described in the bill. However, where the marks are essential to the identification or description of the cargo, the *prima facie* evidence rule is applied. In *Parsons v New Zealand Shipping Co*,[20] frozen lambs, shipped under a bill of lading, stated that 608 carcasses had been shipped bearing the mark 622X. On arrival, endorsees

15 See *The Mata K* [1998] 2 Lloyd's Rep 614, where Clarke J said:

> a bill of lading which states that 11,000 tones of cargo were shipped 'quantity unknown' is not a representation that 11,000 tonnes were shipped. Any other conclusion would give no meaning to the expression 'quantity unknown' [at p 616].

See also *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas)* [1996] 1 Lloyd's Rep 642, at p 646; *River Gurara (Cargo Owner) v Nigerian National Shipping Line Ltd* [1998] 1 Lloyd's Law Rep 225, at p 234. See also Chapter 8, Documentary Responsibilities.

16 [1906] 1 KB 237.

17 [1930] 1 KB 416; (1930) 142 LT 244.

18 Such statements are to be based on a reasonable assessment of the apparent order or condition of the goods. See Colman, J, *The David Agmashenebeli* [2003] 1 Lloyd's Rep 92.

19 [2005] EWHC 1542 (Comm).

20 [1901] 1 QB 548.

found that 101 of the 608 carcasses carried a different mark, 522X. The endorsees refused to accept delivery of the carcasses bearing 522X. The issue turned on whether the marks were material to the identity of the goods – that is, whether they indicated characteristics essential to the nature and identity of the goods or they were placed purely for easy tracing. On the particular facts, the marks were not found material to the identity of the goods and the carrier was not estopped from denying that all the carcasses shipped bore the mark 622X. As Collins J explained:

> . . . if mere identification marks are within the estoppel, any discrepancy between the mark on the goods and the marks in the margin would equally destroy the identity. Every difference would be equally material, whether the result of accident or clerical error. To hold this would impose an enormous and, indeed, having regard to the practice of tallying, an impossible task on the shipowners. Marks which convey a meaning as to the character of the goods stand on a totally different footing. These, it seems to me, would be embraced in the estoppel, because the characteristics which they indicate are essential to the identity of the goods, and an article so marked is a different article in the market from one not so marked. They are material factors in the identity as distinguished from identification of the goods sold, and therefore a discrepancy between the goods described and the goods shipped would mean a difference of identity . . .
>
> But, as it is found as a fact that these figures conveyed nothing whatever to the dealers in these goods, and, further, that the first figure indicated in fact nothing which had any bearing on the quality of the goods, was merely a private mark helping the manufacturers to trace them through their books, it seems to me that any considerations based on them can have no place in the discussion [at pp 565–67].

It seems from this judgment that the distinction between a public and a private mark is an important factor in establishing whether a mark is, or is not, material to the identity of the goods. A mark is public if it is so recognised by those dealing in goods – that is, to be established by the response of businesses dealing in the goods. If the mark means, is associated with, or indicates in some way the nature of the goods, the *prima facie* evidence rule will come into play.

Enforceability of indemnity agreements for issuing clean bills of lading

It is apt, at this juncture, to say something about indemnity agreements that the shipper and the carrier may enter into for producing a clean bill of lading – that is, a bill of lading with no reservations on it. Reservations on a bill of lading affect its commercial value in a number of ways:

(a) the consignee normally relies on the bill of lading to establish whether the goods as agreed in the contract of sale have been shipped, and where the bill of lading is claused (i.e., contains reservations), he may refuse payment;

(b) should the consignee or the shipper (i.e., where he still has not got a buyer) want to sell the cargo during transit, it is unlikely to be sold on the basis of a claused bill of lading; and

(c) as a document of title,[21] the bill of lading is often used to raise money from banks and finance houses (these institutions normally prefer to lend money against a clean bill of lading).[22]

Given the commercial importance of a clean bill of lading, it is not unusual for the shipper to ask the carrier to issue one on the understanding that he will indemnify the carrier for any losses incurred by him as a result of issuing such a bill. Enforceability of such agreements really depends

21 See 'Bill of lading as document of title', pp 173–7.

22 See Chapter 15.

on the circumstances of each case. Where the carrier, despite his knowledge of the unsatisfactory condition of the goods, issues an unclaused bill, the indemnity agreement with the shipper will be unenforceable should the shipper fail to pay. *Brown, Jenkinson and Co Ltd v Percy Dalton (London) Ltd*[23] provides a good illustration. In this case, the plaintiffs issued a clean bill of lading even though they knew that the barrels containing orange juice were old and leaking, against an indemnity from the defendants, which read:

> (1) We the undersigned hereby certify that we are aware that in connection with the undermentioned goods . . . the following have been noted at the time of shipment: old and frail containers in leaking condition . . . to avoid any misunderstanding with third parties, we request no mention be made of the above in the bills of lading.
>
> (2) . . . we herewith undertake to indemnify the master, vessels, the owners or their representatives against all losses or damage of any nature whatsoever which might arise from the issuance of clean bill of lading for the said goods.

The plaintiffs sued the defendants on the indemnity agreement for the loss suffered. Since the plaintiffs made a representation on the bill of lading that they knew to be false, the court held that the agreement was unenforceable for fraud. According to Morris LJ:

> . . . on the facts which are not in dispute, the position was, therefore, that at the request of the defendants the plaintiffs made a representation which they knew to be false and which they intended should be relied on by persons who received the bill of lading, including any banker who might be concerned. In these circumstances, all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from making the representation is unenforceable. The claim cannot be put forward without basing it in an unlawful transaction. The promise on which the plaintiffs rely is, in effect, this: If you make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain [p 9].

Besides public policy, it goes without saying that the court was preserving the integrity of the bill of lading in international commerce. Pearce LJ makes this point lucidly:

> . . . in the last 20 years, it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shipper in certain cases where there is a *bona fide* dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have recourse against the shipping owner, who will in turn recover under his indemnity from the shippers. Thus, no one will ultimately be wronged.
>
> This practice is convenient where it is used with conscience and circumspection, but it has its perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits . . . trust is the foundation of trade; and bills of lading are important documents. If the banks and purchasers felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities [p13].

23 [1957] 2 Lloyd's Rep 1.

Of course, indemnities given in genuine circumstances – for example, where there is a dispute about the condition of the goods or adequacy of packaging, between the shipowner and the shipper – are enforceable.[24]

Bill of lading as evidence of contract of carriage

A bill of lading, even though it normally contains the terms of carriage, is regarded *in the hands of the shipper* as evidence of the contract of carriage, since the contract with the shipper is likely to have been concluded orally long before the issue of the bill of lading, and it is possible that the document varies some of the agreed terms or contains terms that have not been agreed to by the parties. According to Lush J in *Crooks v Allan*:[25]

> . . . a bill of lading is not the contract, but only evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms [pp 40–41].

Where the terms contained in the bill of lading do not reflect the terms agreed orally, evidence regarding the oral agreement may be submitted by the shipper. In *The Ardennes*,[26] the shipper of a consignment of oranges was assured by the ship's agent that the vessel would sail directly to London and arrive there before 1 December. The ship, however, stopped at Antwerp on her way to London and arrived at London on 4 December. When sued for breach of contract by the shipper, the shipowner relied on the bill of lading, which contained a clause giving the ship liberty to deviate during the course of her voyage. The court, however, came to the conclusion that the oral evidence put forward by the shipper was admissible. Lord Goddard CJ clearly acknowledged in his judgment that 'a bill of lading is not, in itself, the contract between the shipowner and the shipper of the goods, though it has been said to be excellent evidence of its terms . . . the contract has come into existence long before the bill of lading is signed' (p 59).

The judgment from the Court of Appeal in *Cho Yang Shipping Co Ltd v Coral (UK) Ltd*[27] affirms this view:

> . . . in English law, the bill of lading is not the contract between the original parties but is simply evidence of it [for example, *The Ardennes* (1950)].[28] Indeed, though contractual in form, it may in the hands of a person already in contractual relation with the carrier (for example, a character) be no more than a receipt [*Rodocanachi v Milburn* (1886)].[29] Therefore, as between shipper and carrier, it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice. It remains necessary to look at and take into account the other evidence bearing upon the relationship between the shipper and the carrier and the terms of contract between them . . . The terms upon which the goods have been shipped may not be in all respects the same as those actually set in the bill of lading . . . [at p 643].

24 See 'Bills of Lading and Fraud', pp 186–8.
25 (1879) 5 QBD 38.
26 [1951] 1 KB 55.
27 [1997] 2 Lloyd's Rep 641.
28 [1950] 2 All ER 517; [1951] 1 KB 55.
29 (1886) 18 QBD 67.

