THE BILL OF LADING IN SOUTH AFRICAN LAW

by

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PROMOTER: JUDGE FR MALAN

SEPTEMBER 2000
Aan my ouers
I hereby declare that the thesis submitted for the LL.D. degree to the Rand Afrikaans University, apart from the help recognised, is my own work and has not been formerly submitted to another university for a degree

SF du Toit
Preface

I wish to express my appreciation to Judge Malan, my former professor, for his support, advice and encouragement, as well as his friendship, during the completion of this thesis. He was willing to be involved in this project until long after exchanging his Chair for the Bench.

I also want to thank the National Research Foundation for a bursary that enabled me to do research at the Institute of Advanced Legal Studies in London, and at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg.

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Abstract

The bill of lading in South African law is the theme of this study. In the first part of the thesis, the bill of lading in its traditional paper form is examined. The aim of the first part of the study is to reconcile the bill of lading that is based on English law with the principles of South African law, especially regarding concepts such as possession and ownership. A plea is made for the application of South African law to bills of lading rather than English law exclusively. Even though English law undoubtedly forms the basis of the law governing bills of lading, such law should be applied in a way that is consistent with the general principles of South African law. The functions of the bill of lading are considered in detail, particularly the bill of lading as a document of title. A submission is made of five characteristics of a document of title. The conclusion is that the bill of lading, though based on English law concepts, can be integrated into South African law without difficulty. The subsequent examination of the transfer of contractual rights and the imposition of liabilities will show that there is a dire need for new legislation in South Africa to replace an English Act of 1855. The current proposals for such legislation are, however, in need of extensive revision. The fact that the traditional bill of lading only arrives at the port of destination after the goods, leads to a multitude of problems. The carrier may only deliver the goods in exchange for a bill of lading. Letters of indemnity are therefore used to protect the carrier that delivers the goods without receiving a bill of lading. Such indemnities will be enforceable in South African law if the carrier has no reason to suspect that the receiver of the goods is not entitled to delivery.

The consideration of the nature and functions of the traditional bill of lading, enables the study to progress to an examination of an electronic bill of lading. The use of an electronic bill of lading means that many problems facing the traditional bill of lading can be avoided. The continuing evolution of the bill of lading will be examined against the background of electronic commerce. Writing and signature requirements should not inhibit the development of an electronic bill of lading. The difficulty facing the dematerialisation of the bill of lading is providing for negotiability in an electronic environment, and ensuring that an electronic bill of lading is the equivalent of an original and unique paper bill of lading. It is possible to create an
electronic bill of lading that performs all the functions of a traditional bill of lading, and there are examples of the use of such electronic bills of lading in practice. Delivery of the goods can take place by way of attornment rather than the usual symbolical delivery following the transfer of a paper bill of lading. It is submitted that there is currently no need for legislative intervention to provide for electronic bills of lading in South Africa.
Die onderwerp van hierdie studie is die konnossement in die Suid-Afrikaanse reg. In die eerste deel van die proefskrif word die tradisionele konnossement op papier ondersoek. Die doel van die eerste deel van die studie is om die konnossement wat gebaseer is op Engelse reg te versoen met die beginsels van die Suid-Afrikaanse reg, veral met betrekking tot begrippe soos besit en eiendomsreg. Die toepassing van Suid-Afrikaanse reg op die konnossement word bepleit eerder as die eensydige toepassing van die Engelse reg. Alhoewel die Engelse reg sonder twyfel die basis vorm van die reg wat konnossemente beheers, moet sodanige reg toegepas word op 'n wyse wat versoenbaar is met die algemene beginsels van die Suid-Afrikaanse reg. Die funksies van die konnossement word deeglik ondersoek, veral die konnossement as 'n titelbewys. 'n Voorstel word aan die hand gedoen waarin vyf kenmerke van 'n titelbewys geïdentifiseer word. Die gevolgtrekking is dat alhoewel die konnossement gebaseer is op die Engelse reg, dit met gemak by die Suid-Afrikaanse reg kan inskakel. Die daaropvolgende ondersoek na die oordrag van kontraktuele regte en die oplegging van verpligtinge sal aandui dat daar 'n dringende behoefte is aan nuwe wetgewing in Suid-Afrika om 'n ou Engelse wet van 1855 te vervang. Die huidige voorstelle vir nuwe wetgewing moet egter nog grondig hersien word. Die feit dat die tradisionele konnossement dikwels eers by die bestemmingshawe aankom na die goedere, lei tot 'n magdom probleme. Die goedere mag slegs gelever word in ruil vir die konnossement. Praktyke soos die gebruik van vrywarings is daarom nodig om die vervoerder te beskerm wanneer die goedere gelever word sonder om 'n konnossement te ontvang. Sulke vrywarings is afdwingbaar in die Suid-Afrikaanse reg solank die vervoerder nie rede het om te glo dat die ontvanger nie geregtig is op die lewering van die goeder nie.

Die ondersoek na die aard en funksies van die tradisionele konnossement, maak die daaropvolgende ondersoek na 'n elektroniese konnossement moontlik. Die gebruik van 'n elektroniese konnossement sal lei tot die vermyding van baie probleme wat 'n tradisionele konnossement tans in die gesig staar. Hierdie verdere evolusie van die konnossement sal ondersoek word teen die agtergrond van elektroniese handel. Die ontwikkeling van 'n elektroniese konnossement behoort nie verhinder te word deur vereistes van skrif en
handtekening nie. Die grootste struikelblok wat oorkom moet word indien die dematerialisasië van die konnossement sou plaasvind, is om voorsiening te maak vir verhandelbaarheid of oordraagbaarheid in 'n elektroniese milieu. Verder moet verseker word dat 'n elektroniese konnossement gelykstaande is aan 'n oorspronklike en unieke konnossement op papier. Dit is moontlik om 'n elektroniese konnossement te skep wat al die funksies van 'n tradisionele konnossement kan vervul, en daar is voorbeelde van die gebruik van elektroniese konnossemente in die praktyk. Lewering van die goedere kan plaasvind deur middel van attornement eerder as die normale simboliese lewering wat gebruik word in die geval van 'n konnossement op papier. Daar word aan die hand gedoen dat daar tans geen behoefte bestaan aan wetgewing wat spesifiek voorsiening maak vir elektroniese konnossemente nie.
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Chapter 1
Introduction

1.1 Introductory Remarks

Referring to new legal concepts more than two hundred years ago, Lochau¹ wrote that "PAPINIANUS zelf, hoe groot een rechtskundige by ook geweeest zy, zoude moeten bekennen, dat hy weder in de waereld komende, van nieus de rechten behoorde te leeren." This study is about an instrument that on the one hand has a long and distinguished legal history, but is now in a process of adaptation and evolution to enable it to survive into the twenty-first century. This process of evolution has already culminated in what has been termed an electronic bill of lading, in order to distinguish it from its counterpart on paper. An electronic bill of lading might indeed look like a strange creature to someone familiar with a bill of lading written or printed on paper, and thereafter signed. But an electronic bill of lading will still fulfill the same functions as the traditional bill of lading, even though the process will be different.² It will therefore be seen that a paper bill of lading³ and an electronic bill of lading are remarkably different in some ways, but also remarkably similar in many more.

The continuing evolution of the bill of lading is, of course, merely part of the larger process whereby our paper world is becoming electronic in many ways. Roscoe Pound’s⁴ often quoted

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¹ Wisselhandel 499.
² Toh See Kiat Paperless International Trade 15 quoted Solomon in Ecclesiastes 1:9. The Afrikaans version reads: “Wat was, sal weer wees; wat gebeur het, sal weer gebeur. Daar is niks nuuts in hierdie wêreld nie.” The truth is probably to be found somewhere between Solomon and Lochau.
³ For an example of a modern bill of lading see Williams Chartering Documents 234-237 and its discussion at 109-126. For a discussion of other transport documents see Oelofse Letters of Credit 205 et seq.
⁴ Philosophy of Law 133. First published in 1922.
statement is, "Wealth, in a commercial age, is made up largely of promises." Arlidge and Parry expanded this statement in 1985: "'Wealth, in a commercial age is made up largely of promises', and promises are frequently to be found in documentary form." In the twenty-first century this is not true anymore. In the not too distant future these promises will be seldom found in documentary form. Paper will grow less important as electronic commerce becomes widespread — even though it is difficult to predict the future. Concepts such as writing and signature — familiar for thousands of years — are now being subjected to reinterpretation and sometimes discarded as of no use. It is against this background that the continued existence of the paper bill of lading and the development of an electronic bill of lading will be examined.

1.2 Aim and Scope of Study

This thesis can be divided into two main parts, or two main themes. The first (Chapters 2-8) deals with the traditional bill of lading. Of course various aspects of the bill of lading that are interesting or uncertain will be discussed in this first part. The main objective of this first part, though, can be said to reconcile the bill of lading that is based on English law with the concepts of South African law. For example, aspects such as how a bill of lading is negotiated is governed by English law, but the effect of the negotiation must to some extent be reconciled with South African law. It should, for example, be examined how the negotiation of a bill of lading will affect the transfer of ownership of the goods in South African law. Another question is whether one can regard the bill of lading as commercial paper (Wertpapier), even though the concept does not exist in English law, and has been imported into our law from a foreign legal system. Thus this first part of the study will look at the essential nature and functions of the bill lading, and will ensure that the nature and functions of the bill of lading can be reconciled with the general principles of South African law. It should be emphasised that this does not mean that it will ever be denied that the bill of lading in South African law is based on English law to begin with.

5 *Fraud* 166. Also quoted by Toh See Kiat *Paperless International Trade* 143 n 79.

6 Or, as Malan 1990 *Stell LR* 153-154 wrote: "It is true, as Roscoe Pound says, that '[w]ealth, in a commercial age, is made up largely of promises', but proof of our riches is needed."

Chapter 1: Introduction

Regarding this first part a comment is also necessary about the scope of the study. This part of the study is concerned exclusively with the bill of lading, and especially its nature and functions. This is not a treatise on maritime law in general. Aspects of maritime law will be examined in so far as those aspects are relevant to the bill of lading. Many maritime law topics, although they often appear in conjunction with a bill of lading, do not really have anything to do with the bill of lading as such — they can, for example, just as well be discussed in the context of charterparties. Such aspects will not form part of the first section of this thesis.

The first part of this thesis is important for another reason. It is important to ascertain the legal rules underlying the bill of lading, before one can move on to examine the different aspects of an electronic bill of lading. Before devising an electronic bill of lading, the essential nature of the traditional bill of lading and the theory underlying it, must first be determined:

"In order to find a satisfactory solution for those new situations, it is necessary to turn to the underlying theory of existing law. An examination of this kind provides a means of creating new tools, adapted to new frameworks. The absence of an adequate theoretical background may well stifle the success of attempted innovations at the very outset ...."  

The second part of the study (Chapters 9-12) is easier to define and deals with the possibility of an electronic bill of lading. The obvious question that will be posed whether an electronic bill of lading is indeed possible and, together with that, what the form of such an electronic bill of lading will be. It will be examined whether an electronic bill of lading is possible particularly in South African law, and whether any legislative intervention is necessary to create an environment in which such an electronic bill of lading will flourish.

1.3 Some Remarks about Terminology

Labelling a concept has the nasty habit of influencing the nature of the concept. Rogers told how locomotives were originally called "iron horses" in the nineteenth century and automobiles

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8 Barak (1983) 18 Israel LR 50. Barak was referring to the theory underlying negotiable instruments (which in South Africa was introduced and developed by Malan 1976 TSAR 1 et seq), but what he wrote is equally applicable to bills of lading today. According to Reed Electronic Finance Law 112, “The dangers are that dematerialised instruments may fail to achieve their intended functions. To ensure this, the nature of the instrument which they replace must be understood ....” Also see Smeele Passieve Legitimatie 8.

"horseless carriages":

"Today those metaphors sound quaint. It is amusing that the people of the nineteenth century could not think of these marvellous devices in any other way than by commenting on their ‘horseness’ or lack thereof. But were the terms really all that odd? ... In a very real sense, horseness was a key concept in land transport, so any new means of land transport could quite sensibly be regarded as some variant on the horse."

Today, as Rogers wrote, horses and carriages are curiosities, and cars the norm: "Not surprisingly, then, the ‘horseless carriage’ metaphor has become archaic. As practices change, so too must language and concepts."

