Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective†

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I

INTRODUCTION

The ocean bill of lading is undergoing a radical transformation. Until the 1960's, most commercial letters of credit, reflecting documentary sales terms, called for payment against presentation of negotiable ocean bills of lading indorsed to the issuing or confirming

†Editor’s Note: While the manuscript of this article was being prepared for publication, UNCTAD and the ICC completed their work on the draft rules for multimodal transport documents referred to in note 253. The UNCTAD/ICC Rules for Multimodal Transport Documents, ICC Publication No. 481, January 1992, replace the ICC’s Uniform Rules for a Combined Transport Document, ICC Publication No. 298. Also, the United Kingdom will be amending the Bills of Lading Act 1855. The amendments will be the subject of an article in an upcoming issue of the Journal.

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bank.\textsuperscript{1} Bankers regarded the ocean bill of lading as sound collateral, and as a secondary source of repayment of the account parties' reimbursement obligations to the issuing bank. This is no longer the case. During the last two decades more and more bankers have come to regard the bill of lading as just another letter of credit document. Issuers of letters of credit now view themselves not as purchasers of bills of lading, but as mere examiners of the bills' facial compliance with the terms of the letter of credit. The banker's decision to issue a credit nowadays is rarely based upon the availability of a "clean, on board, negotiable" ocean bill covering the shipment of a readily marketable commodity. Prominent American bankers recently informed me that half of their commercial letters of credit provided for payment not against ocean bills of lading, but against freight forwarders' cargo receipts.\textsuperscript{2} These forwarders' receipts lack essential elements of ocean bills of lading. Their popularity is due to the lower cost of "consolidated" shipments, in which freight forwarders place the cargo of several shippers in the same container or on pre-leased space in a vessel. In a similar vein, representatives of one of the most active carriers in the North Atlantic trade recently told me that most of its North Atlantic and Baltic business is documented with sea waybills, which also differ sharply from the negotiable ocean bill of lading.\textsuperscript{3} During the mid 1980's, a major bank attempted to develop electronic procedures to facilitate trading in North Sea crude oil with the support of a centralized bill of lading registry.\textsuperscript{4} At the same time, carriers have begun to switch to paperless or electronic bills of lading. In response to the need for paperless bills of lading, in June 1990 the

\textsuperscript{1}For a discussion of commercial letter of credit issuance practices through 1966, see B. Kozolchyk, Commercial Letters of Credit in the Americas, 12-14, 42, 43 (1966) (hereinafter Kozolchyk, Commercial Letters of Credit). For a discussion of the transformation of the documentary sale (CIF) term requirement of a clean negotiable ocean bill of lading, see infra notes 74-75.

\textsuperscript{2}During a meeting of the United States Council on International Banking ("USCIB") Letters of Credit Committee held in Atlanta on November 29, 1990, Maryann Pizzulo of NCB Bank, Chair of the Committee, made the statement in the principal text. Present at the meeting were Dennis Affleback, Fidelity Bank, N.A.; Charles White, Citizens & Southern Nat'l Bank; Walter Baker, First National Bank of Chicago; Alan Bloodgood, Morgan Guaranty Trust Company; Joe Neilson, Chase Manhattan Bank; Ray Cervone, Société Generale; and Dan Taylor, Executive Director of the USCIB. The USCIB is the umbrella educational and lobbying organization for the approximately 500 United States banks engaged in foreign trade and financing operations.

\textsuperscript{3}See infra text following note 200.

\textsuperscript{4}See infra text accompanying notes 225-229.
Comité Maritime International (CMI) approved a set of rules covering the electronic bill of lading.5

The ocean bill of lading's demise or metamorphosis can be evaluated from a strictly maritime law perspective (an evaluation that this writer is not equipped to make), or from a banking law perspective. The banking law perspective, although narrower in scope, is likely to reveal what lies ahead for the ocean bill of lading. Bankers' willingness to purchase ocean bills of lading and to rely on them as collateral provided much of the impetus for universalizing bill of lading practices until the 1960's. Conversely, bankers' unwillingness to rely on some electronic sea waybills as collateral for present day letter of credit issuances has thwarted generalized acceptance.6

The acceptability of legal institutions in the financial marketplace usually depends upon how fair and certain their users perceive them to be.7 Hence, the following historical and comparative analysis will seek to identify those features that made the bill of lading the fair and certain negotiable document of title it was until the advent of containerization. Having identified such certainty and fairness features, it should be easier to determine which contemporary variant will reinvigorate or replace the ocean bill of lading. The analysis will also perform the more mundane task of acquainting bankers and banking lawyers with the fundamentals of ocean bill of lading law which made the ocean bill a merchantable document, including landmark statutes, decisions, conventions, and contractual clauses. The analysis will also acquaint maritime lawyers with banking-bill of lading law.

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5See infra text accompanying notes 207–224.
6See infra text accompanying notes 205–206.
II

EVOLUTION OF THE BILL OF LADING

2.1 Appendage of the Charter Party and Contract of Ocean Carriage

During its early history the bill of lading was an appendage of the charter party and of the contract of ocean carriage. The function of the bill of lading was to acknowledge receipt of the cargo delivered by the shipper to the shipowner, charterer, or master of the vessel and to summarize the principal terms of the contract of ocean freight. In a typical 16th century English charter party the owner of the vessel acknowledged, directly or through the ship’s master, that: 1) it had let the ship and promised to prepare it, by a fixed date, to take in the goods provided by the charterer; 2) the ship would sail with the first

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The description of the parties’ rights and duties in the text is a summary of 8 Holdsworth, supra note 8, at 254–55.
convenient wind to the stipulated port; 3) in accordance with a receipt or bill of lading it would deliver the goods in good condition to the designated person; 4) the ship would remain at that port for a fixed period to take in such goods as the charter party nominee party needed to reload, and that the ship would then return to the port of origin, and deliver the reloaded goods in good condition; and 5) the crew would be as described, and would be furnished with the proper gear.

The charterer, on the other hand, promised: 1) to load the ship within the stipulated time; 2) to pay freight on the discharge of the goods; and 3) to pay customary fees such as “primage” (a small payment to the master for his “trouble”), “pilotage” (pilot’s fee), and “average” (an assortment of small fees for services, such as towing shared by ship and cargo, not to be confused with general or particular average). The charter party made the shipowner liable for very little; it exempted him from liability for accidents, and listed instances in which the losses were shared by the shippers as “general average” losses. The inclusion of the charterer’s duties in the text of the charter party made this contract conditional in the sense that its enforcement by the charterer depended upon fulfillment of the specified conditions. Since the bill of lading promise of delivery was subject to charter party stipulations, the bill of lading conveyed no rights beyond those in the charter party.

Malynes’ description of 17th century English shipping practices makes clear that bills of lading were not issued separately from charter parties. In fact, it seems no ship without a charter party could be loaded (“freighted”); and bills of lading were supposed to be drawn up to declare the nature of the cargo and to bind the master of the vessel to deliver in accordance with the charter party. Consequently, Malynes’ 17th century bill of lading included, among other recitals: the name of the ship, the date of sailing, the cargo, conditions under which the freight was paid or payable by the “laders” of the goods, disclaimers or exceptions for non-performance, and the promise of delivery of “the said goods also well conditioned, to the . . . merchant or his assigns.” Malynes’ explanation for the use of several copies of the bill of lading was:

Of these bills of lading, there is commonly three bills of one tenor made of the whole ship’s lading, or of many particular parcels of goods, if

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10 See id. at 254 (quoting G. Malynes, Consuetudo vel Lex Mercatoria 97 (1629) (The Ancient Law Merchant)).

11 Id.
there be many laders; and the mark of the goods must therein be expressed, and of whom received, and to whom to be delivered. These bills of lading are commonly to be had in print in all places and several languages. One of them is enclosed in the letters written by the same ship, another bill is sent overland to the factor or party to whom the goods are consigned, the third remaineth, the merchant, for his testimony against the master, if there were any occasion for loose dealing; but especially it is kept for to serve in case of loss, to recover the value of the goods of the assurors that have undertaken to bear the adventure with you.12

The issuance of multiple copies was thus intended to assure that the consignee received at least one. Multiple copies also enabled the consignor, the consignee, or the consignor’s assigns to claim a breach of the carrier’s duty of safe carriage and to lodge a claim against the cargo insurers. It should be noted that Malyne’s used the expression “assigns” and did not describe the claimant of the goods or proceeds as a “holder” of the bill of lading. The claimant could not be described as the lawful holder of the bill of lading unless a given copy or all the copies issued by the carrier were designated as the original bill or set of bills. Eventually, tender of such a bill to the carrier became a prerequisite for the latter’s delivery of the goods to the bill’s holder. Unless it was an “original,” a document could not carry with it the right to claim delivery of the goods.

2.2 Document of Title Linked with the Documentary Sale: Assignability, Negotiability, and Abstraction

The availability of good roads in Central and Mediterranean Europe, during the first half of the 19th century, made possible sales contracts under which the buyer paid for the goods upon the seller’s tender of the bill of lading at the port of shipment or transhipment. For example, a Belgian seller would agree with its Algerian buyer that payment of the purchase price would be due in Marseilles upon delivery, not of the goods, but of the bill of lading, an invoice that described the merchandise and listed its price, and an insurance policy that covered shipment risks.13 In the above example, the

12Id. at 256.
13Marseilles was one of the most active 19th century Mediterranean shipment and transhipment ports, and for this reason a “documentary” sale, such as just described, was also referred to as “vente maritime” or “vente a Marseilles.” For a description of these sales and their impact upon bill of lading law, see Knauth, supra note 8, at 375. For a description of some of the key late 19th century decisions on maritime sales by Marseilles courts, see R. Bellot, Traité Théorique et Pratique de la Vente CAF 19-22 (1951).
“cost, insurance, and freight” or “CIF” stipulation was made possible by the likelihood that the Belgian bill of lading would arrive in Marseilles by land before the goods would arrive by sea. Timely arrival of the bill of lading prevented the accrual of costly demurrage, storage, and customs charges, which might have been incurred had the vessel arrived before the bill of lading.

The ocean bill of lading’s transformation from an appendage of the charter party to a document of title was inevitable once shippers discontinued the practice of accompanying their wares during maritime carriage and entrusted them to the ocean carriers. The consignee needed a document that justified its claim to the goods at the journey’s end and the bill of lading became such a document. In this writer’s opinion, the bill of lading’s transformation into a document of title was made possible by the notarial and fiduciary role vested in the ship’s master. Jacques Savary, one of Europe’s leading 17th century commercial lawyers, illustrated in an answer to a consultation (Parere) the importance of the captain’s public fiduciary role. Savary explained the distinction between a charter party and a bill of lading as follows:

The charter party is the document made between the merchant and the bourgeois or the owner of the ship to make a voyage. . . . The bill of lading is a document that the master of the vessel gives to the merchant-shipper in which he acknowledges having received on board a number of packages or cases containing the quantity or quality of merchandise to be consigned or delivered to a person in the place where the ship must go.

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14See Mitchelhill, supra note 8, at 1. Bennett quotes the Spanish Fuero Real of 1255 for the same “Register” or “Book” requirement quoted by Mitchelhill. Bennett, supra note 8, at 5. According to Bennett, there was no need for more than one copy at that time “for it was clearly the custom for the merchant or his agent to travel with the goods.” The practice of sending unaccompanied wares seems to have been encouraged by the requirement that the carrier provide each shipper with the equivalent of a bond or insurance policy. Hence, the 1316 Italian Statutes of Sassari refer to a practice of requiring the carrier to provide a bond concomitant with the delivery to the shipper of its “policy of loading.” Id.

15See J. Savary, Le Parfait Negociant (1742) (hereinafter “Savary”). If Savary’s publisher is to be believed “no person has labored with greater success in the subject matter of commerce than M. Savary . . . quoted by the most distinguished lawyers and judges.” Id. at iij. Wyndham Beawes shared this opinion; and he acknowledged his liberal borrowing from Savary by stating that he “extracted from the works of the best writers both at home and abroad; more especially from those justly celebrated ones of M. Savary.” W. Beawes, Lex Mercatoria Rediviva 1 (6th ed. 1773).

16Savary, supra note 15, at 655.
Earlier, Savary had responded to the question whether a shipment by the owner of the vessel still required a charter party and bill of lading issuance by stating:

If it is the owner of the ship who has shipped the goods one cannot force the master of the vessel, who is on board the vessel for the purpose of sailing to its destination, to enter into a charter party because the ship belongs to the merchant shipper. Yet, if the ship has been leased to a merchant shipper, the master must enter into a charter party or a contract of freight.\(^{17}\) (Emphasis added).

Then, Savary added an important clarification:

If the shipowner has loaded the ship for his own account he must have a bill of lading which must state that the merchandise loaded on board belongs to him, that is to say, the quantity of packages or boxes, the marks and the name of the consignee. Hence if the master does not issue the above mentioned bill of lading at the time of loading, the merchandise is declared well taken or captured. It being of no use for the master to say that the merchandise belongs to the owner of the ship because he cannot be believed upon his word; and he is not believed on his word when he declares that the ship belongs to the bourgeois and that there is no point to the charter party for the above stated reasons.\(^{18}\)

Savary’s statements show that the 17th century bill of lading had begun to function as a “necessary” document; only by showing the document could Savary’s shipper-owner claim lawful possession of the goods it had shipped in its own vessel. A charter party did not necessarily attest to the ownership of the goods shipped because the charterer might not have been a shipper, but merely a lessor of space. On the other hand, the charterer might not have dealt with any or all shippers, because it delegated this function to the vessel’s master. Shippers needed a document that could be issued by someone trustworthy in control of the shipping space and who was presumably aware of who shipped what. This trustworthy person was the ship’s master, and the document he issued served as an attestation to both shipment and ownership.

In placing this responsibility on the master, European maritime law likened the master’s duties of certification and giving notice to those of a quasi judicial official referred to in the law of land based trade as

\(^{17}\)Id.

\(^{18}\)Id.
a "scrivener" or "notary public." This certifying function was confirmed in a subsequent paragraph of Savary’s opinion. Savary was asked whether a bill of lading that did not state for whose account the goods had been shipped was valid. He responded:

[O]ne must absolutely state the name of the person for whose account the merchandise is loaded; otherwise it is a fraud. . . . [I]f the shipper’s name were not stated, the master would be able to take the merchandise on board for the account of a merchant who is a citizen or subject of an enemy state, [and this] merchandise [could be] subject to confiscation. It is the law [jurisprudence] of the usages and customs of the sea of all the European nations, and it conforms to the Maritime Ordinance of August 1681.

The requirement that the consignor’s name be stated was only half of the document of title equation. The other half was the requirement that the cargo be delivered only to the lawful holder of an original in the set of three bills that Savary referred to as a "triplet." If the consignor wanted to ensure that no person other than the consignee or the lawful holder of the bill could claim delivery, he could stipulate that delivery required production of all the copies or parts of the set that were not in the master’s possession.

The Lickbarrow v. Mason decisions by the House of Lords were the first (at least in Anglo-American law) to establish that a consignor’s right to stop the goods before they reached the consignee was subordinate to the rights of the consignee’s endorsees holding such a bill. In addition, the special verdict of the jury in this case established that by custom of merchants a bill of lading was transferable by endorsement, and capable of transferring title to the goods. Lickbarrow v. Mason’s sanction of commercial custom as a source of documents of title law is significant. Although common law jurisdictions are more willing to validate judicial customs that create documents of title than are civil law jurisdictions even in common law

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19For a description of the captain’s role as a quasi judicial official who also acted as a notary public, see J. de Veitia Linage, Norte de la Contratación de las Indias Occidentales 687 (1672, facsimile ed. 1945).
20Savary, supra note 15, at 656.
22(1794) 5 T.R. 683.
23See Kum v. Wah Tat Bank Ltd., [1971] 1 Lloyd’s Rep. 439, in which the Privy Council, in dicta, seemed willing to accept that a custom existed in trade between Singapore and Sarawak to treat mates’ receipts as documents of title. On this, see Law Commission No. 196 and
validation has been mostly legislative. It is important to note that in shipping practice, possession of all the originals continues to be a prerequisite for the exercise of the consignor’s right to control the goods delivered to the carrier. This right of control is manifested in, among other situations, the consignor’s retrieval of goods from the carrier or the carrier’s warehousing agent and in the consignor’s instruction to refrain from delivering to the named consignee or to deliver to another consignee.

Therefore, when the bill of lading is described as a necessary document of title, this description includes the claim for delivery at

Scottish Law Commission No. 130, Rights of Suit in Respect of Carriage of Goods by Sea (1991) (hereinafter “Law Commission Report”). In contrast, German law places very serious obstacles to the negotiability of documents not declared negotiable by the legislature. According to Zahn, supra note 8, at 168, the German Commercial Code (hereinafter “HGB”) § 363 exhaustively lists the categories of order paper (Regehbare Orderpapier). Zahn, supra note 8, at 191-92, states that an unlisted document cannot be turned into a negotiable document of title (Traditionspapier) by mere agreement of the parties; such a transformation is only possible through legislation (See HGB §§ 424, 450 & 650). The endorsement on a combined transport document, made out to order as envisioned by the ICC Rules for Combined Transport documents, would merely constitute a normal assignment and would not have the legal effect of an endorsement regulated by the HGB. Thus, the envisioned order clause merely constitutes a notice of assignment. The prohibition against turning a combined transport document into a negotiable document of title (Traditionspapier), unless legislation intervenes, is important when collateral security is concerned; the combined transport document will not provide the advantages of a negotiable document of title.

The preamble to the English Bill of Lading Act of 1855 pointed to a major reason for reliance on statutory law. Despite the transferability of the bill of lading by the custom of merchants, an endorsee or bearer could not sue the carrier because it had not dealt directly with the carrier, and thus lacked privity of contract. The Bill of Lading Act filled the privity gap by allowing contractual rights against the carrier to be conveyed by possession of the bill of lading. Thereafter, statutory law became the main source for sanctioning documents of title. In Great Britain, see, for example, § 1(4) of the Factors Act of 1889, which applies to bills of lading, dock warrants, delivery orders and “any other document used in the ordinary course of business as proof of the possession or control of the goods, or as authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.” In the United States, U.C.C. § 1-201 includes in the definition of document of title bills of lading, delivery orders, dock warrants, receipts, “and any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers.” This broad definition has all the elements of a statutory delegation of authority to the courts to sanction customary documents of title.

As summarized in K. Grönfors, Towards a Transferable Sea Waybill—An Answer to Shortcomings of Bills of Lading—A Report to the Hamburg Symposium on Sea Waybills 7 (October 2, 1987) (hereinafter “Grönfors, Sea Waybill”):

The consignor has the exclusive right of control from the moment the carrier takes the goods in his charge and the consignor has got all originals in his possession. As long as he keeps these originals, he still has the right of control. As soon as he has himself given away at least one original, he loses his right of control. A person who buys one original has the right to demand the delivery of the goods, as soon as they have arrived at the place of final destination.
destination as well as the control over the goods in transit or in custody awaiting transit or delivery. In this sense, a common carrier’s “straight” or non-negotiable bill of lading is a document of title under United States law, especially since title to the goods (although not as full fledged a title as with a negotiable bill of lading) is acquired upon the transfer of a straight bill.\textsuperscript{26}

By the middle of the 19th century, European commercial codes sanctioned the assignment or transfer of bills of lading by endorsement or delivery.\textsuperscript{27} Assignment or transfer conveyed to the assignee the rights, and burdens or disabilities of the transferor-assignor. If the

\textsuperscript{26} See 49 U.S.C. App. §§ 109 and 112 (1988). As set forth in the relevant part of the latter section:

A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification. Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor or a subsequent sale of the goods by the transferor.

Contrast this type of title with that given to the holder of a negotiable bill of lading under 49 U.S.C. App. §§ 81 and 103 (1988), as discussed infra in text accompanying note 29. Decisional law has confirmed the right of a consignor’s transferee of a straight bill of lading to demand payment before arrival of the goods or advancement of money thereon by the consignee, see George F. Hinnichs, Inc. v. Standard Trust & Savings Bank, 279 F. 382 (2d Cir. 1922), cert. den., 258 U.S. 629 (1922). On the other hand, if a carrier delivers the goods to the consignee’s assignee of a straight bill of lading after notice of consignor’s superior rights, the carrier is liable for damages resulting to consignor, see Getchell v. Northern Pacific Railway Co., 110 Wash. 66, 187 P. 707 (1920). According to U.C.C. § 2-505(1)(b), a straight bill to the seller “or his nominee reserves possession of the goods as security.” R. Riegert & R. Braucher, Documents of Title 113 (3d ed. 1978), point out the Code’s reference to “possession of the goods” as the security reserved in the straight bill of lading to the seller or its nominee echoes the distinction in the older uniform acts between “property in the goods” reserved by a bill to the seller or its order, and a “right to the possession of the goods” reserved by a bill to buyer’s order. Riegert and Braucher assert that little seems to turn on this distinction for in each case the seller or its successor in interest would “seem to have a right to stop delivery and to resell if the buyer defaults,” citing U.C.C. §§ 2-703, 705 and 707, but cf. § 9-504. In Condor Industries Int’l v. M/V American Express, 667 F. Supp. 99, 1988 AMC 598 (S.D.N.Y. 1987), a straight bill of lading was used as the means with which to transfer title to the goods in a CIF sale. In this case it was established that the custom of the Port of Miami was to turn in the straight bill of lading before delivery of the goods could be made. As pointed out by George Chandler in a letter to this writer, this “document of title” feature of the straight bill of lading may also be found in some sea waybills. Letter from George Chandler to Boris Kozolchyk 4 (April 4, 1991) (hereinafter “Chandler letter”).

\textsuperscript{27} See, for example, Código de Comercio art. 802 (Spain 1829) which states: “By virtue of an endorsement the endorsee acquires all the rights enjoyed by the shipper of the cargo.” (Author’s translation).
transferor’s rights were subject to a third party claim, or if the transferor was not the true owner of the goods shipped, its assignee-endorsee had no better rights than the transferor. 28

Beyond assignment and transfer, however, was true negotiation; i.e., the creation of new, independent or “abstract” rights to protect the increasing number of bona fide purchasers, pledgees or mortgagors of bills of lading against claims by current or previous owners or possessors of the goods or bills, or by parties with legal or equitable claims against or derived from the shipper-consignor. Once the bill of lading became an abstract document, it conveyed to a good faith holder what became known as a “mercantile” title to the goods—the lawful holder of the bill of lading acquired a better right to the possession of the goods than its transferor. The United States Pomerene Act provided that if the goods were delivered to a common carrier by their owner or by the owner’s agent, once an order bill of lading was issued, the goods could not be attached or levied upon, under an execution, unless the bill was first surrendered to the carrier, or its negotiation was enjoined. 29 Moreover, if shipper A entrusted its goods to faithless agent B who shipped the goods, obtained an “order” bill of lading and endorsed it to C who acquired it for value and in good faith, A could not replevy the entrusted goods from C. 30 A bank then, could be assured that it would become an “absolute purchaser of goods upon deposit with it of [a] draft and bill of lading . . . [and would acquire] absolute title to property, unless it took with notice of some infirmity.” 31

28Id.
29In order to obtain jurisdiction over a Brazilian corporation, “Bozel,” in the Louisiana courts, a Swiss bank obtained a non-resident writ of attachment on cargo allegedly owned by Bozel, and located on a ship docked in New Orleans. The Louisiana Court of Appeals held that the attachment was not valid regardless of who owned the cargo. Under U.C.C. § 7-602, when property is shipped subject to a negotiable bill of lading the property may not be seized unless the bill of lading has been surrendered to the carrier or impounded by a court. Although the bank instituted proceedings elsewhere to enjoin negotiation of the documents after the writ of attachment had been issued, the validity of the attachment was determined as of the date it was issued. Banque de Depots v. Bozel Mineração e Ferreiras, 569 So. 2d 40, 1991 AMC 327 (La. Ct. App. 1990).
The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.
31See Commercial Sav. Bank v. Mann, 206 A.D. 297, 200 N.Y.S. 587, aff’d, 238 N.Y. 559, 144 N.E. 890 (1924). As other courts have made clear, a mere deposit for collection is not
With the early 20th century enactment of the Uniform Bill of Lading and Pomerene Acts in the United States, American issued bills of lading attained the highest level of abstraction available at that time. If a bill of lading was issued either by a carrier or by its employee or agent whose authority included receiving goods and issuing bills of lading, the carrier was liable for damages: a) to the owner of the goods covered by a straight bill of lading; or b) to the holder of an order bill who gave value in good faith and who relied upon the description of the goods or upon their shipment on the date shown. This meant that even though no goods had actually been received by the carrier's faithless agent or that the goods received were misdescribed, the mere fact that a bill of lading had been issued

enough to provide the protection of abstraction. See, for example, Liberty Central Trust Co. v. Serton, 139 Miss. 850, 104 So. 157 (1925), which held that a bank was not a bona fide purchaser for value when it handled a draft and bill as one of several correspondent banks, for the sole purpose of collection, and gave credit to the forwarder for the amount of the draft.