Bill of lading as contract of carriage

The view that the bill of lading is evidence of the contract of carriage is correct only in so far as the holder of the bill is the shipper. On endorsement to a third party (i.e., the consignee or endorsee) *in the hands of that third party*, the bill of lading is the contract of carriage. Any oral or written agreement between the shipper and the shipowner not expressed on the bill of lading will not affect the third party on grounds of lack of notice. In *Leduc v Ward*,[30] the endorsee of a bill of lading sued the shipowner for loss to cargo as a result of deviation. The shipowner contended that they were not liable since the shipper was aware, at the time of shipment, that the ship would deviate. The court held that anything that took place between the shipper and the shipowner not embodied in the bill of lading could not affect the endorsee. The endorsee acquired his rights of suit and liability in respect of the goods by virtue of s 1 of the Bills of Lading Act 1855, which provides that 'every consignee . . . every endorsee . . . shall have transferred to and vested in him all rights of suit, and be subject to the same liability in respect of such goods, as if the contract contained in the bill of lading had been made with himself'. According to Lord Esher MR:

> . . . it has been suggested that the bill of lading is merely in the nature of a receipt for the goods, and that it contains no contract for anything but the delivery of the goods at the place named therein. It is true that, where there is a charterparty, as between the shipowner and the charterer, the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee, the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage for the goods [at p 479].

Bill of lading as document of title

Physical inability of the merchant to deliver the cargo (because of long transit periods) may have triggered the custom among merchants to treat the bill of lading as a symbol for the goods. Until goods are physically delivered, possession of the bill of lading is deemed to be constructive possession of the goods. Transfer of the bill of lading by the seller to the buyer is deemed to be a symbolic delivery of the goods to the buyer, and the buyer, on the ship's arrival, could demand delivery of the goods. As Bowen LJ said, in *Sanders v Maclean*:[31]

> . . . a cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol; and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo . . . It is a key which in the hands of the rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be [p 341].

Since possession of the bill of lading is regarded as good as possessing the goods, the buyer can sell the goods on while they are at sea to a third party by simply endorsing the bill of lading and delivering it to the third party. The third party, by becoming the holder, can demand delivery of the goods on arrival.

30 (1888) 20 QBD 475.
31 (1883) 11 QBD 327.

Not all bills of lading, however, are transferable. To impart transferability to a bill of lading, it must be drafted as an *order* bill – that is, where the carrier is to deliver the goods to a *named consignee or to his order or assigns*. It must be noted that bills of lading made out to named consignees, known as straight bills of lading, are not documents of title.[32]

On endorsement, the endorsee takes the place of the original party to the bill of lading and will be able to sue and be sued on all the terms, express and implied, in the bill of lading, despite privity of contract. This is achieved by the combined operation of ss 2 and 3 of the Carriage of Goods by Sea Act 1992.[33] The consignee or endorsee under the Bills of Lading Act 1855 acquired their rights and liabilities by virtue of s 1 which provides:

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

Quality of title acquired by transferee

Commonly said to be a negotiable document in commercial circles, a bill of lading is not to be equated with a bill of exchange, which is a negotiable instrument in the strict (legal) sense of the term.[34] The holder of an endorsed bill of lading does not obtain a bill of lading free of defects. That is, a holder who endorses a bill of lading cannot give a better title than the one he has. So, if he has no title, he cannot pass one. In other words, the bona fide transferee for valuable consideration of a bill of lading acquires as good a title as the transferor possesses. As Lord Campbell in *Gurney v Behrend*[35] observed:

> . . . a bill of lading is not, like a bill of exchange or a promissory note, a negotiable instrument which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his rights are not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it against the shipper of the goods. The bill of lading only represents the goods, and, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented [at p 271].

It, therefore, makes more sense in legal terms to talk of the bill of lading as a transferable document,[36] rather than a negotiable document.

Delivery against bills of lading

Since the bill of lading is a document of title, the carrier is under an obligation to deliver the cargo only against an original bill of lading. If the carrier delivers goods without the production of a bill of lading, he will be liable in contract and in tort (for conversion) to the bill of lading holder.[37]

32 However, in *The Rafaela S* [2003] EWCA Civ 556, where the straight bill of lading required the bill of lading to be presented for delivery, it was held to be a document of title for the purposes of the Hague-Visby Rules (see Chapter 8, pp 269–70). See also Tiberg, 'Legal qualities of transport documents' [1998] Tulane Maritime LJ 1; *Voss v APLC Co Pte Ltd* [2002] 2 Lloyd's Rep 707 (Singapore, CA).

33 See 'The Carriage of Goods by Sea Act 1992', pp 181–6 for further on these sections and the developing case law in this area.

34 See 'Bills of Exchange', Chapter 15.

35 (1854) 3 E&B 262.

36 In some jurisdictions, however, the bill of lading is regarded as a negotiable document. See Yiannapoulos (ed), *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems*, 1995, Kluwer.

37 See *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 2 Lloyd's Rep 114, at p 120.

Where a person seeks to take delivery of goods in the absence of an original bill of lading, he must prove to the carrier's reasonable satisfaction that he is entitled to possession of the goods and there is a reasonable explanation for the absence of the bills of lading – for instance, where it can be shown that the bills of lading are lost.[38] Frequently, the carrier may be asked to notify a customs broker, banker or warehouseman of the arrival of the goods. Such clauses are known as 'notify party' clauses. 'Notify party' clauses do not curtail the operation of the rule that delivery must take place against the original bill of lading. It is, however, possible that the law of the country or custom of the port requires that goods be delivered to an agent (of the bill of lading holder) without the production of a bill of lading. In these circumstances, it seems, from *The Sormovskiy 3068*, that the carrier will not be liable for breach of contract were he to deliver the goods without presentation. Custom, however, according to Clarke J, must be construed strictly, and must be distinguished from practice. He drew the distinction between law, custom and practice thus:

> Law
>
> If it were a requirement of the law of the place of performance that the cargo must be delivered to the CSP as the agent of the plaintiffs without the presentation of an original bill of lading, the defendants would, in my judgment, have performed their obligations under the contract of carriage. Any other conclusion would mean that the contract could not be lawfully performed, which could not have been intended by the parties.
>
> Custom
>
> Equally, if there were a custom of the port . . . that cargo was always delivered to . . . the agent of the person entitled to possession without the production of an original bill of lading, delivery to the [agent] would probably amount to performance of the defendants' obligations under the contract of carriage. However, custom in this context means custom in its strict sense: that it must be reasonable, certain, consistent with the contract, universally acquiesced in and not contrary to law: see *Scrutton on Charterparties*, p 1416.
>
> Practice
>
> Practice must, in my judgment, be distinguished from custom. A vessel may be discharged by any method which is consistent with the practice in the port: see *Carver's Carriage by Sea*, 13th edn, vol 2, para 1542. It would not, however, in my judgment be good performance of the defendants' obligations under the contract if it were merely the practice for vessels to deliver goods to the CSP without presentation of a bill of lading in circumstances where neither the law nor custom (in its strict sense) required it [p 275].[39]

It is common for bills of lading to contain a clause that allows the carrier to discharge goods without production of a bill of lading against a warranty of title, and an indemnity clause in favour of the carrier for any loss he suffers as a result of discharging the goods in the absence of a bill of lading. Clause 46 of the charter in *The Sormovskiy 3068* provided that the shipowners could discharge the cargo against production of a bank guarantee if the original bills of lading were not in the discharge port in time for the vessel's discharge. This clause had been incorporated into the bill of lading. However, according to Clarke J, 'the purpose of the clause was to ensure the [shipowners] would discharge even if the bill of lading was not available for presentation, but on terms they would be protected by a letter of indemnity. It thus contemplated that they would be liable to the holder of the bill of lading if they delivered otherwise than in return for an original bill of lading' (p 274). In other words, the indemnity clause did not make the delivery of the goods without

38 See *Sucre Export SA v Northern Shipping Ltd (The Sormovskiy 3068)* [1994] 2 Lloyd's Rep 266.

39 See also *East West Corp v DKBS 1912 and AKTS Svendborg Utaniko Ltd, P&O Nedlloyd BV* [2002] 2 Lloyd's Rep 182, at pp 202–7.

presentation of the bill of lading lawful. Its purpose was to protect the shipowner if he did do what he was not contractually obliged to do: 'A shipowner who delivers goods without production of a bill of lading does so at his own peril', as Lord Denning said in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*.[40] Where a bill of lading is lost, according to *The Houda*,[41] the best course of action would be to obtain a court order to the effect that 'on tendering a sufficient indemnity the loss of the bill of lading is not to be set up as a defence'.[42]

Forgery of documents is a common phenomenon in international trade. It is not unknown for forged documents to be presented for delivery purposes. What is the position of the innocent carrier were he to deliver against a forged bill of lading? This issue was examined in *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab, Akteiselskabet Dampskibsselskabet Svendborg*.[43] The cargo was carried under Maersk Line bills of lading, which included cl 5(3)(b) that stated:

> Where the carriage called for commencement at the port of loading and/or finishes at the port of discharge, the carrier shall have no liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over ship's rail, or if applicable, on the ship's ramp, howsoever caused.