But to return from “horseless carriages” to the concept of an “electronic bill of lading”. On the one hand one can argue that this is not a bill of lading at all, but a completely new concept. We only call it an electronic bill of lading due to the lack of any other words to describe its novelty — as a car was called a horseless carriage. On the other hand, one can argue that an electronic bill of lading is essentially a bill of lading with a somewhat different name and nature. Rogers wrote,\(^\text{10}\)

"We had a commercial system based on paper and a law written in terms of paper. The paper was being replaced by electronic media, so the law had to be revised to reflect that change. How do you do that? Simple; you just take the paper part out. If we had a law of paper security certificates, we add a law of paperless ‘uncertificated securities’. So today we hear a good deal of discussion on the need for a law of electronic negotiable promissory notes, or electronic bills of lading. Or, to use current jargon, we consider rewriting the law in ‘media neutral’ terms, so that it will not matter whether the thing in question is represented by carved stone, ink on paper, or electronic pulses. But there’s the rub. Are we really so sure the world is media neutral? To define, and hence limit, law revision projects by the effort to devise electronic equivalents of the familiar paper-based representations, such as security certificates, promissory notes, or bills of lading, is to assume that technological change will have no significant ontological consequences. We’ll still have the same old things, they’ll just look (or not look) a little different."\(^\text{11}\)

The important question to be decided here, is indeed whether the world is really “media neutral”. According to Fry,\(^\text{11}\) "... there is a qualitative difference between paper-based and electronically-based markets. Attempting to fit electronic commercial practices into paper-based systems resembles nothing so much as trying to force a round peg into a square hole." Whether an electronic bill of lading can still logically be called a bill of lading, is a conclusion that can only be reached at the end of this thesis after the nature of the paper bill of lading has been


examined, and alternatives to the traditional bill of lading have been scrutinized. In the meantime, where the term electronic bill of lading is used — and it will be used often — the reader should not draw any inferences as to how much of a bill of lading an electronic bill of lading really is. At this stage it is merely a convenient term to use.

Even if one decides that an electronic bill of lading is legally possible, it will be seen in the final chapters of this thesis that there are widely diverging ways of implementing such an electronic bill of lading in practice. Until the electronic bill of lading is discussed in those chapters, "electronic bill of lading" will be used generically to refer to any replacement of the bill of lading by electronic means.

1.4 Overview of Study

A brief summary of the chapters will be given in this paragraph. In Chapter 2, *The History and Evolution of the Bill of Lading*, the development of the bill of lading will be traced. A journey will be undertaken from Italy, then on to northern Europe, including France, the Netherlands and England. The development of the bill of lading was necessitated by the "sedentary merchant" who did not accompany his cargo anymore. The "book of lading" as a register of the cargo later evolved into a "bill of lading". It will further be emphasised that because maritime law formed part of the law merchant, the bill of lading today is a remarkably similar instrument even in different jurisdictions. Finally it will be indicated that even though an electronic bill of lading will not be able to rely on the leisurely development of the traditional bill of lading, such an electronic bill of lading should still succeed if it is needed by commerce.

Chapter 3 deals with *Jurisdiction and Applicable Law*. After a brief historical introduction to the Admiralty Court and an examination of the nature of admiralty law, it will firstly be determined which courts have jurisdiction (called admiralty jurisdiction) to hear bill of lading disputes. Then, more importantly, it will be determined what is the law to be applied to bills of

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12 Another point of view is given by Chandler (1998) 22 *Tul Mar LJ* 469 n 21, who wrote (my emphasis) that the "paper bill of lading in use today is not the bill of lading that originally used the term, no more than the term 'charter party' is anything like the original document. Both terms are representative of a well established process." If the electronic bill of lading is therefore merely regarded as the culmination of an evolutionary process, it can still be called a bill of lading.
lading. It will be seen that the law to be applied to maritime claims can be either English law or Roman-Dutch law. English law will generally be applied to bills of lading. Where English law must be applied, it will be submitted that the English law applied must be limited to the nature of the bill of lading, and English law should not for, example, be applied to the transfer of the ownership of the goods. Apart from that, it will further be submitted that the distinction between English and Roman-Dutch law should rather be avoided, and a plea for the application of South African law instead will be made. It will be submitted that even though English law undoubtedly forms the basis of the law governing bills of lading, such law should be applied in a way that is consistent with the general principles of South African law.

Chapter 4, *The Nature of the Bill of Lading*, deals with the bill of lading as commercial paper, and the reason why the bill of lading was never regarded as a negotiable instrument. The German concept of *Wertpapier* (commercial paper) will be examined with a view to determine the suitability of classifying the bill of lading as *Wertpapier*. It will be submitted that although the concept provides a clear illustration of the nature of the bill of lading, particularly the close connection between right and paper, the bill of lading managed to survive in England without reference to anything similar to the *Wertpapiere*. The chapter then continues to examine the concept of a negotiable instrument, and it will be indicated that the bill of lading is of course not a negotiable instrument in the traditional sense. There is also no need to elevate the bill of lading to the status of a negotiable instrument.

Chapter 5 examines *The Functions of the Bill of Lading*. A bill of lading is evidence of the contract of carriage, a receipt for the goods shipped and a document of title. Regarding evidencing the contract of carriage, the difference will be shown between those instances where the bill of lading is in the hands of the shipper, an indorsee or a charterer. Following this, the bill of lading as a receipt will be discussed. A bill of lading will usually state the quantity and condition of the goods, and here section 6 of the Sea Transport Documents Bill will be examined as well. The bulk of the chapter will examine the bill of lading as a document of title. Under this heading a varied array of subjects will be addressed, and only some will be briefly mentioned here. The case of *Lickbarrow v Mason* that can be said to give birth to the bill of lading as a document of title, will be examined extensively at the beginning. Then follows a discussion with reference to both English and South African law about the fact that the holder of the bill of lading can be said to be in possession of the goods, and that the transfer of the bill
of lading will amount to symbolical delivery of the goods. The problems surrounding the use of more than one original bills of lading, the manner in which a bill of lading is negotiated, the use of replacement bills of lading, "switch bills of lading", material alteration of the bill of lading and bulk cargoes will be examined. Finally a submission will be made of five characteristics of a document of title. These are that a document of title is transferable, that the holder of the document is usually in possession of the goods, that the transfer of the document will usually transfer possession of the goods, that the transfer of the document can transfer ownership in the goods and that the holder of the document normally has a right to delivery of the goods against the carrier. From the whole of the chapter it will be seen that the bill of lading, though based on English law concepts, can be integrated into South African law without difficulty.

When a bill of lading is negotiated, there should also be a transfer of the contractual rights (and obligations under certain circumstances) to the transferee, and this is the topic of Chapter 6, *Contractual Rights and Obligations*. The Bills of Lading Act 1855 that currently applies in South Africa will be examined, but it will be shown that the Act is inadequate in many respects. Ways to avoid those inadequacies will be discussed, but these measures are only partially successful. Thereafter follows a comprehensive analysis of the English Carriage of Goods by Sea Act 1992 that replaced the Bills of Lading Act in the UK. After that a critical appraisal of the Sea Transport Documents Bill will be presented. It will be submitted there is a dire need for legislation dealing with contractual rights and obligations in South Africa, but that the Bill not only fails in nearly every section, but that it also is left without many essential provisions. It will be submitted that any future legislation in South Africa should follow the Carriage of Goods by Sea Act 1992 very closely.

Chapter 7, *Delivery of the Goods by the Carrier*, examines questions in some way related to the delivery of the goods and the bill of lading. It will, first, be submitted that a bill of lading embodies a right to delivery of the goods. Thereafter it will be shown that the carrier may only deliver the goods in exchange for a bill of lading, but that in the case of more than one original bill of lading, the carrier is generally protected when delivering in exchange for the first bill of lading presented. It will be submitted that in the absence of contractual requirements indicating the contrary, the carrier should verify the identity of the presenter of the bill of lading, but that it is not necessary for the carrier to verify the validity of the indorsements. Thereafter follows
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a discussion on lost bills of lading, the practice of carrying an original bill of lading on board (it will be submitted that the practice is generally valid), the use of exemption clauses to limit the liability of the carrier (such clauses should be interpreted so as not to defeat the main object of the carriage contract, which is the delivery of the goods against presentation of the bill of lading) and the widespread use of letters of indemnity. Regarding letters of indemnity, it will be submitted that such an indemnity will be enforceable in South African law if the carrier has no reason to suspect that the receiver of the goods is not entitled to delivery. The bill of lading also ceases to be a document of title after the delivery of the goods. Finally a strange provision in the Sea Transport Documents Bill dealing with delivery will be criticized.

In Chapter 8, Problems Facing the Traditional Bill of Lading, the disadvantages of using a paper bill of lading will be discussed. The primary reason why an alternative to the paper bill of lading should be sought, is the fact that the goods arrive at the port of destination before the bill of lading, leading to some of the problems discussed in Chapter 7. It will be submitted that an electronic bill of lading will be a solution to the problem, and will, in addition, curb many fraudulent practices when using paper bills of lading. A second question that will be discussed in the chapter, is whether a bill of lading in whatever form — paper or electronic — should be used at all. It will be submitted that a transferable document such as the bill of lading can be replaced by a sea waybill in many instances, but that there nevertheless remains a commercial need to use a bill of lading.

Chapter 9, Electronic Data Interchange, as the name indicates, introduces electronic data interchange (EDI). The chapter starts out by looking at the concept of paper in our law. The disadvantages, functions and characteristics of paper will be examined, as well as different approaches to replacing paper. Thereafter writing as a requirement for certain documents in South African law and the reasons for statutory writing and signature requirements will be considered. It will be seen that there is no definite link between writing and paper — words can be written on other materials as well. That said, the material should at the very least enable the bill of lading to perform its functions — a bill of lading must, for example, be delivered to the carrier in exchange for the goods. It will be submitted that the objectives of writing can still be achieved by electronic media. The UNCITRAL Model Law on Electronic Commerce 1996 will be examined as a model for law reform. Concluding the section on writing, it will be submitted that statutory requirements for writing currently do not inhibit commerce. The aim of any
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legislation in South Africa should be to ensure that any electronic document (even where there is no statutory requirement for writing) enjoys the same status as a paper document. Regarding a bill of lading, it will be indicated that legislation dealing with writing might encourage the use of electronic bills of lading, but that merely stating that a bill of lading does not need to be written on paper, is not enough to create an electronic bill of lading. Leaving writing, the chapter then continues to discuss the concept of an original and uniqueness in an electronic environment. Following that is a discussion of the concept of a signature. A signature has generally been interpreted widely in South African law. The functions of a traditional signature will be examined, and it will be stressed that one should not expect more of an electronic signature than was previously demanded from a traditional signature. It will be submitted that intention can and should play an important role in determining whether a signature is present. Electronic signatures as well as digital signatures will subsequently be discussed, and it will be submitted that many electronic signatures and all digital signatures can perform all the functions of a traditional signature. Ways in which legal reform to provide for electronic and digital signatures can be effected will then be presented, including an examination of some American solutions and the UNCITRAL Model Law on Electronic Commerce 1996. It will finally be submitted that a South African court should be able to recognize an electronic bill of lading as being signed by way of a digital signature. The chapter ends with a brief discussion on the formation of contracts in an electronic environment and a brief reference to interchange agreements.

Chapter 10, Dematerialisation and Negotiability, deals with the concept of negotiability or transferability in an electronic environment, which is probably the most difficult problem facing the creation of an electronic bill of lading. There is firstly a discussion of dematerialisation in general, intended as a prelude to examining possible electronic bills of lading in later chapters. The chapter then goes on to examine the possibility (and desirability) of an electronic negotiable instrument, with models proposed by Henriksen, Reed and others. Brief mention will also be made of the dematerialisation of share certificates, even though dematerialisation is much easier in a small closed environment. There is no real need for a dematerialised negotiable instrument, but these models indicate possibilities of how transferability can be achieved in an electronic environment. As in Chapter 8, it will be submitted that negotiability or transferability of a bill of lading can still play a useful role even in an electronic environment.
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The possibility of *Replacing the Bill of Lading* is examined in Chapter 11. The chapter centres mainly around two projects. The first is Grönfors' Cargo Key Receipt (CKR), which is an electronic version of the waybill, and therefore does not provide for negotiability or transferability. It nevertheless indicates that sea transport documents can be replaced by electronic means. The second is SeaDocs, which is a registry for paper bills of lading — the bill of lading continues its existence, but is immobilised in a registry where it can still be negotiated. Even though SeaDocs did not create an electronic bill of lading, the reasons why SeaDocs failed provide valuable lessons that should be taken into consideration in any future project that does indeed create a fully electronic bill of lading.

In Chapter 12, *Negotiable Electronic Bills of Lading*, electronic bills of lading that perform all the functions of the traditional bill of lading will be examined. The first system that will be assessed, is Reinskou's pioneering notification-confirmation system. Then follows a comprehensive evaluation of all the articles in the CMI Rules for Electronic Bills of Lading. In this discussion problems surrounding the transfer of the rights of suit and the imposition of obligations will be highlighted, as well as the question whether the holder of an electronic bill of lading can be said to be in possession of the goods. Regarding contractual rights and obligations, it will be submitted that the Bills of Lading Act 1855 will not apply when using the Rules, but that a new contract is concluded between the carrier and each transferee. Regarding possession, it will be submitted that attornment as a form of delivery can be used instead of the normal symbolical delivery. During the discussion it will further be submitted that there is no express requirement in South African law that a bill of lading must be in writing and signed. This leaves room for South African courts to interpret the concept of a bill of lading widely, and it will be submitted that a court should not declare an electronic bill of lading to be of no effect merely because it is not written on paper and does not contain a traditional signature, as long it performs all the functions of a traditional bill of lading and can also be regarded as unique. Following that, the different possibilities of ensuring by regulation that the Carriage of Goods by Sea Act 1992 applies also to electronic bills of lading, will be discussed. Relevant articles of the UNCITRAL Model Law on Electronic Commerce 1996 will be considered, and it will be submitted that regarding bills of lading Articles 16 and 17 of the Model Law should not currently form part of South African law. Bolero ("bolero.net") will then be discussed as a registry for electronic bills of lading that is currently being used successfully in practice. It will finally be submitted that there is currently no need for any legislative intervention to provide for
electronic bills of lading. It will also be submitted that an electronic bill of lading can still be regarded as a bill of lading.
Chapter 2
The History and Evolution of the Bill of Lading

2.1 Introduction

While it may seem a bit unwarranted to devote a full chapter to the history of the bill of lading during an age where the emphasis must surely fall on its dematerialisation and the possible replacement of it by electronic means, there are nevertheless some lessons to be learnt from a study of the bill of lading's origins. The functions of the bill of lading were gradually created by the practical needs and technical developments of a certain time, and to study these functions, it is necessary to understand how the bill of lading evolved into the instrument we know today. A brief historical analysis will therefore not only illustrate why the bill of lading performs certain functions and displays certain characteristics, but also what should happen to these functions and characteristics in a modern environment. Such an analysis will help to point in the direction of the course to be taken by the bill of lading necessary to reach its destination in a changing paperless world.