Uniform Bills of Lading Act, 4 U.L.A. 3 (1922) (hereinafter "UBLA"). For the historical background of this enactment, see Knauth, supra note 8, at 115 and 323–24. The list of adoptions supplied by Knauth shows 24 adoptions until 1952. Knauth, supra note 8, at 437. Knauth dates the northern states' adoption to 1907, but this must have been an earlier version of the uniform act adopted by the Conference of Commissioners on Uniform State Laws in 1909. Gilmore and Black use 1909 as the official date of the UBLA. Gilmore & Black, supra note 8, at 95.

With the adoption of U.C.C. Article 7, the UBLA is no longer in force. References to the UBLA and quotes therefrom will be based on the text in 4 U.L.A. (1922).


35The English common law fully subscribed to the Roman law *axiom nemo dat quod non habet*. As stated by Lord Blackburn in Cole v. North Western Bank, [1875] L.R. 10, 44 L.J.C.P. 233, [1874–80] E.R. Rep. 486, cited by Bennett, supra note 8, at 25. “[a]t Common law, the possession of the bill of lading or other Documents of Title by means of which actual possession of the goods could be obtained had no greater effect . . . than the transfer of the actual possession. . . .” Thus, prior to the enactment of the so called “Factors Acts,” 4 Geo. 4, ch. 83 (1823), the rule prevailed that “where a person is deceived by another into believing that he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner.” The Factors Acts protected third parties who dealt with agents of the actual owners of the goods in the belief that the agents had the power to sell or pledge these goods. The nature of the agency, at first narrowly construed, was broadened by subsequent statutes and court decisions. On the English Factors Acts, see Bennett, supra note 8, at 25–34. For a comparative law discussion of late nineteenth century Continental European, Scandinavian, and Western Hemisphere law bearing on the abstraction of the ocean bill of lading, including some occasional court decisions, see Bennett, supra note 8, at 67–101.

by someone empowered to do so created a right to claim the value of the described goods. Such a right instilled trust in the written

36The Pomerene Act replaced the U.S. Supreme Court's decision in Friedlander v. Texas & Pacific Railway Co., 130 U.S. 416 (1889), in which the Supreme Court held that an agent who issued a bill of lading without actually receiving the cargo acted ultra vires and did not bind his principal, with the opposite principle of abstraction. Knauth, supra note 8, at 124, pointed out that the possibility of fraud allowed by Friedlander was seized on by astute persons, and pending legislative relief, the Liverpool Cotton Bill of Lading Conference of 1911 was called and the merchants and bankers compelled the American railroad carriers to accept responsibility for bills issued by their agents. Some courts have, in this writer's opinion, seriously misinterpreted the Pomerene Act to extend protection only to the holders of negotiable bills of lading. See, for example, Chesapeake & Ohio Railway Co. v. State National Bank, 280 Ky. 444, 133 S.W.2d 511 (1939). In this decision, the Kentucky Court of Appeals held that in accordance with § 22 of the Pomerene Act, 49 U.S.C. App. § 102 (1988), the holder or transferee of a straight bill did not have a cause of action against the carrier for goods not shipped. The court's mistaken interpretation stems from the unwarranted equation between § 22's "owner" and the court's consignor-shipper of the goods. According to the Court of Appeals, if the owner (consignor) did not ship the quantity of chicken represented on the straight bill, how could someone acting in his shoes (the bank-transferor of the bill of lading) have greater rights than his transferor, especially when the transfer was not a negotiation. Significantly, § 22 does not refer to consignors but to owners, and consignees (not consignors) are often the owners of the cargo as a result of the documentary sale agreement involved or of applicable sales law. Moreover, § 22 itself renders the court's interpretation absurd, when it qualifies the right to claim damages of the owner by stating that it is "subject to existing right of stoppage in transit." Accordingly, the alluded to owner cannot be the consignor, whose right to stop the transit must qualify not its own but someone else's rights to the goods. For sounder readings of this section, see Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co., 366 F.2d 333, 1966 AMC 2376 (9th Cir. 1966); Strohmeyer & Arpe Co. v. American Line S.S. Corp., 97 F.2d 360, 1938 AMC 875 (2d Cir. 1938), but cf. G.A.C. Commercial Corp. v. Wilson, 271 F. Supp. 242, 246 (S.D.N.Y. 1967), which found it "completely illusory to attempt to assign an 'owner' to nonexistent goods." See also Berisford Metals Corp. v. SS Salvador, 779 F.2d 841, 1986 AMC 99 (2d Cir. 1985). Following this reasoning, the holder of a negotiable bill of lading would also be barred from suing the carrier, since its document of title (the negotiable bill of lading) could not have conveyed title to nonexistent goods. Decisions such as Chesapeake & Ohio Railway and G.A.C. Commercial ignore the reliance and estoppel components of § 22, which explain the distinction between the protection owed to an owner (shipper-consignor) of the goods in the straight bill and to a good faith holder of an order bill. The differences between the contractual and abstraction status of a consignor and a holder of the bill are reflected in the carrier's ability to sue the holder for acts attributable to its immediate or mediate endorser. Thus, neither the Pomerene Act nor the U.C.C. confer upon the carrier a right of action against the holder of the bill for, say, damage inflicted upon the ship or upon other cargo by the dangerous nature of the cargo shipped by the holder's indorser, or for demurrage caused by the shipper. But cf. Law Commission Report, supra note 23, at 26, which takes the view that although it may seem unfair to saddle the holder with liabilities incurred prior to or during the shipment of the goods, it is difficult to draw a line at the moment of shipment, especially when the holder is ordinarily made liable for demurrage occurring at the port of discharge. This Report also refused to immunize the holder of the bill for liability as a result of damage caused by dangerous cargo, alleging that in some cases the endorser may have been the prime mover behind the shipment. The Law Commission fairness arguments are unpersuasive. If knowledge of the infirmity is attributable to the holder it should be disqualified from acting as a good faith holder. If however, good faith holding is to be encouraged, then infirmities unknown to such a holder, should not be attributable to it.
statements by carriers and encouraged consignees to deal with distant and unknown sellers. At the same time, however, the practice of issuing multiple originals gave rise to the problem of choosing among the rights of multiple holders. To protect the carrier against conflicting claims by more than one holder it became customary for bills of lading and letters of credit to require that delivery of the goods, or payment of the documentary draft or letter of credit by a bank be made against presentation of the "full set."

The 19th century English ocean bill of lading was considerably less abstract and incorporated or merged fewer possessory rights than did its 20th century American counterpart. First, the contractual relationship between the shipper-consignor and the carrier issuer of the bill controlled subsequently acquired rights. In typical *nemo dat quod non habet* (no one can convey what he does not have) fashion, the rights acquired by the consignee or transferee of the bill were measured by the rights conveyed or retained by the shipper. One of these rights, the right to sue the carrier, to this day is not fully lodged with the holder of the bill.\(^37\) Also in typical *nemo dat quod non habet* fashion, the rights of the holder of the bill were connected with its acquisition of title to the goods.\(^38\) Furthermore, in 1851 the Court of Common Pleas held in *Grant v. Norway* that a master who signed a bill of lading for twelve bales of silk that had not been shipped had no authority to issue such a bill and thus the bill was unenforceable.\(^39\) Section 3 of the 1855 Bill of Lading Act was intended as an assurance against *Grant v. Norway*:\(^40\)

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 goods 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 been in fact laden on board: Provided, that the master or other person . . . may exonerate himself . . . by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or the holder, or some person under whom the holder claims.\(^41\)

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\(^{38}\)Id.

\(^{39}\)(1851) 10 C.B. 665.

\(^{40}\)On the purpose of Section 3 of the English Bill of Lading Act, see Law Commission Report, supra note 23, at 28.

\(^{41}\)Id. The United Kingdom Carriage of Goods by Sea Act, 1971, 19 & 20 Eliz. 2, ch. 19, adopted in its paragraph 4 the following language taken from Article III, § 4 of the Hague-Visby Rules:
Yet, the same Act subjected the bill of lading endorsee "to the same liabilities in respect of such goods as if the Contract contained in the Bill of Lading had been made with himself."42 Moreover, a close reading of the quoted language in Section 3 above reveals that it neither provided a cause of action for non-delivery of the goods stated to have been shipped, nor deemed the statement in the bill conclusive evidence of shipment against the carrier. What is stated in the bill is only conclusive evidence against the master or agent who signed it, "even where the carrier's agent had actual authority to sign."43 Nevertheless, despite these obvious failures to protect holders of bills of lading, English merchant banks continued to buy the lion's share of the world's sterling documentary drafts during the remainder of the 19th century.

English central banking policy was a major contributor to the development of this, the first worldwide, sterling denominated, documentary draft and bill of lading market. The Bank of England adopted a policy of encouraging "self liquidating" commercial loans.44 A transaction that conveyed title to readily marketable

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Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a)(b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

It is noteworthy that this formulation is broader than that of the Pomerene Act because it protects a transferee in good faith who need not prove that it bought the bill or paid value for it. Unlike its 1855 ancestor, the 1971 Act precludes use of the master's proof of diligence as a means to avoid abstract liability on the bill of lading. Section 1 of the English Bill of Lading Act, however, stipulates that the consignee's and endorsee's right to sue the carrier is predicated on: 1) the existence of a consignment or an endorsement; 2) passage of title to the goods to the consignee or transferee.

42An Act to Amend the Law Relating to Bills of Lading, 1859, 18 & 19 Vict., ch. 111, § 1. In addition, Section 1 of the English Bill of Lading Act stated that every consignee named in a bill of lading and every endorsee of a bill of lading could assert contractual rights of action against the carrier, but only if the interest in the goods passed to the consignee because of the consignment or endorsement. For a present attempt to revise the English Bill of Lading Act where the right to sue of the parties to the bill of lading is concerned, see the Law Commission Report, supra note 23.


44The view of commercial loans as self liquidating, and of retail trade and consumption loans as dependent upon the honesty of "good" men which became part of the Bank of England's credit policies was articulated in the following two excerpts from Nicholas Barbon, A Discourse of Trade (1690), reprinted in Money and Banking in England 132 (B. L. Andersen & P. L. Cottrell eds., 1974):

There are Two sorts of Credit; the one is Grounded upon the Ability of the Buyer; the other, upon the Honesty: The first is called a Good Man, which implies an Able Man; he generally buys upon short Time; to pay in a Month, which is accounted as ready Money, and the Price is made accordingly. The other is accounted an Honest Man; He may be poor; he Generally buys for three and Six Months or longer, so as to pay the Merchant by
staples by endorsement of the bill of lading or warehouse receipt to the commercial, and subsequently to the central banker was encouraged.\textsuperscript{45} A similar official encouragement became apparent in United States central banking policy in the middle of the 19th century.\textsuperscript{46}

2.3 The Merchantability of the Bill of Lading: Cleanliness and On Board Requirements

From a merchant banker’s standpoint, a desirable bill of lading has to be “merchantable,” i.e., it has to be easily resalable. In order to be easily resalable, it must allow quick and low cost possession of readily marketable goods. Hence, whenever possible, bankers require bills of lading that contain no notations stating defective conditions in the goods or their packaging.\textsuperscript{47} These are referred to as “clean” bills of lading, and are contrasted with “foul,” “unclean,” or “clauséd” bills, which do contain qualifying statements or notations.\textsuperscript{48} Furthermore, from a banker’s standpoint a bill that indicates that the merchandise has been “shipped” or placed “on board” is preferable to one which merely states that it has been received for future shipment. The on board statement establishes a direct link between the goods and the vessel, a link that facilitates not only the holder’s recovery of the goods or insurance proceeds, but also its arrest of the vessel in the event of loss of or damage to the cargo.\textsuperscript{49}

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\textsuperscript{45} See generally Kozolchyk, Commercial Letters of Credit, supra note 1, at 608–09.

\textsuperscript{46} International Chamber of Commerce Pub. No. 400, Uniform Customs and Practices for Documentary Credits, art. 34 (1983) [hereinafter “UCP”] defines a clean transport document as “one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.”

\textsuperscript{47} Id.

\textsuperscript{48} The reciprocal susceptibility to liens arising out of the carriage relationship comes into being, it seems, only when the goods are loaded aboard. At that time, the ship and the cargo are regarded as pledged to one another for the performance of the obligations of the venture. Cleirec’s phrase, invariably quoted in this connection, is the classic epitomization: “\textit{Le batel est obligé à la marchandise, et la marchandise au batel.}” Thus, a ship may not be proceeded
Unquestionably, a bill of lading is more merchantable when issued by the owner or master of a "seaworthy" vessel, i.e., a vessel capable of providing both a safe journey and reliable stowage facilities. Hence, for years bankers have disliked bills issued by owners or masters of "sailing vessels." 50

Underlying these concerns is the bankers' need for a fair document of title, and fairness requires first of all honesty. Honesty exists when a document is enforceable on the basis of its ostensible (as opposed to "small print") terms, or when express warranties are not disclaimed in the small print. A modicum of ocean bill of lading honesty and fairness was attained through late nineteenth and early twentieth century statutory, decisional, and treaty law.

2.4 The Carrier's Historical, Treaty, and Statutory Liability
2.4.1 The Strict Liability of Carriers

The term "carrier" seems to have been coined in Anglo-American legal discourse largely to aid in the assessment of liability for damage to cargo. If cargo has suffered damages while in transit or in custody awaiting transit, Anglo-American law usually decides liability after determining the identity of the carrier. This is not to say that the term "carrier" has no purpose in bill of lading law other than to assess damage liability. A good deal of the administrative law of ocean transportation is concerned with licensing and tariff issues, which also require a definition of "carrier." 51 Nevertheless, multiple persons and entities, such as "shipowners," "charterers," "possessors of property shipped," "masters of the vessel," their "agents," and even "ships" are referred to as carriers in bill of lading law and practice once they are made responsible for loss or damage to cargo.

According to the Justinian Digest, ocean carriers, among others, were distrusted by their clients, and this distrust resulted in strict liability for delivery. 52 The ocean carrier in the Roman receptum

50 See UCP, supra note 47, at Article 25.
51 See, for example, infra text accompanying note 143 for a discussion of the recent regulations on NVOCC’s.
52 See A. Berger, Encyclopedic Dictionary of Roman Law 668-69 (1953) (hereinafter "Dictionary"), which defines Receptum Nautae (coupous stabulari) as: An agreement by which a shipowner (the keeper of an inn or of a stable) assumed goods for transportation or custody, with the addition of a specie proviso salum fore (recipere), i.e., that the things confided them will be safe. . . . They were not liable for vis maior (shipwreck or a major assault of robbers which could not be resisted) but they had to make...
nautae was liable to its consignee to deliver the goods at the end of the journey in the same condition as delivered to it by the consignor, even if the damage occurred without the carrier’s fault.53 The ocean carrier, therefore, was deemed to warrant to the consignor safe transport and delivery and could avoid liability only if it proved that something in the nature of force majeure had intervened.54 This principle of strict liability prevailed through the Middle Ages in Mediterranean countries, including Western France.55 In slightly modified fashion, the same principle still governs the liability of common carriers in English common law. Instead of the Roman damnum fatale, the common law carved out exceptions for inherent defects or vices of the goods, shipper’s contributory negligence, and acts of God or of the King’s enemies.56

The English law strict liability principle, however, was not mandatory and thus carriers could contractually disclaim it.57 And disclaim it they did, especially with the advent of steamer shipping across the Atlantic Ocean. Steamers could carry larger volumes of cargo than sailing vessels and do it more frequently and regularly. The sharply

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good damages or destruction caused by themselves or their personnel and they were answerable if the goods were stolen . . . The extended responsibility of those persons (shipowners and innkeepers) was established in the praetorian Edict with the justification that the “dishonesty (improbitas) of this kind of persons” required such measures.

Berger cites Digest § 9.4.3.1, this appears to be a wrong cite, the appropriate passage appears in Digest § 4.9.3.1. See also K. Grönfors, Transport Law, in International Uniform Law in Practice 376 & 385 (UNIDROIT 1988) (hereinafter “Grönfors, Transport Law”).

53Dictionary, supra note 52, at 669.
54Id.; see also Grönfors, Transport Law, supra note 52, at 385.
55Grönfors, Transport Law, supra note 52, at 385.
56See Gilmore & Black, supra note 8, at 179.
57Professor Grönfors calls attention to the fact that “mandatory rules are a late invention made by lawyers only at the end of the last century.” Grönfors, Transport Law, supra note 52, at 386. He adds that the ocean carriers’ principle of “not responsible for anything” called for corrective measures. These measures included the adoption of mandatory rules on minimum liability for carriers “although the United Kingdom Parliament was not considered to be the appropriate body for passing legislation of a mandatory character directed at shipowner interests.” Id. at 386.

In light of the relatively young life of the principle of freedom of contract in the European continent (it was ushered in by the French Civil Code of 1800) one may quibble with the reference to the “late” invention in the above quote. Nonetheless, Professor Grönfors is correct when he calls attention to the highly unusual nature of mandatory rules in the end of 19th century Europe, and especially in the sea faring “mother of parliaments.” See Diamond, The Hague-Visby Rules, 2 Lloyd’s Mar. & Com. L.Q. 225, 227 (1978) (hereinafter “Diamond”), which states that until 1921 England possessed the largest merchant fleet in the world and having a “correspondingly powerful shipowning lobby, had remained faithful to its strong 19th century tradition that Parliamentary interference with the freedom of commercial men to contract as they pleased was to be avoided at almost all cost.”
increased volume of traffic increased the opportunities for profits, but also for crippling losses.

Since Britannia "ruled the waves" for at least the last half of the 19th century and for the early part of the 20th century, and since profitable shipping was of paramount British national interest, British legislators and judges were sympathetic to the British carriers' use of extremely broad disclaimers.58 Once the 1855 English Bill of Lading Act upheld the "common law" exemptions to the strict liability principle,59 English shipowners felt reassured in their liberal use of disclaimers. Thereafter, the number and reach of disclaimers grew to the point where carriers customarily exempted themselves from liability for every conceivable act or event that could damage the goods, including their own negligence.60 In addition to the disclaimers, carriers used other clauses that limited the amount recoverable to very low sums, and established unreasonably short periods for the presentation of a claim.61 English courts, in particular, were reluctant to invalidate such disclaimers and limitation of liability clauses.62 The result was described by a leading U.S. commentator as a "free contract of carriage . . . to the point where it could be said that the

58 Diamond, supra note 57, at 227.
59 On the common law exceptions to strict liability, see Carver, supra note 8, at 1-20, and Gilmore & Black, supra note 8, at 139-42.
60 A partial list includes: thieves; heat; leakage; breakage; contact with other goods; perils of the seas; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; non-responsibility for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit. Yancey, The Carriage of Goods: Hague, COGSA, Visby and Hamburg, 57 Tul. L. Rev. 1238, 1240 (1983) (hereinafter "Yancey").
61 An equally oppressive clause conferred the "benefit of the (shipper's) insurance" on the carrier, thereby cutting off the shipper's insurer's right of subrogation against the carrier. Id. at 1240. Yancey points out that the carriers' use of benefit of insurance clauses was successfully nullified by the cargo's insurers' use of a fictitious loan receipt whose effect was to preserve the insurer's subrogation.
62 Yancey describes the English 19th century law on exemption clauses as follows: "a shipowner was given certain latitude to contract out of his liability for negligence, and in some instances, even for unseaworthiness, but only if he did so in absolutely clear, unambiguous, and unequivocal terms. Clauses of adequate specificity, leaving the carrier free from the effects of the negligence of his own servants or agents, were enforceable." Id. at 1239. For an illustrative British decision, see In re Missouri S.S. Co., 42 Ch. 321 (1889), upholding a negligence clause despite the invalidity of this clause in Massachusetts, the place of issuance of the bill of lading and shipment of the goods. As pointed out in Gilmore & Black, supra note 8, at 142, some United States state court decisions, such as Rubens v. Ludgate Hill S.S. Co., 20 N.Y.S. 481 (1892), all'd without opinion, 143 N.Y. 629, 37 N.E. 825 (1894), followed the British rule and thereby "further muddled the picture" of liability for negligence.
carrier accepted the goods to be carried when he liked, as he liked, and wherever he liked.\textsuperscript{63}

In the United States, carriers encountered a much less sympathetic judiciary. Only four years after the enactment of the English Bill of Lading Act, the United States Supreme Court subjected bill of lading exemption clauses to obligations which were described as "overriding": 1) The obligation to use due care with respect to the cargo; and 2) the obligation to furnish a seaworthy ship at the beginning of the voyage.\textsuperscript{64} As if to remove any doubt about the prevalence of an American view contrary to the English view, an 1889 United States Supreme Court decision expressly denied enforceability to the "negligence" exemption.\textsuperscript{65} Even where a particular exemption clause or disclaimer was deemed valid, the shipper could avoid it if a breach of one of the overriding obligations was a concurrent cause. The main judicial concession to the carriers' interests was that in such a case, the burden of proving such breach was placed on the shipper.\textsuperscript{66} This evidentiary burden acted as an encouragement for carriers, United States and foreign, to continue to insert as many disclaimers as possible.

Lacking today's liberal pre-trial discovery, 19th century United States shippers suing in the United States had a difficult time proving the carriers' negligence. Conversely, if United States shippers were to sue the carriers in Great Britain, where most of the sources of information on the defendants' diligence and assets were located, they would be bound by exemption clauses that the United States courts had voided. The result became apparent in cases such as \textit{In re Missouri S.S. Co.},\textsuperscript{67} where an English court held that a bill of lading issued in Massachusetts, to an American shipper for goods loaded in Massachusetts, was subject to English law because the carrier was British and the parties were presumed to have intended the application of English law.