The carriers released the goods against forged bills of lading. Rix J in the Queen's Bench concluded that it was a case of misdelivery.[44] The carrier in the Court of Appeal submitted that Rix J was wrong in categorising the event as misdelivery, rather than theft, and that cl 5(3)(b) excluded liability for theft. On appeal, the court, without hesitation, agreed that what took place was a misdelivery and that a forged bill of lading is a nullity. In these circumstances, cl 5(3)(b) was ineffective in protecting the carrier. According to Stuart-Smith LJ:

> In my judgment, Mr Justice Rix was correct to characterise what occurred as misdelivery. A forged bill of lading is in the eyes of the law a nullity; it is simply a piece of paper with writing on it, which has no effect whatever. That being so, delivery of the goods was not in exchange for the original bill of lading but for a worthless piece of paper. No doubt so far as the owner of the goods is concerned there is little difference between theft of the goods by taking them without consent of the bailee and delivery with his consent where the consent is obtained by fraud. Mr Dunning, adopting the colourful phrase sometimes used of a bill of lading, that it is the key to the floating warehouse . . . said that it made no difference whether the thief used a duplicate key to break in and steal or a forged metaphorical key. But one cannot take the metaphor too far. In my judgment, cl 5(3)(b) is not apt on its natural meaning to cover delivery by the carrier or his agent, albeit the delivery was obtained by fraud. I also agree with the judge even if the language was apt to cover such a case; it is not a construction which should be adopted, involving as it does excuse from performing an obligation of such fundamental importance. As a matter of construction, the courts lean against such a result if adequate content can be given to the clause. In my view . . . it is wide enough also to cover loss caused by negligence, provided the loss is of the appropriate kind [at p 216].

It seems from this that a clause absolving the carrier of liability in the event of delivery against a forged bill of lading will not be construed in his favour on the grounds that delivery against an original bill of lading is a fundamental obligation.[45]

40 [1959] 2 Lloyd's Rep 11, at p 120.
41 [1994] 2 Lloyd's Rep 541.
42 See Leggatt LJ at p 558.
43 [2000] 1 Lloyd's Rep 211.
44 [1999] 1 Lloyd's Rep 837.
45 Mance LJ, however, seems to be suggesting that a clause suitably worded may help the carrier when he says:
There is no dispute that an appropriately worded clause could achieve the result for which the shipowner contends [at p 217].

It must be noted that, where the bill of lading is made out to a named consignee (i.e., where it is not a transferable bill of lading[46]), there is no requirement that delivery take place against its production unless of course the bill of lading expressly states that delivery is to be against presentation.[47] In these circumstances, the straight bill of lading will be regarded as a document of title for the purposes of the Hague-Visby Rules.[48]

Rights and liabilities of consignee/endorsee

Parties to a bill of lading are normally the shipper (consignor) and the carrier. The English law doctrine of privity prevented a consignee or endorsee of a bill of lading from suing the carrier on the bill of lading. The Bills of Lading Act, enacted in 1855, operated to transfer the rights and liabilities under a contract of carriage to a third party but was not always effective in transferring them due to:

(a) poor drafting,
(b) restrictive reading of the legislation,
(c) concurrent operation of s 1 of the Bills of Lading Act 1855 and s 16[49] of the Sale of Goods Act 1979 (on passing of property) and
(d) inflexibility of the Act to respond adequately to emerging commercial practices brought about by advances in transport technology.

Inadequacies of the Bills of Lading Act 1855 are considered, in the following paragraphs, to highlight the improvements introduced by the Carriage of Goods by Sea Act 1992, which replaced the earlier legislation.

Problems caused by the Bills of Lading Act 1855

The problematic s 1 of the Bills of Lading Act 1855 states that:

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

However, further down the page, he could be construed as saying that the ship's obligation to deliver against presentation of original bills of lading is of central importance, when he says:
A shipowner issues bills of lading to serve as the key to the goods and ought usually to be well placed to recognise its own bills of lading . . . the bill of lading serves . . . an important general role in representing and securing both title to and physical possession of the goods . . .
For a more recent case, see *Transfigura Beheer BV v Mediterranean Shipping Co (The Amsterdam)* [2007] 1 Lloyd's Rep 88, which treated forged bills of lading as void and as of no effect. *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] 2 Lloyd's Rep 11 cited with approval.
46 Also known as a straight bill of lading.
47 See *The Rafaela S* [2003] EWCA Civ 556. Of course, this raises the important question of whether a non-transferable bill of lading is a document of title. This is an important issue when it comes to the applicability of the Carriage of Goods by Sea Act 1971. See Scope of application Chapter 8. See also Tetley, 'Waybills: the modern contract for carriage of goods by sea', Pts I and II [1983] JMLC 465; [1984] JMLC 41.
48 See Chapter 8 for further on the Hague-Visby Rules.
49 This section was amended as a result of the Law Commission Report, *Sale of Goods Forming Part of a Bulk*, Law No 215 HC 807, 1993, HMSO, which are reflected in ss 20A and 20B of the Sale of Goods Act 1979.

Under this provision, the consignee or endorsee of a bill of lading acquires the right to sue on the contract only where property has passed to the consignee or endorsee. A consignee or endorsee caught in the following situations cannot sue on the bill of lading:

(a) where no intention to pass property is present – for example, where a pledgee lends money against the bill of lading;[50]
(b) where property passes post-endorsement – where the sale is of goods forming part of a bulk and the goods are ascertained subsequent to endorsement;[51]
(c) where property passes independently of endorsement – for example, where goods are delivered to the buyer against a letter of indemnity due to the late arrival of the bill of lading;[52] and
(d) where no property passes – for example, where goods are lost or the seller reserves title in the goods.

The courts (driven by common sense) veered in favour of the consignee/endorsee by finding an implied contract, or finding liability in tort as the following sections show. The reasoning, largely developed to combat the injustice of a particular case, was not always intellectually tidy.

Position of pledgees

Intention to transfer property, as stated earlier, is essential for acquiring rights and liabilities under the Bills of Lading Act 1855. Transfer of a bill to a third party for raising finance did not impart rights or liabilities to the third party. *Sewell v Burdick*[53] illustrates this well. In this case, a cargo of machinery was shipped to Russia. The shipper, who endorsed the bills in blank to the banker to obtain a loan, failed to collect the goods at the port of destination. The carrier, unable to recover full freight from the sale of the goods, brought an action for the balance owing against the banker as endorsee. The House of Lords held that the banker was not liable for the balance of freight as he was not a party to the contract of carriage. No intention to transfer ownership in the goods to the bankers was present. This decision is justifiable on policy grounds. To make banks and other pledgees liable to the shipowner for freight and other charges due to the mere fact of endorsement could affect international commerce. Banks and other lenders would refuse to lend money to merchants under such onerous conditions. Of course, in some circumstances, the ruling in *Sewell v Burdick* could act to the detriment of the pledgee – that is, where the pledgee realises his security by taking delivery of the goods. Unable to sue on the bill of lading, he may be able to rely on the existence of an implied contract.[54]

Right to sue and bulk goods

Where goods shipped in bulk are covered by several bills of lading, endorsements of these bills to various third parties are not effective in transferring the rights under the Bills of Lading Act 1855. The right to sue arises only when property in the goods has passed, and this, in the sale of part of

50 See 'Position of pledgees' below.
51 See 'Right to sue and bulk goods' below.
52 See 'Endorsement of bill of lading after delivery', p 180.
53 [1884] 10 AC 74.
54 See 'The implied contract approach' below.

a bulk, happens only when the goods are ascertained under s 16 of the Sale of Goods Act 1979. The injustice caused by the concurrent operation of s 1 of the Bills of Lading Act and s 16 of the Sale of Goods Act 1979 was corrected by finding either:

(a) an implied contract;
(b) a special contract; or
(c) liability in tort.[55]

The implied contract approach

A contract on the terms contained in the bill of lading between the carrier and the endorsee was implied, provided some consideration from the endorsee to the carrier was present. Taking delivery of goods against freight by the endorsee was deemed sufficient to find an implied contract – the payment of freight being the consideration. *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd*[56] illustrates this approach. The pledgee of the bill of lading took delivery of the goods from the shipowner after paying freight. The Court of Appeal implied a contract on terms contained in the bill of lading between the pledgee and the shipowner. To imply a contract, an element of consideration must be present. In its absence, there is no remedy for the bill of lading holder. In *The Aramis*,[57] cargo was shipped in bulk, for which several bills of lading were issued. By the time the plaintiff presented his bill of lading, the cargo had been exhausted. The freight had been prepaid by the shipper. A contract on the terms set out in the bill of lading between the endorsee and the carrier could not, therefore, be implied.

Some degree of co-operation between the cargo receiver and the carrier may also result in the finding of an implied contract. In *The Captain Gregos (No 2)*,[58] the court found an implied contract between the carrier and the ultimate purchaser, who took delivery against a letter of indemnity on the basis that the cargo of oil could not have been delivered without the active co-operation of the purchaser and the crew of the vessel. The question of co-operation is a matter of fact. For instance, in *The Gudermes*,[59] on the facts, the courts were unwilling to find an implied contract between the purchaser and the carrier.