Maritime law always formed part of the law merchant. Malynes, in his address to the
"Courteous Reader", wrote:

"And even as the roundness of the Globe of the World is composed of the Earth and Waters; so the Body of Lex Mercatoria made and framed of the Merchants Customs, and the Sea-Laws, which are involved together as the Seas and Earth."

Sanborn, less elegantly than Malynes, further clarified the relationship between maritime law and the law merchant: "Such a division, [between commercial law and maritime law] it must be said at once, is a purely artificial one, and one that at no time has had any basis in fact."

Because of the common origins of the bill of lading in the law merchant, a bill of lading is a very similar instrument albeit in different jurisdictions. In 1865 Polak wrote,

"Bij alle handeldrijvende volkeren der bechaafde wereld wordt, ten behoeve van het vervoer van goederen over zee, een dokument gebezigd, dat, ofschoon bij sommige natieën een verschillenden naam dragende, bij allen evenwel in het algemeen eene zoó groote eenheid vertoont in vorm en rechtsgevolgen, dat het een deel uitmaakt van het algemeen Europeesch zeerecht. Ik bedoel het Cognoscement."

2.2 Earliest Origins

Primitive societies did not make any use of documentation when transporting goods, because the merchant was often also the master of the ship, or at least accompanied his cargo at sea until it had been sold. These merchants were "peregrinators, moving constantly about in unending pursuit of profit." With an increase in commercial activity, and merchants remaining ashore, practicality and the prevention of disputes dictated the use of documentation to serve as proof of the shipment, for the benefit of both the consignor and the consignee, as the cargo will for

(...continued)

than once in this chapter!

4 Origins 125; Gilmore and Black Admiralty 5.

5 Cognoscement 10; Goudsmit Zeerecht 2.

6 Grönfors Electronic Documents 7; Polak Cognoscement 17; Knauth Bills of Lading 115; Sanders Cognoscement 76; De Roover Organization of Trade 48. De Roover wrote, "In order to succeed, a travelling merchant had to possess a great deal of physical endurance and be ready to face many hardships. Although conditions were primitive, he needed more than brawn: moral stamina and some intellectual baggage were indispensable prerequisites to success."

7 De Roover Organization of Trade 42.
some time be outside the sphere of control of both. According to De Roover, the practice of the merchant accompanying the goods (on sea or on land) began to change in 1250. In this respect one can refer to this "new type of merchant" as "the sedentary merchant". As De Roover wrote, "The one-time traveller gradually turned into a business administrator, who spent most of his time behind a desk reading reports and giving instructions." 

Although the *Corpus Iuris Civilis* contains provisions on maritime law, there is no trace of anything similar to the bill of lading. Nevertheless, an early document resembling the modern bill of lading in some ways can be found in Roman times as far back as AD 15:

"From Arctus Bibulus, pilot of a public vessel of 2000 artabas burden, whose figure head is an ibis, acting through Sextus Atinius of the 22nd legion, second maniple, to Acusilaus, public collector of corn for the two villages of Lysimachus, deputy of Lucius Marius, freedman of Augustus, greeting:

I acknowledge that you have embarked into my vessel at the harbour of Ptolemais in the Arsinoite name at Erboreis to the address of Dionysus and Philologis ... first Syrian wheat, pure, genuine, unadulterated and winnerved, measured in a public brazen measure of Alexandria, of first Syrian corn on thousand seven hundred and eighteen and a half artabas ... which I will convey to Alexandria and deliver to Dionysus and Philologus or to whomsoever they shall order it to be given, and I have no claim against you (signed) J.H. ... in the 2nd year of Tiberius Caesar [sic] Augustus".

The document described the condition and weight of the wheat taken on board, and therefore it acted as a receipt. It served as evidence of an elementary contract of carriage, but without  

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8 Polak *Cognoscement* 17-18; McLaughlin 35 *Yale LJ* 550. According to Grönfors *Electronic Documents* 7 the documentation must serve as an instrument to create "a grip on the cargo", a phrase he subsequently used often.

9 *Organization of Trade* 69.

10 De Roover *Organization of Trade* 74, 43.

11 De Roover *Organization of Trade* 43, 74.

12 See Sanborn *Origins* 10-18; Gold *Maritime Transport* 10 et seq.

13 Polak *Cognoscement* 17, also n 2.

14 This document is quoted as it appeared in Grönfors *Electronic Documents* 10. The author made the following comment: "The internationally wellknown merchant banker Bernard Wheble has in 1982 drawn my attention to this document and some comments on it made by Mr Brian Parkinson in a mimeographed paper with the title 'Maritime Documentation — the future', presented at an international meeting." Neither the name of the international meeting nor the original source of the document was given. McLaughlin 35 *Yale LJ* 550 remarked that "there are clear evidences of the use of a document similar to the bill of lading in Roman times", but provided no further particulars of such a document and began his historical discussion in the eleventh century.

15 Grönfors *Electronic Documents* 11. Generally see Chapter 5 on the functions of the bill of lading.
any of the detailed clauses found today. There was only an undertaking to carry the wheat to Alexandria and to deliver it to Dionysus and Phililogus. The text contains no evidence that this was a document of title.

Grönfors wrote, “I am quite convinced that a creative historian with imagination could discover even older documents of the same kind from some thousand years before Christ, either in Ancient Egypt or in the trade on the Yangzi River in China. But I doubt that such findings would be of any real interest today.” The reason, according to him, is that such documents, if they existed, and the quoted specimen, all lack the document of title function that underlies the bill of lading’s uniqueness. Grönfors dismissed documents performing only the first two functions as “meaning nothing more than a transport document used for ocean transportation.”

Grönfors is of course correct when saying that documents that fulfil only the receipt and evidence functions cannot be regarded as bills of lading in the modern sense. But although the document of title function was only formally expressed about two hundred years ago, documents fulfilling the first two functions undoubtedly were the precursors of the modern bill of lading. Therefore, without trying to bestow upon the bill of lading a “glorious history” which it never had, it is possible to pick up the trail of documentation fulfilling some functions of the modern bill of lading in the eleventh century in an Italian city called Trani. When

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16 Grönfors Electronic Documents 8-9, 11.
17 Grönfors Electronic Documents 11.
18 Electronic Documentation 10. Indeed, in Purchase Documents of Title 208 one finds the following in an appendix: “In an address to the Humber District Association of Chartered Shipbrokers, December 9, 1924, on the Carriage of Goods by Sea Act, 1924, Colonel Jackson, D.L., refers to a form of bill of lading before the Christian era which was discovered in Egypt. The lecturer stated that it was not materially different from any bill of lading in use up to about 1850. It was for a cargo of wheat to be carried from the Fayoum by the Nile to a town in Lower Egypt. There was a full provision for lay-days, measuring out the cargo, payment of freight and advances, and even for a gratuity to the master consisting of certain measures of wine.” Purchase provided no further details of this document. Bennett Bill of Lading 8 also remarked, “it is quite possible that documents corresponding to the ‘Registers’ of the Customs of the Sea ... may have been also known to the Ancient World but of this there is no evidence.”
19 Electronic Documents 9, 10-11.
20 Electronic Documents 9.
21 See §2.11 infra.
22 A phrase used by Grönfors Electronic Documents 10 (somewhat cynically) to describe efforts by scholars to highlight the use of “bills of lading” in Marseilles in the thirteenth century.
referring to a bill of lading in the sections below, it does not necessarily imply a bill of lading in its modern form.

2.3 Birthplace in Italy

Polak conducted a thorough search for the origins of the bill of lading. He started by examining Norwegian and Icelandic statutes on maritime law of the tenth century. Writing was rarely used then, and nothing looking remotely like a bill of lading is to be found. Some statutes required formal acts when concluding a contract, rather than writing. So a Swedish statute of 1254 required that contracts of carriage must be concluded in the presence of two councillors to be valid. Statutes of Schleswig in 1150, Flensburg in 1284 and Hadersleben in 1292 all required having a drink together when leasing ships — as a symbol of friendship and good faith. The shipper could still release the goods by paying half the freight before the ship sailed and the full freight when the ship was three miles into the ocean. The shipper had this right because the master was not bound to deliver in exchange for a bill of lading, and therefore the shipper (who was probably on board as well) remained the owner of the goods.

Neither is any sign of a written bill of lading to be found in the maritime law of Wisby (a compilation of laws from Lubeck, Flanders and Amsterdam), nor in the maritime laws of the Hanseatic cities. A Hanseatic law of 1369 (renewed in 1417) declared that the master had to bring back with him a sealed letter confirming that he had delivered the goods properly. This is the opposite of the bill of lading that functions as a receipt for the original shipment of the goods.

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23 Cognoscement 18-22. Polak, Bennett and McLaughlin relied heavily on the following source: Pardessus Collection des Lois Maritimes. About it, Polak wrote, "Ter instelling van dit onderzoek bezit de rechtswetenschap, sedert een twintigtal jaren [Polak’s thesis dates from 1865], een uitstekend hulpmiddel in de ‘Collection des lois maritimes antérieures au XVIIIème siècle’ van PARDESSUS, waarin deze geleerde, daartoe in staat gesteld door de ondersteuning der Fransche regering, na een bijna twintigjarigen arbeid (1829-1845), de overblijfselen van oude zeerechten uit alle landen van Europa heeft bijeengebracht en grootendeels voor t eerst openbaar heeft gemaakt; een werk, dat voorzeker niet de geringste aanspraak uitmaakt, die de schrijver op de dankbaarheid van het nageschlacht heeft. Uit deze rijke bron nu zijn de volgende bijzonderheden geput.”

24 Polak Cognoscement 19.

25 The sea laws of Wisby can be found in Miege Ancient Sea-Laws 14-21. On Wisby see Miege 14; Gilmore and Black Admiralty 6-7 n 20. Also see Goudsmit Zeerecht 142 et seq.

26 The sea laws of the Hanseatic cities can be found in Miege Ancient Sea-Laws 23-28. On the Hanseatic cities see Miege 22-23; Gold Maritime Transport 28-30. Also see Murray 37 University of Miami LR 690 n 1.
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goods. Similar laws of Lubeck in 1420 and the Hanseatic cities in 1418 specifically mentioned the delivery of the cargo by the shipper to the master, but no mention was made of any sort of bill of lading, proving that it did not exist there yet.\(^{27}\) The bill of lading is also not mentioned in the Rolls of Oleron,\(^{28}\) probably dating from the twelfth century.\(^{29}\)

One can assume that the bill of lading did not appear suddenly, but rather developed gradually as did other instruments and usages in commercial law.\(^{30}\) One of the earliest occasions that the bill of lading is mentioned by its modern name in northern Europe, is in a law of the Hanseatic cities in 1591,\(^{31}\) as a document already well known. As no evidence of its development in the north can be found, the only possible explanation is that the bill of lading has been adopted from another nation in southern Europe, probably in the beginning of the sixteenth century.\(^{32}\) The outlandish name from the Italian verb “conoscere” also confirms this presumption.\(^{33}\)

Some authors have already designated Italy as the fatherland of the bill of lading. Because of the flourishing economies of the Italian city states and the contemporaneous rise of sea commerce there in the eleventh century, it would be the logical place and Polak set out to prove it.\(^{34}\)

Historically there are sound reasons why we find the first evidence of the modern bill of lading in Italy. Sanborn proved a close connection between Italy and the Roman Empire in Constantinople, and the application of the later Empire’s law in Italy.\(^{35}\) The development of

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\(^{27}\) Polak *Cognoscement* 20-21. Also see Goldschmidt *Handbuch des Handelsrechts* Teil C 655 n 4.

\(^{28}\) The Rolls (or Laws) of Oleron can be found in Miege *Ancient Sea-Laws* 4-13. On Oleron see Miege 3; Malynes *Collection of Sea-Laws* 44; Gold *Maritime Transport* 19. Also see Gilmore and Black *Admiralty* 7; Murray 37 *University of Miami LR* 690 n 1; Sanborn *Origins* 63 et seq; Goudsmit *Zeerecht* 55 et seq.

\(^{29}\) Hare *Shipping Law* 7. Also see Sanborn *Origins* 63-64:

\(^{30}\) Polak *Cognoscement* 18; McLaughlin 35 *Yale LJ* 549.