\textsuperscript{63}Knauth, supra note 8, at 116.
\textsuperscript{64}Gilmore & Black, supra note 8, at 140.
\textsuperscript{65}See Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U.S. 397, 438-63 (1889).
\textsuperscript{66}See Clark v. Barnwell, 53 U.S. (12 How.) 272, 280 (1851); and Gilmore & Black, supra note 8, at 141.
\textsuperscript{67}In re Missouri S.S. Co., 42 Ch. 321 (1889).
2.4.2 The Harter Act Compromise

U.S. shippers eventually took their case to the United States Congress which enacted the Harter Act of 1893.\(^{68}\) The Harter Act effected a compromise between the competing interests of shippers and carriers. This compromise distinguished between fault in the navigation and management of the vessel versus fault in the custody and care of the goods and in equipping the vessel. The Harter Act voided any bill of lading clause that sought to relieve the carrier from the consequences of negligence in proper loading, stowage, custody, care, or proper delivery of the goods.\(^{69}\) It also voided any disclaimer or limitation of the owner’s obligation of due diligence in regard to seaworthiness, or in equipping the vessel.\(^{70}\) If a shipowner exercised due diligence to see that the vessel had been made seaworthy in all respects, the Harter Act exempted the shipowner from the consequences of errors in navigation and management.\(^{71}\) The Harter Act was also the first United States federal statute to specify what had to be stated in a bill of lading. Required to be stated were the goods’

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\(^{69}\) 46 U.S.C. App. § 190 (1988) states that:

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

\(^{70}\) 46 U.S.C. App. § 191 (1988) states that:

It shall not be lawful...to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

\(^{71}\) 46 U.S.C. App. § 192 (1988) states that:

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners...be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.
identification marks, the number of packages or quantity of goods and the indication whether the stated weight was the carrier’s or the shipper’s, and the apparent order and condition of the merchandise when received by the carrier.\footnote{46 U.S.C. App. § 193 (1988) listed the requirements of the bill of lading as follows: the marks necessary for identification, number of packages, or quantity, stating whether it be carrier’s or shipper’s weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.}

The requirement of an indication of the apparent order or condition of the goods encouraged the use of clauses or notations such as “shipper’s load and count,” “shipper’s description,” and “said to contain.” From the carrier’s standpoint, these as well as any other clauses or notations that indicated apparent irregularities made legal sense because they protected it from the allegation that the goods had been delivered in a sound condition and could have been damaged only because of improper loading, stowing, or care.\footnote{47 On the acceptability of some notations, including “rusty” for iron shipments, see International Chamber of Commerce Pub. No. 473, Clean Transport Documents 9-11 (1989); and U.C.C. § 7-301(1) (1982). For an analysis of these clauses in the UBLA, the Pomerene Act, the Carriage of Goods by Sea Act, 46 U.S.C. App. §§ 1300-1315 (1988), and at U.C.C. § 7-301(1) (1982), see Murray, supra note 8, at 703-08. That some of these notations or clauses could be removed without damage to the carrier’s purse was made clear by the United States Supreme Court. In Austin Nichols & Co. v. The Isla de Panay, 267 U.S. 260, 272, 1925 AMC 447, 459 (1925), the United States Supreme Court decided that where a bill of lading is silent as to the apparent condition of the goods, the carrier is not estopped by the Harter Act from showing that the goods were defective when received for shipment.} At the same time, the Harter Act requirement encouraged the practice of indicating on the bill of lading the slightest apparent irregularity in the goods or their packaging, even when the apparent irregularity was inevitable with the type of goods shipped, such as “wrappers bloodstained” for meat shipments, or “rusty” for iron shipments.\footnote{47 INCOTERMS is the most widely used set of international rules for the interpretation of trade terms in foreign trade. It was first published by the International Chamber of Commerce in 1936, and subsequently revised in 1953, 1967, 1976, 1980, and 1990. The 1980 INCOTERMS (as well as earlier revisions) required, among other things, that in a CIF sale (Rule A-7) the seller “at his own expense furnish to the buyer without delay a clean negotiable bill of lading for the agreed port of destination.” International Chamber of Commerce, Guide to Incoterms 57 (1980). Rule A-8 of the 1990 INCOTERMS contains language that reflects the changing nature and role of the ocean bill of lading and requires that the seller “at his own expense provide the buyer without delay with the usual transport document for the agreed port of destination.” Thereafter, A-8 lists some of the usual transport documents and includes, among others, the negotiable bill of lading.} In due course, when internationally observed standard terms and sales rules, such as INCOTERMS,\footnote{47} required the seller to supply the buyer with a
“clean” document of title, the determination of what notation rendered the bill of lading unclean became essential to sellers, buyers, and their bankers.

Although the Harter Act compromise was seemingly counter-intuitive (how could the carrier be allowed to exempt itself for its own mistakes of navigation and management?), it became one of the most internationally influential laws ever enacted by the United States Congress. Close restatements were enacted in common law countries, such as Canada, Australia, and New Zealand. The Harter Act was also highly influential in shaping the laws of leading civil law jurisdictions, such as Germany. Eventually, the Harter Act helped to shape the text of the 1924 Brussels International Convention for the Unification of Certain Rules Relating to Bills of Lading (the “Hague Rules”). As a statute that contained “protector of the weak” features, the Harter Act became a precursor of contemporary consumer protection law.

The Harter Act’s protection of the weak betrays its perception of the bill of lading as a contract for the carriage of goods, whose terms are dictated by the carrier. In contrast, the Harter Act’s draftsmen regarded the charter party as a contract for the lease of vessel space.

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76 Knauth, supra note 8, at 125. For references to some of the relevant national statutes, see id. 454 and 485.

77 Julius Von Gierke, the author of an influential pre-second World War German commercial law treatise was emphatic: "A new stage in the history of the law unfolded when the United States enacted the Harter Act. . . . From this enactment were derived various international initiatives . . . and [also] the amendment of the German Commercial Code of August 10, 1937." J. Von Gierke, Derecho Comercial y de la Navegación 277 (Spanish Trans. 1957).


For a much shorter account, see Knauth, supra note 8, at 118–32, which traces the effort to write internationally uniform rules to the International Law Association’s adoption of the “conference form” model bill of lading in Liverpool in 1882. This form included a “due diligence” clause, and listed specific types of losses which shipowners and carriers were not required to pay. The Liverpool conference form was adopted with some amendments by the New York Produce Exchange in 1883 and 1884 and continued to be revised and adopted in other important commercial centers throughout the western world; see also Yancey, supra note 60, at 1241–1242. For a comparative law analysis of the binding effect of the Hague Rules, see Yiannopoulos, supra note 8, at 28-143.

79 On the consumer law features of the Harter Act, see Tetley, Waybills: The Modern Contract of Carriage of Goods by Sea, 14 J. Mar. L. & Com. 465 (1983), and Tetley, supra note 8 at 21, but c.f., Yancey, supra note 60, at 1241, who admits that the Harter Act was an important step “in the development of the law of maritime carriage" but asserts that it “ultimately was a disappointment.”
by parties of relatively equal bargaining power and knowledge. This perception continues to prevail, hence, while the bill of lading continues to be the subject of considerable national and international regulation, the charter party has until very recently attracted little regulatory attention.\textsuperscript{80}

The protection given by the Harter Act to shippers and consignees benefitted banks and secured creditors. After the Harter Act, United States issuers, confirmers, and negotiators of letters of credit and documentary drafts who paid monies or extended credit on the strength of, \textit{inter alia}, ocean bills of lading, could count on a minimum enforceable carrier liability, even where such a liability was artfully disclaimed. This is not to say that the Harter Act provided an adequate measure of compensation or a sound claims procedure against carriers, for it did not. The Harter Act failed, for example, to forbid the low limits on damages that prevailed throughout the shipping world at the turn of the century. It also failed to deal with the unreasonably short times for notices of claims against carriers; and it did not reverse the burden of proof that weighed upon the shipper whenever the carrier claimed the application of seemingly valid exculpatory clauses.\textsuperscript{81}

2.4.3 \textit{The Hague Rules}

In September of 1921, the International Law Association (ILA), an English based private association met in The Hague, Netherlands and drafted a set of voluntary rules to govern some of the main aspects of ocean carriage liability. These rules were subsequently amended by the CMI, which although affiliated with the ILA acted as an indepen-

\textsuperscript{80} Quite recently, however, a movement in favor of a multinational convention on charter parties appeared among developing nations. At a recent meeting of UNCTAD, a working group was charged with looking at the question of whether clauses used in standard charter parties need updating. The UNCTAD Secretariat argued that a number of important charter party clauses are ambiguous, uncertain in their operation, and when subjected to the scrutiny of the courts, variously interpreted and prone to different constructions by different national regimes. The Secretariat recommended “tailor made” rules, similar to the Hague or Hague-Visby Rules, which would be mandatorily applicable to charter parties to cover the main areas of responsibility for cargo. Such mandatory rules would still leave the parties free to negotiate any special terms required for their particular charter party. OECD countries did not agree with the Secretariat’s conclusions and recommendations. The OECD countries believed that while chartering is not problem free, standardization and harmonization of charter party clauses already exists and charter parties are continuously evolving and adapting to changing conditions. On this development, see Report of the United States Council for International Business, IGO, No. 8 at 8 (1990).

\textsuperscript{81} On the deficiencies of the Harter Act, see Yancey, supra note 60, at 1241.
dent entity. The amended text produced by the CMI reflected the strong influence of the Harter Act. In August of 1924, the Belgian government hosted an International Conference on Maritime Law to discuss the Hague Rules as amended by the CMI.82 Despite the fact that the Harter Act was a prime source of the Hague Rules, the United States Senate did not enact an implementing statute, the Carriage of Goods by Sea Act (“COGSA”), until April 16, 1936. In this article, when appropriate, this implementing statute will be used as the relevant version of the Hague Rules.

The Hague Rules as well as COGSA are applicable to shipments under a “bill of lading or similar document of title.”83 When applicable, these two sources of law provided shippers with benefits that had been unavailable under the Harter Act. Among these benefits were: 1) bill of lading provisions that granted the carrier the benefit of the shipper’s insurance were outlawed;84 and 2) the right of the carrier to limit liability to a fixed sum per package or shipping unit was modified so as to specify a mandatory minimum of 100 Pounds Sterling (or English Gold Sovereigns) or the national currency equivalent per package or unit.85

As did the Harter Act, COGSA required that carriers exercise due diligence to provide a seaworthy ship. Unlike the Harter Act, however, unexcused unseaworthiness did not deprive the carrier of immunity for liability for the consequences of errors of navigation and management because COGSA required that the alleged unseaworthiness be the cause of the loss.86 The 1990 decision by the United States

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82See supra note 78.
83Hague Rules, supra note 78, art. 1(b) states that “‘contract of carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea.” (Emphasis added). For the same language in COGSA, see 46 U.S.C. App. § 1301(b). For an extract from the official French text, see infra note 117.
84Hague Rules, supra note 78, art. 3(8).
85Id. art. 4(5). COGSA, at 46 U.S.C. App. § 1304(5) (1988), fixed the amount in the United States at $500 per package or customary freight unit. Diamond points out that the Hague Rules gave cargo a liberal limit of liability and precluded shipowners from inserting clauses in their bills of lading purporting to limit liability to ridiculously low figures. The amount stipulated was the quantity of gold contained in 100 gold sovereigns. Diamond, supra note 57, at 229. Yet, Hague Rules Article 9 gave contracting States, other than those who used sterling as a unit of currency, a liberty or option to convert this limitation figure into their national currencies and this liberty was interpreted as entitling those States to fix the value of 100 gold sovereigns in terms of their national currencies at the value prevailing at the date of the relevant legislation.
86Section 3 of the Harter Act, 46 U.S.C. App. § 192 (1988), predicated the carrier’s exemption of liability for damage or loss resulting from faults or errors in navigation and management of the vessel upon the exercise of due diligence to make the ship in all respects seaworthy:
Court of Appeals for the Ninth Circuit in Damodar Bulk Carriers Ltd. v. People's Insurance Company of China makes the effect of this distinction eminently clear. Prior to COGSA unseaworthiness was determinative of liability; after COGSA a carrier could rely on the Harter Act derived exemptions for errors in navigation or management, even though the vessel was unseaworthy as long as the unseaworthiness was not the cause of the loss.

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy . . . neither the vessel, her owner, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.

In contrast, Section 4(2)(a) of COGSA, 46 U.S.C. App. § 1304(2)(a) (1988), unconditionally exempts the carrier from responsibility for loss or damage resulting from an: "Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

As pointed out in Gilmore & Black, supra note 8, at 155, the United States Supreme Court in the landmark case of May v. Hamburg-Amerikanische Packetfahrt A. G. (The Isis), 290 U.S. 333, 1933 AMC 1565 (1933), read Section 3 literally and held that even where unseaworthiness did not cause the loss, the requirement that the carrier exercise due diligence to make the ship "in all respects" seaworthy had to be met before immunity could be obtained under the Harter Act. This ruling was perceived by carriers as imposing upon them the burdensome standard of strict liability, and may have contributed to their support for what they perceived to be the more permissive language in COGSA. But cf. Yancey, supra note 60, at 1243. Since § 4(2)(a) of COGSA does not predicate immunity upon seaworthiness, it has abolished the rule in The Isis where COGSA applies.

93 F.2d 675, 1990 AMC 1544 (9th Cir. 1990).

At 903 F.2d at 684, 1990 AMC at 1553, the court quoted Congressional testimony on the intent of 46 U.S.C. App. § 1304 (1988):

This section constitutes a modification of the Harter Act in that it does not make it a condition precedent to the carrier receiving the benefit of these exceptions that he shall have exercised due diligence to make the ship in all respects seaworthy—properly manned, equipped and so forth. It is true that the shipowner is under that obligation as fully as before. . . . The change, in reality, would affect but few cases. It presents such a situation as this: Suppose a ship sails from New York and, in going down the harbor, owing to an error of the master, she comes into collision with another ship. . . . it is simply an error in navigation on the part of the master, but it is found that the compass is out of order. Now, as that unseaworthiness had not the slightest cause in connection with the disaster, as no one ever looked at the compass, even it would seem the shipowner should not be liable, should not be deprived of the Harter Act exemption from liability, as a result of the error of navigation, but probably under existing law that would be the case. Now, this changes that: It says in effect that the carrier, whenever there is unseaworthiness, whenever he has failed in the duty of due diligence, to have the ship seaworthy, and whenever that has resulted in a damage or loss, he must pay for it; but it does not deprive him of the benefit of these exceptions where the failure on his part has had nothing whatever to do with the disaster.

In addition, unlike the Harter Act, COGSA did not extend the carrier's liability to the delivery of the goods to the consignee. The Harter Act lists among the carrier's obligations with respect to cargo to "properly deliver same," 46 U.S.C. App. § 191 (1988) (emphasis added), whereas COGSA lists the "custody, care and discharge of such goods," 46 U.S.C. App. § 1302 (1988) (emphasis added). On the difference between these two terms, see Caterpillar Overseas, S.A.,
The Hague Rules, COGSA, and the Harter Act regarded the sea voyage itself as a risk sharing venture between shippers and carriers. Since the carriers risked their ships, it was assumed that they would select and supervise their crews with enough care to prevent the damages that could result from improper management and navigation of the ship. Such damages were therefore exempted by the Hague Rules, as were those caused by fire (unless caused by the design or neglect of the carrier), and by traditionally exempt perils, acts, and events.\(^9\)

In order to standardize bill of lading texts and to promote uniformity of practice, the Hague Rules listed a number of required statements reminiscent of the Harter Act's requirements. Prominent among these requirements were: a) the leading marks necessary for identification of the goods; b) either the number of packages or pieces, or the quantity or weight; and c) the apparent order and condition of the goods.\(^9\)

Court interpretation of the Hague Rules' implementing statutes detracted from international uniformity.\(^9\) International uniformity on the amount of compensation became an unrealistic goal. Courts in country B (the country of shipment) would not award the amount stipulated in the per package limitation of country A (the importing country) even though A's implementing statute stated that it applied to inward as well as to outward bound shipments. Accordingly, depending upon whether a bank holder of a bill of lading sued in the

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\(^9\)See Hague Rules, supra note 78, art. 4(1)-(2). In addition to the restrictions listed in Article 4, Professor Kendall mentions other restrictions of liability included in the bill of lading by reference to the appropriate statute such as: no responsibility for damage by fire unless caused by the design or neglect of the carrier, the limitation of the liability of the shipowner to the value of its interest in the ship plus pending freight, and the provision that if the interest of the owner is insufficient to meet all losses, the shippers will accept a proportional settlement. Kendall, supra note 8, at 257.

\(^9\)Hague Rules, supra note 78, at art. 3(3)(a)-(c).

\(^9\)See Watermill Export v. M/V Ponce, 506 F. Supp. 612, 1981 AMC 2457 (S.D.N.Y. 1981), in which a United States District Court held that since COGSA had been properly incorporated into the bill of lading the inconsistent clause was void. This decision was contrary to two previous holdings by other federal courts: Norwich Pharmacal Co. v. S.S. Bayamon, 474 F.Supp. 240, 1979 AMC 2781 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980), and Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico, 607 F.2d 322, 1979 AMC 2772 (4th Cir. 1979). George Chandler suggests that overall reconciliation of contradictory or seemingly contradictory decisions is possible if the manner in which COGSA is incorporated or applies to the bill of lading in question is taken into account. Chandler letter, supra note 26, at 12. Thus, one ought to determine first if the incorporation of COGSA is qualified as in Ralston Purina Co. v. Barge Juneau and Gulf Caribbean, 619 F.2d 374, 375, 1981 AMC 2829, 2830 (5th Cir. 1980).
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United States or in England it could get $500 instead of £100 for loss of the same package or unit of freight. 92 Similarly, the question of whether the per package limitation applied to containers (regardless of size) became a lex fori determination. 93

Despite the lack of international judicial uniformity on several important issues, the Hague Rules made a signal contribution to international trade. The Hague Rules eliminated uncertainty of liability by setting standards of responsibility and establishing a mandatory minimum of compensation. These mandatory standards and minimum compensation made the international ocean bill of lading a more honest instrument. The Hague Rules “boundaries” of liability encouraged less costly schemes of risk assumption. COGSA, for example, applies from the time the goods are loaded on board the vessel to the time they are discharged, i.e., “tackle to tackle.” 94 This was only one among the many spatial, time, and monetary boundaries of liability set forth in the Hague Rules. Once established, these boundaries enabled shippers, carriers, banks, and insurance companies to contract for appropriate insurance coverage.

It is true that a considerable overlapping of insurance coverage has resulted from this basic arrangement. Yet, overlapping is inevitable whenever risk categories fit easily into more than one compartment. Consider, for example, the risk categories of improper stowage, error in the navigation and management of the vessel, and unseaworthiness. Assume that goods became loose in rough seas either because of improper lashing or because of heavy seas that could have been avoided with better navigation. Assume further that the loose goods caused damage to a vulnerable vessel structure, which damage, in

92 Tetley, Waybills, The Modern Contract of Carriage of Goods by Sea, supra note 79, 14 J. Mar. L. & Com. at 493-96, cites the decision by the Supreme Court of Italy in American Export Lines v. Fiat, 1961 Dir. Mar. 601, for the rule that the incorporation of COGSA in a bill of lading issued in the United States was subordinate to Italian text of the Brussels Convention as enacted in Italy. If the United States version of COGSA applied, the $500 limit prevailed. If the Italian version applied, the equivalent in Italian lira of 100 English gold pounds was awarded.

93 As pointed out in Moore, The Hague Rules, 10 J. Mar. L. & Com. 1, 3 (1978) (hereinafter “Moore”), COGSA retained the term package but as containerization set in “the size of packages [changed] from those that could be man-handled by two men to the 40 foot container, weighing, with its contents up to 35 tons. The question of what was and what was not a ‘package’ had created chaos in United States law, some decisions depending on extremely narrow and, commercially, impractical distinctions.” On the issues raised by the meaning of the Hague Rules and COGSA’s term “package,” see van Wageningen, Interpreting COGSA: The Meaning of Package, 30 U. Miami L. Rev. 169 (1975).

94 46 U.S.C. App. § 1301(e) (1988). “The term ‘carriage of goods’ covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.” For a discussion of the respective coverages of COGSA and the Harter Act, see Gilmore & Black, supra note 8, at 145-49.
turn, caused damage to the goods themselves. Under these circumstances, how could overlapping be avoided? Overlapping coverage, albeit wasteful in some respects, ultimately contributed to the certainty and merchantability of bills of lading. In the event of loss or damage, carriers, shippers, consignees and their financiers could count on sets of insurers to pay the claims. Once the claims were paid, the insurers decided amongst themselves who bore the loss and in what proportion.

The standardization of textual requirements was an equally important contribution of the Hague Rules to the certainty of the ocean bill. If prior to the Hague Rules bankers had legitimate concerns that a bill of lading issued in country A, the place of shipment, would not be enforceable in country B, the place of issuance of the letter of credit and arrival of the goods, such concerns were lessened by the enactment in more than 70 nations of statutes implementing the Hague Rules.\(^95\) While a Hague Rules inspired bill of lading can be challenged by an issuing bank on the basis that Article 3(3) of the Hague Rules defers to municipal law for unlisted requirements,\(^96\) decisional law does not reveal any such challenge. In this sense, the Hague Rules' "incomplete" list of ocean bill of lading requirements has withstood inconsistencies with municipal law.

2.4.4 Hague-Visby

The Brussels Protocol, derived from proposed amendments to the 1924 Brussels Convention adopted by the CMI at Visby, which amended the Hague Rules, was adopted in 1968, after approximately a decade of negotiations.\(^97\) The Protocol is usually referred to as the "Visby Rules," the "Visby Amendments," or, simply, "Visby." As with the Hague Rules, the Visby Amendments apply to bills of lading "or other documents of title."

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95For a list of Hague Rules ratifications and accessions, as well as declarations and reservations, see Benedict on Admiralty docs. 1–1 & 1–11 (M. M. Cohen ed., 6th ed. 1955).
96The Hague Rules, supra note 78, at art. 3(3) state that "the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things . . . ." (emphasis added).
2.4.4.1 Package, Unit, and Tort Action Limitations

The Hague Rules mandatory minimum compensation for loss or destruction of cargo became outdated. The Visby Amendments raised the package and freight unit limitation and expressed the amount as the equivalent of a specified quantity of gold: 10,000 Poincaré francs per package or 30 Poincaré francs per kilogram. At the time of the adoption of this standard 10,000 Poincaré francs were worth approximately $660 dollars or £235.98

Carriers, on the other hand, gained increased protection against tort lawsuits as a result of the Visby Amendments' clarification that the limits of liability and defenses of the Hague Rules applied equally to actions in tort and in contract.99 This clarification was particularly needed in common law countries, such as Great Britain, because of their procedural requirement of privity of contract. As noted by Anthony Diamond, Q.C., if the cargo owner was a party to the bill of lading it was subject to the disclaimers whether it sued in contract or tort.100 If the cargo owner was not in privity of contract, the shipowner might need protection against claims in tort.