The special contract approach

The existence of a 'special contract' – a contract made by the consignor on behalf of the consignee with the shipowner in which the consignor can enforce even after property in the goods has passed to the consignee – is an alternative. It was successfully invoked, in *Dunlop v Lambert*,[60] to circumvent the doctrine of privity[61] at a time when the Bills of Lading Act 1855 had not been enacted. The 'special contract' approach was argued by the plaintiff (charterer) in *The Albazero*.[62] The endorsee had the right to sue the carrier on the bill of lading since property had passed to him but could not do

55 See pp 179–80 for all three approaches.
56 [1924] 1 KB 575.
57 [1989] 1 Lloyd's Rep 213.
58 [1990] 2 Lloyd's Rep 395.
59 [1993] 1 Lloyd's Rep 311 (CA).
60 (1839) 7 ER 825.
61 Note, however, that many of the problems created by privity are resolved by the Contracts (Rights of Third Parties) Act 1999. See MacMillan, 'A birthday present for Lord Denning: the Contracts (Rights of Third Parties) Act 1999' (2000) 63 MLR 721.
62 [1976] 2 Lloyd's Rep 467. See *McAlpine v Panatown* [2000] 3 WLR 946 on the applicability of the special contract approach to building contracts. See also MacMillan, 'The end of the exception in *Dunlop v Lambert*?' [2001] LMCLQ 338.

so since he had failed to institute proceedings within the time limit set by the terms on the bill of lading. The charterers, therefore, sued on behalf of the endorsees. The court concluded it did not apply to situations where the consignee/endorsee had the necessary contractual rights flowing from the contract of carriage.

Liability in tort

Where the claim for damage to cargo is based on negligence on the part of the carrier, his servants or agents, the courts, at times, found liability in tort in the absence of a contractual relationship. Until 1986, judicial opinion swung between liberal and restrictive approaches. The former did not insist on a contractual relationship to find tortious liability. For instance, in *The Irene's Success*,[63] coal (purchased on CIF terms) was damaged by sea water during the voyage. The plaintiffs were not the legal owners (not being holders of the bill of lading) at the time of the damage. An action in negligence was brought against the carriers, on the reasoning that they were at risk at the time the cargo was damaged. Lloyd J had no hesitation in saying that the plaintiff could sue in tort on the grounds that the incidence of risk in CIF sales was well known to shipowners. The restrictive approach, conversely, required that, for an action in negligence to succeed, the plaintiff must, at the commission of the tort, be the owner of the goods, as *Margarine Union v Cambay Prince*[64] illustrates. In this case, a cargo of dried coconuts was damaged because of the shipowner's failure to fumigate the holds of the ship. The plaintiff (not the legal owner of the goods) obtained delivery against a delivery order. Roskill J had no hesitation in holding that the plaintiff could not succeed since he was not the legal owner of the goods when the damage occurred.

This sharp division in judicial opinion was ultimately resolved by the House of Lords in *The Aliakmon*,[65] when it held that, for an action in negligence to succeed, the plaintiff must, at the time of the commission of the tort, be the owner[66] of the goods that suffered damage.

Endorsement of bill of lading after delivery

Where endorsement of a bill of lading takes place after the passage of property, the bill of lading does not impart rights to a third party. In *The Delfini*,[67] the plaintiffs bought part of a cargo carried in bulk. Under the contract, payment was to be made either against shipping documents or a letter of indemnity in the event that the bills of lading were unavailable at the date of payment. The sellers also wanted a bank guarantee not later than the nomination of the vessel. The plaintiffs took delivery of the goods against a letter of indemnity, which the sellers had issued to the ship with instructions to deliver without a bill of lading. They also paid for the goods against a letter of indemnity issued to them by the sellers. Subsequent to delivery and payment, the plaintiffs received the bill of lading. They sued the shipowner on the bill for short delivery.

The court held that the plaintiffs had no rights of action under the Bills of Lading Act 1855 since endorsement of the bill did not play a causal role in the passing of property. Property passed when the plaintiffs paid for the goods against the letter of indemnity furnished by the sellers.

63 [1981] 2 Lloyd's Rep 635.
64 [1969] 1 QB 219.
65 [1986] 2 All ER 145; [1986] 1 Lloyd's Rep 1.
66 Physical possession of bills of lading may not always give a sufficient possessory title to sue in tort – see *East West Corp v DKBS 1912 and Akts Svendborg Utaniko Ltd v P&O Nedlloyd BV* [2003] 1 Lloyd's Rep 239.
67 [1990] 1 Lloyd's Rep 252.

The Carriage of Goods by Sea Act 1992

Rights of suit

The Carriage of Goods by Sea Act 1992, unlike the Bills of Lading Act 1855, separates contractual rights from the passing of property. This legislation enables the lawful holder of a bill of lading to sue the carrier in contract irrespective of the question of passage of property by reason of consignment or endorsement bringing British law into line with the laws of several member states of the European Union (EU)(i.e., Holland, France, Germany, Sweden and Greece) and the US. The Carriage of Goods by Sea Act 1992 reflects the recommendations made by the Law Commission in their report *Rights of Suit in Respect of Carriage of Goods by Sea* (hereinafter 'Report').[68]

Two other options were open to the Law Commission. The first, an administratively simple option, was to take a wide view of s 1 of the Bills of Lading Act 1855, such that any lawful holder of the bill of lading would be allowed to sue the carrier if, at some stage, property passed to him under a contract in pursuance of which he became the lawful holder. Although resolving *The Delfini*[69] problem, it would not impart rights of suit to those bill of lading holders who had not obtained property in the goods – for example, where they were lost before they could be ascertained.

The second option was the replacement of references to property in s 1 with risk. This would have permitted a lawful bill of lading holder to sue and be sued if he was at risk in respect of the loss that occurred. It would, however, exclude bill of lading holders such as pledgees who wished to realise their security. Unfamiliarity with the concept of risk was also a strong detracting factor.[70]

Transfer of rights and transfer of liabilities are, unlike the Bills of Lading Act 1855, dealt with in two separate sections in the Carriage of Goods by Sea Act 1992. Section 2 deals with the transfer of rights, and s 3 deals with transfer of liabilities.

Transfer of rights

Since 16 September 1992, any lawful holder of a bill of lading, a sea waybill or a delivery order acquires the right to sue the carrier in contract for loss or damage to the goods, regardless of whether property in the goods has passed or not, under s 2(1) of the Act, which states:

> Subject to the following provisions of this section, a person who becomes:
>
> (a) the lawful holder[71] of a bill of lading;
> (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a seawaybill relates is to be made by the carrier in accordance with that contract; or
> (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to the contract.

68 Law Com No 196, 1991, HMSO.
69 [1990] 1 Lloyd's Rep 252. See 'Endorsement of bill of lading after delivery', p 180.
70 See paras 2.18–2.23 of the Report.
71 See s 5(2) on the interpretation of bill of lading holder. The lawful holder also includes a pledgee. In *Motis Exports Limited v Dampskibsselskabet AF 1912 v Aktieselskab, Aktieselskabet Dampskibsselskabet Svendborg* (2001) available on Westlaw database (2001 WL 239695), in an application for a summary judgment, Moore-Bick J said that 'the deposit of a generally indorsed bill of lading with the intention of creating a pledge over the goods operates to render the pledgee the holder the bill of lading under the Carriage of Goods by Sea Act 1992 . . . Sub-section 5(2)(b) refers to the completion of *any other transfer* of the bill; these are wide words which in my view are capable of embracing a transfer by way of pledge' (para 17). This also includes holder of a bearer bill. See *Keppel Tatlee Bank v Bandung Shipping* [2003] 1 Lloyd's Rep 619.

It must be noted that the Act also imparts rights of suit to holders of sea waybills and delivery orders, which reflects the realities of commercial practice.

Problems highlighted earlier (*The Aliakmon*,[72] *The Aramis*,[73] and *The Delfini*[74]) should no longer arise. Attachment of rights of suit to bills of lading that can be acquired after delivery creates the possibility of improper trading in bills of lading (i.e., where bills could be negotiated for cash in the open market purely as causes of action against the carriers subsequent to delivery).[75] This is addressed by s 2(2)(a), which operates to prevent the transfer of rights to a holder unless that party has become a holder of the bill 'by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill'.[76]

On transfer, as provided for in s 2(1), the rights to enforce the contract previously vested in any other person are extinguished under s 2(5), which states:

> Where rights are transferred by virtue of the operation of sub-s (1) above in relation to any document, the transfer for which that sub-section provides shall extinguish any entitlement to those rights which derives:
>
> (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or
> (b) in the case of any document to which the Act applies, from the previous operation of that sub-section in relation to that document;
>
> but the operation of that sub-section will be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that sub-section in relation to that order.