\(^{31}\) See Goldschmidt *Handbuch des Handelsrechts* Teil C 653 n 1.

\(^{32}\) Polak *Cognoscement* 22; Goldschmidt *Handbuch des Handelsrechts* Teil C 658.

\(^{33}\) This argument may of course be attacked on the basis of the fact that the bill of lading in Italy is called “polizza di carico”. Polak did, however, also find the word “conoscimento” used in Italian — see p 23, also n 3.

\(^{34}\) Polak *Cognoscement* 22-23; Gilmore and Black *Admiralty* 4. One reason why an increase in trade is found there, is because it was the place where the (Roman) law would still be known best — see Sanborn *Origins* 26.

\(^{35}\) *Origins* 26, 35, 37.
maritime law travelled "down the ages from Rome to Constantinople, back to Italy, on France and Spain, and then north to England, to the Low Countries and to Wisby in the Baltic."\textsuperscript{36} "For almost five centuries ... [after the sixth century] the influence of Constantinople waxed and waned in Italy, but it was strong enough and lasted long enough to tide the young and weak Italian ports over the darkest days of the disorganization and anarchy of the western world."\textsuperscript{37} We need not wonder, therefore, nor consider it to be the flowering of some incomprehensible seed, when we see codes of maritime law and commercial courts springing up in Italy in the XI and XII Centuries almost immediately, as the historical time goes, after the officials of the Empire had left the peninsula forever."\textsuperscript{38}

Shipping and the laws that govern it, acquired its modern form in the Mediterranean during that age.\textsuperscript{39}

2.4 The \textit{Book} of Lading

Moving from a world based on an oral tradition as a way of exchanging information, writing increasingly started to play an important role, generally lending authority to a transaction:

"The necessity of having some written evidence as to the goods shipped and the conditions of shipment is obvious. Contracts by which the monarch sold privileges to the towns were embodied in written Charters, the privileges of the gilds were often drawn up in the same form and a deed often formed part of the same solemn process by which land was transferred. The value of written evidence was clearly appreciated in these matters. It would be of equal, if not of greater importance in the case of merchandise shipped where the multiplicity of merchants and of goods would render oral evidence less reliable and confusion more probable than in the case of isolated transactions."\textsuperscript{40}

The need for (written) evidence as to what exactly the cargo consisted of, led to statutes such as the \textit{Ordinamenta et Consuetudo Maris} of Trani, dating from 1063\textsuperscript{41}, and containing some

\textsuperscript{36} Sanborn \textit{Origins} 27. Further see 25-41.
\textsuperscript{37} Sanborn \textit{Origins} 29.
\textsuperscript{38} Sanborn \textit{Origins} 26. Bennett \textit{Bill of Lading} 8 agreed: "It is quite possible that the Rhodian Law as embodied in that of Imperial Rome may have left its impress on the customs of merchants on the Mediterranean in littoral in the early Middle Ages ...".
\textsuperscript{39} Gilmore and Black \textit{Admiralty} 4-5.
\textsuperscript{40} Bennett \textit{Bill of Lading} 7. Also see Usher \textit{Deposit Banking} 28 et seq.
\textsuperscript{41} The date is probably correct according to Bennett \textit{Bill of Lading} 7, relying on Pardessus. On the city of Trani generally see Sanborn \textit{Origins} 45-49, and 46 n 25 on conflicting views as to the authenticity of the date; Gold \textit{Maritime Transport} 18.
interesting provisions.\textsuperscript{42} The master had to be accompanied by a clerk (called a “scheepsschrijver” by Polak\textsuperscript{43}) under an oath of fidelity. Large ships often needed two clerks. He was an essential member of the crew, in rank second only to the master of the ship. His most important duty was to accurately record the cargo received from the shipper in a “parchment book or register” (called a “scheepsboek” by Polak\textsuperscript{44}), while the master, shipper and another witness were present. According to the statute the register served as evidence of receipt of the goods, and it “also expressly provided that this clerk was not the agent of the shipper or the captain. He was a public officer to safeguard the interests of both.”\textsuperscript{45} Similar statutes were enacted in Aragon, Majorca, Valencia and Barcelona in 1258. A statute of Marseilles in 1253 specifically required that the full names of the shipper and the marks of the goods be recorded.\textsuperscript{46}

Bennett\textsuperscript{47} quoted from a code probably originating in Barcelona in the middle of the thirteenth century,\textsuperscript{48} with a manuscript that was preserved from the fourteenth century, called \textit{Customs of the Sea}.\textsuperscript{49} It contained much the same provisions about the “Ship's Book” as those mentioned in the previous and subsequent paragraphs. Apart from the receipt of goods the register often contained the contract of carriage, payments made by the ship and other related concerns: “It is not surprising if in the 14th century the contents of the modern bill of lading were entered in the single book kept, at a time when parchment was scarce, for all the entries required to be made in connection with the affairs of the ship.”\textsuperscript{50} Sometimes goods were carried without any entry in the register. Bennett argued that passages from the manuscript show a “transitional period” when oral evidence of the goods shipped was gradually replaced by evidence from the

\begin{footnotes}
\item On the provisions mentioned in the paragraph below, and some other statutes, see McLaughlin 35 \textit{Yale LJ} 550-551; Polak \textit{Cognoscement} 24-25, also 25 n 1; Bennett \textit{Bill of Lading} 7, 4-5; De Roover \textit{Organization of Trade} 59; Goldschmidt \textit{Handbuch des Handelsrechts} Teil C 655-657.
\item See \textit{Cognoscement} 24 for a variety of terms used to describe this person.
\item See \textit{Cognoscement} 24-25 for a variety of terms used to describe this register.
\item McLaughlin 35 \textit{Yale LJ} 550.
\item Bennett \textit{Bill of Lading} 4 referred to a register mentioned in \textit{Le Fuero Real}, a document of 1255, in which the goods, their nature and quantity had to be recorded.
\item \textit{Bill of Lading} 4-6. Also see Sanborn \textit{Origins} 82 et seq.
\item Sanborn \textit{Origins} 83; Hare \textit{Shipping Law} 7.
\item Or \textit{Consols de la Mar}; see Hare \textit{Shipping Law} 7; Gilmore and Black \textit{Admiralty} 5-6, 6 n15.
\item Bennett \textit{Bill of Lading} 5.
\end{footnotes}
register. Bennett further wrote that the register "would also be of the nature of a Document of Title — at the end of the voyage it would manifest the merchant's right to the goods entered in his name."  The document of title function was the last to develop, and documents that were not even bills of lading yet, certainly did not fulfill this function in the fourteenth century.  

The immense responsibility resting on the clerk is illustrated by a statute of 1350 declaring that the register must stay in possession of the clerk, and if it had been in possession of someone else, nothing in it could be believed. He also had to take an oath that he would not sleep without having the keys of the cabinet containing the register with him, and that he would never leave the cabinet open. Nobody, not even the master, was allowed to load goods in his absence, and he had to know whenever any goods were removed. A dishonest clerk was punished severely and rather cruelly according to modern standards. If he did make false inscriptions in the register, he suffered the terrible fate of losing his right hand, being marked on his forehead by a branding iron and all his belongings were confiscated.

When the register was in order, the evidence of the clerk therein was regarded as the only and complete evidence of the parties' rights, and was equal to a "public deed". In contradiction to other written documents, the register could not be revoked. Finally the evidence of the clerk was regarded as the equivalent of that of three other witnesses. The merchant could claim everything recorded in the register, and the master had to reimburse him if something could not be found. The master's responsibility did not stretch to damaged goods not recorded in the register.

Malynes also referred to a clerk of the ship:

"In ships of great bulk and burden, a Clerk is most needful: Who being put in by Men of chief Power, and sworn solemnly before some Judge, as the use is in Italy, (or at least before Owners and Mariners) that he shall write nothing but the truth, not leave ought unwritten; being, I say, so constitute, neither Merchant nor Mariner may put in or take out any thing of the Ship without his knowledge."

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51 Bill of Lading 5.
52 Bennett might not have meant "document of title" in a too technical sense.
53 McLaughlin 35 Yale LJ 551; Polak Cognoscement 25-26; Sanders Cognossement 76.
54 Provisions taken from different statutes. Polak Cognoscement 26, 35-36; Bennett Bill of Lading 5-6.
55 Bennett Bill of Lading 5.
56 Collection of Sea-Laws 58, 52.
In *Diamond Alkali Export Corporation v Fl Bourgeois* McCardie J stated that, "It is clear, I may add, that the bill of lading sprang from the ship's book of lading, which was a document of recognized importance showing the goods actually put on board."

### 2.5 The *Bill of Lading*

The *bill* of lading, originally only a copy of the *book* of lading, probably came into existence to guard against the loss of the only record of the cargo when a ship was lost. In such a case the shipper would often be at the mercy of the master as to what the cargo consisted of. When the shipper did not accompany his cargo anymore, there would also be a need for separate documentation that he could keep with him, and later another copy would also serve as proof that the person demanding delivery was in fact the consignee. To avoid disputes all the interested parties had to have a copy of the register.

The statutes of Marseilles of 1253-1255 are the oldest source that expect the clerk to give the merchant a copy of the register if he requested it. In 1397 a statute of Ancona in Italy compelled the clerk to give a copy of the register to parties allowed to demand it, even if the master prohibited him from complying with the request. It had to be done within three days of the request, and noncompliance could lead to a fine or damages in a civil action. Apart from the shipper's copy, a copy had to be left in the hands of a safe person at the port of departure.

In these abstracts from the ship's register, the origins of the modern bill of lading are to be found. When a copy was given to the shipper, the master was, as had been the case with the
register, liable to deliver all the goods as described in the document.\textsuperscript{63} This copy of the register was named “apodixia” in a law of Genoa in 1441. This was probably the first time that this document was given an independent name, which is also the Latin word later used for the bill of lading. The word “cognoscement” as such probably appeared first in 1538 in a law of Burgos in Spain as “conosçimiento”.\textsuperscript{64} Today, in French a bill of lading is called a \textit{connaissement}, in German a \textit{Konnossement}, in Dutch a \textit{cognossement}, in Spanish a \textit{conocimiento de embarque}, in Afrikaans a \textit{konnossement} and the Scandinavians refer to an \textit{utenriks konnossement}.\textsuperscript{65} These terms are derived from the Latin \textit{cognoscere}.\textsuperscript{66}

### 2.6 Some Further Developments in Italy

The modern bill of lading thus originated in southern Europe, in the old Mediterranean codes. The oldest Italian codes do not tell us anything about making multiple copies, the transfer of the bill of lading by the shipper to someone else, and the transfer of possession and ownership. The way was nevertheless paved for such developments to take place, and the copy of the register describing the goods was the suitable instrument.\textsuperscript{67}

The following document dates from 1390:

"1390 the 25th day of June. Know all men that Anthony Ghileta shipped certain wax and certain hides in the name and on behalf of Symon Marabottus which things must be delivered at Pisa to Mr. Percival de Guisulfis, and by order of the said Mr. Percival we shall deliver all his things to Marcellino de Nigro his agent, and I Bartholomeus de Octono shall deliver all his goods at Portovenere and for better caution I affix my mark so. A copy.

Bartholomeus de Octono Mate of the ship of Andrea Garoll."\textsuperscript{68}

It contains “something in the nature of an indorsement”, as the goods originally had to be

\textsuperscript{63} Polak \textit{Cognoscement} 31-32, 35.
\textsuperscript{64} Polak \textit{Cognoscement} 30-31; Goldschmidt \textit{Handbuch des Handelsrechts} Teil C 653 n 1.
\textsuperscript{65} Grönfors \textit{Electronic Documents} 8; Knauth \textit{Bills of Lading} 134. Further see Goldschmidt \textit{Handbuch des Handelsrechts} Teil C 652-654 n 1 for a more detailed discussion.
\textsuperscript{66} See Goldschmidt \textit{Handbuch des Handelsrechts} Teil C 652 n 1.
\textsuperscript{67} Polak \textit{Cognoscement} 31-32, 36.
\textsuperscript{68} Purchase \textit{Documents of Title} 207, quoting a pamphlet of Dr Enrico Bensa, called \textit{The Early History of Bills of Lading} (Genoa 1925) in which Dr Bensa translated the “bill of lading” from the Latin.
delivered to Percival de Guisulfis in Pisa, who in turn ordered the goods to be delivered to his agent Marcellino de Nigro in Portonevere, and the mate regarded himself as bound to do so. It is submitted that one cannot derive from this that the document was negotiable or transferable in any way. The original consignee merely instructed the carrier as to how and to whom delivery should be effected.

Moving in time to the beginning of the sixteenth century, more information may be found in the *Decisiones Rotae Gemiae*, a collection of decisions of a judicial court in Genoa. After examining four possibly relevant decisions, Polak concluded that only in one of them one finds the first possible evidence of the indorsement of bills of lading, though in a very rudimentary form. It is of course possible that the transfer (or indorsement) of the bill of lading took place earlier already, but Polak did not find any evidence of this. Although the consignee was apparently given an independent personal right against the master, there was no question at all of the transfer of possession or ownership.