Mr. Diamond provided some helpful illustrations of the need for the clarification. His first example concerned a bank which took a bill of lading as security for its loan to the seller or buyer of the goods.101 Since, under English law, the bank was not in contractual privity with the carrier until the bank took delivery of the goods, if the ship and cargo were lost the bank would have to sue the carrier in tort.102 In such a suit the carrier's right to rely on the Hague Rules defense of error in navigation is uncertain. His second example involved a transshipment bill of lading issued by the first carrier and damage or

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98The Visby Amendments, supra note 97, art. 2. Despite its label, the Poincaré franc is not a unit of currency but a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900. On the monetary aspects of Visby, see Diamond, supra note 57, at 237-40, which notes that the Poincaré franc had been used as a unit of account in other conventions. A December 1979 Protocol to the Visby Amendments changed the amounts to 666.67 SDR's (about $850.00) per package, and 2 SDR's (about $2.55) per kilogram ($1.11 per pound). On this amendment, see Chandler, A Comparison of 'COGSA,' the Hague/Visby Rules, and the Hamburg Rules, 15 J. Mar. L. & Com. 233, at 268 (1984). For a helpful explanation of the use of gold currencies and gold value clauses in international conventions, see International Monetary Fund Pamphlet Series No. 19, J. Gold, Floating Currencies, Gold and SDR's (1976), and International Monetary Fund Pamphlet Series No. 22, Floating Currencies, SDR's and Gold, Further Developments (1977).

99The Visby Amendments, supra note 97, art. 3(1).

100Diamond, supra note 57, at 248.

101Id.

102Id.
loss occurring on the second carrier’s vessel.\textsuperscript{103} As with the first example, it was not certain whether the Hague Rules defenses available to the first carrier were available to the second carrier.\textsuperscript{104} A similar uncertainty is apparent in the third example where a bill of lading was issued by a time charterer, but the shipper sued the owner of the vessel.\textsuperscript{105} Finally, his fourth example involved a freight forwarder’s bill of lading. The freight forwarder stuffed the plaintiff’s goods as well as other shippers’ goods into one container, and then procured a single bill of lading in the forwarder’s name from the carrier. Alleging lack of contractual privity with the carrier, one or all of the shippers whose goods were in the container sued the carrier in tort.\textsuperscript{106}

Prior to the Visby Amendments there was a possibility that the carrier would be liable in tort in the four examples. Mr. Diamond asserts that under the Visby Rules tort liability would be precluded in at least two of the examples. These would be examples 1 and 4, where the party who carried the plaintiff’s goods had also issued the bill of lading or had entered into the freight contract with the shipper, whether or not the shipper was the plaintiff.\textsuperscript{107}

2.4.4.2 Application of One Year Time Bar to Claims for Wrong Delivery

Another Visby amendment was designed to ensure that the one-year time bar to claims for damages applies also to claims for misdelivery of the goods.\textsuperscript{108} This amendment addressed what has by

\textsuperscript{103} Id.
\textsuperscript{104} Id. at 249.
\textsuperscript{105} Id. at 248.
\textsuperscript{106} Id. at 248-49.
\textsuperscript{107} Id.
\textsuperscript{108} Article 1(2) of the Visby Amendments, supra note 97, provides:
In Article 3, paragraph 6, sub-paragraph 4 shall be deleted and replaced by:
Subject to paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.
Article 1(3) of the Visby Amendments states in relevant part:
In Article 3, after paragraph 6, shall be added the following paragraph 6 bis:
An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case.
Article 3 of the Amendments states in relevant part:
Between Articles 4 and 5 of the Convention shall be inserted the following Article 4 bis:
now become a generalized practice and problem throughout the shipping world. If, upon arrival of the goods, the consignee does not have the required bill of lading in its possession, it often obtains the carrier's release of the goods by tendering an acceptable letter of indemnity. Often this letter of indemnity is issued or countersigned by a bank. As long as the carrier continues to be liable for the delivery of the goods to a holder of the missing bill of lading, the indemnity has to run for long or indefinite periods of time. With the application of the one year time bar to misdelivery of the goods, longer or indefinite term indemnities are no longer necessary. The amendment also protects the carrier from claims of "fundamental breach of the contract" for misdelivery or deviation which would have otherwise voided the contract and rendered the one year time bar inapplicable.

2.4.4.3 Conclusive Evidence of Shipment and Abstraction

One of the most significant contributions made by the Visby Amendments to the merchantability of the bill of lading was the "conclusive effect" amendment to the Hague Rules. The Hague Rules had adopted the principle that the bill was only "prima facie evidence of the receipt by the carrier of the goods as therein described . . .". Visby added the following sentence: "However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

This sentence overruled cases such as Grant v. Norway, which

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1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort.

90The Visby Amendments, supra note 97, art. 3(4).

10The Visby Amendments, supra note 97, art. 1(1). Chandler points out that the purpose of the words added by Visby was to halt the practice of shippers providing letters of indemnity to the carrier to cleanse an otherwise possibly unclean bill of lading. This type of indemnity differs from that provided by the consignee when bills of lading are missing. Chandler letter, supra note 26, at 3. The added words were to make it clear that where the transferee of the bill of lading is concerned what appears on the face of the bill of lading binds its issuer. This was necessary in jurisdictions where the statements on the face of the bill of lading were not actionable, or were not regarded as misrepresentations. Courts in the United States regard such misleading statements in the bill of lading as actionable misrepresentations. See, among others, Berisford Metals Corp. v. S.S. Salvador, 779 F.2d 841, 1986 AMC 99 (2d Cir. 1985), and Condor Industries Int'l v. M/V American Express, 667 F. Supp. 99, 1988 AMC 598 (S.D.N.Y. 1987). This amendment illustrates how the correction of a maritime law concern had an unintended, albeit positive, effect upon banking law because it established the abstract nature of the bill of lading in jurisdictions other than the United States.

1110 C.B. 665, 20 L.J.C.P. 93 (1851).
held that a captain or other owner's agent, who signed a bill of lading for goods that were not received, did so *ultra vires* or without authority. In doing away with the *ultra vires* doctrine, Visby increased the certainty and abstraction of international bills of lading to the level of the Pomerene Act. Depending upon the courts' interpretation of the term "good faith," this amendment may include a larger number of protected holders than the Pomerene Act. If good faith requires only that the holder have no actual notice that the goods have not been shipped or do not correspond to the bill of lading description, the holder does not have to prove that it gave value or consideration, as it must under the Pomerene Act.

2.4.5 The Hamburg Rules

The Visby Amendments did not still the criticism of the Hague Rules. Dissatisfaction with the Hague Rules came from both the maritime carrier countries and the developing nations of Asia and Africa. Visby's compromise was regarded by the developing nations as responsive to the complaints of maritime carriers. Third world countries felt that their concerns remained unaddressed. In response to these concerns, the United Nations Commission on International Trade Law ("UNCITRAL") undertook a revision of Hague-Visby. A diplomatic conference was convened at Hamburg, Germany in March 1978, under the auspices of UNCITRAL. The resulting convention, known as the Hamburg Rules, is skewed toward the interests of cargo-shipping nations and against the interests of cargo-carrying nations. According to a member of the United States delegation, a spirit of economic warfare permeated the conference.

The Hamburg Rules introduced radical changes, including a much larger scope. Hamburg eliminated the Hague and Visby Rules'
disputed precondition of applicability only to documents of title. Hamburg applies generally to "all contracts of carriage by sea between two different States," and specifically to the "bill of lading or other document evidencing the contract of carriage by sea." The omission of the words "of title" allows applicability to non-documents of title, such as sea waybills and cargo and forwarders' receipts, as long as these waybills and receipts evidence the contract of carriage. Other changes were radical reversals of previous liability rules. For example, the Harter Act's and Hague Rules' defenses of error in navigation or management of the vessel were eliminated, and replaced by liability for negligence in navigation or management.

This new liability principle contained *res ipsa loquitur* provisions in accordance with which the carrier now had the burden of proving freedom from fault. The Hague Rules' fire defense was changed to place liability on the carrier for fault or neglect in the causation of a fire or in measures to extinguish the fire. The burden of proof on a fire claim, however, remained on the claimant. Liability for delay in delivery was unclear under Hague-Visby; Hamburg made carriers liable for delay. The Visby limitations of 10,000 Poincaré francs per package or 30 Poincaré francs per kilogram were raised by 25%. The Poincaré franc was replaced by the Special Drawing Right (hereinafter "SDR") at 835 SDR's per package and 2.5 SDR's per kilogram.

The carrier was made liable, without limitation, if the loss, damage or delay in question was proven to have resulted from its act or omission "done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would

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117Hamburg Rules, supra note 115, at 2, § 1. As pointed out by George Chandler in an addendum of December 4, 1991 to the Chandler Memorandum, the following language in the official French text of both the Hague and the Visby Protocol "*document similaire formant titre pour le transport de marchandises*" gave rise to a dispute on its meaning in different legal systems. One of the most important aspects of this dispute was whether a non-negotiable bill of lading could be regarded as a document of title. On the conflicting views, see M. F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 432–3 (1990).

118Hamburg Rules, supra note 115, at 2, § 1(d)–(e). See also the definition of "contract of carriage by sea" in id. at Art. 1(6).


120Annex II, id.

121Hamburg Rules, supra note 115, Art. 5(4)(a)(i)–(ii).

122Id. Art. 6(1)(a).

123Id.
probably result.” The same rule also applied to servants or agents of the carrier. The limitation of time for suit was increased from one to two years.

Some of the changes in Hamburg reflected the increasingly important role of freight forwarders. Hamburg permits an issuer of a through bill of lading to contract out of liability for damage done during the carriage by another carrier only if the contract of carriage “provides explicitly that a specified part of the carriage is to be performed by a named person.” Hamburg covers the whole period during which the carrier is in charge of the goods at the ports of loading and discharge. This contrasts with the shorter “tackle to tackle” period of the Hague Rules.

III

PRESENT STATE OF THE OCEAN BILL OF LADING

3.1 Practices determined by Specialization

3.1.1 Types of vessels: Liners, Tramps, Tankers, Combination, General Cargo, and Container Ships

The world’s ocean transportation needs are serviced by “liner” and “tramp” vessels. Generally speaking, if the service is scheduled along a fixed route, the vessel is a “liner”; if the service is not on a fixed route and is unscheduled, the vessel is a “tramp.”

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124Id. Art. 8(1).
125Id. Art. 8(2).
126Id. Art. 20. This limit was expressed as a time bar rather than a discharge from liability.
127Id. Art. 11(1).
128Id. Art. 4.
129See supra text accompanying note 94.
130For a very useful introduction to shipping practices, see Kendall, supra note 8, at 5–80. For a clear and perceptive overview of the effect of shipping practices upon documentary credits, see Walsh, Note, Documentary Maritime Fraud: Redefining the Standard, 6 Ariz. J. Int’l & Comp. L. 223, 228–40 (1989). Much of the descriptive material in the principal text is based upon Walsh’s description.
131For a comparison of the main features of liners and tramps, see Kendall, supra note 8, at 5–11. Among the lesser known differences listed by Kendall are: 1) liners are common or public carriers, required by law to accept any legal cargo which the ship can transport, whereas tramps are contract or private carriers and normally carry full shiploads of a single commodity, usually in bulk; 2) a liner-service company issues a standard or uniform contract of carriage or bill of lading, regardless of the size of the shipment or the number of different commodities, whereas the owner of the tramp ship negotiates non-uniform contracts for each employment of the vessel; and 3) procurement of liner cargo is by the owner’s staff, whereas procurement of tramp cargo is handled through brokers who act both for the tramp owner and cargo interests. Id. at 6–11.
In addition to requiring special types of vessels, containerization requires a special place for reception of the goods. If the goods are not “stuffed” at the seller’s place of business, they are stuffed at the consolidator’s place of business or in terminals or container yards (usually referred to as Container Freight Stations (C.F.S.) or as Container Yard (C.Y.) points). Thus, containerized loading commences, in many instances, not at dockside or on board the vessel but at inland points.

Predictably, different types of vessels and methods of shipment entail distinct bill of lading practices. Consider, for example, the issuing and signing of bills of lading. Most oil or liquid gas tankers and dry bulk vessels are not likely to issue many bills of lading to cover their full cargo load. Consequently, the master or captain of a tanker or dry bulk vessel may reasonably be expected to sign each bill. Such an expectation would be unreasonable with container ships or with general cargo vessels, where hundreds of bills of lading may have to be issued, and the issuance of final documentation is often possible only after the vessel has departed from the place of shipment. In addition, general cargo vessels depend upon shipping agents and loading brokers to fill out their cargo space and to issue their bills of lading. In such a situation, the captain seldom issues or signs the bill of lading. Container transport documents are issued frequently by freight forwarders or “consolidators.” These freight forwarders or NVOCC’s frequently act as carriers in their own right when they consolidate multiple shippers’ cargoes and hire space on the vessel or vessels involved in the maritime leg of the journey.

Container shipping has, in customary letter of credit practice, caused the replacement of the presumptive requirement of “on board” bills of lading with “received for shipment” bills. This replacement was brought about not only by the consolidation practices just mentioned, but also because containerized shipping entails a multi-modal method of transportation. A multi-modal carrier issues

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In the United States Shipping Act of 1984, 46 U.S.C. App. § 1702 (6), the term “common carrier” is defined as “a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

132 Contrast Article 27 of the 1983 UCP revision adopting the received for shipment presumption, with Article 20 of the 1974 revision, which, in the absence of an express indication in the credit, requires presentation of an “on board” bill of lading.
“transport documents” that cover the non-maritime portion of the journey. If the maritime portion does not take place in the first leg of the journey, the transport document cannot attest to a loading on board the vessel when, in fact, the goods are only on board a truck or railroad car. The most such a multi-modal transport document can attest to is that someone in a position to effect a future ocean shipment is in charge of the cargo and will be responsible for effecting ocean shipment. The important event in container shipping occurs not when the goods are placed on board the vessel, but when the goods are taken charge of by someone entrusted with the “door to door” carriage of the goods, including, when appropriate, vessel carriage.\textsuperscript{133}

Containerized shipment is inconsistent with the prohibition against transhipment, commonly insisted upon by applicants, in commercial letters of credit. Inevitably, containerized, multi-modal shipments require that the goods be unloaded from one mode of conveyance and reloaded on another. Thus, transhipment prohibitions in relation to multi-modal or inter-modal means of conveyance amount to impossible conditions. Hopefully, the revision of the UCP presently underway will correct this problem by clearly distinguishing between transhipment with respect to traditional ocean bills of lading and transhipment with respect to multi or inter-modal carriage.

Finally, consider the practice of negotiating the bill of lading while the goods are en route or awaiting transhipment. Cargo carried by oil and gas tankers or in bulk vessels is much more likely to be sold afloat than is cargo carried by general cargo vessels. In fact, while an oil cargo could be sold and resold several times a day under the right market conditions, very few North Atlantic or Baltic general cargo shipments are sold on the water. One of the risks inherent in negotiating and transferring bulk cargo paper-based bills of lading is that an endorser-transferor may become insolvent prior to the transferee’s or endorsee’s acquiring possession of the bill of lading. In such a situation, it is not uncommon for a trustee in bankruptcy to claim the cargo as an asset of the bankruptcy estate, thereby rendering subsequent negotiation of the bill and delivery of the goods uncertain.

\textsuperscript{133}See generally UCP 1974/1983 Revisions Compared and Explained 46–52 (1984). Chandler points out that received for shipment bills can be stamped as shipped on board upon loading for ocean carriage at the port of shipment. Chandler letter, supra note 26, at 5. See also Hague Rules, supra note 78, art. 3(7), and 46 U.S.C. App. § 1303(7) (1988). According to Mr. Chandler, this practice is occasionally found in door to door carriage in order to attain higher protection for the shippers.
3.1.2 Intermediaries: Lessees, Brokers and Freight Forwarders
3.1.2.1 Contemporary Charter Parties

Charter parties are common and can still be classified into the three main types that prevailed at the end of the second world war: demise, voyage, and time charters.\textsuperscript{134} To create a demise or bareboat charter, an owner must relinquish possession, control and navigation of the vessel to the charterer.\textsuperscript{135} The other two types of charters are basically contracts of affreightment.\textsuperscript{136} That is, the charterer lets the vessel or part of the vessel (space charters) for a fixed term (time charter), or a certain number of trips or for a voyage to transport a designated cargo (voyage charter). The voyage charter party is most common in the tramp trades.\textsuperscript{137} Certain trades rely on special types of charter party bills of lading. For example, the commodity trades which generate a high percentage of charter party bills of lading rely on a "Master's" bill of lading. Often charter party bills state that the freight is payable "as per the charter party."

The format of a charter party bill of lading differs from that of a liner bill of lading in that the latter stipulates the terms of carriage of the goods on the bill of lading itself. Traditionally, the long form bill of lading contained all the clauses of the contract of affreightment including charges, fees and related costs. In contrast, the charter party bill of lading did not contain the charter party contract, but incorporated it by reference. In some instances, the "port agents" (also known as ship agents) act as agents for both the shipper and the tramp carrier. Acting in this dual capacity, the port agent gives the captain the forms of "consignment bills of lading" subject to charter party conditions. The captain then signs the bills of lading and

\textsuperscript{134}See generally Gilmore & Black, supra note 8, at 193–94 and 229–42.
\textsuperscript{135}Guzman v. Pichirilo, 369 U.S. 698, 699, 1962 AMC 1142, 1143 (1962). "Demise clauses" typically stipulate that if the ship is not owned by or chartered by demise to the company or line, which issues the bill of lading, then the subject bill of lading will only have effect as a contract with the owner or demise charterer as principal. The reason for this clause is that under § 503 of the English Merchant Shipping Act of 1894, charterers in contrast with shipowners, were unable to limit their liability for cargo loss. The English Merchant Shipping Act of 1958 allowed the charterers' use of limitation of liability clauses. Time charterers, however, continued to use the demise clause to exonerate themselves and to establish the shipowner's liability for acts of the master of the vessel. On United States law, see Blanchard Lumber Co. v. SS Anthony II, 259 F.Supp. 857, 1967 AMC 103 (S.D.N.Y. 1966); for doctrinal comments, see Tetley, supra note 8, at 251, but c.f. Pritchett, The Demise Clause in American Courts, 1980 Lloyd's Mar. & Com. L.Q. 387.
\textsuperscript{137}Kendall, supra note 8, at 5–13. Chandler points out that space charters are usually documented at first by "booking notes," which are frequently superseded by bills of lading that incorporate their whole text or large parts thereof. Chandler letter, supra note 26, at 5.
precedes his signature with a statement that shipment is subject to charter party conditions. More commonly, however, the agent for the owner or head charterer is a specialized ship’s agent dedicated to service only specified owners or head charterers, who provides port services for the chartered vessel. This agent, who may or may not be affiliated with a freight forwarder, prepares the charter party bill of lading and gives it to the captain for signature, subject to charter party conditions.\textsuperscript{138}

From a bank’s standpoint, a serious danger with charter party bills of lading is the possibility of having to pay unexpectedly large freight charges in order to obtain possession of the merchandise. Usually this situation comes about when a voyage or space charterer issues his own bills of lading, without the master’s or his agent’s signature. If no bill or statement has been signed by the master or his agent indicating that the freight had been paid, the carrier may exercise a lien on the cargo for the unpaid freight. Alternatively, the master can refuse to deliver the cargo until freight is paid. An experienced maritime law practitioner has suggested that a charter party bill accompanied by a “Master’s” bill of lading showing freight paid or prepaid would eliminate this uncertainty.\textsuperscript{139} This is a commendable solution to a thorny problem because, unlike ordinary bills of lading, charter party bills rarely mention the total amount of freight paid or due. However, this solution does not address the problem of costs of delay known as “demurrage” which can be very substantial.\textsuperscript{140} Aside from incorporating charter party terms by reference, charter party bills usually disclaim liability for the specific weight, contents, quantity, and value of the goods.\textsuperscript{141} The mentioned features account for much of the

\textsuperscript{138}Chandler letter, supra note 26, at 5-6.

\textsuperscript{139}Id. at 6.

\textsuperscript{140}For an illustration of the problems created by charter party demurrage charges, see In re Commonwealth Oil Refining Co., Inc., 734 F.2d 1079, 1988 AMC 303 (5th Cir. 1984), and compare it with Beverly Hills Nat’l Bank & Trust Co. v. Compania de Navegacion Almirante S.A., 437 F.2d 301, 1971 AMC 2665 (9th Cir. 1971). In connection with the solution alluded to in the principal text, it should be remembered that the expressions “freight paid” or “freight prepaid” do not cover the expenses of loading and unloading. If the sale has been agreed on the basis of “delivered terms,” the charter party is usually concluded on “Free in and out” (“FIO”) terms which imply that the discharging or unloading operations are not included in the charter party hire. See J. Ramberg, Guide to Incoterms 1990, at 21 (ICC Publication 461/90). “Liner Terms” as used in liner bill of lading practice means that the carrier will load and discharge the cargo at its risk and expense, that is, the cost of such operations is covered by the freight.

\textsuperscript{141}Charter party shippers bear the burden of proof of lack of inherent vice with respect to certain goods. See Larsen v. A. C. Carpenter, Inc., 620 F. Supp. 1084 (E.D.N.Y. 1985). In Larsen the court held that when the marine carriage contract remains private with no bill of
unpopularity of charter party bills of lading with bankers. Nevertheless, bankers must face the fact that the charter party bill of lading is used extensively, and that in the commodity trades it is quite common. Thus, the Working Party for the revision of the UCP should reconsider the acceptability of charter party bills of lading, including requirements such as the carrier’s name when bills are signed by the master. The Working Party should also consider the implications of various types of references in the body of the charter party bill of lading to the payment of freight, or to the lack thereof.

3.1.2.2 The NVOCC Practice

The appearance of the “non-vessel operating common carrier” (NVOCC) in the United States is a post World War II development prompted by containerization and multi-modal transportation. As defined in § 3 of the Shipping Act of 1984, (the “1984 Shipping

lading issued or transferred, the carriage contract is not subject to federal statutory law and the charter party alone may be controlling. Id. at 1106. A charter party bill of lading stating “SHIPPED on board in apparent good order and condition” was not sufficient to satisfy the shipper’s burden of dispelling the possibility that spoilage of the cargo resulted from inherent vice in the form of erwinia bacteria. Id. at 1113–14. Yet, the burden of proof with respect to the lack of inherent vice has also been placed on the shipper-consignee even under Hague/COGSA, see, for example, Caeurint Food, Inc. v. Lloyd Brasileiro, 647 F. 2d. 347, 351–2, 1981 AMC 1801 (2d Cir. 1981).

142 The statement in 1983 UCP Article 26(c)(i) directing banks to reject charter party bills of lading unless otherwise stipulated in the credit is organically linked to the prohibition against bills of lading issued by forwarding agents. The prohibition of forwarding agents’ bills can be traced to one of the first set of United States banking rules on letters of credit. See, for example, Regulations Affecting Commercial Credits Art. 4 (New York Bankers Commercial Credit Conference 1926). Chandler points out that freight forwarders seldom issue charter party bills, and that even liner bills of lading seldom state the amount of freight paid or prepaid. Loading or handling charges are usually referenced in the bill of lading by terms such as FIO (Free In and Out) or Liner Terms. Chandler letter, supra note 26, at 5–6. See also FIO means that the loading and unloading operations are “free” of risk and expense to the carrier. Chandler asserts that the most serious uncertainty with respect to loading and unloading costs and charges is that of demurrage charges, particularly in specialized and bulk shipments. As a rule, delays in loading or discharging are the responsibility of the party designating the berth. Factors such as market and political conditions, weather and port congestion, unpredictable as they are, often produce substantial demurrage charges. Chandler suggests that short of spelling out responsibility for these charges in the sale agreement and in the invoice and bill of lading, there is no solution for demurrage charges. Nevertheless, in his view, a charter party bill of lading signed by the master or his agent (with the master’s authority), stamped “freight prepaid,” and bearing a Clause Paramount is as reliable as a liner bill lading. On the other hand, a “mere charterer’s bill of lading can be as illusory as an NVOCC bill of lading.” Chandler letter, supra note 26, at 6. On shipowners’ attempts to avoid liability in charter parties incorporating the Clause Paramount, see Chandler, The Measure of Liability for Cargo Damage Under Charter Parties, 20 J. Mar. L. & Com. 395 (1989).