The shipper's rights are extinguished on endorsement. The category of parties with rights to sue on the bill of lading are restricted to avoid multiplicity of actions. Giving the right to sue to the seller would entail giving intermediate sellers on risk the right to sue.[77]

In *Motis Exports Ltd v Dampskibsselskabet AF 1912 v Aktieselskab, Aktieselskabet Dampskibsselskabet Svendborg*[78] the banks held the bills of lading for advances that had been given to the claimants (shippers). There was misdelivery of the goods. The buyers had no intention of taking up the bills of lading when the bill of lading was forwarded by the bank to its correspondent bank for collection. The bank debited the claimants' account and returned the bills of lading to the claimants. On the return of the original bills of lading indorsed in blank, the claimants, it was held, became the holders of the bill of lading for the purposes of the Carriage of Goods by Sea Act 1992 and could exercise their rights under s 2.[79]

72 [1986] 2 All ER 145; [1986] 1 Lloyd's Rep 1.
73 [1989] 1 Lloyd's Rep 213 (CA).
74 [1990] 1 Lloyd's Rep 252.
75 See para 2.43 of the Report.
76 Ibid, para 2.44. See *The Ythan* [2006] 1 Lloyd's Rep 457 where bill transferred after insurance settlement.
77 Ibid, para 2.34.
78 Available on Westlaw under ID tag 2001 WL 239695.
79 In *East West Corp v DKBS 1912* [2002] 2 Lloyd's Rep 182, the sellers named the bank as consignees. The bank obtained rights under s 2(1) of the Carriage of Goods by Sea Act 1992. The bank subsequently transferred the bills of lading to the seller but did not indorse them. The sellers argued they had become holders by virtue of the operation of ss 2(2) and 5(2)(c). It was held that these sections are relevant only where the bills of lading were spent. This was not the situation here – the bills had not ceased to be a transferable document of title since they gave a right of possession against the carrier (at pp 191–2). See also *The David Agmashenebeli* on the operation of s 2(2)(a).

It was suggested by the defendants that, before the receipt of the bills of lading, the claimants were aware that the goods had been misdelivered against forged documents; they did not, thereafter, become holders in good faith as required by s 5(2). However, since the claimants became holder as a result of pre-existing commercial arrangement (security for credit), the court did not address the question of whether a person who becomes the holder of a bill of lading in the knowledge that the goods have been lost or destroyed while in the hands of the carrier is a holder in good faith.

The seller has a limited right of suit, and this is where he wishes to sue on the contract of carriage – for example, where the buyer rejects the goods on arrival. This right is imparted by s 2(2)(b), which states:

> 2(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of sub-s (1) above unless he becomes the holder of the bill:
>
> (a) ...
> (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

Section 2(2)(b) does not operate to give rights of suit to the seller in other situations, where he remains on risk.

As for intermediate holders, their rights are extinguished on transfer.[80] An intermediate owner is left to his own devices should he remain on risk on endorsement. One solution would be to arrange an assignment of the buyer's rights against the carrier.[81]

Questions do arise whether the Carriage of Goods by Sea Act 1992 has done away with the right to claim in bailment.[82] In *DKBS v East West Corp*,[83] goods were shipped at Hong Kong for delivery at Chile, cash on delivery terms. The bills of lading named Chilean banks as consignees. On arrival, the goods were placed in a licensed customs house since no duty had been paid in advance. Once the duty was paid, they were released to Gold Crown (the buyer) without the production of bills of lading. No payment was made by the buyer, and the carriers were sued for misdelivery. The carriers contended that the claimants did not have any title to sue under the Carriage of Goods by Sea Act 1992. The claimants, among others, contended that they had retained their rights as shippers and they had, in any event, title to claim in bailment. Thomas J concluded on the basis of ss 2 and 5 of the Carriage of Goods by Sea Act 1992 that the claimants had parted with all rights of suit to the Chilean banks. More importantly, he concluded that, as a result of the transfer of the bills of lading to the Chilean banks, the claimants had lost their right to immediate possession. This meant they

80 *Borealis AB v Stargas Ltd (The Berge Sisar)* [1988] 4 All ER 821.
81 See para 2.40 of the Report.
82 Bailment is peculiar to common law; it is *sui generis* and exists independently of contract or tort. The law of bailment allows the owner of the goods or a person who has a right to possession to bring an action in bailment against third parties with whom no contractual relationship exists. Bailment comes into existence when X is knowingly and willingly in possession of goods belonging to Y. X is the bailee, and Y the bailor – that is, one who leaves the goods in possession of X. It is likely that bailment will be for reward, although gratuitous bailment is recognised. See also Chapter 13.
83 [2003] 1 Lloyd's Rep 239.

had no rights in bailment on transfer,[84] although he concluded that they could as proprietors of the goods claim for the permanent deprivation of their proprietary interest resulting as a consequence of the delivery to the buyers. On appeal, the respondents challenged the judge's reasoning on a number of grounds: '(i) that they were the original bailors; (ii) that whether or not their delivery of the bills to the Chilean banks transferred any right to immediate possession of the goods depended at common law upon their and the bank's intention and that there was no such intention to transfer any such right; (iii) that there is nothing in the 1992 Act to alter this position or to transfer their rights in bailment to the Chilean banks; and (iv) that the fact that the banks at all times held the bills for the respondents enabled the respondents to sue in bailment as the bank's principals.'[85] After a review of authorities such as *The Pioneer Container*,[86] Mance LJ concluded that the case under consideration 'was not one of bailment and sub-bailment of the container load of goods', although

> . . . in respect of the shipping documents themselves, the Chilean banks were, on the face of it, bailees, but even assuming that the delivery to them of the bills of lading passes to them a constructive or symbolic possessory interest in the goods, the Chilean banks cannot be realistically viewed as bailees of goods *vis à vis* the respondents . . . a relationship of bailment continued in existence between the respondents and the shipping line despite the respondent's transfer.[87]

Section 2(2) in paragraph (a) also confers right to sue on the lawful holder bill of lading, even in the absence of possession of the goods, provided he became holder of the bill of lading as a result of contractual arrangement before the 'time when such a right to possession ceased to attach to possession of the bill' – that is, before the bill of lading was spent as where the goods are delivered without a bill of lading. In *Pace Shipping Co Ltd v Churchgate Nigeria (The Pace)*,[88] where Churchgate became holders of the bill of lading by virtue of it having been endorsed to them by its bankers after the cargo had been discharged, it was held that they had title to sue by virtue of s 2(2)(a).

Section 2(4)[89] further enables a lawful holder who has acquired title by virtue of s 2(2)(a) but who has not suffered a loss to bring an action against the shipowner to recover another person's loss. In *Pace Shipping Co Ltd of Malta v Churchgate Nigeria Ltd of Nigeria*,[90] the scope of s 2(4) was considered and, according to Burton J Churchgate, 'was entitled to, pursuant to its own cause of action, albeit having suffered no loss, to recover, pursuant to its own cause of action, the loss suffered by NBIC and, in due course, no doubt to account for it. That is the system that is permitted, and initiated, by s 2(4) of the 1992 Act'.[91]

84 See *East West Corp v DKBS 1912 and AKTS Svendborg Utaniko Ltd, P&O Nedlloyd BV* [2002] 2 Lloyd's Rep 182, at pp 191–3.
85 [2003] 1 Lloyd's Rep 239, at p 248.
86 [1994] 2 AC 324. See also Chapter 13.
87 At p 252. See also para 49, p 255.
88 [2009] EWHC 1975 (Comm).
89 It states:
Where, in the case of any document to which this Act applies—
(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but
(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,
the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.
90 [2011] 1 All ER (Comm) 939.
91 *Ibid.*, para. 30.

Imposition of liabilities

The carrier acquires enhanced rights of claim against the bill of lading holder. Section 3(1) of the Carriage of Goods by Sea Act 1992 states that any person in whom rights are vested by virtue of s 2(1) 'takes or demands delivery from the carrier of any of the goods to which the document relates; makes a claim under the contract of carriage against the carrier in respect of those goods; or is a person who, at a time before the rights were vested in him, took or demanded delivery from the carrier of any of those goods', and is subject to the same liabilities under that contract as if he were a party to the contract.

This provision does not state whether the bill of lading holder is only liable for those events that occur post-endorsement or whether he is liable for events preendorsement. For instance, is the bill of lading holder liable for damage caused by dangerous goods at the time of shipment, or freight and demurrage on loading? Also, under s 3(1), the bill of lading holder who has received no goods at all is liable.

As for liability incurred before endorsement, s 3(3) may provide a possible solution since this section retains the liability of the original parties to the contract of carriage. Where the shipper has the contractual obligation to pay freight or demurrage on loading, he will remain liable to the carrier. This view finds support in the *obiter* statement found in *Effort Shipping Co Ltd v Linden Management SA and Others*.[92] The issue before the court in this case was whether the liability of the shipper for the damage caused by shipment of the dangerous goods was transferred to endorsees (purchasers) under s 1 of the Bills of Lading Act 1855. The court held that the purpose of the Bills of Lading Act 1855 was to create an exception to the doctrine of privity and that the endorsee became subject to the same liabilities as the shipper by way of addition, and not substitution, meaning that the shipper remained liable. Lord Lloyd went on to observe that 'the result would have been the same under s 3(3) of the Carriage of Goods by Sea Act 1992' (pp 214–5).

As for those who hold bills of lading for security purposes, they will not be liable unless they take or demand delivery of the goods, under s 3(1). This preserves the position developed in *Sewell v Burdick*,[93] where the bank was not liable for the freight owed to the carrier.