Before leaving Italy behind, Polak examined some works of Straccha, a patrician of the city of Ancona, writing about 1550. Although bills of lading were generally used in the beginning of the sixteenth century, sending a copy to the consignee was not yet customary. One reason why sending a bill of lading to somebody was seldom necessary, was that the goods were seldom ordered in advance. The merchant speculatively sent a cargo to a port, in the hope of selling his goods at a profit. Therefore people called *sopracharichi* who had to receive the goods at the port of destination, and sometimes had an even wider mandate still, were often appointed by the

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69 Purchase *Documents of Title* 207.
70 Polak *Cognoscement* 36.
71 See Malan *Reelmatige Houer* 35-41 for the development of the indorsement of bills of exchange. Malan 35-36 indicated that the indorsement of a bill was known in Italy in 1519.
72 Polak *Cognoscement* 33.
73 Polak *Cognoscement* 37-43. Earlier, on p 33, Polak speculated that before indorsement of the bill of lading became commonplace, a merchant staying home could have the name of a consignee he regarded as a friend, entered into the register (and copied to the abstract from the register, kept by the merchant), and the master then had to inform the consignee on arrival that he could collect the goods. The consignee could still inspect the original register as an interested party when collecting the goods, but the transfer of the bill of lading, although useful, would at least not always have been an absolute necessity.
74 Also see previous footnote.
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merchant. The master only had to know who this person was, and it was unnecessary to dispatch
the bill of lading to anybody.\textsuperscript{75} A bill of lading also did not transfer possession of the goods. In
a later work by Straccha,\textsuperscript{76} a case is discussed where the bill of lading had indeed been sent to
the consignee. Nevertheless the shipper, and not the consignee, remained the owner of the
goods. This is inter alia proved by the fact that Jewish merchants submitted a false person as
shipper, to prevent the goods being seized and declared forfeited to Christian rulers. If the bill
of lading transferred possession and ownership to the consignee, this would not have been
necessary.\textsuperscript{77}

It is now necessary to leave southern Europe and look northwards for the further development
of the bill of lading. It is certain that late in the sixteenth century bills of lading were widely
used.\textsuperscript{78} The reason for that may be the wholesome influence of the Renaissance, voyages of
discovery and the simultaneous increase in trade.\textsuperscript{79}

2.7 Northern Europe

2.7.1 France

Up to now bits of information about the bill of lading were scattered in different maritime codes
and texts of scholars. Although many characteristics and functions of the bill of lading have
been mentioned in a very fragmented fashion, the first exact description of a more developed

\textsuperscript{75} Polak Cognoscement 44-45, relying on Straccha. De Roover Organization of Trade 44-45 wrote, “Medieval
trade ... involved venturing. An assortment of goods was shipped to a distant place in the expectation that it
would be sold at a remunerative price .... Each transaction, therefore, involved a speculative element and, in
a certain way, was an adventure. It is with good reason that the exporters of English cloth called themselves
the Merchant Adventurers ...”.

\textsuperscript{76} The bill of lading is here often used as proof of the insured objects on board the ship for the purposes of
insurance contracts, as also indicated in other northern sources later — see Polak Cognoscement 45, 52 and
59.

\textsuperscript{77} Polak Cognoscement 47-48.

\textsuperscript{78} Murray 37 University of Miami LR 690; McLaughlin 35 Yale LJ 552; Bennett Bill of Lading 8.

\textsuperscript{79} See eg Sanborn Origins 262: “The overland routes began to decline, and transport on the sea received a new
and greater impetus. As never before commerce took to the water, and voyages of commerce and discovery
were undertaken to the most distant parts of the globe.”
bill of lading is found in northern Europe, in France.

*Le Guidon de la Mer* was a collection of maritime customs for the inhabitants of Rouen, drawn up at the end of the sixteenth century. The bill of lading was treated as a well-known document, and the code defined it as “the acknowledgement which the master of the ship makes of the number and quality of the goods loaded on board.” Multiple copies were mentioned, as well as the fact that one had to be sent to the person who would accept the cargo. One of the copies indicated to the master to whom he had to deliver the cargo. The third copy sent to the consignee only served as notice to him of the shipment of the cargo. Possession and ownership were not transferred and the shipper thus remained the owner of the goods. There is also no evidence of the indorsement of a bill of lading in this code.¹¹

Also in *Les Us et Coutumes d'Olonne*, the maritime code of a small town, dating from the same time as the *Guidon*, the bill of lading served mainly to indicate the address where and to whom the cargo had to be delivered. The master had to seek out the merchant named on the bill of lading, and demand that he accept the cargo.²²

### 2.7.2 The Netherlands³³

In 1563 a placaat of Philip II⁴⁴ mentioned the bill of lading (the term used is *bevrachtbrieve*) in the Netherlands, and showed that they were used towards the end of the sixteenth century.⁵⁵ The *Tractaet van 't Recht der Nederlantsche Avarijen*, compiled by Weijtsen⁶⁶ from 1554-1563, used the word “cognoscementen”.

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¹⁰ Bennett *Bill of Lading* 8; McLaughlin 35 *Yale LJ* 552. The passage from Bennett including the definition was quoted approvingly in *Diamond Alkali Export Corporation v Fl Bourgeois* [1921] KB 443 at 449.

¹¹ Polak *Cognoscement* 49-53. Also see McLaughlin 35 *Yale LJ* 552.

¹² Polak *Cognoscement* 53-54.

³³ Polak *Cognoscement* 63-68 also examined four German authors from the beginning of the seventeenth century, but found much confusion and no new information.

⁴⁴ Cap III “vander Versekeringen ofte Asseurantien” Art 7; the relevant article is printed in *Verwer Nederlants See-Rechten* 130.

⁵⁵ See Polak *Cognoscement* 54-58. Polak 57-58 showed that these *bevrachtbrieve* were definitely bills of lading, although the placaat does not provide much more detail.

⁶⁶ §26; printed in *Verwer Nederlants See-Rechten* 200. Also spelt Weitsen on the title page of Verwer.
Bylaws of Amsterdam (1598) and Middelburg (1600) mentioned the bill of lading as evidence of the goods in insurance contracts. It was mentioned in consultations and opinions of legal practitioners in the beginning of the seventeenth century, and again in 1635 and 1638. Though the sources are many, nothing is to be found about the nature of the bill of lading, including the possibility of effecting a transfer of possession of the goods, especially because the scholars, including De Groot, “het stilzwijgen bewaren of meestal weinige gegevens mededeelen.”

An opinion of nine advocates and three attorneys of 1661, at least stated that the consignee has a right against the master to take the cargo under his control. Polak indicated that this still did not mean that the holder of the bill of lading was in possession of the goods.

In a book of 1727, there is definite evidence of bills of lading made to order, and the indorsement of them, although such bills of lading probably existed a while before the given date already. Indeed, in the book by Verwer dating from 1711, the author (or rather koopman) wrote,

“In wijders, inde Seevaert, en hier en selfs heel de werelt door, eene onwedersprekelijke Costuime; van het recht, vervat in ... in Cognoscementen; in alle gevallen, geene uitgesondert; validelijk over te dragen bij simpel endossement, ofte overschrijvinge achter op den rugge; met gelijke wijze ende effect als inde Wisselbrieven ...

In an appendix Verwer gave the following example of a cognoscement (spaces in Verwer’s text where information must be filled in are indicated by “...”):

“Ik Schipper van’t Schip genaemt ... gereed leggende ... om, met den eersten goeden wind, dien God verleenen sal, te seylen naer alwaer mijne regte ontladinge sijn sal, bekenne ontfangen te hebben onder den overloop van mijn Schip, van U [large space for goods] al droog, wel gekonditioneert, ende gemerkt met dit voorstaende Merk. Het welke ik belowe te leveren (indien God my behouden reise verleent) aen ... of aen zijn ordre, mits betealende aan my, of ordre, voor Vragt ... en de Haverije naer de Costuimen van der See. Om te voldoen dat voorsz. is, verbinde ik my selven, al mijn goed, en mijn voorsz. Schip met sijne toebehoreen. In kennis der waerheid, heb ik drie Cognossementen ondertekend; van een inhoud; het een voldaen sijnde, de andere van geener waerden. In ... den ... Anno”

Polak Cognoscement wrote, “De groote rechtsgeleerden, die Nederland in de XVIIe eeuw to sieraad strekten, bewaren omtrent het cognoscement een diep stilzwijgen ...”. Polak referred to De Groot, Van Leeuwen and Huber.

Polak Cognoscement 59-63.

Polak Cognoscement 69-71, also for other sources a few years later.

Nederlants See-Rechten 174.

Nederlants See-Rechten 223.
So the master of the ship clearly accepted that delivery must be made to a named consignee or his order. There is also a clear indication that delivery must be made to the first person presenting a bill of lading, after which the other bills of lading will be of no effect.

The indorsement of bills of lading in the Netherlands therefore probably started at the end of the seventeenth century, and came to be used frequently in the eighteenth century. There was still no indication of the bill of lading effecting the transfer possession or of real rights. Sources giving such an indication were either interpreted incorrectly or were of doubtful validity. Questions of possession and ownership had to be determined according to normal legal principles — and not the bill of lading.

2.8 English Law: The Admiralty Court

Early materials on the bill of lading in English law are nearly non-existent. A reason for this may be the customary nature of the law merchant. The merchants knew the relevant principles well, and there was no great need for written rules. The expeditious procedure of the courts applying the law merchant made recorded decisions unlikely.

Many examples of bills of lading are to be found in English law in the sixteenth century. For the reasons mentioned above, earlier specimens are unlikely to be found. Bennett wrote:

"Several visits to the Record Office convinced him [Bennett] of the futility of searching for isolated specimens of Bills of Lading which, he had thought, might be buried in such records as those of the Customs' officers. It is, in fact practically certain that the earliest extant specimens are those to be found in the publications of the Selden Society and which are discussed in this Essay."

Bennett argued that the bill of lading existed long before the sixteenth century. The case he cited

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92 Polak Cognoscement 71.
93 Polak Cognoscement 72. On the basis of the words "het een voldaen sijnde, de andere van geener waerden" in the quoted bill of lading one can argue that these words indicate that the bill of lading was a document of title: see the argument of Bennett in §2.8 infra. Polak would have disputed this though.
94 Bennett Bill of Lading 2-3.
95 Bennett Bill of Lading vi-vii. Also see pp 2-3 for his scrutiny of other sources and the decisions of early courts dating from the thirteenth century, which did not contain anything about the bill of lading.
as authority, Chapman v Pears\textsuperscript{96} (1534), does state that “it is the rule and is provided and it has also been repeatedly ruled in adverse judgements” that the master is not liable for goods “not entered mentioned or inserted in the Book of Lading”. The case clearly mentioned a book and not a bill of lading, and therefore cannot prove that the bill of lading existed long before 1530 in England. It rather indicates that at this date and earlier the book of lading was commonly used, and the bill of lading probably not.\textsuperscript{97}

Nevertheless records of the Admiralty Court\textsuperscript{98} show that the bill of lading was well known in the sixteenth century, even its form getting stereotyped.\textsuperscript{99} The oldest extant copy\textsuperscript{100} of a bill of lading is found in 1538 in the case of The Thomas:

“This bylle Indented, made the xxij daye of October in the XXX yere of our sovereigne lorde kyng Henry the viij Wytnessith that I Robert Man servaunt to Syr Oswald Wylstrop knyght hath delyvered to John Haldry merchant of the Newe Castell and layd in his shyp called the Thomas of the Newe Castell xxvj weye salt of the measure of Blythe to carye to London to Dyce Kye as shortly as wynde and wether wyll sarve after daye abovenamed and ther to delyver the sayd salt to my master his assigney or lawful attorney.”\textsuperscript{101}

“It recites the delivery by the merchant to the captain, the loading on board the ship, and the contract to carry the shipment from the point of loading to the point of discharge and to deliver it there to the shipper or his assignee.”\textsuperscript{102} There is no evidence of the indorsement of the bill of lading.

In The Brandaris (1546) the bill of lading ends in the following way: “In Witness whereof I have given you three cognossements all of one tenor marked with myne owne marke the one

\textsuperscript{96} Bennett Bill of Lading 8-9, quoting from I Select Pleas in the Court of Admiralty 44.

\textsuperscript{97} Bennett often mentioned the “Bill or Book of Lading” in the same breath, and does not seem to attach much importance to the difference between the two documents. See pp 7 and 9.

\textsuperscript{98} On the history of this court and the conflict between it and the common law courts see Gilmore and Black Admiralty 9-10; Sanborn Origins Chapter IV; Bennett Bill of Lading 13; Chapter 3 §3.2.

\textsuperscript{99} Bennett Bill of Lading 8; Holdsworth English Law 256.

\textsuperscript{100} Bennett Bill of Lading 9.

\textsuperscript{101} As quoted by McLaughlin 35 Yale LJ 552 n 14, from I Select Pleas in the Court of Admiralty 61; Bennett Bill of Lading 9.

\textsuperscript{102} McLaughlin 35 Yale LJ 552.

\textsuperscript{103} Bennett Bill of Lading 9.
performed the other to be of none effecte." According to Bennett these words prove that this bill of lading is a document of title:

"These provisions seem clearly to contemplate the transfer of the Bill of Lading as a Document of Title to the goods shipped — if it had not been customary for the delivery of the goods to be made to the holder of the Bill of Lading the words which provide that if one Bill should be performed the others should be of none effect, would be meaningless."