Act') an NVOCC is "a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier." Much of the attraction of NVOCC carriage is that it offers discounted rates, especially for less than a full container load of cargo. In NVOCC practice, the vessel is operated by a shipping company; but vessel space is either "sold" or leased to a freight forwarder or other intermediary who acts as a contractual "common carrier" for the actual shipper of the goods. As a common carrier, the NVOCC enters into contracts of affreightment with its shipper, issues its own bill of lading, and assumes full responsibility for the carriage not merely from port of shipment to port of discharge, but from the point of origin to point of destination. Under U.S. law, an ocean freight forwarder cannot act as a common carrier or as an agent for such a carrier and thus cannot be an NVOCC. Many freight forwarders, however, skirt this prohibition by forming separate subsidiary corporations for their NVOCC operations.

The bills of lading issued by NVOCC's are subsidiary bills, in the sense that the right to claim the goods described in the NVOCC bill is predicated upon the NVOCC's rights under a "master" or underlying bill of lading issued by the shipping company to the NVOCC, or upon a contract of affreightment between the same two parties. Delivery of the goods covered by the NVOCC bill is effected by presentation of the NVOCC bill to an agent of the NVOCC at the port of discharge. This agent, in turn, presents the required copy or part of the set of the master bill of lading to the shipping company and obtains the goods. Since it is up to the NVOCC's agent to obtain the goods, control of the goods by the consignee or its creditors is

144 Yet, what if an ocean freight forwarder issues a bill of lading? Is the transaction a total nullity or does it have some legal effects? A recent decision, Atlantic Mutual Ins. Co. v. M/V President Tyler, 765 F. Supp. 815, 1991 AMC 452 (S.D.N.Y. 1990), held that a freight forwarder's misrepresentation that it was an agent for the carrier did not render the bill of lading void in relation to the application of COGSA's one-year time bar where the liability of the actual ocean carrier was concerned. The court also held, based upon the text of the freight forwarder's bill, that the latter's liability was not necessarily barred by COGSA because COGSA did not apply to non-carriers and non-agents for carriers. "In order for a bill of lading to be void because of misrepresentation, the misrepresentation must go to the very essence of the contract, the promises made by the party who has issued the bill of lading." 765 F. Supp. at 818 n.2, 1991 AMC at 454 n.2. The court further held that plaintiff, the shipper's insurance company, made no allegation that the statement by the freight forwarder implicated the "essence" of the bill of lading which appeared to be that the freight forwarder was to arrange for the transport of the shipped and damaged goods. Thus, there is now authority for the proposition that a freight forwarder bill of lading is presumptively valid to establish the carrier's liability under COGSA and the forwarder's own liability under the terms of the bill of lading.
uncertain. Until delivery of the goods to the beneficiary, its creditors and buyers cannot ascertain whether the goods were actually loaded on board, or whether the freight was paid. A safer practice from a banking and sales law standpoint would have the NVOCC tender copies of the master or underlying bill of lading to the beneficiary of the letter of credit for presentation to the issuing or confirming bank. Such a copy would contain the statements or notations necessary to reassure the beneficiary and letter of credit bank that the goods had been loaded on board the vessel and that freight had been paid.145 Bona fide NVOCC’s would have no objections to this practice, but bad faith NVOCC’s would oppose it because it would prevent them from issuing their own bills on a “freight prepaid” basis after they had obtained “freight collect” terms from the actual carriers.146 The suggested practice would also help the holder of the copy of the master bill trace its goods in the event of the NVOCC’s insolvency or disappearance, especially if the NVOCC’s bill does not name the actual vessel.

In an attempt to bolster the reliability of NVOCC bills, the 1984 Shipping Act required NVOCC’s to file tariffs with the Federal Maritime Commission (“FMC”), regardless of whether they were domestic or foreign-based. Since lower tariffs were one of the main attraction of NVOCC’s, NVOCC’s were prohibited from deviating from the rates and charges that appeared in their filed tariffs.147 The use of NVOCC’s has spread to Pacific rim countries, and as their use has grown concerns have been expressed by shippers, shipping companies, NVOCC’s themselves, and bankers. Shippers are concerned that many NVOCC bills of lading are issued by unscrupulous or insolvent operators. The FMC has received frequent complaints about shippers having to pay freight twice, both to the insolvent NVOCC and to the shipping company which had not been paid by the NVOCC.148 Bona fide NVOCC’s, on the other hand, feel that they operate at a competitive disadvantage with regard to unscrupulous

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145It was George Chandler’s suggestion to the NCITD Drafting Group that the practice described in the principal text be made part of the UCP. Chandler letter, supra note 26, at 5.
146Id., citing various newspapers and periodical stories on such practices.
NVOCC's which seem able to disregard the 1984 Shipping Act with impunity.

Article 26 of the 1983 UCP enabled banks to accept freight forwarders' bills of lading when letters of credit required marine bills of lading if the freight forwarders' bills of lading indicated that they were issued by a "freight forwarder acting as a carrier, or the agent of a named carrier." Since the 1984 Shipping Act authorized NVOCC's to issue bills of lading as carriers, NVOCC issued bills of lading which contain a signature of the forwarder "as carrier" or "agent for the carrier" qualify under Article 26.

Despite UCP Article 26 and the 1984 Shipping Act, applicants and issuing banks continued to require "on board" statements or notations in the NVOCC bills. Since the tendered bills were issued by NVOCC's, and the NVOCC's had issued the bills while placing the goods on the first means of conveyance and not on the ocean going vessel, banks either rejected such bills or required additional statements or notations attesting to actual loading on the ocean going vessel. In addition, United States bankers and beneficiaries of and applicants for the issuance of letters of credit remained concerned that unless the solvency and reliability of the NVOCC could be established by the FMC prior to the issuance of an NVOCC bill, cases of non-existent goods or of unpaid freight or related charges would multiply with the growing number of issuances.

Australian bankers raised the question of whether NVOCC bills should be acceptable as marine bills of lading. These bankers claimed that NVOCC bills were not true receipts of shipments, contracts of afreightment, or documents of title. The ICC Banking Commission decided not to consider the issues raised by the Australian bankers, pointing out, inter alia, that the legal nature of NVOCC bills was a determination to be made in accordance with the local law of the place of issuance or presentation of the bill. Thus, the issues raised by the use of NVOCC bills remain on the agenda of the UCP revision.

The re-examination of NVOCC related rules has been made easier by the proposed FMC regulations implementing the 1984 Shipping Act, as amended in 1990. According to these rules, NVOCC's would file an up-to-date tariff with the FMC, and post a performance

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149See UCP, supra note 47, Art. 26(c)(iv).  
151Id.  
bond of no less than $50,000. This bond requirement is not a substitute for the normal liability insurance carried by freight forwarders. If the NVOCC is not United States based, it would designate a resident agent for the service of judicial and administrative process. The FMC regulations also provide a means for notifying the public of the requirements and availability of surety bonds and enable ocean carriers to ascertain whether they are doing business with an unregistered or unbonded NVOCC. Carriers would be prohibited from accepting cargo from NVOCC’s which do not have an up-to-date tariff filed with FMC, or which have not complied with the new regulations.153 The expressed regulatory purpose was to apply the new rules equally to all NVOCC’s, both foreign and domestic, “inasmuch as foreign NVOCC’s were already subject to tariff filing requirements under the Shipping Act of 1984.”154

A public register that would provide an up-to-date list of legitimate NVOCC’s, and, also, screening of NVOCC reliability and solvency by means of a licensing procedure would be desirable additions to the existing law. In the absence of a public registry, a private registry has been created by an NVOCC trade association.155 In addition to providing resident agent services for non-United States based NVOCC’s and tariff filing, bonding and insurance services for all NVOCC’s, this private registry is attempting to gain industry acceptance of an NVOCC registration number. This number would be imprinted on NVOCC bills of lading and would certify that the NVOCC in question has complied with the tariff filing and bonding

153 Id.
154 Id. European freight forwarders and their governments objected to the new rules, and argued that the United States inappropriately extended tariff-filing requirements to inland cargo movements that take place entirely within Europe. Journal of Commerce, Feb. 7, 1991, at 3b.
155 Letter from J. Reyes-Montblanc of Triadex Services, Inc. to the author (January 4, 1991) (hereinafter “Reyes-Montblanc Letter”) concerning the creation of “The NVO Register.” The NVO Register will act as an NVOCC trade association registry open to NVOCC’s regardless of size and nationality. It will establish compliance with the requirements outlined in the text and require adequate cargo, errors and omissions and carrier liability insurance. See also, Journal of Commerce, Feb. 7, 1991, at 8b; Feb. 9, 1991, at 1; and Feb. 11, 1991, at 3b. See also Reyes-Montblanc, supra note 147, at 21-22. According to the Reyes-Montblanc Letter, the NVOCC’s cargo open policy is similar in coverage to the marine all risks cargo policy usually purchased by the shipper. Since the volume of shipments handled by an NVOCC is usually larger than that of an individual shipper, the cost of coverage under such a policy (in the form of a certificate of insurance) is usually lower than if purchased individually by the shipper. The error and omissions policy covers improper statements or notations in the bills of lading or other transport documents issued by the NVOCC. These improper statements may, inter alia, turn a clean bill or document into a foul one or vice versa. The NVOCC’s liability insurance usually mirrors the coverage in a carrier’s liability policy.
requirements.\textsuperscript{156} Since ocean carriers must now verify prior to accepting NVOC\textsuperscript{c} shipments to or from the United States that FMC bonding and tariff filing requirements have been met, the registration feature is designed to facilitate the carriers' verification and to gain a standing for the NVOC\textsuperscript{c} bill equal to that of its European counterpart, the FIATA bill of lading.

3.2 The ICC Combined Transport Document and the FIATA Bill of Lading

The rapid expansion of combined or multi-modal transport in the 1960's, and the fact that no convention or treaty existed covering such transport led the ICC to publish a set of Uniform Rules for a Combined Transport Document ("CTD") in 1973, and to revise these rules in 1975 ("CTD Rules").\textsuperscript{157} The following were some of the most important features of these rules: 1) the contractual undertaking involved was to perform or to procure performance of combined transport by two or more modes of transport, such as by sea, inland waterway, air, rail, or road;\textsuperscript{158} 2) the document of title function was retained by the CTD, but it was predicated upon presentation of the CTD only to the Combined Transport Operator or his representative;\textsuperscript{159} 3) the issuer of the CTD for the entire multi-modal carriage had to assume liability for the whole carriage, including delayed delivery, and this assumption of liability was as a principal and not as an agent of the shipper;\textsuperscript{160} and 4) abstraction protected

\textsuperscript{156}Reyes-Monthblanc Letter, supra note 155.

\textsuperscript{157}The Uniform Rules for a Combined Transport Document were first issued as ICC Publication No. 273 in November 1973. A revised version was published in October 1975, as ICC Pub. No. 298, Uniform Rules for a Combined Transport Document (hereinafter "CTD Rules").

\textsuperscript{158}Id. rule 2(a) states: "Combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country."

Id. rule 2(c) states: "Combined transport document . . . means a document evidencing a contract for the performance and/or procurement of performance of combined transport of goods and bearing on its face either the heading 'Negotiable combined transport document issued subject to the Uniform Rules for a Combined Transport Document (ICC Publication No. 298) . . . .'

Id. rule 2(d) states: "Different Modes of Transport means the transport of goods by two or more modes of transport, such as transport by sea, inland waterway, air, rail, or road."

\textsuperscript{159}Id. rule 3(f) states: "delivery of the goods may be demanded only from the CTO [combined transport operator] or his representative, and against surrender of the CT [combined transport] document duly endorsed where necessary."

\textsuperscript{160}Id. rule 5 states:
third parties relying in good faith on the text of the CTD, and this protection was couched in terms similar to those of the Hague-Visby rules.\textsuperscript{161}

The preceding features required that certain traditional statements in the text of the ocean bill of lading be modified or replaced. For example:\textsuperscript{162} the traditional notation regarding “on board” loading was replaced by a “taking in charge” statement; the traditional prohibition against transshipment was eliminated, because transshipment was of the essence in combined transport; since the transport commonly originated and finished inland, the terms “place of receipt” and “place of delivery” were inserted in separate boxes, either replacing the traditional “port of loading” and “port of discharge” or joining them as additional specifications; and since often times the name of the vessel was not known or could not be established with certainty at the time of issuance, the box for the vessel’s name was modified to refer to an “intended vessel.”

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By the issuance of a CT [combined transport] document the CTO [combined transport operator]: a) undertakes to perform and/or in his own name to procure performance of the combined transport—including all services which are necessary to such transport—from the time of taking the goods in charge to the time of delivery, and accepts responsibility for such transport and such services to the extent set out in these Rules; b) accepts responsibility for the acts and omissions of his agents or servants. . . . c) accepts responsibility for the acts and omissions of any other person whose services he uses for the performance of the contract evidenced by the CT document; . . . e) assumes liability to the extent set out in these Rules for loss of or damage to the goods occurring between the time of taking them into his charge and the time of delivery, and undertakes to pay compensation as set in these Rules in respect of such loss or damage; and f) assumes liability to the extent set out in Rule 14 for delay in delivery of the goods and undertakes to pay compensation as set out in that Rule.

Zahn, supra note 8, at 192, points out that the scheme of CTD Rules covering liability for damages incurred at a place that is not ascertainable creates remedial difficulties. Similarly, the issue of transport insurance for combined transport documents has not yet been satisfactorily resolved. Finally, there is a difference of opinion as to whether there should be a uniform liability system with rigorous liability rules (favored by Canada and Australia), or whether there should be a so-called network system which distributes liability to the different carrier (favored by Japan and England).

\textsuperscript{161}CTD Rules, supra note 157, rule 9 states:

The CT [combined transport] document shall be prima facie evidence of the taking in charge by the CTO [combined transport operator] of the goods as therein described. Proof to the contrary shall not be admissible when the CT document is issued in negotiable form and has been transferred to a third party acting in good faith.

For the comparable Hague Visby language, see supra note 116 and accompanying text.

\textsuperscript{162}The following list of completely new or modified statements in contemporary combined transport bills of lading are based upon an examination of formats provided by various United States, English, and Scandinavian shipping companies and freight forwarders. Some of these appear in Transport Documents (U.S.C.I.B. Education Series 1989-1990) and Mitchell, supra note 8, at 105-15.
The publication of the CTD Rules prompted the Baltic and International Maritime Conference ("BIMCO") to issue a conforming type of combined transport document (referred to as "COMBI-DOC"). An equally conforming document was issued by FIATA, a European based association of international freight forwarders.\(^{163}\)

The treatment accorded to the FIATA combined transport bill of lading ("FBL") in the UCP has generated controversy because unlike BIMCO and NVOCC bills of lading, the FBL, even though issued by freight forwarders, was singled out as acceptable by the 1983 UCP. Article 25 d. of the 1983 UCP provides that banks will reject a transport document issued by a freight forwarder "unless it is the FIATA Combined Transport Bill of Lading approved by the International Chamber of Commerce or otherwise indicates that it is issued by a freight forwarder acting as a carrier or agent of a named carrier."\(^{164}\) The International Chamber of Commerce also took the unusual step of allowing the FBL to use the ICC logo.\(^{165}\)

Non-FIATA members contend that such an endorsement of a FIATA document by a supposedly neutral, multinational entity such as the ICC creates an unfair competitive advantage in FIATA’s favor.

\(^{163}\)For the format and text of many of these documents, see Mitchelhill, supra note 8, at 105-115.

\(^{164}\)See UCP 1974/1983 Revisions Compared and Explained 49 (1983), which states: The 1974 automatic rejection of freight forwarder type documents is now qualified. They are acceptable when the freight forwarder acts as a principal, accepting carrier responsibility for the performance of the entire contract of carriage and responsibility for loss or damage wherever occurring. This is evidenced by the issue of the FIATA Combined Transport Bill of Lading approved by the International Chamber of Commerce, or by other indication that the freight forwarder is acting as a carrier or agent of a named carrier. It should be noted that depending upon whether the document is an FBL (FIATA bill of lading) or one bearing another "indication that the freight forwarder is acting as a carrier or agent for a named carrier" two totally different methods of examination would be involved. In the case of the FBL, the document would qualify under UCP Article 25(d) by a mere verification of the FIATA logo, whereas any other indication of issuance by a carrier or agent, may well prompt rejection, or an attempt to verify the status of carrier by non documentary means. The UCP Article 25(d) distinction acts to the detriment of freight forwarders who do not use the FIATA form.

\(^{165}\)At its 129th general session, the International Chamber of Commerce gave the Secretary General advance authorization to approve the Combined Transport Document submitted by FIATA, after the document was examined by an approval committee set up under the Joint Committee on Intermodal Transport. See I.C.C. Doc. No. 39672, dated 5/26/78. Upon submission of the FBL, on April 27, 1978, to the International Chamber of Commerce Council, the Council deemed the FBL in compliance with the CTD Rules and allowed the use of the ICC logo alongside that of the national FIATA association. FIATA, in turn, provided that only those freight forwarder members of national associations (ordinary members of FIATA) that have FIATA approval to print and distribute FBL’s and that have the approval of their national association, may issue the document. See FIATA 1987 2 Revue 4 (FIATA World Congress, Antwerp 1987) [hereinafter “FIATA Revue”].
FIATA, in turn, argues that those who complain are welcome to join FIATA, provided they can qualify for membership. In light of the sharp difference of opinion among freight forwarders and national delegations to the ICC, the Working Party for the revision of the UCP will need to review FIATA’s status, especially in conjunction with a review of the status of the NVOCC bill of lading.

The 1988 version of the FBL is a combined or multimodal transport document as well as a “carrier” type document. When issuing the FBL, the FIATA freight forwarder acts as a carrier in that it concludes a contract for a combined or multi-modal transport with the shipper, and contracts or sub-contracts for the carriage with one or more carriers. Thus, the FIATA freight forwarder is not generally the actual carrier of the goods, although it can carry the cargo in vehicles or vessels it owns or has leased or of which it is the designated operator. In this respect, the FIATA issuer of a combined transport bill of lading acts as the issuer of a NVOCC bill.

The distinctiveness of the FBL stems from its close conformity with the CTD Rules. One of the key features of the CTD rules is that the combined transport operator acts as a principal, not as agent of the shipper, when performing or procuring the performance of the combined transport contract. As a principal, it assumes responsibility for the performance of the entire transportation contract.

It is also clear that even if the transport described on the face of the bill of lading is performed by one mode of transport only, notwithstanding the heading “combined transport bill of lading,” the FIATA standard conditions apply. This provision has prompted FIATA to request that the ICC Banking Commission rule that a single transport FBL be deemed to satisfy the letter of credit requirement of a marine bill of lading if all the other requirements of UCP Article 26(b) are met.

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166This FBL was approved in 1987 in Antwerp, Belgium during FIATA’s 20th Congress and made effective January 1, 1988. On this adoption, see FIATA Revue, supra note 165, at 2 (1987).
167See supra note 160.
169Among the Article 26 requirements referred to in the principal text are the following:
(b) Subject to the above, and unless otherwise stipulated in the credit, banks will not reject a document which:
(i) bears a title such as “Combined transport bill of lading,” “Combined transport document,” “Combined transport bill of lading or port-to-port bill of lading,” or a title or a combination of titles of similar intent and effect, and/or
(ii) indicates some or all of the conditions of carriage by reference to a source or document other than the transport document itself (short form/blank back transport document), and/or
A comprehensive and reliable assumption of liability for late arrival and damage to cargo is one of the most attractive features of the FBL. As discussed earlier in connection with the Hamburg Rules,\(^\text{170}\) neither the Hague Rules nor the Visby Amendments deal with liability for delayed delivery. If a FIATA freight forwarder is held liable because of delay for consequential loss or damages (other than loss of or damage to the goods) its liability is for double the freight covered by the bill of lading, or the value of the goods—whichever is less.\(^\text{171}\) In addition, the FIATA freight forwarders' diligence is encouraged by their duty to act as principals and to ascertain that certain basic procedural requirements have been met.\(^\text{172}\) The FBL's compulsory insurance requirement is intended to reassure shippers and consignees that they will be adequately and reliably compensated in the event of delay or accidental loss, from the time the goods were "taken in charge" by the freight forwarder to the time of their delivery to the named consignee. The availability of the combined transport operator's comprehensive insurance is clearly better than a suit against an

\(^{\text{170}}\)See supra text accompanying note 115.

\(^{\text{171}}\)See Art. 9 of the FBL, reprinted in FIATA Revue, supra note 165, at 3. The FBL affords better protection to shippers than that provided by COMBIDOC. Under COMBIDOC, compensation for delay is payable only when the stage of the transport where the delay occurred is known and to the extent that there is liability for delay under international conventions or national law applicable to that stage. As delays often occur during the sea leg of a combined transport, claimants whose transportation is subject to Hague or Hague-Visby will not receive COMBIDOC compensation. FIATA Revue, supra note 165, at 3.

\(^{\text{172}}\)See id., at 3, where it appears that when issuing the FBL the freight forwarder has to ensure: a) that it or its agent (branch or intermediary forwarder) has taken over the consignment specified therein, and that the right of disposal of the goods is vested solely in it; b) that the goods appear to be in apparent good order and condition; c) that the details on the document correspond with the instructions it received; d) that the responsibility for the transport insurance of the consignment has been agreed; and e) that it is specified whether one or more originals have to be issued.
uninsured, insolvent issuer of a traditional ocean bill of lading. Yet, serious doubts have been raised about the soundness and adequacy of the FBL’s insurance coverage.\footnote{A July 30, 1991 addendum to the Chandler letter, supra note 26, points out that in Mr. Chandler’s experience FIATA’s insurance coverage falls considerably short of what it is generally assumed to be, and what it should be. Mr. Chandler characterized the FIATA policy as of an “errors and omissions” type as contrasted with a typical cargo liability P & I policy.}

Undeniably, the holder of an FBL lacks the substantive and procedural rights it enjoys as a holder of the traditional ocean bill of lading. First of all, when holding an FBL it gives up its right of control and disposition of goods in transit.\footnote{See item (a) of the items an issuer of a FBL must ascertain in supra note 172.} The right to claim possession of the goods from the carrier belongs to the FIATA issuer of the FBL (and holder of the actual carrier’s bill), and not to the holder of the FBL. Whether this right can be used derivatively by the holder of the FBL is an open question.

3.3 The Pressure to Eliminate Paper and Expedite Shipments: Fragmentation and Dematerialization of the Bill of Lading

Regardless of the type of vessel and the type of ownership or intermediary arrangement involved, the ancient mariner’s maxim “an idle vessel earns no freight” continues to shape the world’s shipping and documentary practices. One of the key features of contemporary ocean shipment is that, often, vessels travel faster than the airmailed ocean bill of lading. Delays not only affect the profitability of the shipping industry, but also frequently determine the success of the underlying business ventures. Unlike the 19th century bill, the contemporary bill of lading often does not arrive at the port of destination or transshipment prior to the arrival of the goods, especially when the maritime journey lasts a few days or less. Unless sent by an air courier, an ocean bill of lading can take as long as a week to arrive by air mail.