The question of what constitutes demand was considered in *Borealis AB Stargas Ltd and Another (Bergesen DY a/s Third Party), Borealis AB v Stargas Ltd and Others*.[94] Since the nature of the consequences flowing from s 3 were important, it was construed as not including taking of samples by the endorsee but as meaning a formal demand. According to Lord Hobhouse:

> A 'demand' might be an invitation or request, or, perhaps, even implied from making arrangements; or it might be a more formal express communication . . . From the context of the Act and the purpose underlying s 3(1), it is clear that s 3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance, the endorsee may not be fully aware of what the liabilities are. I would therefore read the phrase 'demands delivery' as referring to a formal demand made to the carrier or his agent asserting the contractual right as endorsee of the bill of lading to have the carrier deliver goods to him. And I would read the phrase 'makes a claim under the contract of carriage' as referring to a formal claim against asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading [at p 228].

92 [1998] 2 WLR 206.
93 [1884] 10 AC.
94 [2002] 2 AC 205.

But what about the liability of an intermediate holder who subsequently endorses the bill of lading to another? In *Borealis AB Stargas Ltd and Another (Bergesen DY a/s Third Party), Borealis AB v Stargas Ltd and Others*, the intermediate holder, on rejecting the cargo after taking samples, subsequently endorsed the bill of lading to another purchaser. Does he remain liable post-endorsement? Unlike s 2, which has an express specific provision in s 2(5) about the rights of intermediate holders, s 3 is silent. Lord Hobhouse concluded that, on transfer, the liabilities of the intermediate holder are extinguished on two grounds. First, on the basis that ss 2 and 3 had adopted the wording of the Bills of Lading Act 1855, thus indicating the intention to preserve their interpretation in cases such as *Smurthwaite v Wilkins*.[95] Second, there is the principle of mutuality, embedded in s 3(1), since liabilities attach only when the rights are acquired. In the words of Lord Hobhouse:

> . . . it makes it fundamental that, for a person to be caught by s 3(1), he must be the person in whom the rights of suit under the contract of carriage are vested pursuant to s 2(1). The liability is dependent upon the possession of the rights. It follows that, as there is no provision to the contrary, the Act should be construed as providing that, if the person should cease to have the rights vested in him, he should no longer be subject to the liabilities. The mutuality which is the rationale for imposing the liability has gone. There is no longer the link between benefits and burdens [at p 233].

Bills of lading and fraud

Before going on to consider the impact of information technology, attention must be drawn to fraud in bills of lading. Bills of lading are normally issued in sets of three or six originals. This mercantile practice enables the bill to be sent to the consignee by different modes of dispatch and ensures that the consignee gets at least one of the originals on time to take delivery of the goods at the destination. Treating each bill of lading as an original leaves it open to misuse. The carrier, as stated earlier, delivers the cargo against presentation of the bill of lading, and it is not necessary for the holder of a bill of lading to present the entire set to the carrier. Presentation of part of a set is enough. Delivery of the cargo against one of a set would cause no problems if the consignee/endorsee had the entire set. However, it is normal for the endorser to transfer only part of a set to the endorsee, which means that both the endorsee and endorser possess part of a set, where part of the set is endorsed to the endorsee and the others remain unendorsed (or may be endorsed, in cases of fraud, to other third parties). Since each bill in the set is treated as an original, the endorser (or other third parties), as well as the endorsee, can demand delivery. The dangers inherent in issuing bills of lading in sets of three or six originals were spotted by Lord Blackburn in *Glyn Mills v East and West India Dock Co*,[96] when he said:

> . . . the very object of making a bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had. And the consequence of making a document of title in parts is that it is possible that one part may come into the hands of one person who *bona fide* gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee or pawnee, and another may come into the hands of another person, who, with equal *bona fides*, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen unless there is fraud on the part of those who pass the two parts to different persons [at p 604].

95 (1862) 11 CBNS 842. See Erle CJ at p 848.
96 (1882) 7 App Cas 591.

Despite their proneness to fraud and developments in communications technology, merchants continue to issue bills of lading in sets. Why this practice continues to this day is unclear. Lord Blackburn found this mercantile custom equally perplexing:

> I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I would have thought that, at least since the introduction of quick and regular communications by steamers, and still more since the establishment of electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as it is thought convenient: those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out [at p 605].

Bills of lading drawn in sets normally provide that 'one being accomplished, the others are to stand void'. This is to protect the carrier, were he to deliver against an unendorsed or a validly endorsed bill of lading. In the event of misdelivery, the carrier will not be liable if he has no notice of other endorsements. There is no duty on the carrier to make inquiries of the unendorsed bill of lading holder whether any assignments have taken place. Of course, it is always open for the assignee to protect against misdelivery by contacting the shipowner as soon as the assignment has taken place and inform him of his acquired rights. This does not happen often in practice. In *Glyn Mills v East and West India Dock Co*,[97] a set of three bills of lading was issued, naming Cottam and Co as the consignees. Freight was to be payable on arrival of the goods at London. Cottam and Co endorsed one bill of lading as security to Glyn Mills and retained the other two bills in the set. When the goods arrived in London, they were warehoused, and Cottam and Co obtained delivery of the goods from the warehouse on presentation of the unendorsed bill of lading and on payment of freight due. Glyn Mills brought an action against the warehouseman for misdelivery. The House of Lords held that the warehouseman was not liable for misdelivery since:

> . . . it would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment of which the shipowner has no notice should prevent a *bona fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the party having no notice of anything to displace his right . . . it is for the assignee to give notice of his title to the shipowner if he desires to make it secure and not for the shipowner to make such inquiry [at p 596].

Where a carrier delivers cargo in the absence of a bill of lading, the carrier will be in breach of contract. The breach is regarded as a fundamental breach, such that he will lose the benefit of the exception clauses in the contract of carriage. In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*,[98] the carrier discharged the goods to their agents, who delivered the goods against an indemnity from the bank. No bill of lading was presented. The bill of lading contained a clause, which read:

> During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion

97 (1882) 7 App Cas 591.
98 [1959] 2 Lloyd's Rep 114.

of any other provisions in this bill of lading that it may be inconsistent therewith, *viz*, (a) so long as the goods remain in the actual custody of the carrier or his servants . . . (b) whilst the goods are being transported to or from the ship . . . (c) in all other cases the responsibility of the carrier, whether as a carrier or as a custodian or as a bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.

The issue was whether the carrier could rely on this clause to absolve him from liability for delivering the goods without production of a bill of lading. The court held that the clause could not protect the carrier, for:

. . . if such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company 'unto order or his or their assigns' against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences . . . they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause [at pp 120–21].

Lord Denning's reference to fundamental breach, however, has to be interpreted in the light of *Photo Productions Ltd v Securicor Transport Ltd*.[99] Were a case similar in facts to *Sze Hai Tong*[100] to come before the courts again, no doubt they would hold the clause ineffective on the grounds that it defeats the main purpose of the contract. After all, as Lord Denning said,' . . . if the exemption clause upon its true constructions absolved the shipping company from an act such as that, it seems that, by parity of reasoning, they would have been absolved if they had given the goods away to some passerby or had burnt them or thrown them into the sea . . . there is, therefore, an implied limitation in the clause'.[101] The case of *The Ines*,[102] where goods were delivered without production of a bill of lading, lends support. In holding that cl 3, which provided:

. . . after discharge, the goods are to be at the sole risk of the owners of the goods and thus the carrier has no responsibility whatsoever . . . for the goods . . . subsequent to the discharge from the ocean vessel . . .

was insufficient to excuse misdelivery, Clarke J clearly stated that:

. . . one of the key provisions, so far as the shipper is concerned, is the promise not to deliver the cargo other than in return for an original bill of lading . . . The parties would not . . . be likely to have contracted out of it. Thus, clear words would be required for them to have done so. The clause should be construed so as to enable effect to be given to one of the main objects and intents of the contract, namely, that the goods would only be delivered to the holder of an original bill of lading [at p 152].[103]

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99 [1980] AC 827; [1980] 1 All ER 556.
100 See 'Duty to pursue the contract voyage' in Chapter 8, pp 229–32.
101 [1959] 2 Lloyd's Rep 114, at p 120.
102 [1995] 2 Lloyd's Rep 144.
103 See also 'Delivery Against Bills of Lading', pp 174–7.

Electronic data interchange (EDI) and the Carriage of Goods by Sea Act 1992

As stated in Chapter 1, INCOTERMS 2000, expecting an increase in the use of electronic means of communication, had made suitable amendments in trade terms to accommodate the use of electronic bills of lading. And these changes are also reflected in INCOTERMS 2010. Developments relating to paperless trading have also been anticipated by the Carriage of Goods by Sea Act 1992, even though the Commission's consultation document did not consider electronic transmission of transport documents. Section 1(5) of this legislation empowers the Secretary of State to make provisions for the application of the Act to cases where a telecommunications system or any other information technology is used for effecting transactions corresponding to:

(a) the issue of a document to which the Act applies;
(b) the endorsement, delivery or other transfer of such a document; or
(c) the doing of anything else to such a document.

'Information technology' is defined in s 5(1) to include any computer or other technology by means of which information or other matter may be recorded or communicated, without being reduced to documentary form. This definition appears to be sufficiently wide to include other means of information transfer through intangible means that may be developed in the future.