In *Hurlocke and Saunderson v Collett* (1539) "iron was sold afloat" and the bill of lading ends with the words, "In Witness I the said master have firmyd three bylls of one tenor the one complied and fulfylled and the other to stand voyd". According to Bennet the fact that the goods were sold at sea together with the provision that after one bill of lading has been performed, the others are void, is "clear evidence" that the transferees of a bill of lading (the buyers) had the authority to demand the goods from the master — the bill of lading was a "good document of title" in their hands.

Bennett concluded that these cases of the Admiralty Court "show clearly" that the bill of lading was a document of title in the sixteenth century. When assigned, the assignee could claim the goods from the master upon arrival. Certainly there are clear indications that this might have been the case, but for formal confirmation waiting until the end of the eighteenth century is necessary.

There is also no evidence that bills of lading were transferred by indorsement and delivery at this stage. Bennett wrote that the indorsement of bills of exchange was fully established in the middle of the seventeenth century and had been known much earlier. Because the law reports of the eighteenth century regarded the indorsement of bills of lading as a well-known custom, bills of lading were probably indorsed much earlier, especially due to their similarity to bills of exchange.

104 Quoted by Bennett *Bill of Lading* 10, citing *Select Pleas in the Court of Admiralty* 127.
105 *Bill of Lading* 10. Bennett’s conclusion was also quoted approvingly by Holdsworth *English Law* 257 n 1.
106 Quoted by Bennett *Bill of Lading* 10, citing *Select Pleas in the Court of Admiralty* 88.
107 *Bill of Lading* 11.
108 For further examples of bills of lading to "assigns" and evidence that if one bill of lading is performed the others will be void, see Bennett *Bill of Lading* 9-11. Also see Murray 37 *University of Miami LR* 691; Holdsworth *English Law* 256.
109 *Bill of Lading* 12.
exchange.\textsuperscript{110} Again, waiting for formal confirmation until the eighteenth century is necessary. Although characterising the bill of lading as a document of title took some time, a bill of lading was of course always a receipt for the goods shipped. Regarding the bill of lading’s function as evidencing the contract of carriage, detailed contractual clauses (often exemption clauses) only formed part of the bill of lading since the nineteenth century.\textsuperscript{111} Prior to this a bill of lading did not constitute much more than an undertaking by the carrier to carry the goods.

2.9 Three Bills of Lading

Already in 1539 and 1546 three bills of lading were used.\textsuperscript{112} Malynes\textsuperscript{113} explained this phenomenon:

"Of these bills of lading there is commonly three Bills of one tenor made of the whole Ships lading, or of many particular parcels of goods, if there be many laders; and the marks 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 inclosed in the letters written by the same Ship, another Bill is sent over land to the Factor or Party to whom the goods are consigned, the third remaineth with the Merchant, for his testimony against the Master, if there were any occasion or 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 ...".

In \textit{Lickbarrow v Mason}\textsuperscript{114} four bills of lading were issued — the merchants (shippers) were initially given two bills of lading instead of one. Buller J pointed out that this is not the normal custom, and that it could lead to fraud as the party with the extra bill of lading could transfer the bill of lading to two different parties, without an innocent transferee knowing or expecting it. The continued use of three bills of lading in modern commerce will be discussed — and criticized — in the following chapters.\textsuperscript{115} Today the use of more than one original bill of lading is an unfortunate historical relic.

\textsuperscript{110} Bennett \textit{Bill of Lading} 11.
\textsuperscript{111} Grönfors \textit{Electronic Documents} 8.
\textsuperscript{112} In \textit{Hurlocke and Saunderson v Collett} and in \textit{The Brandaris}, quoted by Bennett \textit{Bill of Lading} 10.
\textsuperscript{113} \textit{Lex Mercatoria} 97.
\textsuperscript{114} 2 TR 63 (100 ER 35) at 72.
\textsuperscript{115} See Chapter 5 §5.4.9; Chapter 7 §7.3.3.
2.10 Advantages of a Document of Title

Merchants always faced the difficulty of selling their wares in an orderly market that is not subject to huge fluctuations. While a vessel is at sea, few commodities are available and prices are pushed upwards. After the ship’s arrival, the market is flooded, prices drop and the remaining goods have to be stored. Earlier overland couriers were used to report on the progress of trading vessels, but goods still had to be bought or sold at the port when the ship arrived, after being examined by the prospective buyer.\footnote{Knauth Bills of Lading 374; De Roover Organization of Trade 45.}

In the marketplace of Marseilles in 1818, the centre of Mediterranean trade, merchants traded bills of lading that arrived before the cargo. The courts in Marseilles recognized the legal force of the maritime sale of goods at sea represented by a bill of lading — a procedure called the vente maritime. The courts relied on the law merchant instead of codes that lacked the necessary authority. The huge advantage of trading in this way was that the shippers and other merchants involved could receive payment much sooner, and use the money to start their next venture. Better highways and the safety of travellers made the relatively swift transfer of bills of lading between major centres a practical reality.\footnote{Knauth Bills of Lading 374-375.}

Although courts in other French cities were reluctant to follow suit, in the middle of the nineteenth century new steamers carrying the mail were travelling a lot faster than the freight vessels. The bill of lading therefore arrived long before the cargo. Railways and improved postal systems made it easy, inexpensive and certain to get bills of lading from one place to another. Trade routes without pirates and better ships also reduced the risk of trading on documents before examining the goods. Bills of lading arrived from all over Europe and the Mediterranean at the major trading centres.\footnote{Knauth Bills of Lading 117 and 375. See pp 375-376 for some further developments. Also see Grönfors Electronic Documents 9.}

The advantages of the bill of lading as a document of title was enunciated by the House of Lords...
in *Lickbarrow v Mason*¹¹⁹ in 1793:

"The great object of commerce is a quick and speedy sale of goods; and it frequently happens that a merchant disposes of his cargo by means of a bill of lading, to a very great advantage, and has received the price of the goods before the ship arrives in the port, and the merchant is therefore not only relieved from the danger of temporary inconveniences, but is likewise enabled to extend his capital, and to enter into further mercantile concerns; whereas if he cannot transfer the goods whilst at sea, by his bill of lading, he may be ruined before the cargo comes to hand ...".

### 2.11 Common Law Courts

In *Lickbarrow v Mason*¹²⁰ the verdict of the special jury of merchants is of sufficient importance to quote it in full. The jury of merchants found that,

"by the custom of merchants, bills of lading, expressing goods or merchandise to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons. And that, by the custom of merchants, indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only, have been, and are, and may be, filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons: and, according to the practice of merchants, the same, when filled up, have the same operation and effect, as if the same had been made or done by such shipper or shippers when he, she, or they indorsed the the same bills of lading with their names as aforesaid."

As the first case that *specifically* considered the nature of the bill of lading, especially as a document of title, as well indorsement, this decision is often regarded as the birth of the modern bill of lading.¹²¹ The precise ambit and effect of the different *Lickbarrow* decisions, and some other early cases, will be discussed in detail when dealing with the bill of lading as a document.

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¹¹⁹ IV Brown 57 (2 ER 39) at 64-65.

¹²⁰ *Lickbarrow v Mason* 5 TR 683 (101 ER 380) at 685-686.

¹²¹ Grönfors *Electronic Documents* 11.
Chapter 2: The History and Evolution of the Bill of Lading

2.12 Conclusion

In conclusion two characteristics of the evolution of the bill of lading can be emphasised again. First, it can be seen from the history of the bill of lading that its evolution into its current form was a process that took place over many years. Only when the need arose for the bill of lading to be a document of title in addition to being a receipt and evidence of the contract of carriage, did the bill of lading eventually become a document of title. This long period of development is not a luxury that any electronic bill of lading will have. There seems to be an immediate need for such an electronic bill of lading, but there is no practice of merchants over many years that developed rules and customs governing such an electronic bill of lading. It will be seen that currently a comprehensive contractual framework will be necessary to implement any form of an electronic bill of lading in order to fill the legal vacuum. Secondly, it can be seen from the development of the bill of lading, that it shared a common history among the merchants of Europe. It was an instrument that was similar enough to be used by all merchants, notwithstanding different countries of origin. At the moment there seems to be no possibility of an electronic bill of lading that can be used by everyone. It will be seen that an electronic bill of lading will be implemented in a closed network — without belonging to the particular association or company that administers the use of the electronic bill of lading (or at least concluding a contract with such a company), a merchant will not be able to use the particular electronic bill of lading.

Although there are differences between the unhurried evolution of the traditional bill of lading and the very fast development of an electronic bill of lading, an electronic bill of lading will — as was the case with the paper bill of lading — be used in some form or another, if there is a need for it by merchants.

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122 See Chapter 5 §5.4.2.
Chapter 3
Jurisdiction and Applicable Law

3.1 Introduction

Before analysing the nature and functions of the bill of lading in the following two chapters, it is necessary to determine which court has jurisdiction over disputes relating to bills of lading, and the law to be applied. This is not an easy task, given the fact that English statutes as far back as 1840[1] as well as the original and inherent jurisdiction of the English Admiralty Court (dating from at least the fourteenth century[2]) may need to be considered.

3.2 Brief Historical Perspective[3]

Because the Admiralty Jurisdiction Regulation Act[4] failed to "relieve the South African practitioner of the burden of history",[5] it is necessary to look briefly at the evolution of admiralty jurisdiction in English law.

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1. Admiralalty Court Act 1840 (3 & 4 Vict c 65).
2. Staniland 1988 SALJ 326; Staniland 1992 SALJ 532; Dillon and Van Niekerk Maritime Law 4; Girdwood 1995 SA Merc LJ 301, 315 mentioned that there is a strong possibility that the Admiralty Court existed in the twelfth century already. In the fourteenth century "deputies" started to fulfill the duties of the admiral and they became the first judges in admiralty courts: see Hofmeyr 1982 Acta Juridica 34.
5. Shaw Admiralty Jurisdiction 2. Van Niekerk 1994 SA Merc LJ 26 wrote, "The burden of admiralty history is heavy. In South Africa it has assumed albatross-like qualities."
The origins of the English Admiralty Court can be found in the power of admirals to hear disciplinary matters, and later disputes relating to piracy. The jurisdiction of the Admiralty Court was gradually expanded to cover a vast terrain of maritime matters. The extended jurisdiction in turn led to a bitter conflict between the Admiralty Court and the common law courts. Statutes were passed to curb the rapidly expanding jurisdiction of the Admiralty Court, and later the common law courts issued writs of prohibition based on these statutes, further restricting the Admiralty Court's jurisdiction.

In the nineteenth century the Admiralty Court became much more active and found favour even with the common law courts. As a result the heads of jurisdiction of the Admiralty Court were extended (or rather restored considerably) by two acts still relevant to us today, the Admiralty Court Act 1840 and the Admiralty Court Act 1861.

Vice-Admiralty Courts were established in the British colonies to apply admiralty law. These courts were completely separate from ordinary courts (applying Roman-Dutch law in our case), but nevertheless had concurrent jurisdiction with the ordinary courts. The Colonial Courts of Admiralty Act 1890 abolished the Vice-Admiralty Courts and further declared that every court of law in a British possession is also a Colonial Court of Admiralty. The jurisdiction of a Colonial Court of Admiralty is the same as the “Admiralty jurisdiction of the High Court in England, whether existing by virtue of statute or otherwise, and the Colonial Court of Admiralty ... shall have the same regard as that Court to international law and the comity of nations.” Although physically there were not two separate courts anymore, actions could be brought

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8 3 & 4 Vict c 65. See Shaw Admiralty Jurisdiction 4-5 for the extensions introduced by the Act.
9 24 Vict c 10. See Shaw Admiralty Jurisdiction 5-7 for the extensions introduced by the Act.
11 53 & 54 Vict c 27.
12 s 17.
13 s 2(1).
14 s 2(2).
before an Admiralty Court applying English admiralty law or before an ordinary court applying Roman-Dutch law — with the possibility of a different result in each court.\textsuperscript{15} This situation, among other factors, necessitated the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983.\textsuperscript{16}

### 3.3 Nature of Admiralty Law

Juta JA characterized admiralty law in the following way:\textsuperscript{17}

> "The law it administered was a body of laws, customs, and usages of the sea taken from various continental sources and writers; and as thus received and administered in the High Court of Admiralty it constituted the General Maritime law of England, a law differing in several important respects from the Municipal law of England."

Admiralty law thus evolved from Roman law,\textsuperscript{18} the customs of maritime states, the law merchant and even international law and the comity of nations.\textsuperscript{19} It was therefore a body of law quite different and distinct from the English common law. Admiralty law was, however, still \textit{English} maritime law rather than some sort of an international maritime law common to all seafaring nations. Although English admiralty law originally evolved from some common sources, modern admiralty law was mainly created by the admiralty courts themselves.\textsuperscript{20}

\textsuperscript{15} Shaw \textit{Admiralty Jurisdiction} 3-4; Hofmeyr 1982 \textit{Acta Juridica} 43, 45; Rycroft 1984 \textit{LMCLQ} 417; Booyse 1984 \textit{MBL} 75; Forsyth 1982 \textit{SALJ} 255-256, 260-261, 265-268.