Other delays in obtaining access to the goods are caused by the importers’ need to produce an ever increasing number of documents. As shown by recent studies on the facilitation of trade,\footnote{See Grönfors, Simplification of Documentation and Document Replacement, [1976] Lloyd’s Mar. & Com. L.Q. 250; and H. B. Thomsen & B. Wheble, Trade Facilitation and Legal Problems of Trade Data Interchange, Int’l Bus. Law., July/Aug. 1985, at 313 (hereinafter “Thomsen & Wheble”)} the weight of the documentation of all consignments on board a contemporary container vessel can exceed 40 kilograms. Further, the average number of documents required per international commercial ship-
ment in the U.S. in 1970 was 45 documents. The number has risen to nearly 100. The cost of processing such a large number of documents has been estimated at approximately 10% of the invoice value of the goods—a significant cost by any standard.\textsuperscript{176}

Electronic messages could reduce the cost of the unavailability of a paper bill of lading when the goods arrive at their destination.\textsuperscript{177} In addition, the electronic “documentation” will facilitate the use of international standard data elements and codes, and cause a swifter turn-around of ships in port. Developing countries will benefit from avoidance of port congestion as a result of speedier clearance of ships and of goods. They will also gain from simplified procedures and from the use of standardized data for more efficient decision-making.

Some of these cost reduction and efficiency considerations have prompted changes in maritime and customs documentation practices, including the trimming of the traditional functions of the ocean bill. In some of the most active maritime routes, such as in the North Atlantic and Baltic, the ocean bill has been largely replaced by sea waybills which are receipts of shipment and which can act as documents of title where the applicable law allows such a function. In United States maritime trade, both incoming and outgoing, freight forwarders’ receipts have become as common as the traditional ocean bill of lading.\textsuperscript{178}

The obvious question prompted by these practices is whether we are witnessing the demise of the traditional ocean bill of lading or the repackaging of its main features in technologically suitable garb. The answer requires a brief detour to air transport documentation.

\subsection*{3.3.1 The Air Waybill as a Model of the Sea Waybill}

The massive transportation of goods by air would not have been possible without a faster method of documenting shipments. If goods cannot be taken up by their buyers upon their arrival, many of the advantages associated with air shipments disappear. Perishable goods would perish or would have to be warehoused at an additional cost. Resale and transshipment by air would be curtailed, if not precluded. Consequently, the air waybill did not require presentation to obtain

\textsuperscript{176}Thomsen & Wheble, supra note 175, at 313.

\textsuperscript{177}Thomsen and Wheble list the following gains in efficiency: a reduction in the numbers of errors; earlier access to cash; better availability of data for direct use; better accounting, stock and production management; and wider range of in house, national, and international statistics. Id. at 314.

\textsuperscript{178}See supra text accompanying note 2.
possession of the goods. The air waybill was designed as an acknowledgment of receipt of goods from the consignor, and as a notice of shipment to the carrier (and especially to his agent at the destination), a notice which would also enable the identification of the consignee.\textsuperscript{179} Interestingly, the receipt and notice features were not derived from the ocean bill of lading, but from 19th century European land transport documents, and especially from railroad bills and consignment notes.\textsuperscript{180}

The receipt given to the air shipper is not the same arrival document sent to the consignee; it could hardly be the same document given the shortness of air travel time. Delivery of air cargo to a named consignee or agent merely requires its identification, and not a surrender of the air waybill. As do their land and sea counterparts, air carriers delegate the power to issue waybills to various types of agents. Several types of air waybills have emerged as a result of the type of agency relationship involved.

In the “proprietary” type, the agent acts for the airline whose name appears pre-printed in the air waybill.\textsuperscript{181} This proprietary air waybill can be issued only by the airline whose identity is pre-printed on its or its agent’s document. In the “neutral” agency type, the agent acts for different airlines, and, thus, the air waybill form does

\textsuperscript{179}For its formal requirements, see, among others, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, Art. 5, 49 Stat. 3000, 137 L.N.T.S. 11 (hereinafter “Warsaw Convention”). At the present time more than 100 states are parties to the Warsaw Convention. This Convention remained unchanged until 1955 when the so called Hague Protocol was adopted. As of this writing approximately 100 nations are parties to the Hague Protocol. For a brief but insightful evaluation of the adoption of the Warsaw Convention and subsequent evolution of air transport law, see Grönfors, Transport Law, supra note 52, at 390-93.

\textsuperscript{180}During much of their history, European railroad bills and consignment notes did not contain a promise of carriage by the carrier. As explained by Professor Grönfors, Western European law on carriage by rail has its roots in administrative law, because rail transport was regarded as a state task. Grönfors, Transport Law, supra note 52, at 393. Professor Grönfors also points out that European consignment notes were mere notices from the shipper or sender of the goods to the receiver that the goods had been received. These notices did not require the carrier’s assumption of liability or its signature acknowledging receipt of the goods. The first step in involving the carrier’s liability occurred when the letter was shown to him and he was asked to confirm the validity of the particulars. Eventually the carrier issued and signed the land transportation waybill, but did not fill it out, as was done with the ocean bill of lading. Clearly these land waybills were not intended to be documents of title to the goods shipped. The person demanding the delivery of the goods had to identify itself as the consignee of the waybill. See Grönfors, Sea Waybill, supra note 25, at 5–6.

\textsuperscript{181}The description of the various types of air waybills in the text is based upon IATA’s answer to a query by the ICC Banking Commission concerning the carrier type features of various types of air waybills. For the ICC query and IATA reply, see ICC Doc. No. 470/513 (1988).
not contain a pre-printed reference to the airline’s name and number. The agent enters the airline identification when the air waybill is issued. The purpose of a neutral air waybill is to enable agents for more than one airline to use one air waybill format, especially when these agents use automated systems of issuance.

The “house” air waybill uses the neutral format. Unlike the neutral air waybill, however, it is issued on behalf of a freight forwarder, not an airline. Normally such a document evidences only a contract between the shipper and the freight forwarder, who acts as a broker for air cargo space or as an independent commission agent. Since the airline is not a party to such contract it is not bound to carry or even to store the goods referred to in the house air waybill. When the freight forwarder joins the cargo of one or more shippers to form a unit of shipment to be transported by one or more airlines, the cargo is said to be “consolidated.” In such a case, the freight forwarder fills out a proprietary or neutral air waybill form, which bears the issuing airline’s identification, and inserts the number of the air waybill of the first airline to fly the goods (often referred to as the “master” air waybill). Since such a shipment normally involves different airlines, each airline segment of the consolidation may involve a house air waybill. Yet, such a house air waybill is not made available to the respective airline and does not bind either the airline responsible for the first leg of the journey (also referred to as “first airline”) or subsequent airlines.

Banks have begun to recognize that consolidation of air transport is as common as containerization of ocean cargo. Accordingly, many banks accept consolidators’ air waybills whose text contains a master or first airline air waybill number, and which also shows such an airline’s reception stamp. Yet, since consolidation practices are not uniform, the task of banks verifying compliance with the terms of a letter of credit that, say, requires a “clean on board air waybill,” is not easy. At times, house air waybills use neutral formats that do not identify the first airline. In other instances the consolidator provides a master air waybill that indicates the first airline by inserting that airline’s stamp accompanied by a mention of the consolidator’s agency but without indicating the flight number.\(^\text{182}\)

For UCP purposes the air waybill is an Article 25 transport document, and as such, it must comply with Article 25(a)(i) and include, unless otherwise specified in the credit, a signature by a

\(^\text{182}\)For the problems encountered by banks with consolidators’ air waybills, see ICC Doc. No. 470/602 (1990) containing the evaluation by F. Müller, Chairman of the ad hoc group.
named carrier or its agent. As it did with the Combined Transport Bill of Lading, FIATA has proposed to help resolve the uncertainty of the carrier designation in the air waybill. FIATA now supplies an air waybill form which allows the freight forwarder-consolidator to sign as a contractual carrier, in a box in which it fills in its full name and its capacity as a contractual carrier. Another box in the same form is to be filled by the actual or “issuing carrier.”

The air waybill differs from its land ancestors in two respects. Pursuant to the Warsaw Convention air waybills are issued in sets of three originals; one is retained by the issuer, another is sent to the consignee, and the third is sent to the shipper. Only when the shipper parts with its original is it deemed to have given up control of the goods. This feature accounts for the “quasi-document of title” nature of the air waybill. The air waybill is not a full fledged document of title because the consignee does not need it to obtain the goods from the carrier. At the same time, by retaining its copy, the shipper retains the right to prevent delivery or other disposition of the goods. For this reason, commercial letters of credit usually stipulate that the bank’s payment will be against presentation of the shipper’s copy of the air waybill.

Indisputably, the air waybill has attained sufficient significance to merit its own provision in the present revision of the UCP. Such a provision should specify the air waybill’s basic requirements, including, given its peculiarities, its designation as an air waybill, or its functional equivalent, mandatory and optional statements or notations such as indications of receipt by the carrier or agent, reception stamps, flight dates and numbers, and airports of departure and destination. It should also reflect the practice of accepting the shipper’s original in lieu of a “full set of originals.”

3.3.2 The Sea Waybill and the Straight Bill of Lading

As with the air waybill, the consignor of the sea waybill is issued a document, most often in the form of a receipt of shipment, which in

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183 UCP, supra note 47. Article 25 applies to credits calling for a “transport document” other than a marine bill of lading. In relevant part it states that “banks will, unless otherwise stipulated in the credit, accept a document which: i—appears on its face to have been issued by a named carrier, or his agent . . . .”

184 The new air waybill, proposed by FIATA, differs from the FBL in that it does not refer to FIATA in its title or in the guidelines. See ICC Doc. No. 470/513 at 1. For a discussion of the layout and contents of each box in the proposed air waybill, see ICC Doc. No. 470/602, Attachment 2 (1990).

185 See supra note 179.
some jurisdictions is neither a document of title nor a negotiable undertaking. As a result, a consignee of a waybill does not need to present the waybill to obtain the goods; all the consignee needs to do in order to obtain the goods is to identify itself. Nonetheless, since the sea waybill's text may be needed by the consignee or by customs brokers or authorities, it may be transmitted electronically to the port of destination. This feature is especially attractive to importers worried about the ship arriving ahead of the shipping documents. Container shipments are ordinarily unloaded without awaiting the arrival of the bill of lading. This is not true, however, with bulk shipments. Bulk commodity shipments are not unloaded until the bill of lading is presented to the carrier. Consequently, the sea waybill allows the ship to unload the bulk shipment immediately upon arrival, thereby reducing the time and cost of unloading and processing the cargo. The sea waybill also allows the consignor to vary its delivery instructions to the carrier at any time during the carriage.

The fact that the sea waybill is not a document of title in some important maritime jurisdictions removes it, according to a widely held view, from the purview of the Hague Rules and Hague-Visby. The absence of mandatory liability detracts from the merchantability of the sea waybill because consignors as well as consignees have to worry about the legal effect of small print and extremely broad disclaimers. Another consequence of the fact that the sea waybill is not a document of title is that the consignor's endorsement or delivery of such a waybill to a third party is legally meaningless. This lack of transferability does not necessarily make the sea waybill undesirable. Parties to the sea waybill are willing to give up transferability in exchange for an extra measure of security, especially against fraudulent issuances. At the time of issuance, the sea waybill is available to only the pre-designated parties, the consignor, consignee, and a notify party. This minimizes fraudulent issuances and transfers, which have become increasingly common to the negotiable ocean bill of lading.

Several types of sea waybills are presently in use. Their features vary with the country or region of issuance, as well as with the types of goods and method of shipment. Professor Tetley attributes one of the oldest waybills in circulation, the "straight" ocean bill of lad-

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186See Tetley, Waybills, The Modern Contract of Carriage of Goods by Sea, supra note 79, 14 J. Mar. L. & Com. at 471. After describing the conventional view, Professor Tetley offers a differing view based upon "the public order nature of the Hague Rules and the fact that the only exceptions permitted to contracts of carriage by sea under the text of the Rules are non-negotiable receipts issued under special circumstances." Id.
ing,\textsuperscript{187} to the United States Pomerene Act. Consequently, a sea
waybill that meets the requirements of a straight bill of lading under
United States law not only acts as a receipt of goods but also as a
transferable document of title. Professor Tetley likes the regulated
status of this United States version of a waybill and contrasts it with
waybills in the United Kingdom and Canada, which, being unfettered
by a statute, stipulate their own terms and conditions often to the
detriment of certainty and fairness.\textsuperscript{188}

As indicated earlier, the United States straight bill of lading is,
although not negotiable, a transferable document, and as such
functions as a document of title.\textsuperscript{189} Under the Pomerene Act, a person
to whom a common carrier's bill of lading has been transferred (not
negotiated) acquires title to the goods, subject to the terms of the
agreement between the issuer and the transferor.\textsuperscript{190} The transferee of
a straight bill also acquires the right to notify the carrier of the
transfer, and thereby to become the direct obligee of whatever
obligations the carrier owed to the transferor of the bill immediately
before the notification, including delivery of the goods.\textsuperscript{191} This
statutory empowerment confers, upon the transferee of a straight bill,
a number of rights not enjoyed by the holder of the sea waybill. Not
only can the transferee claim the goods on the same legal basis as its
transferor, but it also acquires the rights of a seller and secured
creditor to the proceeds of the shipped goods.\textsuperscript{192} In addition, if the
transferee is the named consignee of the non-negotiable bill of lading,
it can demand delivery of the goods without having to produce the
bill.

The dualism (document and non-document of title) of the Pomerene
straight bill of lading poses serious problems in jurisdictions where
the concept of a document of title is synonymous with negotiable bill
of lading. In these jurisdictions, carriers who deliver goods to
consignees of straight bills of lading without obtaining the bills of
lading from these consignees risk liability to subsequent transferees
of these bills. This problem is compounded by the practice common
with some United States carriers of issuing straight bills without
stamping the words "non negotiable" on the originals. At the same
time, since the Pomerene Act applies to bills of lading issued in the

\textsuperscript{187}Id. at 479.
\textsuperscript{188}Id.
\textsuperscript{189}See supra note 26 and accompanying text.
\textsuperscript{190}Id.
\textsuperscript{191}Id.
\textsuperscript{192}Id.
United States,193 consignees abroad would be justified in characterizing the right to possession conferred by the Pomerene "straight" bill as enforceable by mere identification. Conversely, a carrier who issues a non-negotiable bill in a foreign port naming a United States importer as consignee may be held liable in the United States for refusing to deliver the goods to the United States consignee who does not surrender the bill of lading. To make matters worse, United States banks are unable to issue guarantees for missing bills of lading unless they have a "substantial interest in the performance of the transaction."194

3.3.2.1 Two English Prototype Waybills

Professor Tetley has described two representative types of English waybills. The first is the General Council of British Shipping ("GCBS") waybill.195 It is issued in a common form which any carrier may use and is designed to be filled out by the shipper and completed by the carrier. As with the charter party and short form ocean bill of lading, many of the parties' rights and duties under the GCBS waybill are dealt with in another document or set of trade rules. The standard form analyzed by Professor Tetley refers to the individual carrier's contract of carriage as follows:

The contract evidenced by this waybill is subject to the exceptions, limitations, conditions, and liberties (including those relating to pre-carriage and on-carriage) set out in the Carrier's Standard conditions of Carriage applicable to the voyage covered by this Waybill and operative on this date of issue.196

Since the GCBS waybill lacks the spaces for the data that usually accompanies combined or multi-modal transport, it is suitable only for port to port and through transport.

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196 14d.
The second type of English waybill studied by Tetley is the Overseas Containers Limited ("OCL") waybill.¹⁹⁷ This waybill is designed for computer use. Although it is to be used, filled out, and completed by one carrier only, its layout resembles that of air waybills whose text is flexible enough to include references to combined transport shipments. The OCL waybill refers to the applicable contract terms and conditions as follows:

The contract evidenced by this waybill is subject to the Carrier's standard Bill of Lading terms and conditions and tariff for the relevant trade, copies of which may be obtained from the offices of the Carrier and those of his authorized Agents.¹⁹⁸

Whether an OCL waybill would be subject to Hague or Hague-Visby rules if it were to incorporate them by reference, and whether if applied, these rules would exclude inconsistent contractual clauses seems to vary from statute to statute.¹⁹⁹

By contrast with the Hague-Visby rules, the application of the UCP to sea waybills does not seem complex. For the same reason that UCP Article 25 applies to air waybills it also applies to sea waybills. Moreover, Article 25's application to sea waybills is less problematic because waybills are generally issued by the actual ocean carriers or their agents. As with air waybills, however, the widespread use of sea waybills requires separate UCP treatment. The new UCP provision should list the basic requisites of sea waybills, but should be flexible enough to allow the development of incipient electronic or paperless varieties.

### 3.3.3 The Scandinavian Data Freight Receipt

The main function of Sweden's Trade Procedures Council ("SWEPRO") is to develop administrative, commercial and legal institutions that facilitate trade by simplifying and harmonizing trade related procedures. A large part of SWEPRO's work is devoted to the formulation of standards and protocols for computer to computer communications.²⁰⁰ The sea waybill is one of SWEPRO's most

¹⁹⁷Id. at 468–70.
¹⁹⁸Id. at 468.
¹⁹⁹For the best discussion encountered by this writer of the ex proprio vigore and incorporation issues, see id. at 471–96.
²⁰⁰The materials in the present and following section on the data freight and cargo key receipt were obtained in large measure from interviews conducted by this writer in Gothenburg, Sweden on June 29, 1990 with Messrs. Peter Lyon of Transagency Inc.; Hans E. Laessker,
popular products. Roughly 50% of the North Atlantic trade involving the Nordic countries utilizes the sea waybill, although it seems more popular with Scandinavian initiated traffic.

In 1971, the Atlantic Container Lines ("ACL"), one of the world’s largest container carriers, introduced a sea waybill labelled the Data Freight Receipt ("DFR"), for its North Atlantic shipments. As with the air waybill, the DFR eliminated the need to send paper documents along with the shipment. All that was needed was a computer at each end of a dedicated phone line, and software to allow computer to computer communications. ACL would communicate the issuance of the DFR to ACL’s office at the consignee’s location; this could be done in conjunction with the sending of an arrival notice and manifest, or separately. The consignee, notify party, or both, would then do whatever was necessary to expedite the claim and release of the goods. The goods would be delivered either upon the consignee’s or notify party’s identification, and delivery would not require presentation of the arrival notice.

As with the air waybill, the DFR was non-negotiable. In addition, the DFR’s text differed sharply from that of the ocean bill of lading in that it lacked the terms and conditions of carriage, including disclaimers. The DFR only acknowledged receipt for shipment and not receipt for on board shipment; and as did the air waybill, the DFR required only proper identification by the consignee or his agent to obtain delivery of the goods.

Since the DFR was not a document of title, but merely a receipt and notice of shipment it did little to assure the consignee or bona fide purchaser of the goods that the shipper would not resell or reroute the goods in transit. Neither did the DFR reassure the bank that it would have an adequate security interest in the document representing the goods.

In addition to its inability to reassure consignees and potential lenders, the DFR was generally viewed as not subject to Hague-Visby. Importers and banks who feared that DFR’s would be used to evade carrier liability objected to their use.

Esq., Legal Advisor to Atlantic Container Lines; and Soren Lonnartesson of SWEPRO (hereinafter “Interviews”). These interviews are on file with the Documentation Center of the University of Arizona Law Library. The author is most grateful to the interviewees for sharing their time and knowledge and to Professor Kurt Grönfors for arranging these interviews.
3.3.4 The Cargo Key Receipt

The Cargo Key Receipt ("CKR") was designed by Prof. Kurt Grönfors of Gothenburg University in cooperation with Swedish shipping companies and SWEPRO to overcome some of the DFR's inadequacies, especially its inability to serve as collateral in documentary credit transactions. As with the DFR, the CKR provided an arrival notice given either to the consignee or to designated notify parties. Unlike the DFR, the CKR contained a "no disposal" ("no disp") clause, in which the shipper waived its right of disposal of the goods while in transit. This clause was expressly agreed to by the shipper-consignor and the carrier at the moment of issuance of the CKR and to be effective had to be noted in the original or master bill of lading. The CKR named the third party creditor as consignee and the buyer as notify party; no other parties participated in the transaction. The CKR, therefore, was designed as a closed system that precluded negotiation of either the CKR or of the master bill of lading that contained the no disp clause.

The conceptual basis of the CKR was the conveyance to the secured party of the seller's right to control the goods while in transit. This is a "negative" right because its object is not to gain permanent possession for the seller, but to prevent the buyer's acquisition of possession. Similar negative rights are conveyed by the transfer of the "shipper's" copy of the air waybill, and are retained by unpaid sellers under Section 2-705 of the UCC. In addition, as indicated when discussing the concept of a document of title, whoever holds the full set of original bills controls possession of goods in transit. By means of the CKR's "no disp" clause the shipper-consignor agreed to a known (although not widely used) method of creating a security interest, i.e., the conveyance of its negative possessory right to a consignee who was either an issuing or confirming bank. To be sure, this may be a partial and limited right of control because the consignor may have retained a right to change the consignee while conveying the right of stoppage in transit. In addition, the right of control conveyed by the "no disp" clause can be exercised only in a

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201 On the cargo key receipt, see generally, K. Grönfors, Cargo Key Receipt and Transport Document Replacement (1982) (hereinafter "Grönfors, Cargo Key Receipt").
202 See Grönfors, Sea Waybill, supra note 25, at 3; and Grönfors, Cargo Key Receipt, supra note 201, at 55.
203 U.C.C. § 2-705(1) in relevant part states: "(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-703)."
204 See supra text preceding note 21.
manner consistent with the carrier’s normal operations of storage, loading, and unloading. Nonetheless, the right of control conveyed to the consignee-bank in the “no disp” clause ordinarily allowed the bank’s stoppage in transit, withdrawal of the goods at the departure pier, unloading of the goods already placed on board the vessel, and warehousing or re-routing of these goods, including the right to deliver the goods to another consignee. The buyer-importer, who, as indicated above, was usually designated as the notify party of the CKR, was one of the two parties to receive the arrival notice, the other was sent to the consignee-creditor. When the buyer-notify party paid the amount owed to the issuing bank, it received the latter’s authority to claim the goods from the carrier.

The use of paper documents was considerably reduced by the CKR. Instead of the numerous originals and copies generated in a documentary ocean bill transaction, the CKR created just a handful of documents, mostly in the form of simple statements. The first document was the CKR signed by the carrier, indicating that the goods described in the letter of credit were in its possession for shipment. This receipt also restated the description of the goods and the terms and conditions of carriage. Customarily, one of the terms and conditions of carriage associated with the CKR was application of Hague-Visby. In order to convey the right of control to the consignee, the letter of credit beneficiary handed over its signed CKR to the confirming bank. If the confirming bank found the CKR in compliance with the terms of the credit, it paid the beneficiary’s draft, or stamped its acceptance thereon and forwarded the tendered documents to the issuing bank. Release of the goods to the buyer, and verification of all the terms and conditions of the credit was a two step process. First, the issuing bank received from the carrier an arrival notice of the goods and a printout of the CKR. The bank, upon verifying compliance with the terms of the credit, and obtaining its customer’s payment or reimbursement, released the goods to the customer. Second, once the remaining documents were received from the confirming bank, they were checked against the credit, and upon verifying compliance, including consistency with the CKR, reimbursement to the confirming bank was authorized.