So far, the Secretary of State has not exercised his powers under s 1(5), since electronic bills of lading are not yet in common use.

However, since the passing of the Carriage of Goods by Sea Act 1992, many developments have taken place both technologically and legislation wise at the domestic as well as at the international level. Contracts concluded electronically are now recognised widely in many juridisctions[104] largely as a result of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.[105] Equally, formal requirements for a contractual document, such as signatures, have been made possible as a result of legislation modelled on the UNCITRAL Model Law on Electronic Signatures.[106] Further, the CMI Rules on Electronic Bills of Lading and the BOLERO Rules have made the use of electronic bills of lading a reality. However, before considering these developments, a few words on the advantages and disadvantages of using paperless documents are provided.

Advantages and disadvantages of using electronic documents

Electronic bills of lading are regarded by some traders and practitioners as a vast improvement on paper bills of lading since they will see a reduction in:

(a) problems created by late arrival of documents at the port of discharge; and
(b) fraud, since bills of lading will no longer be sent in sets of three or six originals.

There is some truth in the view that problems, legal and logistical, associated with the late arrival of mailed transport documents, will be solved by their electronic transmission. Whether this

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104 For example, Australia, Singapore, Malaysia, India. See also Carr, 'India joins the cyber-race: Information Technology Act 2000' (2000) 6(4) International Trade Law and Regulation 120.
105 See Chapter 3.
106 See Chapter 4.

will reduce the incidence of fraud in bills of lading is debatable. The incidence of fraud may well increase because of the likelihood of computer misuse – more so, where an open network, such as the Internet, is used. The successful implementation of paperless documents in the shipping industry is possible only if:

(a) there are reliable security devices that would make it near impossible for the fraudster or hacker to gain access;
(b) there are adequate mechanisms in the available law or new laws are enacted, at both national and international levels, that would deter the would-be hacker or fraudster;
(c) there is greater co-operation between countries to exchange information about cross-border data flow and access to evidence; and
(d) the laws of evidence allow for admissibility of computer-generated documents.

As for (a), security devices using digital cryptology that make computer break-ins near impossible, thereby reducing the chances of forgery or alterations to the data by a fraudster or a mischievous hacker, are technically feasible. Encryption of data is also possible. Of course, such technology in some countries[107] is treated as defence material, and hence regulated. Its free availability and use in some countries cause concern since terrorists, drug barons and money launderers are likely to use it to cloak their activities. Leading Western governments would like to give government agencies extensive powers to intercept communications[108] and access computer-held information for purposes of national security and preserving the economic infrastructure. It raises policy issues, ranging from the acceptable level of tolerance to criminal activities that undermine the social and economic structure, the paternalistic role of states, to the rights of individuals (e.g., the right to privacy). Organisations, such as the Organisation for Economic Co-operation and Development (OECD), and economic groupings, such as the EU, are continuously considering policy issues with a view to arriving at a solution that makes electronic commerce secure without jeopardising the well-being of nations, societies and the individual.[109]

As for (b), Britain is one among many countries to introduce legislation on computer misuse – the Computer Misuse Act 1990. Legislation in this area came about when traditional criminal law could not cope with certain kinds of computer-related crime because of the intangible nature of the information held on computers.[110] This legislation carries criminal sanctions in the event of computer misuse. Its success in curbing computer misuse is debatable. Prosecutions are few, and yet the Audit Commission estimates annual losses caused by computer misuse at more than £2m. The failure may be due to difficulties in gathering evidence and limited police resources.[111] The Council of Europe, with the intention of harmonising the law on computer misuse, has drafted the International Convention on Cybercrime,[112] which it is hoped will have wide impact.

107 eg, the US.
108 See the Regulation of Investigatory Powers Act 2000, which gives extensive powers to authorities in the United Kingdom. See also Indian Information Technology Act 2000, Williams and Carr, 'Crime risk and computers' [2002] Electronic Communications LR 23; Carr and Williams, 'A step too far in controlling computers? The Singapore Computer Misuse (Amendment) Act 1998' [2000] International Journal of Law and Information Technology 48.
109 To cite a few: OECD, Report on Background and Issues of Cryptography Policy; A European Initiative in Electronic Commerce, COM (97) 157; Commission Green Paper, Legal Protection of Encrypted Services in the Internal Market, COM (96) 76, European Commission. See also Chapters 3 and 4 for further references.
110 R v Gold; R V Schifreen [1988] AC 1063; Cox v Riley 91986) 83 Cr App 554.
111 See Carr and Williams, 'Regulating the e-commerce environment: enforcement measures and penalty levels in the computer misuse legislation of Britain, Malaysia and Singapore' (2000) 16(5) Computer Law and Security Report 295.
112 The text of the convention is available at www.coe.org. See also Chapter 4; Carr and Williams, 'Criminalisation of new offences under the Council of Europe Convention on Cybercrime' (2002) 18(2) Computer Law and Security Report 91.

As for (c), international organisations, such as the Council of Europe, have recommended various measures that countries may take both nationally and internationally. Their success depends on the countries' (political) willingness to participate.[113]

As for (d), rules of evidence in common law countries have been developed largely to handle the oral nature of the trial, resulting in the hearsay rule, whereby witnesses can testify on the basis of their own first-hand knowledge. Anything short of this requirement falls foul of the hearsay rule. In England, computer-generated evidence in civil matters is admissible because of recent legislation. Following the Law Commission's Report, *The Hearsay Rule in Civil Proceedings*,[114] the Civil Evidence Act was passed in 1995, which allows the admissibility of computer-generated evidence. There are no special rules about the reliability of the computer from which the document is generated for it to be admissible. Presumably, this is due to the difficulties in guaranteeing the non-corruptibility of computer systems. The course recommended by the Commission is one of weighing the evidence according to its reliability.[115]

Prior to the Civil Evidence Act 1995, under s 5 of the Civil Evidence Act 1968, a statement contained in a document produced by a computer was admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, provided the conditions stipulated below were satisfied:

(a) the documents must have been prepared during a period over which the computer was regularly used to process information for the purposes of the activities regularly carried on over that period;
(b) information of the kind contained in the document, or from which it is derived, was, over that period, regularly supplied to the computer in the ordinary course of those activities;
(c) the computer was operating properly throughout that period; or if not, the reason for any malfunction was not such as to affect the accuracy of the document; and
(d) the information contained in the document is reproduced or is derived from information supplied to the computer in the ordinary course of the activities for which it was used.

The court also had to be satisfied that these conditions were fulfilled either by oral evidence or by a certificate signed by a person occupying a responsible position.

Although innovative at the time, s 5 lacked clarity – for instance, it was unclear whether s 5 of the Civil Evidence Act 1968 was a general rule relating to the admissibility of all computer-generated evidence or whether it was an exception to the hearsay rule, because the inclusion of this section under that part of the Act headed 'Hearsay Evidence'. If the heading was an operative part, s 5 was an exception to the hearsay rule. Conditions stipulated in s 5 also posed problems. Its emphasis on regularity of use of the particular computer from which the document was retrieved, rather than the reliability of the computer, excluded documents generated by a computer as a one-off task.

113 See Council of Europe, Recommendation No R 95(13) Concerning Problems of Criminal Procedural Law Connected to Information Technology and Explanatory Memorandum, text available at www.coe.org; United Nations, Manual on the Prevention and Control of Computer related Crime, 1994. See also Carr and Williams, 'Council of Europe on the Harmonisation of Criminal Procedural Law Relating to Information Technology (Recommendation No R95(13)) – some comments' [1998] JBL 468.
114 Law Com No 216, 1993, HMSO.
115 Paragraph 4.43, *The Hearsay Rule in Civil Proceedings*. See also s 7(1) of the Electronic Communications Act 2000, which allows electronic signatures and authentication certificates to be admitted in legal proceedings.

The UNCITRAL Model Law on Electronic Commerce,[116] on which many jurisdictions have based their legislation, allows for the admissibility of computer-generated evidence in its Art 9, which states:

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) on the sole ground that it is a data message; or
(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which its originator was identified, and to any other relevant factor.

Electronic bills of lading: the SEADOCS scheme, CMI Rules for Electronic Bills of Lading

In the mid-1980s, the International Association of Independent Tanker Owners (INTERTANKO), in association with Chase Manhattan Bank, experimented with an electronic system, known as SEADOCS. Primarily devised to combat fraud, the bill of lading started life in a tangible form – that is, as a paper bill of lading. This was lodged with Chase Manhattan Bank, which functioned as a central registry. Acting as an agent for all parties, the bank transferred ownership in the goods on electronic notification. The system did not take off, since the participants were worried about the confidentiality of the information they divulged to the bank. The scheme was also economically unviable because of insurance costs to cover the bank's liability. Further, questions were also raised about whether the bill of lading was truly electronic since it came into existence in a tangible form.