\textsuperscript{16} Further see Staniland 1984 \textit{Acta Juridica} 272-273; Staniland 1993 \textit{Annual Survey} 722.

\textsuperscript{17} Crooks & Co v Agricultural Co-operative Union Ltd 1922 AD 423 at 432.

\textsuperscript{18} Staniland 1993 \textit{SA Merc LJ} 276-277 wrote, “Indeed, so influential was Roman law in the Admiralty Court that it was one of the prime reasons for the centuries of antagonism between the common lawyers and civilian lawyers — an antagonism which lasted until the High Court of Admiralty Act 1859 finally removed the monopoly of practice enjoyed by the civilian lawyers. It is not surprising, therefore, that Roman law should have played an important role in the development of the maritime lien and the action in rem ... until the mid-nineteenth century.” Up to 1859 a doctorate in civil law was required for admission to admiralty practice.

\textsuperscript{19} See Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) s 2(2); Hofmeyr 1982 \textit{Acta Juridica} 36-38; Forsyth 1982 \textit{SALJ} 259; Dillon and Van Niekerk \textit{Maritime Law} 5-7.

\textsuperscript{20} Dillon and Van Niekerk \textit{Maritime Law} 6; Van Niekerk 1994 \textit{SA Merc LJ} 28, also n 12; \textit{Southern Steamship Agency Inc v MV Khalij Sky} 1986 1 \textit{SA} 485 (C) 486C-J.
3.4 Admiralty Jurisdiction of the High Court

According to the Admiralty Jurisdiction Regulation Act 105 of 1993\(^{21}\) every division of the High Court has jurisdiction, called admiralty jurisdiction by the Act, to hear and determine maritime claims, irrespective of the place where the claim arose, the ship's place of registration or the residence, domicile or nationality of the ship's owner.\(^{22}\) Maritime claims include\(^{23}\) loss of or damage to goods carried or which ought to have been carried in a ship,\(^{24}\) the carriage of goods in a ship or any agreement for or relating to such carriage,\(^{25}\) any matter in respect of which a court of admiralty referred to in the Colonial Courts of Admiralty Act 1890\(^{26}\) had jurisdiction as well as "any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs".\(^{27}\) Only a court exercising admiralty jurisdiction, may hear a maritime claim.\(^{28}\) A court exercising admiralty jurisdiction may, however, decide a matter arising in connection with a maritime claim, even if such matter itself is not a maritime claim.\(^{29}\)

\(^{21}\) Date of commencement: 1 November 1983.

\(^{22}\) s 2(1).

\(^{23}\) The definition of "maritime claim" in s 1(1) contains a comprehensive list.

\(^{24}\) s 1(1) sv "maritime claim" (g).

\(^{25}\) s 1(1) sv "maritime claim" (h).

\(^{26}\) 53 & 54 Vict c 27; Admiralty Jurisdiction Regulation Act 105 of 1983 s 1(1) sv "maritime claim" (dd).

\(^{27}\) s 1(1) sv "maritime claim" (ee).

\(^{28}\) s 7(2)(a). Booysen 1984 MBL 77, 78, 83 and 86 expressed some doubts (he was the only author to do so) because s 7(2)(a) uses the words "a court competent to exercise its admiralty jurisdiction" rather than "a court exercising its admiralty jurisdiction". A court competent to exercise admiralty jurisdiction may still exercise its normal jurisdiction according to Booysen. This approach should not be followed as one of the main aims of the Act was to avoid different results in different courts flowing from the previously existing concurrent jurisdiction. The exclusive jurisdiction of the Admiralty Court was confirmed in Peros v Rose 1990 1 SA 420 (N) 424C-D and Weissglass NO v Savonnerie Establishment 1992 3 SA 928 (A) 940G.

\(^{29}\) s 5(1) and s 5(2)(a).
3.5 Section 6: Applicable Law

Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 deals with the law to be applied and rules of evidence. Hare wrote that the section "was a jurisdictional nursemaid, necessary perhaps in the early years of the Act to effect a compromise between the English law pragmatists (clearly more prevalent in an international field like shipping law) and the Roman-Dutch purists." The result of this, as Shaw wrote, is that "[t]he provisions are of sufficient importance (and obscurity) to warrant their being quoted in full." Section 6 provides the following:

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall —

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

Sections 6(2) and 6(5) are reasonably clear. The first provides that another South African statute enjoys preference over the law that must be applied according to section 6(1). The words "[n]otwithstanding anything to the contrary in any law or the common law ..." probably refer to statutory law generally and to the common law, and not to specific statutory provisions.

30 Shipping Law 23; Lourens 1998 Stell LR 100.

31 Admiralty Jurisdiction 72. Also see Sheriff of Cape Town v MT Argun, Her Owners and All Persons Interested in Her 2000 1 SA 1061 (C) 1070H.

32 Sections 6(3) and 6(4) provide that the court may admit hearsay evidence and that the weight attached to such evidence will be in the discretion of the court.

33 See Shaw Admiralty Jurisdiction 72-73. A possibility raised by Booyen 1984 MBL 82 is that the introductory words in s 6(1) refer to statutory provisions dealing with the legal system to be applied to maritime matters, and s 6(2) deals with substantive norms.
second provides that the parties may still agree on the legal system to govern their transaction.\textsuperscript{34} When such a choice has been made, then that legal system is applicable. Most of the uncertainties relating to section 6 arise when such a choice has not been made.

The following remarks in this paragraph deal only with questions relating to section 6(1)(a), ie when a South African court applies English law rather than the Roman-Dutch law referred to in section 6(1)(b).

Quoting Shaw\textsuperscript{35} once again, section 6(1) is “on any interpretation ... a remarkable provision.” There are a number of difficulties and uncertainties regarding the section.\textsuperscript{36} The first is the words “High Court of Justice of the United Kingdom”. The phrase refers to the Supreme Court of England and Wales.\textsuperscript{37} The matter is further complicated by the unfortunate decision of \textit{Van der Linde v Calitz}.\textsuperscript{38} The question was whether the Appellate Division should follow a Privy Council decision or a decision of the House of Lords. Steyn CJ followed the Privy Council, because the Privy Council was at the relevant time the highest court of appeal in the Union of South Africa.\textsuperscript{39} In the United Kingdom, however, a decision of the Privy Council would not bind the Supreme Court, as the Privy Council is not part of the appellate hierarchy of the Supreme Court, although its decisions would be of great persuasive value.\textsuperscript{40} Regarding admirality law, the Supreme Court of England and Wales would apply the law as laid down by the House of Lords. This approach was adopted by our courts. Leon J held in \textit{Brady-Hamilton Stevedore Co v MV Kalantiao} 1987 4 SA 250 (D) 253D.

\textsuperscript{34} s 6(2); Staniland 1988 \textit{SALJ} 328.
\textsuperscript{35} \textit{Admiralty Jurisdiction} 72. Staniland 1988 \textit{SALJ} 324 wrote, “The precise meaning of s 6 is not readily ascertainable ...” and, “Indeed, the provision is somewhat controversial and may be amended.”
\textsuperscript{36} For a “list” of questions regarding the section, see Van Niekerk 1994 \textit{SA Merc LJ} 29 n 18.
\textsuperscript{37} As constituted by the Supreme Court Act 1981. See Shaw \textit{Admiralty Jurisdiction} 73; \textit{Brady-Hamilton Stevedore Co v MV Kalantiao} 1987 4 SA 250 (D) 253D.
\textsuperscript{38} 1967 2 SA 239 (A). The case dealt with the law of evidence.
\textsuperscript{39} 250G. For criticism see Schmidt \textit{Bewysreg} 17-18. The specific Privy Council decision in the \textit{Van der Linde} case was actually an appeal from an \textit{Australian} court.
\textsuperscript{40} \textit{Brady-Hamilton Stevedore Co v MV Kalantiao} 1987 4 SA 250 (D) 255D-H; \textit{Transol Bunker BV v MV Andrico Unity; Grecian-Mar SRL v MV Andrico Unity} 1989 4 SA 325 (A) 339C-E. According to Corbett JA, even though a decision of the Privy Council is not a binding precedent, the “greatest attention and respect must be paid” to it (340D).
Chapter 3: Jurisdiction and Applicable Law

Co v MV Kalantiao\textsuperscript{41}  

"Whatever justifiable criticisms may be made of the decision in Van der Linde v Calitz, I do not understand the case to go further than to hold that pre-1950 Privy Council decisions will be regarded by the Appellate Division as being on par with its own decisions. I do not read the judgement as conferring any status on later Privy Council decisions beyond their persuasive force ...".  

Corbett JA agreed with this statement in Transol Bunker BV v MV Andrico Unity; Grecian-Mar SRL v MV Andrico Unity.\textsuperscript{42} According to Leon J, the question is not whether he prefers the majority or minority decision of the Privy Council (he is not obliged to follow either), but rather "what would a notional Court in England (including the highest Court) decide was the law on 1 November 1983?"\textsuperscript{43} To do that the following factors, among others, must be taken into account: the House of Lords has not spoken yet, the persuasive force of the majority decision of the Privy Council, the majority decision is clearly defensible, as well as the fact that no subsequent English decisions called into question the majority view of the Privy Council.\textsuperscript{44}

According to the Civil Proceedings Evidence Act\textsuperscript{45} and the Criminal Procedure Act\textsuperscript{46} the law in force on 30 May 1961 (the day before the Union became a Republic) should be applied regarding many matters not regulated by the two Acts. Similarly, it is not quite certain what happens after 1 November 1983 according to the Admiralty Regulation Jurisdiction Act.\textsuperscript{47} Can English decisions after the commencement date of the Act still influence South African law? Subsequent English legislation cannot affect the law in South Africa anymore, but relevant English legislation up to 1 November 1983 forms part of South African admiralty law — it is

\textsuperscript{41} 1987 4 SA 250 (D) 257J-258A. The problem in the case was that a majority decision of the Privy Council differed from the minority decision, with a decision of the Court of Appeal that might support the minority view (254A-B). The House of Lords did not make any decision on the point yet (ie should a foreign maritime lien be recognized). The decision was confirmed on appeal in Brady-Hamilton Stevedoring Co v MV Kalantiao 1989 4 SA 355 (A), heard simultaneously with the appeal in Transol Bunker BV v MV Andrico Unity; Grecian-Mar SRL v MV Andrico Unity 1989 4 SA 325 (A) and dismissed for similar reasons.

\textsuperscript{42} 1989 4 SA 325 (A) 340B.

\textsuperscript{43} 263J-264A.

\textsuperscript{44} 264A-E. Also see the remarks of Marais J in Transol Bunker BV v MV Andrico Unity; Grecian Mar SRL v MV Andrico Unity 1987 3 SA 794 (C) 803G-804B, 821H-J.

\textsuperscript{45} 25 of 1965 s 42.

\textsuperscript{46} 51 of 1977 s 206 and s 252.

\textsuperscript{47} 105 of 1983 s 6(1).
law that an English court would have applied at that date.\textsuperscript{48} Regarding case law, there exists an English fiction that the common law never changes, and that the courts do not alter the law, but only interpret the law.\textsuperscript{49} Therefore, according to this approach, English decisions after 30 May 1961 could still be followed, because such decisions only set out the common law as it has always been.\textsuperscript{50} That position was not accepted by the courts, and it seems that the law is in fact "frozen" on 30 May 1961 (or 1 November 1983).\textsuperscript{51} According to Rumpff JA, "dit is die reg wat op 30 Mei 1961, gegeld het, nl, die Engelse reg, soos dit tot op daardie stadium bestaan het en hier toegepas is."\textsuperscript{52} The Admiralty Jurisdiction Regulation Act\textsuperscript{53} uses the words "apply the law which the High Court ... \textit{would have applied} ... at such commencement". It seems to follow that it does not matter if the English courts later (ie after 1 November 1983) regard their previous decisions as wrong.\textsuperscript{54} Later decisions clarifying or setting out English law as it was in 1983, that do not differ from the law as in 1983, or attempt to change the law as it was in 1983, would be binding. Staniland\textsuperscript{55} wrote, "An English decision made after 1983 was binding in South Africa only in so far as it reflected the law as it stood on 1 November 1983 in England." It is submitted that all English decisions after 1983 should at least be of strong persuasive authority.\textsuperscript{56} The phrase "in so far as that law can be applied"\textsuperscript{57} allows for the fact that the law applied on 1 November 1983 in the United Kingdom may in some cases not be compatible with South African law.\textsuperscript{58}

\textsuperscript{48} Subject to s 6(2) of course. Shaw \textit{Admiralty Jurisdiction} 73. See Hoffmann and Zeffertt \textit{Evidence} 10-11; Schmidt \textit{Bewysreg} 16.

\textsuperscript{49} See Schmidt \textit{Bewysreg} 16, 21; Hoffmann and Zeffertt \textit{Evidence} 10, 13.

\textsuperscript{50} This approach is favoured by Shaw \textit{Admiralty Jurisdiction} 74, but he cites no authority in support.

\textsuperscript{51} Schmidt \textit{Bewysreg} 18; Hoffmann and Zeffertt \textit{Evidence} 13. Once again one wonders how soon the English law to be applied will be out of date.

\textsuperscript{52} \textit{Ex Parte Minister van Justisie: in re S v Wagner} 1965 4 SA 507 (A) 513G.