Despite the CKR’s reduced reliance on ocean shipping documents, its lesser chance of fraud and breach of security, especially when compared with paper based and telefaxed bills of lading, and its lower handling costs, North American banks, particularly United States banks, did not accept the CKR. The reasons for bankers’ reluctance have not been articulated. In this writer’s opinion the CKR process
threatens two fundamental institutions of letter of credit law. First, it threatens the principle of documentary examination, which requires that banks, meaning both the confirming and the issuing bank, verify the tender of the seller’s document in a unitary, and not in a truncated or segmented, fashion. Second, the CKR threatens the issuing bank’s perfected security interest in the ocean bill of lading and in the goods themselves. In United States law, for example, it is unclear whether a bank that relies solely on the CKR as its collateral can perfect a security interest in the goods, or whether having perfected its interest in the CKR it has priority over bona fide purchasers of the goods or over holders of purchase money security interests in the customer-buyer’s inventory. Since banks were among the intended major beneficiaries of the system, the CKR was “mothballed.”

3.3.5 The CMI Uniform Rules for Sea Waybills

Despite the CKR’s lack of acceptance, some of its basic features are apparent in the Uniform Rules for Sea Waybills adopted by the

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205 See UCP, supra note 47, Art. 15. Professor Grönfors assumes that customers can be convinced to instruct the issuing and confirming banks that payment by the confirming bank should be made only against the CKR and that the remaining documents can be mailed separately to the issuing bank or to the applicant. See Grönfors, Cargo Key Receipt, supra note 201, at 94. While applicants may indeed wish to waive unitary verification under certain circumstances, banks may not be as sanguine, especially when their customer has not prepaid or fully collateralized the issuance of the truncated verification credit.

206 From a United States secured transactions law standpoint, the bank’s security interest is not in the goods themselves, but in the consignor’s right of control over the shipment since the CKR is not a document of title. This right qualifies as a “general intangible” under the catch-all definition of U.C.C. § 9-106. Perfection of such a security interest does not take place when the CKR is issued by the carrier-bailee, as would be the case under U.C.C. § 9-304 if the CKR were a negotiable document of title. An appropriate filing to perfect the security interest is required unless the security interest is characterized as arising “solely under the Article on Sales” (U.C.C. § 9-113). U.C.C. § 9-113 states that as long as the seller’s debtor is not in possession of the goods no security agreement is necessary and no filing is required. Yet, the Article 2 security interest predicated upon U.C.C. § 2-703’s right of stoppage of delivery in transit is narrower in scope than the right conveyed to the bank by the CKR. U.C.C. § 2-703 applies only when the seller discovers the buyer’s insolvency or when the buyer repudiates or fails to make a payment due before delivery or if for “any other reason the seller has a right to withhold or reclaim the goods.” Before such a time, the right, and consequently the Article 2 security interest, does not exist. Assuming, then, the need to file, and assuming proper filing under U.C.C. § 9-401, the bank’s interest could still be inferior to that of a buyer of the goods in the ordinary course of business or of consumer goods under U.C.C. § 9-307, if somehow the goods subject to the bank’s control became inventory or consumer goods. Furthermore, even if the bank’s interest was deemed to apply to the buyer’s inventory, a purchase money security interest in the same inventory would, according with U.C.C. § 9-312, be prior to the bank’s. The net effect is that even if the bank obtains possession of the goods by means of its security interest on the right of control of the shipment, it could very quickly lose its possession to third party creditors or buyers.
CMI in June 1990 ("Sea Waybill Rules").\textsuperscript{207} As stated in the prototypical CKR, Sea Waybill Rule 4 provides that the sea waybill will be subject to the application of any international convention or national law if such a source of law is compulsorily applicable or would have been if a bill of lading "or similar document of title" had been issued.\textsuperscript{208} Sea Waybill Rule 6 restates another essential CKR feature, the consignor's right of control over the cargo, and sets the limits of this right. Until the moment that the consignee claims the goods after their arrival at destination, the consignor retains the right to change the consignee's name, provided that if the name is changed, the consignor gives the carrier reasonable written notice, whereby undertaking to indemnify the carrier for the additional expenses created by the change.\textsuperscript{209} Yet, the right of control can be transferred to the consignee until the moment of receipt of the goods by the carrier. Reminiscent of the CKR's "no disp" clause, however, the transfer will be effective only if noted on the sea waybill.\textsuperscript{210} In addition, the Sea Waybill Rules provide an important remedial clarification for those common law jurisdictions that predicate actionability between a plaintiff or defendant consignee and a plaintiff or defendant carrier on privity of contract. Sea Waybill Rule 3 imputes the status of agent for the consignee to the shipper-consignor. Accordingly, the shipper enters into the contract of carriage not only on its own behalf, but also as an agent of the consignee. The consignee is then able to sue the carrier directly, but is also subject to the latter's direct suit.\textsuperscript{211} Finally, Sea Waybill Rule 5 sets forth a level of abstraction, for the sea waybill's description of the goods, similar to that of a Hague-Visby bill. The carrier's description of the goods is prima facie evidence of the receipt of the goods where the shipper is concerned, but is conclusive evidence of receipt where a good faith consignee is concerned.\textsuperscript{212}

\textsuperscript{208}Id. rule 4.
\textsuperscript{209}Id. rule 6(ii).
\textsuperscript{210}Id. rule 6(ii).
\textsuperscript{211}Id. rule 3 states:
(i) The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do.
(ii) This rule shall apply if, and only if, it be necessary by the law applicable to the contract of carriage so as to enable the consignee to sue and be sued thereon. The consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title.
\textsuperscript{212}Compare id. rule 5(ii)(a) and (b) and text accompanying notes 110–111, supra.
3.3.6 Privity of Contract and the Modernization of English and Scottish Bill of Lading Law

Contemporaneously with the CMI's adoption of its Sea Waybill rules, the English and Scottish Law Commissions prepared a report with respect to "Rights of Suit in Respect of Carriage of Goods by Sea."213 According to this report, privity of contract has remained the main obstacle to the modernization of English bill of lading law. Under the English Bill of Lading Act of 1855,214 the rights under the contract of affreightment are transferred only to a person "to whom the property in the goods passes upon or by reason of endorsement."215 As pointed out by the report of the Law Commissions,216 this requirement causes problems whenever property either does not pass at all, or passes independently of the transfer of the bill of lading, or where the transfer of the bill is not causative of the passing of property. For example, under English sales law the buyer of a parcel of fungible goods, sold in bulk, does not get title until the parcel is apportioned to the buyer.217 Since the title to the goods does not pass to the buyer of unidentified bulk goods "upon or by reason of the endorsement" it has no claim under the bill of lading contract. Not all the effects of the privity doctrine are necessarily damaging to third party purchasers or creditors. A House of Lords decision relied on lack of privity to protect a pledgee-endorsee of a bill of lading, such as a bank, with respect to a claim for the payment of freight unpaid by the endorser-shipper. The pledgee was immunized against the freight claim because of its failure to acquire full title to the goods.218 Yet, the benefit inherent in a holder's right to sue the carrier may well be worth the burden of having to pay unpaid freight. In light of the many problems connected with the passage of title as a basis for the right to sue, the Law Commissions recommended allowing the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by the bill, irrespective of whether title to the goods passed by reason of the consignment or endorsement. The suit would be allowed even if the plaintiff did not suffer the loss, but was recovering damages for

214See supra note 42.
215Id. at § 1.
218In Sewell v. Burdick, 10 App. Cas. 74 (1884), the House of Lords held that an indorsee who is a mere pledgee does not have full or general property rights to the goods, and therefore is not liable to the shipowner in the latter's action for payment of the freight.
the benefit of the person who suffered the loss.\textsuperscript{219} Otherwise, English and Scottish bill of lading law would remain hopelessly behind that of other major trading nations. In exchange for this benefit, the holder of the bill of lading would assume the burden of becoming subject to contractual liabilities as if it "had been a party to the contract of carriage."\textsuperscript{220} This symmetrical formula of benefits and burdens would apply to the consignee of the sea waybill, "or such other person to whom the carrier is duly instructed to deliver under the terms of the sea waybill."\textsuperscript{221} It also would apply to the person entitled to delivery of the goods in accordance with the undertaking in a delivery order.\textsuperscript{222}

The Law Commissions took a long needed step in the direction of abstraction, and recommended that the rule of Grant \textit{v.} Norway be abolished. Accordingly, a bill of lading stating that goods had been shipped or received for shipment "and in the hands of the lawful holder, should be conclusive evidence against the carrier of such shipment or receipt."\textsuperscript{223} With a view toward facilitating the use of electronic bills of lading, the Law Commissions recommended that the Secretary of State be empowered to "make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in writing."\textsuperscript{224}

\textsuperscript{219}See Law Commission Report, supra note 23, recommendation no. 1, at 40.
\textsuperscript{220}In the Law Commissions' words:
This would follow the practice in the U.S.A. and in a number of European countries. Under the U.S. Federal Bills of Lading Act 1916 . . . the holder of the duly negotiated bill of lading thereby acquires the direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. Under Article 510 of the Dutch Commercial Code, the proper and lawful holder of the bill of lading, i.e., someone who has not acquired it by means of theft, fraud, violence etc., is entitled to receive delivery from the ship and, it appears, can sue the carrier for any loss or damage to the cargo. Under French Law [Art. 49 of Decree No. 66-1078 of December 31, 1966] the person whose name appears in the bill, the person presenting a bearer bill or the last indorsee of an order bill may all sue the carrier, regardless of whether they were on risk or had property on the goods. Under German law, the lawful transferee of a bill of lading is enabled to sue the carrier for breach of his obligations under Section 606 of the German Commercial Code.

\textsuperscript{222}Id. recommendation no. 4, at 40.
\textsuperscript{223}Id. recommendations no. 6 & 4, at 40.
\textsuperscript{224}Id. recommendations no. 7 & 4, at 40.
\textsuperscript{225}Id. recommendation no. 5, at 40.
\textsuperscript{226}Id. recommendation no. 8, at 40.
3.3.7 The Electronic Bill of Lading Proper

3.3.7.1 The SeaDocs Experiment

The first serious attempt to facilitate the electronic transfer of bill of lading rights took place in 1986 and lasted less than one year. SeaDocs Registry Limited (SeaDocs), a London based Delaware corporation, was formed by Chase Manhattan bank and INTERTANKO, an association of independent oil tanker operators. By the end of 1986 SeaDocs had closed its doors. SeaDocs was intended to bring about the telecommunicated negotiation of bills of lading issued in connection with oil shipments.

It is quite common in the oil trading business for a cargo of crude oil or petroleum products to have been sold or resold numerous times. The right to obtain delivery of such a cargo may have to be transferred to buyers in different parts of the globe. Needless to say, it would be impossible to provide each buyer or its bank with an endorsed original bill of lading in time to provide the same bill to the following endorsee. An electronic or telecommunicated substitute for the paper based document is needed, and SeaDocs attempted to provide it for North Sea crude oil cargoes.

SeaDocs was set up to act as a depository-custodian of the paper based original bill as well as a registry of bill of lading negotiations. The registry was to act as an agent for the parties’ endorsement of bills, as well as for the delivery of the paper based bill of lading with which the goods would be claimed from the carrier. Under the

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226 Per Gram, a Norwegian maritime lawyer, was the first to broach a SeaDocs type approach as a result of a notorious case involving the shipment of a cargo of Italian gas oil to a trader in Northern Germany in 1978. The captain of the Norwegian vessel Sagona delivered the cargo before he received the original bill of lading, and this delivery triggered a number of lawsuits by various claimants to the oil. Per Gram circulated a paper proposing a solution to the Sagona type of problem. "As a result of a study started by Chase, a system for handling documents was scribbled on the back of an envelope at the hotel lobby in Norway." Oil Daily, June 10, 1985, at 8.
SeaDocs procedure, the bill would have been issued by the carrier in the traditional negotiable paper based manner, but would have been taken out of circulation immediately after issuance, and then sent to SeaDocs by courier for safekeeping in SeaDocs’ vault. Any endorsement reflecting the bill’s negotiation would have been effected by SeaDocs as an agent for both endorser and endorsee. SeaDoc’s system of registration and endorsement was reminiscent of that used by stock transfer agents in the United States.227

Upon delivery of the original bill to SeaDocs, the shipper was to receive a code or test key equivalent to the personal identification numbers (PIN) provided by banks for use with automated teller machines. When the bill was negotiated, the shipper/seller would notify SeaDocs by computer of the buyer-endorsee’s name and also provide the endorsee with a portion of the shipper’s test key. The seller’s message was to be tested by SeaDocs before it accepted the communication from the endorsee-buyer. The endorsee-buyer’s message was also tested and accepted if it contained the portion of the original seller’s test key. Upon compliance with the various checks, the name of the new owner of the bill was to be recorded in the registry. This name would also be entered on the documentary bill of lading deposited in SeaDocs’ vault. When the goods arrived at the port of discharge, SeaDocs was to have transmitted an identifying code number to the ship’s master. A similar identifying code number was to be sent to the last endorsee or owner of record of the original bill. Use of the codes allowed the last endorsee to claim the goods.

While no operational difficulties were reported during SeaDocs’ experiment, and while the fees per registration fluctuated between only $300 and $500, SeaDocs failed to attract a sufficient number of traders and financial institutions to survive. Many reasons have been given for its demise: the potential high cost of registry operations’ insurance, especially since the participants’ liability had not been established; the unwillingness of commodity traders to record their transactions in a central registry subject to inspection by competitors and tax authorities; the reticence by the ultimate buyers of spot crude oil to acquire bills of lading from an entity designed to service intermediaries and speculators; and the banks’ discomfort with the exclusive control of the registry business by one of their competitors.

227Merges and Reynolds, supra note 225, at 36, citing Kenter v. Canal Nat’l Bank, 489 F.2d 482 (1st Cir. 1973), and Steranko v. Inforex, 362 N.E.2d 222 (Mass. App. 1972), which describe the function of a stock transfer agent.
Despite its demise, SeaDocs proved that an international, centralized, largely electronic\textsuperscript{228} bill of lading system could work reliably on a world wide basis. In this light, from a banking point of view, SeaDocs' main shortcoming may have been not its premature ambition, but the modesty of its scope. As a private registry it was available only to the trading partners, and not to third parties interested in knowing whether a given shipment was sold, pledged, or had taken place. By preventing interested third parties from inquiring about the status of transactions, including shipments, the notice function of the registry was minimized, and its role in the business world may have been diminished.

Trading partners should be allowed to retain their privacy within the limits of legality and public policy, and many may choose to do just that. Nevertheless, many traders will choose to avail themselves of public notice. Prospective as well as existing secured creditors, for example, must rely on appropriate notice in order to assess the feasibility of their loan and the perfection of their security interest. Similarly, buyers of goods susceptible to being sold without a right to do so also need notice to determine the advisability, as well as the validity of acquisition. On the other hand, it can be validly argued that it would be asking too much from a private entity to provide the same public notice that public registries have provided.\textsuperscript{229}

3.3.7.2 The CMI's "Private Key"

The Rules for Electronic Bills of Lading adopted in Paris in June 1990 by the CMI (the "CMI Rules")\textsuperscript{230} are the most sophisticated attempt to date to regulate an "open ended" computerized method of issuance and negotiation of bills of lading. Unlike the rules of trade networks, such as S.W.I.F.T., which are available only to participat-

\textsuperscript{228}See Merges and Reynolds, id., at 37 for a discussion of the hybrid nature, documentary as well as electronic, of the registry.

\textsuperscript{229}George Chandler asserts that the concept of a public registry is not workable. "No trading house could or would ever use it, since its trading positions would be exposed for all of its competitors to see and use to their advantage . . . . Also who would pay for this registry? The banks won't. The carriers won't. This would build in a stiff transactional cost for the consignee without any benefit—one of the disadvantages of SeaDocs. More importantly, who would insure it? One misdelivery of an oil shipment could be $30,000,000. If the registry has no liability for its negligence, who would be so bold as to entrust it with high value shipments." Chandler letter, supra note 26, at 11.

ing banks, the CMI Rules are open to any contracting party willing to abide by them. Because of their contractual nature, however, unless the participating parties specify their application in the “master” or individual agreements they have no effect. The contractual approach is consistent with the most general method of doing business with electronic data interchange (“EDI”).

The CMI Rules are intended to fill gaps in existing master and individual agreements and trading partner rules, and to provide norms to facilitate the enforceability of telecommunications in jurisdictions reluctant to accept such communications as binding. Thus, while one CMI Rules provision allows the bill of lading to be conveyed by electronic means, another preserves the option of relying on a

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231 On EDI (Electronic Data Interchange) see, generally, UNCITRAL Doc. No. A/CN.9/333, 1–9 (May 18, 1990) (hereinafter “UNCITRAL study”); Trading with EDI, the Legal Issues (H. B. Thomsen & B. Wheble eds., 1989) (hereinafter “Trading with EDI”); and B. Wright, EDI and American Law, A Practical Guide (1989). Prior to entering into a contractual relationship whose terms and conditions will be communicated by EDI, the provider of the service and the trading partners agree on the meaning and effect of this method of telecommunications. Thus, questions such as when the issuer of the electronically issued promise is bound, what is required from the recipient to establish its liability, how the existence and content of a message can be proven, and so on, are covered in the EDI “master agreement” and “trading partner” rules.

232 See CMI Rules, supra note 230, rule 11. As noted in Bergsten & Goode, Legal Questions and Problems to be Overcome, in Trading with EDI, supra note 231, at 136:

What constitutes “writing” is itself a matter of debate. In various countries the word has been defined, though normally by reference to the mode of imposition on the medium rather than by reference to the nature of the medium itself. For example, under the UK Interpretation Act 1978 “writing” includes typing, printing, lithography, photography and other methods of representing or reproducing words in a visible form, whilst the Uniform Commercial Code [U.C.C. 1-201(46)] provides that: “Written or ‘writing’ includes printing, typewriting or any other intentional reduction to tangible form.” It is probably the case that whenever a statute uses the word “writing” without a definition, the legislator intended the writing to be on a traditional piece of paper.

Among the more flexible international conventions and model laws, Bergsten and Goode cite Article 7 of the UNCITRAL Model Law on International Commercial Arbitration which broadens the definition of a writing as follows: “telex, telegrams or other means of telecommunication which provide a record of the agreement.” Id. at 137. This requirement, according to these authors can be satisfied by a computer record without a print-out.

A somewhat different idea is expressed in the definition of “notice in writing” in the 1988 Unidroit Convention on International Factoring: “notice in writing includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form.” This formulation has the advantage of emphasizing the need for the record to be capable of reproduction in tangible form, as opposed, for example, to a recorded message on tape which can be played back but not printed out.

Id. at 137.

Merges and Reynolds, supra note 225, at 38 point out that the creation of an electronic bill of lading under the U.C.C. would not seem to create much difficulty since the U.C.C. definition of a document of title embraces “such probabilities as teletype transmissions of what may some day be regarded as ‘Documents of Title,’ ” citing U.C.C. § 1-201(15), comment 15. This writer
paper document.233 This option is particularly important if municipal law or the Hague Rules require the issuance of a paper based bill of lading upon the shipper’s demand.

The main feature of the CMI Rules is the creation of an electronic bill of lading by the carrier who also acts as an unofficial registry of negotiations. Accordingly, the CMI electronic bill of lading can be issued by as many carriers as have the necessary hardware and software, and it can be “endorsed” by as many endorsees as have the same facilities. The device that makes such issuance, endorsement-negotiation, and registration possible is the “private key.” The private key, in George Chandler’s words, is “akin to a single transaction personal identification number (PIN).”234 Depending upon the specific system in use, the shipper and subsequent holders of the electronic bill of lading receive a password to access the carrier’s computer network, and/or an identification number and a private key. The shipper or subsequent sending party then inputs the electronic address of the carrier-receiving party. As with telex messages, each party to the transmission sees the other party’s address as the electronic “handshake” takes place. After the security procedures are satisfied and the message is sent, the private key is used by the shipper or subsequent holders to verify the authenticity of the message. Thus, even though a fraudulent sender may know how to access the network and establish a valid identity, it can not obtain possession of the goods without the use of the private key.

In an attempt to avoid multiple transfers of the same bill, the private key itself is rendered non-transferable. If a holder, nonetheless, transfers its private key, the carrier will be responsible only to the party to whom it issued the last valid private key. The carrier will be liable, however for misdelivery, if it issues similar private keys or breaches the private key security safeguards.

Unlike the CKR and SeaDocs procedures, which require presentation of a paper based bill or authorization to obtain release of the

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233See CMI Rules, supra note 230, rule 10(a) and (b).
234Chandler letter, supra note 26, at 8. CMI Rules, supra note 230, rule 2(f) defines the private key as: “any technically 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 description of the private key transaction in the principal text is based upon materials provided in the Chandler Letter.
goods, the private key functions as the equivalent of the negotiable ocean bill of lading. Lawful use of the private key entitles the holder to the delivery of the goods. In addition to setting forth rules of "traffic" on issues such as the means to verify a binding transmission, the CMI Rules adopt the United Nations "Layout Key" and EDIFACT standards of message transmission.235 The terms and conditions that govern the electronic bill of lading are incorporated by a

235 CMI Rules, supra note 230, rule 3(c) & (b). Trading with EDI, supra note 231, at 11-12, provides an historical account of the UN Layout Key; it points out that until quite recently international trade documents were of all shapes, sizes and colors. Each document had to be filled in separately, at considerable expense and risk. In the 1950's it was realized that much of the requested information was identical, and that it would not be difficult to design a common layout of the different documents by producing a common master. As a joint Nordic country approach, with the support of the ICC, the project was brought to the United Nations Economic Commission for Europe ("ECE"). The ECE set up Working Party No. 4 for "trade facilitation." This Working Party made the recommendation in the early 1960's for a UN Layout Key, for use in seaborne trade. Thereafter, national facilitation organizations such as SWEDPRO, NORDIPRO, and SITPRO, were developed in ECE member countries. Worldwide participation was insured by the creation of the United Nations Conference for Trade and Development ("UNCTAD"), which contributed to the internationalization of the UN Layout Key. The development of EDIFACT has been described as follows:

In 1987, a new universal communicating system—Edifact (Electronic Data Interchange for Administration, Commerce and Transport)—was finally agreed, and is presently being streamlined and introduced. . . . It provides three building blocks: "a syntax, which equates to the grammar in normal language; common data elements equivalent to the vocabulary; and common messages which combine syntax and data elements into a structured business message similar in concept to paper documents." Id. at 15.