The CMI came up with a proposal where the carrier (instead of the bank) is responsible for affecting the transfer of the bill of lading. The CMI Rules for Electronic Bills of Lading (hereinafter 'CMI Rules'),[117] like INCOTERMS 2010, need to be incorporated into the contract. From the very beginning, the document starts life in an intangible form. Once the carrier receives the goods from the shipper, the carrier sends a receipt message of the goods to the shipper (Article 4(a)) containing the usual details found in such receipts – that is, the name of the shipper; the description of the goods, including any reservation; the date and place of receipt; a reference to the terms of carriage; and the private key to be used (Articles 4(b)(i)–(v)). One of the omissions at this stage is the date and place of shipment that is included in a paper bill of lading. Article 4(c) makes provision for this by requiring that the receipt message be updated with these details as soon as the goods have been loaded. However, the onus seems to be on the holder to demand the updating. So, what is the effect if such an updating takes place? According to Article 4(d), the description of the goods, including any reservation; the date and place of receipt; a reference to the terms of carriage; and the date/place of shipment 'shall have the same force and effect as if the receipt message were contained in a

116 See also UNCITRAL's draft for an International Convention on Electronic Transactions (Proposal Date 29 June–10 July 1998 – A/CN 9 WG IV/WP 77), available at www.uncitral.org.

117 Text available in Carr and Goldby, *International Trade Law Statutes and Conventions*, 2nd edn, 2011, Routledge-Cavendish.

paper bill of lading'. In other words, the receipt function of the electronic bill is to be no different from a paper bill of lading.[118]

Once the shipper confirms the receipt message, he becomes the holder (Art 4(b)(v)).[119] By becoming holder, according to Art 7(a), the CMI Rules enable him to, as against the carrier:

(i) claim delivery of the goods;
(ii) nominate the consignee or substitute a nominated consignee for any other party, including itself;
(iii) transfer the Right of Control and transfer to another party;
(iv) instruct the carrier or any other subject concerning the goods, in accordance with terms and of the Contract of Carriage, as if he were the holder of a paper bill of lading.

It seems the holder of the private key has all the rights traditionally associated with a paper bill of lading, naming of a consignee, transferring it to another including by way of pledge, and claim delivery. In other words, it is seen as equivalent to a paper bill of lading. The private key, which plays a crucial role in imparting identity, as well as identification, is defined in Art 1(f) as a 'technical appropriate form such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a transmission'. The private key is unique to the holder, and, on transfer, the new holder is given a new private key (Art 8). The CMI Rules are technology neutral apart from indicating it must be letter/numbers or a combination. The parties are free to choose. Given the developments in relation to electronic signatures and their sophistication, the parties are likely to choose this rather than the well-known four-digit PIN codes since they are easy to hack into. As to what the consequences are for careless or reckless use in relation to these keys, the CMI Rules are silent apart from one provision which talks about misdelivery and the standard of care to be exercised by the carrier. According to Art 9, the carrier is obliged to notify the holder of the place and date of the intended delivery of the goods. On notification, the holder is expected to nominate a consignee and to give delivery instructions to the carrier with verification by the private key. If the holder has been careless with the private key as a result of which an entity other than the holder gives instructions to the carrier on which the carrier acts, then it seems the loss will fall on the holder since according to Art 9(c) the 'carrier shall be under no liability for misdelivery if it can prove that it exercised care to ascertain that the party who claimed to be the consignee was in fact that party'. Equally, where the holder is unaware that the private key has been compromised, the carrier will escape liability if he can establish reasonable care on his part.[120] The burden, however, is on the carrier that he exercised reasonable care.[121]

The terms and conditions of carriage, however, unlike the majority of paper bills of lading, are not included in the receipt message. Article 4(b)(iv) requires that there is a reference to the terms of carriage in the receipt message, and Art 5(a) provides that such a reference to the terms will be effective in incorporating those terms in the contract of carriage. This means that a consignee or transferee will be subject to the terms. It is difficult to see why the CMI Rules separate the terms from the receipt message. Surely, the receipt message could easily include the standard terms, unless

118 See 'Bill of lading as a receipt', p 167.

119 Holder is defined in Art 1(g) as 'the party who is entitled to the rights described in Art 7(a) by virtue of its possession of a valid private key'.

120 The presentation rule is not as stringent here as at common law. See 'Delivery against bills of lading', pp 174–7.

121 Of course, the carrier may include clauses in his conditions of carriage that exempt him from liability for misdelivery, even where he is negligent. It is debatable whether the courts in England would enforce such a clause. As it is, the CMI Rules have lessened common law presentation rules. See *Motis Exports Limited v Dampskibsselskabet AF 1912 Aktieselskabm Akteiselskabet Dampskibsselskabet Svendborg* and 'Delivery against bills of lading', p 174.

of course they were worried by technical aspects such as hard disk space and preferred to simplify the process by replicating a short form bill of lading.[122]

Unlike a paper bill of lading, electronic bills of lading require a third party to affect a transfer. Under the CMI Rules, the carrier plays an important role in transferring the bill of lading. To affect a transfer, the shipper (transferor) has to inform the carrier of the details of the proposed new holder (transferee). Once the carrier has confirmed the notification message, the carrier will issue a new private key to the new holder. Once the holder has accepted the right of control and transfer, the carrier will then issue a private key to the transferee and cancel the private key issued to the shipper (Art 7(b)).

Some jurisdictions may require a contract of carriage to be in writing and signed. In the event of the parties adopting the CMI Rules, Art 11 ensures that they agree not to raise the defence that the contract is not in writing. Of course, at any moment prior to delivery, the holder can demand a paper bill of lading (Art 10(a)). The issue of a paper bill of lading will cancel the private key and terminate the EDI procedures under the CMI Rules but does not affect the rights, obligations or liabilities while performing under the CMI Rules nor the rights, obligations or liabilities under the contract of carriage (Art 10(d)). In other words, the change in medium – paperless to paper – in no way affects the rights, obligations and liabilities of the parties.

It must, at this stage, be noted that most bills of lading may attract the mandatory application of national law or international conventions, such as the Hague-Visby Rules[123] or the Hamburg Rules.[124] Bills of lading incorporating the CMI Rules are subject to mandatorily applicable law according to Art 6 which states:

> The contract of carriage shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued.

The success of the CMI Rules will depend on whether merchants are ready to relinquish their control over the bill of lading and entrust the carrier with information to effect a transfer. If they were unhappy in giving information to banks as in the SEADOCs scheme, why should they trust a carrier more than a bank? After all, banks do subscribe to codes of conduct, and the duty of confidentiality is a core part of their obligations to their clients. The CMI Rules, however, have the advantage of being freely available to all. It does not require membership to a closed network. This brings us to the BOLERO Rules.

The EU set up a pilot project in the mid- to late-1990s, called the BOLERO project, to study the feasibility of electronic bills of lading. It resulted in the formation of BOLERO International Ltd.[125] It is a closed network and is available to those who subscribe with BOLERO, taking on the role of a trusted third party providing a platform for secure exchange of trade documents – transport documents such as bills of lading and documentary credits. The subscribers are subject to the

122 In short form bills of lading, the carrier's standard terms and conditions are incorporated by reference, and the short form includes details, such as names of shipper, consignee, and vessel, ports of loading and discharge, description of goods, marks and quantity. This form of bill was introduced to simplify and speed up the process of producing the document. Simplification of International Trade Procedures (SITPRO) in the United Kingdom have produced a standard short form bill. The forms are also available from SITPRO at www.sitpro.org.uk.

123 See Chapter 8, Scope of application. The Hague-Visby Rules do not make provision for their applicability to electronic bills of lading. See also Chapter 9 on electronic transport records under Rotterdam Rules.

124 See Chapter 9.

125 Visit www.bolero.net for further details. Jointly owned by TT Club and SWIFT (an organisation that processes financial transfer for banks).

BOLERO Rule Book,[126] which provides the legal framework for paperless transactions. The BOLERO title registry plays a vital role in respect of bills of lading; it is a database of information relating to bills of lading that is centrally operated. Transfer is affected by a combination of notification, confirmation and authentication through digital signatures. It is not very clear how widely this system is used, although the BOLERO website indicates that major banks, shipping companies and traders are their members. This means that it might also be possible to meet the other functions of bill of lading, such as financing the sale/purchase by way of pledge.

Conclusion

This chapter describes the many different functions of a bill of lading, ranging from a mere receipt to a contract of carriage and a document of title in international commerce. The bill of lading as a contract of carriage, of course, defines the rights and duties of both the shipowner and the consignee or endorsee. The 19th century saw the insertion of terms in bills of lading that were extremely disadvantageous to the consignee or endorsee. Common law tried to protect the consignee by construing clauses limiting responsibility (e.g., implied undertaking to provide a seaworthy ship) or excluding liability narrowly. Clearly worded clauses, however, were given effect since it was not the job of the courts to intervene in the parties' contract. International organisations sought to protect the weaker party (cargo owner in this case) through the formulation of international conventions. Chapters 7, 8 and 9 examine the rights and responsibilities of the parties to a bill of lading at common law, under the Hague-Visby Rules (implemented by the UK with the Carriage of Goods by Sea Act 1971), and the Hamburg Rules. Chapter 9 also includes a brief overview of the recently adopted Rotterdam Rules.

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