Quite recently, UN/EDIFACT developed the International Forwarding and Transport Framework ("IFTM") to cover "the information needs for the varied aspects of the forwarding and transport of goods, e.g., booking, waybill, bill of lading, arrival, ordering, and contract status." See Introduction to U.N. Doc. ASC X12Y/90-455. Since this framework is intended to influence the text of the messages involved in the forwarding and transport of goods, regardless of route, mode of transport, or prevailing commercial practice, it could have a significant impact upon bill of lading law and practice. The initial reaction of the United States maritime law community has been quite critical. George Chandler points out that the proposed IFTM procedures only meet the needs of large shippers and carriers, whose chief need is to process information for the flow of goods, and not of small shippers and carriers whose need is for a receipt of shipment, contract terms and document of title. In other words, the need still remains for the elements of the traditional ocean bill of lading. If these elements cannot be transmitted electronically, small shippers and carriers would continue to use paper based bills. Letter from George Chandler to Data Interchange Standards Association (DISA), reprinted in Electronic Contracting in Transactions—Law and Practice (page 25 of the chapter on international aspects) (M. Baum & H. Perritt eds., forthcoming 1991) (hereinafter "Chandler, DISA"). In an addendum to the Chandler Letter, supra note 26, of December 4, 1991, Mr. Chandler informed this writer that the North American Edifact Board (NAeBD) and UNCITRAL Working Party 4 (WP4) have implemented procedures for legal review, and are taking steps to implement a receipt function. Meanwhile, BIMCO is continuing to work on the rest of the problems. This activity provides ground for optimism on the efforts to transform more paper based transportation messages into electronic or paperless communications.
reference to the carrier’s “long form” bill of lading, much as is done with paper based “short form” bills of lading. When not in conflict with the parties’ agreement or with the CMI Rules, the Uniform Rules of Conduct for the Interchange of Trade Data by Teletransmission (UNCID) also govern the parties’ conduct.236

Upon receiving the goods from the shipper, the carrier gives notice of the receipt to the shipper. The carrier sends this notice or “receipt message” electronically to the electronic address specified by the shipper. The receipt message contains, inter alia, the description of the goods, reservations by the carrier on the state of the goods and the private key to be used in subsequent messages. The recipient must confirm receipt of the message to the carrier. If the shipper disagrees with the description of the goods, or with any other material statement in the receipt message it can withhold confirmation until the disagreement is resolved.

The above described procedure attempts to match the initial phase of contemporary paper based bill of lading issuance. In this phase, the shipper’s freight forwarder prepares the text of the bill of lading and submits it to the carrier for calculation of freight, and for stamping or notarization. Until the delivery of the bill of lading, the shipper is given a dock or mate’s receipt. If the completed bill is unsatisfactory, the shipper can either refuse to exchange its dock receipt for the bill of lading, procure a satisfactory letter of indemnity or a substitute carrier. This comparison of procedures reveals that the CMI Rules’ receipt message plays the role of both a paper based dock or mate’s receipt and of a bill of lading.

From a letter of credit standpoint, however, the receipt message can also play a more definitive role. When an issuing or confirming bank becomes the recipient of a receipt message, it has the same right

236See CMI Rules, supra note 230, Art. 3(a). Bergsten and Goode describe the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (ICC 1987) (hereinafter “UNCID”) as rules of conduct which are not directly binding on the parties, but indicate a professional level of behavior. Their legal value is regarded as indirect because contrary behavior might be regarded by courts or arbitrators as negligent. Eventually, if UNCID becomes widely known and used it may develop into customary law. Trading with EDI, supra note 231, at 157. According to the same authors, the UNCID Rules were:

designed to fit in with a basic set of technical requirements and procedures embodied in the UN/Edifact standard of UN and ISO and they form part of the UN/Edifact material. Describing a threshold level of technical requirements, they also ensure an acceptable degree of interchange security. The rules cover message structures, interchange standards, acknowledgment, confirmation and logging, as well as the protection and storage of data.

Id. at 157.

For the text of UNCID and helpful explanations, see id. at 157–66.
LETTER OF CREDIT TRANSACTION
(BANK IDENTIFIED AS AGENT OF CONSIGNEE)

SHIPPER

CONSIGNEE

$ Description

Description

Bank

Private Key #2

Delivery Instr. (Private Key #2)

Confirmation

GOODS

Description

Confirmation

BANK

E.H.

Confirmation

GOODS

Receipt Message w/ Private Key #1

Confirmation

Transfer Message (Private Key #1)

Confirmation

GOODS

Handshake

Electronics

Password/ ID

CMI Rules

Booking Note

Confirmation

*Third Party Service Provider

G. CHANDLER 7/90
SIMPLE LETTER OF CREDIT TRANSACTIONS
(BANK AS CONSIGNEE)

Electronic
Password/ID
Booking Note
Confirmation

GOODS
Receipt Message w/Private Key #1
Confirmation
Transfer Message (Private Key #1)
Confirmation

$ Description
Description

Confirmation
Private Key #2
Delivery Instr. (Private Key #2)
Confirmation

GOODS

G. CHANDLER 7/90
to object to its terms as does the shipper. In addition, the bank's refusal of the receipt message and of the eventual transfer of the bill of lading can also amount to a final rejection of the beneficiary's tender, especially when the discrepancy in the receipt message is major and incurable.

If the receipt message is acceptable, the holder may have it updated by requesting that the date and place of shipment be inserted in the message as soon as the goods have been loaded on board. The holder is also given the same possessory and control rights as a holder of a paper based bill, including the rights to claim delivery of the goods, to nominate the consignee or substitute a nominated consignee, to transfer the right of control and transfer, and to instruct the carrier with respect to the delivery of the goods.

When the right of control and transfer is conveyed, the holder relies on the same method of notification by which he was made a holder, except that it will be the initiator of the message to the carrier, and will need to await the carrier's confirmation before the transfer process can be set in motion. Once the carrier provides confirmation, the carrier transmits the relevant information to the new holder. Upon the new holder's confirmation of the carrier's message, a confirmation that includes the new holder's acceptance of the right of control and transfer, the carrier will cancel the current private key and will issue a new private key to the new holder.

In order to effectuate delivery, the carrier notifies the holder of the place and date of intended delivery. Once notified, the holder is placed under a duty to nominate a consignee and to give delivery instructions to the carrier with verification by private key. The carrier will then deliver the goods to the consignee, upon the latter's proper identification. This delivery automatically cancels the private key. The accompanying diagrams prepared by a participant in the drafting of the CMI rules illustrate these successive steps.

The initial reaction by the banking community to the CMI Rules has been skeptical. United States bankers object to the CMI's use of the UN/EDIFACT standards because they use ANSI X12.
Unless ANSI standards are used, communications between shippers and carriers and banks in the United States will be either impossible or too cumbersome. The inadequate security of the private key is also a source of banking concern. Being comfortable with S.W.I.F.T. security procedures, bankers prefer the security of uniform login procedures, message numbering, error checking, encryption, record retention, uniform formats, and message-self auditing capabilities. Banks contend that unless the transmission of rights through the private key is made secure by means of an appropriate uniform encryption and authentication algorithm no responsible banker would wish to assume the risk of possible fraudulent issuances, negotiations, and pledges. Thus, banks suggest that each private key password also be used as an integral part of the encryption algorithm. The same suggestion applies to methods of establishing the existence and contents of bill of lading telecommunications. The CMI Rules' reliance on the "trade data log" and "audit trail" is inconsistent with standard banking usage. Under banking usage, verification procedures depend upon passwords, private keys, encryptions and algorithms.

The private key concept itself troubles bankers, who cannot visualize how telecommunications between strangers can be accomplished on a secure basis, especially when a large number of carriers and commercial parties is involved. They wonder why, if the private key is the means of authentication of the holder's rights, should the

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Coordinating Committee ("TDCC"). As pointed out in Wright, supra note 231, Foreword, an EDI message can be translated from one message standard to another, such as from a proprietary EDI format to ANSI X12. Yet, bankers asked about the possibility of such translation indicated that security as well as the integrity of messages may be compromised.

242 CMI Rules, supra note 230, rule 3(b) after requiring conformity with UN/EDIFACT standards, states that "However, the parties may use any other method of trade data interchange acceptable to all of the users." Clearly, uniformity of standards is of the essence and it is likely that UN/EDIFACT will indeed be the uniform standard of the future, but it is not such a standard now. George Chandler responds to this objection by indicating that ANSI X12 could be used if the parties so desired. However, ANSI X12 has no developed standard for ocean shipments at the present time. Thus, to suggest that ANSI X12 should be used is "wishful thinking." Moreover, "the fact that no overseas party would have ASC X12 makes the standard unsuitable for overseas transactions except with one's own subsidiaries" Chandler letter, supra note 26, at 10.


244 See CMI Rules, supra note 230, rules 3(e) & 2(b). George Chandler responds to this objection by stating that "the parties will decide the level and type of security to be employed, and will not be locked into the state of the art as it exists at this time. I would expect messages, as well as the Private Key, to be encrypted if a party is to meet its responsibilities under these Rules. Encryption under EDI should be simple and secure to use through a variety of software." Chandler letter, supra note 26, at 11.
rules contemplate the possibility of an erroneous transmission. If the key and password are properly authenticated and used in connection with an encryption and algorithm, an erroneous transmission should be clearly evident because it would not be readable by the recipient as a result of the failure of the process of message decryption. If, on the other hand, the private key process of verification of authenticity involves a manual or visual type of verification, and can be read by anyone, how does this procedure provide the minimum security required by the lawful holder?

Finally, bankers are concerned with the availability of the terms and conditions of the contract to parties other than the issuer. How can the terms and conditions of every carrier and each transaction be made readily available to all the holders? As a holder, a banker would want to know the terms and conditions of the carrier from whom it will be claiming the goods, especially since these terms and conditions often change from one bill of lading to the next.245

From a strictly legal standpoint there are serious doubts as to whether the private key is the equivalent of the paper ocean bill of lading. In the private key procedure, the transferee’s rights are predicated upon both issuance of a private key and the transferee’s acceptance of the right to control. Yet, the transferee’s acceptance is based upon the information on the status of the shipment as trans-

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245 Mr. Chandler responds by saying that bankers do not really look at the terms and conditions of paper based bills of lading. If the bills of lading are “short form” they refer the banker to the “long form,” and not even the carriers themselves can pinpoint the terms and conditions intended in the long form. When litigation arises in this area, it is not unusual to see three or four long forms competing with one another.

The important thing to remember is that the terms and conditions favor the carrier, such that their absence or significant doubt about what they state put the carrier at a disadvantage. In any event, if the bank does have the terms and conditions, what are they going to do with them? Who would determine if something is offensive, and what would they do about it? . . . When banks take NVQCC bills of lading which, notwithstanding their negotiable appearance, do not provide unqualified access to the goods and are ripe with fraud, then there can be no genuine concern about the security of the goods in the transaction. Literally anyone can put out an official looking bill of lading as an NVQCC. Someone, purporting to be a carrier under EDI must have the sophistication to duplicate an electronic address (which would be like tapping into a phone system and using someone else’s number, such that the caller ID unit would be deceived once the x400 standard takes effect). It could be done, but not by the usual fraudsters.

Id. at 11. In a December 4, 1991 addendum to his letter, supra note 26, Mr. Chandler called this writer’s attention to BIMCO’s recent B/L Project which would use the technique of “digital signature” to encrypt and authenticate messages. According to Mr. Chandler, this signature would enhance message security, but it could not be easily used as the Private Key which should be part of the message. The mere fact that BIMCO, one of the largest shipping organizations in the world, is engaged in the electronic bill of lading project indicates how significant electronic messaging is becoming.
mitted by the carrier or by someone purporting to be the carrier in the "receipt message." Accordingly, it is not clear what rights are accepted by the transferee; it may have accepted non-existing rights relying upon fraudulent information in a receipt message transmitted to it by someone pretending to be the carrier. Meanwhile, the carrier may issue the private key to the transferee in the belief that the latter accepted an honest receipt message sent to but not received by the transferee. The rights incorporated into the private key, then, depend not only on the lawful acquisition of the private key but also upon the text of the carrier’s valid receipt message. And while no carrier would want to be bound by terms and conditions other than those on the receipt message it sent, no transferee would want to pay for an electronic bill whose terms and conditions are other than those he received. This difficulty cannot be overcome by a stipulation that the receipt message and the private key together are the equivalent of a paper based negotiable bill of lading. For, as a rule, the creation of negotiable documents of title is a prerogative reserved solely for statutory law.246

The dual source of private key legitimacy raises the question of whether the private key, by itself, is conclusive evidence of the carrier’s receipt of the goods in the condition notified to the transferee. Since an innocent carrier would, in all likelihood, not be estopped from asserting the terms and conditions of the message it sent (as contrasted with the message received by the transferee) the private key would be less certain and therefore less merchantable than the negotiable ocean bill of lading.

IV

CONCLUSIONS: DEMISE OR TRANSITION

The widespread acceptability to bankers of the ocean bill of lading until recent times was due to the certainty of its enforceability and to the relative fairness of its allocation of liability for carriage risks. Its certainty was attained once the bill was separated from the charter party and became not only a receipt for the goods but also an independent (captain or master of the vessel issued) abstract docu-

246See, for example, Official Comment to U.C.C. § 7-104 which, in relevant part states: "A document of title is negotiable only if it satisfies this section." On German law, see Zahn at 191-2. Zahn quotes Section 363 of the German Commercial Code for an exhaustive list of the categories of order paper (Begebares Orderpapier). Zahn states that an unlisted document cannot be turned into a negotiable document of title (Traditionsaner) by mere agreement of the parties and that this power is reserved for statutory law.
ment of title. Treaty law contributed significantly to the certainty of the ocean bill by establishing uniform requirements concerning its descriptive information. Treaty and statutory law also contributed to the fairness of the ocean bills of lading by establishing liability boundaries and reconciling the conflicting interests of shippers, carriers, and insurers on loss of or damage to the cargo.

The certainty of the contemporary ocean bill is seriously threatened by the multiplicity of issuers, such as shipowners, charterers, ship agents, NVOCC's, and freight forwarders. Often shippers and their secured creditors ignore how much is owed for ocean or combined transport carriage and to whom, until the carrier claims unpaid freight or charges and refuses to deliver the cargo. Certainty is also threatened by the work of fraudsters, forgers, and modern day pirates and buccaneers. A contemporary dishonest bill ordinarily involves not an exorbitant disclaimer (although there are plenty of these disclaimers still in use), but a shipment that does not take place, or a vessel that does not exist or disappears without a trace after loading. Perhaps the most significant threat to the bill's certainty is posed by its unavailability at the time of the arrival of the goods.

Sea waybills have reduced some of the above uncertainties by limiting the number of qualified issuers, and minimizing the possibilities of fraud and the vessel arriving at the port of destination prior to arrival of the goods. Yet, these gains in certainty have been made at the expense of the bill of lading's title and negotiability functions, functions that will continue to be needed for the foreseeable future.

A recent communication by a knowledgeable observer of maritime shipping practices validly asserts that the needs for documentation and negotiation of ocean shipments vary depending upon the nature of the cargo and the size of shipper and carrier. The chief need of large shippers and carriers is "to process information for the flow of goods. Yet, while this may be as much as 70% of the cargo for major container carriers, it would apply to less than 30% of all international cargoes." The remaining shippers, carriers and consignees still need documents or their equivalents that can act as receipts, contracts of freight and documents of title. *Mutatis mutandis*, banks willing to finance the trade of the remaining 70% of shippers and consignees will need to rely on negotiable documents of title as

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24The annual losses attributable to oceanborne or maritime fraud were estimated, in 1986, to be as high as $31.5 billion. Walsh, supra note 130, at 225. On the nature and consequences of documentary fraud in letter of credit law, see id. at 225–28.

24Chandler, DISA, supra note 235.

24Id.
collateral. In addition, as developing nations attempt to market their raw materials or commodities on a global and "just in time" basis, they will need to resort to SeaDocs' like systems. Bills of lading and warehouse receipts, therefore, will need to be designed to allow instantaneous sales and pledges across the globe.

The precise electronic garb worn by these future negotiable ocean bills of lading is unclear, but at least some of their legal prerequisites are discernible, especially if banking needs and constraints are taken into account. As trusted and "neutral" paymasters, banks will continue to be asked to pay letters of credit after examining bills of lading whose principal item will be the stated capacity of the signor or authenticator. Since only a limited number of stated capacities grant possessory rights and enable liability those capacities must be easily ascertainable. Accordingly, banks will continue to determine whether the bill was signed or authenticated by an entity stating that it was the "carrier," the "owner," the "master" of the vessel, or the agent of any of the above. Given the volume and speed of the electronic transactions, bank customers are also likely to demand that banks ascertain the trustworthiness of the signers or authenticators. This determination will probably be made by means of paper based on electronic certifications issued by trustworthy entities such as FIATA or the NVOCC registries. Banks will also be asked to examine carriers' and inspectors' descriptions of the goods. As with the determination of the carrier's capacity, bank customers are likely to demand that banks ascertain the capacity of the issuer of the description by examining certifications issued by trusted third parties. Finally, to protect its own security interest in the collateral and its proceeds, the banks will need to acquire the equivalent of possession of the original bills of lading.

As apparent from the preceding description of likely examination and collateralization practices, these practices will not be possible without secure, reliable and quick access to the relevant information, whether in the form of an open ended message or a certification. Once third party rights are likely to be affected, as in the case of secured transactions or open market bona fide purchases, the information flowing from the carrier to the consignor-beneficiary of the letter of credit, and from the latter to the issuing or confirming bank can no longer remain private. To protect the bank as a secured party, as well as third party creditors and purchasers of the goods covered by the bill of lading, the information must become public, and acquire the legal status of public notice. Absence of such a public notice was, as will be recalled, one of the principal legal problems faced by the CKR.
The first legal prerequisite involved in satisfying the transactional needs of the electronic bill of lading, therefore, is reliable public notice. Throughout the history of documents of title, possession provided reliable public notice of legitimacy of acquisition. Two reasons prevent it from continuing to provide this function. Possession of an electronic bill would be symbolic at best and, thus, would not be apparent to third parties and notice on items such as capacity or authenticity of issuance is not connected with possession of the bill or its electronic equivalent. Given the need for reliability, transactional neutrality and ease of access, a public type of bill of lading registry seems the logical choice.

Although the relevance of recordable bill of lading data depends upon the type of transaction involved, the following data are sufficiently generic so as to become prime candidates for public registry recording: 1) storage of goods in carriers’ warehouses or independent warehouses awaiting carriage; 2) issuance of port to port and combined transport bills; 3) on board loading; 4) carriers’ (actual or contractual) names, and electronic signatures or authenticating devices; 5) certificates of carrier, freight forwarder, and other issuer solvency or sufficiency of insurance; 6) inspectors’ and other examiners’ names, electronic signatures or authenticating devices, and certifications of solvency or sufficiency of insurance; 7) negotiation, transfer, pledge, and presentation (including cancellation) of port to port and combined transport bills; and 8) storage of goods upon termination of carriage, and issuance of warehouse and trust receipts. A large item in the contemporary bill of lading-letter of credit practice missing from this list is the letter of indemnity issued by banks to prompt the release of goods that arrive prior to the arrival of the original bill of lading. The reason for not listing this item is that, as proven by the SeaDocs experiment, such letters of indemnity may become unnecessary if the electronic registry succeeds in securing delivery to the rightful holder of the PIN or private key.

At this time it is not possible to predict whether all or just part of the above listed data will be required by the public registry, or whether the public registry itself will be a part of a larger commercial registry that would include other trade and secured transactions. Given the possibility of pre and post-carriage storage of the goods, and the need to extend the bank’s security interest to the sale of the goods upon their arrival, it would make sense to integrate the bill of lading registry with a more encompassing commercial property registry. Yet, such an integration would entail a highly ambitious legal and political undertaking.
Neither can it be forecast whether registration will be an essential prerequisite for the creation of in rem rights in the cargo, as it is for the creation of in rem rights in real property in the German Grundbuch\textsuperscript{250} or whether it will have a purely notice giving function.\textsuperscript{251} A Grundbuch like approach may well require that the electronic document of title be issued only by the public registry as an agent for the carrier. Such an issuance will increase the certainty of the transaction, but will be unacceptable to carriers and intermediaries unable or unwilling to meet registry standards.

The advent of global financial marketplaces, hemispheric free trade zones, and vast common markets suggests that public regional or hemispheric electronic registries are indeed inevitable. Proper notice through registry recordings can be accomplished without having to set up a universal or central registry. The technology for exchanging information among individual registries or groups of registries through computerized networks is sufficiently established to allow easy national and international access to the registry or registries in question.\textsuperscript{252} The obstacles in the way of the public registry, are not technological, but legal and political. International recordings, whether Grundbuch like or merely notice giving, are only feasible if nations and their international traders agree on the uniformity of the form and content of the recording messages. Having agreed on the medium of the message, the next step requires agreement on the contents of the message. Bills of lading will need to be issued in accordance with a uniform layout, whether it is the United Nations or any other universally acceptable format. The terms and conditions inserted in this layout will also need to be uniform for each type of bill or related electronic message. Last but not least, the legal effectiveness of recordings with a potentially world wide impact will require uniformity of legal consequences in each of the jurisdictions involved. Thus, uniformity of form and substance constitutes the second minimum legal prerequisite of a public bill of lading registry.


\textsuperscript{251} Id.

\textsuperscript{252} At the present time, an interested third party, say, in Tucson, may use his computer terminal to determine instantaneously (through the Lexis-Nexis computer service) whether a debtor in Chicago, Illinois, has pledged his inventory, equipment, accounts receivable or other UCC recordable collateral to secured creditors in the Chicago area. During the Oxford University August 1990 Meeting of the International Academy of Commercial and Consumer Law, Professor Ronald Cuming, of the University of Saskatchewan, one of the world’s leading authorities on computerized personal property registries told this writer that networking among personal property registries was already a reality in Canada.
The present study shows that substantive uniformity, whether in the message that constitutes the text of the bill, or in the legal consequences attached to the recording, is only attainable when the various participants in the transactions arrive at a consensus with respect to the fairness of their rights and duties. This was the lesson of the success of the Harter Act and of the Hague Rules and the Visby Amendments, and of the failure of the Hamburg Rules. These lessons should be put to good use by the rightful participants in an appropriate forum. In this light, the task of attaining uniformity and harmonization is not as difficult as it appears. Some of the participants in the bill of lading transaction have either drafted universally minded law, such as the CMI Rules, or are in the process of drafting such rules, as is the case with the present revision of the UCP by the ICC. What is missing is an appropriate forum to merge the various efforts into a functional and widely acceptable whole.

Recently, the ICC Commission on Sea Transport and UNCTAD’s Working Party on Uniform Documents for Multimodal Transport Documents finalized the Draft Rules for Multimodal Transport Documents. See ICC Doc. No. 321–34/1 Rev. 2 bis. This draft attempts to resolve two controversial issues unresolved by the Hague and the Visby Protocol—liability for delay and for consequential loss—in a manner acceptable to shippers and multimodal carriers, who were among the “warring” Hamburg Rules constituencies. Rule 5.1 of this Draft gives the shipper the opportunity to make a declaration of interest in timely delivery acceptable to the Multimodal Transport Operator (MTO). In the absence of such a declaration, the MTO is not liable for delay. The purpose of this declaration is to enable the parties to agree on “just in time” transport and compensation schemes and to avoid speculative and unforeseeable claims against the MTO. Rule 6.1 limits the liability of the MTO to an amount not exceeding the equivalent of 666.67 SDR per package or unit or two SDR per kilo of gross weight of the goods, whichever is higher. Rule 6.2 allows the application of the package amount to packages or shipments units inside containers as long as these are enumerated in the MT shipping document. For a helpful explanation of the provisions of this highly technical set of rules, see Professor J. Ramberg’s comments in ICC Doc. No. 321–34, at 2–9.