\textsuperscript{53} 105 of 1983 s 6(1)(a).

\textsuperscript{54} Contra Hare \textit{Shipping Law} 23.

\textsuperscript{55} 1993 Annual Survey 723.

\textsuperscript{56} See Schmidt \textit{Bewysreg} 18; Hoffmann and Zeffertt \textit{Evidence} 15.

\textsuperscript{57} s 6(1)(a).

\textsuperscript{58} It is also possible that a court may depart from an inappropriate English rule because of different circumstances leading to undesired consequences (\textit{Ex Parte Minister of Justice: in re R v Pillay} 1945 AD 653), but not for reasons of public policy (\textit{Smit v Van Niekerk} 1976 4 SA 293 (A)). See Schmidt \textit{Bewysreg} 18-21; Hoffmann and Zeffertt \textit{Evidence} 14.
3.6 Extent of English Law to be Applied\textsuperscript{59}

Shaw also wrote that the application of s 6(1)(a) “may have some very strange and far-reaching implications, of which it seems extremely doubtful that the legislature was aware.”\textsuperscript{60} For example, if the “High Court of Justice of the United Kingdom” had to apply English statutes dealing with unfair contract terms, must a South African court now also apply such legislation by virtue of section 6(1)(a)\textsuperscript{61} According to Shaw it “remains to be seen” whether a South African court will apply such English legislation. It is submitted that the English law to be applied must be limited to the law relating directly to “maritime claims”.\textsuperscript{62} In \textit{Peros v Rose}\textsuperscript{63} the court held that a claim based on a contractual guarantee entered into simultaneously with a contract for the construction of a yacht,\textsuperscript{64} is not a maritime claim. There was not “a connection of such a nature as to render a claim for specific performance of the guarantee a claim in respect

\textsuperscript{59} For a discussion of the private international law aspects relating to \textit{res in transitu} see Neels 1991 \textit{TSAR} 309 \textit{et seq.} Neels 321 wrote that the English law to be applied will apparently (“blykbaar”) include the English private international law.

\textsuperscript{60} Shaw \textit{Admiralty Jurisdiction} 73-74. Also see Booysen 1984 \textit{MBL} 84.

\textsuperscript{61} For a list of English legislation that may possibly apply see Hare \textit{Shipping Law} 22 n 104.

\textsuperscript{62} An example of where English legislation will (and should) form part of South African law, is in the case of stoppage \textit{in transitu}. Hare \textit{Shipping Law} 463 indicated that stoppage \textit{in transitu} was subject to admiralty jurisdiction in 1891, and therefore English law as in 1983 should apply. As a consequence some sections (44-46) of the Sale of Goods Act 1979 form part of South African law. The proviso in s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 should of course always be kept in mind: “in so far as that law can be applied”. Of course English common law also governed stoppage \textit{in transitu} long before any statutory codification. Regarding stoppage in \textit{transitu} also see Chapter 4 §4.5. The law to be applied to a Himalaya clause is discussed in Chapter 5 §5.2.4 where it is submitted that a very sensible approach was followed in \textit{Santam Insurance Co Ltd v SA Stevedores Ltd} 1989 1 SA 182 (D) that avoided adopting the doctrine of consideration into South African law, but at the same time achieving a result consistent with English law.

\textsuperscript{63} 1990 1 SA 420 (N). Also see Minesa Energy (Pty) Ltd v Stinnes International AG 1988 3 SA 903 (D) where the court held that it could not exercise admiralty jurisdiction over a claim for the balance of the purchase price for two cargoes of coal, and it was irrelevant that the coal was conveyed by sea to Spain. According to Bristowe J, “I cannot believe that the mere claim for the purchase price of goods, which happen to be delivered by sea, can constitute a maritime claim. It must surely be a claim at least touching the carriage by sea .... To put it somewhat more fully, the applicant’s claim does not arise out of an agreement for the carriage of goods in a ship. The purpose of the contract was sale, not carriage” (907A-B).

\textsuperscript{64} A South African court exercising admiralty jurisdiction would at first glance have jurisdiction both according to the Admiralty Court Act 1861 (24 Vict c 10) s 4 and the Admiralty Jurisdiction Regulation Act 105 of 1983 s 1(1) sv “maritime claim” (q), that similarly includes under the definition of a maritime claim “the design, construction, repair or equipment of any ship”.
of the construction of the yacht.” A sensible approach is set out by Page J:

"... it seems clear that it was the intention of the Legislature, insofar as the matters falling within s 6(1)(a) of the Act are concerned, to confer upon the Supreme Court, exercising its admiralty jurisdiction, exclusive jurisdiction to adjudicate upon such claims in accordance with maritime law because these were, by their nature, peculiarly suited to be determined according to that law. It follows further that the Legislature intended this jurisdiction to be limited to such claims since it is only in the case of such claims that there exists any justification for not dealing with them in accordance with the common law.

If a claim is not "peculiarly suited" to be determined according to English admiralty law, it should be decided according to South African law. Page J further held:

"The approach leads me to conclude that the intention of the Legislature in using the expressions under consideration, [in the definition of ‘maritime claim’, eg ‘relating to’, ‘in respect of’, ‘for’, ‘arising out of’, ‘in the nature of’, ‘with regard to’] was, at least when referring to matters arising out of the old jurisdiction, to convey thereby a relationship between the claim and the maritime topic to which it is related, sufficiently intimate to impart to the claim a maritime character which would render it appropriate for the claim to be adjudicated in accordance with maritime law. Nothing short of such a relationship would justify the application to the claim of that system of law."

The use of English law generally may also be limited by the words "in so far as that law can be applied". It is submitted that these words should be actively used by the court when dealing with bills of lading, to ensure that English law is limited to the nature of the bill of lading as such, and does not for example lead to the importation of English concepts such as consideration and English law regarding the transfer of ownership in the goods.

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65 426H. Hare Shipping Law 45 n 7 suggested that the court will reach a different decision today as the case was decided before “catch-all” s 1(1) sv “maritime claim” (ee) was included in the Admiralty Jurisdiction Regulation Act 105 of 1983. This is probably so, but it is submitted that the specific passages quoted from the case can generally still be regarded as good law.

66 424C-E.

67 425E-F.

68 s 6(1)(a). However, Shaw Admiralty Jurisdiction 74 wrote, “The meaning of the words at the end of the paragraph, which can perhaps fairly be described as a gasp of despair ... is so obscure as to be unascertainable.”
3.7 Determination if Jurisdiction Existed at the Commencement of the Act

Regarding any matter in respect of which an Admiralty Court of the Republic (referred to in the Colonial Courts of Admiralty Act 1890) had jurisdiction immediately before the commencement of the Admiralty Jurisdiction Regulation Act,¹⁰⁵ a court exercising admiralty jurisdiction must apply the law that the High Court of Justice of the United Kingdom would have applied at the commencement of the Act.¹⁰⁶ The "Act" referred to here is the Admiralty Jurisdiction Regulation Act 105 of 1983 and not the Colonial Courts of Admiralty Act 1890.⁷¹ Therefore English law as at 1 November 1983 should be applied and not English law as it was in 1890.⁷² Regarding all other matters Roman-Dutch law must be applied by an Admiralty Court.⁷³ Roman-Dutch law should be understood to mean "the modern Roman-Dutch law administered by our courts",⁷⁶ or rather "South African law drawing primarily but not necessarily exclusively upon its common-law source."⁷⁵ It is therefore of vital importance to determine if the specific jurisdiction existed at the commencement of the Act, as it will indicate whether the Admiralty Court should apply English law or Roman-Dutch law. (It is assumed at this stage that we are dealing with a maritime claim, and that an Admiralty Court has exclusive jurisdiction over the matter — jurisdiction at the commencement of the Act serves only to determine the law to be applied.)

The process to determine whether such jurisdiction existed before the commencement of the Act

¹⁰⁵ Admiralty Jurisdiction Regulation Act 105 of 1983 s 6(1)(a).
¹⁰⁶ Staniland 1985 LMCLQ 465-466, also 466 n 35.
¹⁰⁷ Before the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983 English statutes after 1891 did not apply in South Africa: see Tharros Shipping Corporation SA v Owner of the Ship "Golden Ocean" 1972 4 SA 316 (N) relying on The Yuri Maru; The Woron [1927] AC 906 at 915-916; Southern Steamship Agency Inc v MV Khalij Sky 1986 1 SA 485 (C) 486B: "In effect, therefore, this Court has to apply the English Admiralty Law as it was in July 1891."
¹⁰⁸ Admiralty Jurisdiction Regulation Act 105 of 1983 s 6(1)(b).
¹⁰⁹ Corbett CJ in The Shipping Corporation of India Ltd v Evdomon Corporation (The Vallabhbhai Patel) 1994 1 SA 550 (A) 559D.
¹¹⁰ Van Niekerk 1994 SA Merc LJ 27 n 10, also see 28 n 13.
is cumbersome, often not resulting in a clear and definite answer.\textsuperscript{76} It requires "a knack for detective work and legal historical research".\textsuperscript{77} The admiralty jurisdiction of a South African Admiralty Court before the commencement of the Admiralty Jurisdiction Regulation Act\textsuperscript{78} (ie a Colonial Court of Admiralty) was exactly the same as that of the "High Court in England" on 1 July 1891, and was not affected by later legislation.\textsuperscript{79} To determine the extent of the jurisdiction of the English Admiralty Court in 1890, it is necessary to examine legislation and the original and inherent jurisdiction\textsuperscript{80} of that court.

There are two important statutes concerning the jurisdiction of the English Admiralty Court before 1890, the Admiralty Court Act 1840\textsuperscript{81} and the Admiralty Court Act 1861.\textsuperscript{82} Section 6 of the 1861 Act is important:\textsuperscript{83}

The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of

\textsuperscript{76} According to Hare \textit{Shipping Law} 21, "it was scarcely possible in 1891 to define the court's jurisdiction with certainty. In retrospect, it is often nigh impossible."

\textsuperscript{77} Dillon and Van Niekerk \textit{Maritime Law} 27. Van Niekerk 1994 \textit{SA Merc LJ} 32 mentioned the "dreaded historical investigation".

\textsuperscript{78} 105 of 1983.

\textsuperscript{79} Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) s 2(2). The date is the commencement date of the Act according to s 16(1), even though the relevant date is often loosely referred to just as 1890. Trollip JA stated in \textit{Beaver Marine (Pty) Ltd v Wuest} 1978 4 SA 263 (A) 274C: "According to the construction of s 2(2) by the Privy Council in \textit{The Yuri Maru, The Woron} 1927 AC 906 the jurisdiction of a Colonial Admiralty Court is governed by the admiralty jurisdiction of the English High Court as it existed in 1890; it is not affected by any subsequent English enactments." The \textit{Beaver Marine} case was followed by \textit{Malilang and Others v MV Houda Pearl} 1986 2 SA 714 (A) 723A.

\textsuperscript{80} S 2(2) of the Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) refers to jurisdiction "existing by virtue of any statute or otherwise".

\textsuperscript{81} 3 & 4 Vict c 65.

\textsuperscript{82} 24 Vict c 10. For a list of other statutes possibly providing admiralty jurisdiction see Hare \textit{Shipping Law} 19 n 92.

\textsuperscript{83} The section is discussed comprehensively by Hare \textit{Shipping Law} 476-481.
any bill of lading of any goods\textsuperscript{84} carried into any port in England or Wales\textsuperscript{85} in any ship,\textsuperscript{86} for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

Provided always, that if any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

According to this section Colonial Courts of Admiralty did not have jurisdiction over "outward" bills of lading, even though the section should be construed liberally.\textsuperscript{87} It refers only to "goods

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\textsuperscript{84} This does not include passengers' luggage: \textit{R v The Judge of the City of London Court} (1883) 12 QBD 115 at 116-117.

\textsuperscript{85} The Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) s 2(3)(a) provides: "Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court of England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales".

\textsuperscript{86} The goods must enter the jurisdiction on the ship that is now being arrested (subject to what will be said in the next footnote). If the goods were transshipped, the court would not have jurisdiction over the ship that originally carried the goods even where that ship enters a port in England or Wales without the goods: \textit{The Ironsides} (1862) Lush 458 (167 ER 205) at 466-467. In respect of this Hare \textit{Shipping Law} 478 n 21 made the following interesting observation: "Where a cargo claim is enforced in South Africa today by the arrest or attachment of an associated ship, \textit{[Admiralty Jurisdiction Regulation Act 105 of 1983 s 3(6)-(7)]} not being the ship which carried the lost or damaged cargo, the analogy could be drawn to the old English law to the effect that the English court in admiralty would not have had jurisdiction, not so much because it did not know of an associated ship procedure (to the procedural aspects of which the law of the forum would clearly apply) but rather that the English court only had jurisdiction over the actual carrying ship. Hence, South African Roman-Dutch law would apply, even if the cargo were ‘carried inwards’ on a bill of lading." This is of course hardly a satisfactory state of affairs, and again indicates that a better result will always be achieved if a court rather applies South African law than English or Roman-Dutch law: see §3.11 \textit{infra}.

\textsuperscript{87} As to the interpretation of the section see \textit{Owner of MV Aegean Sun v Caisse Generale de Perequation Aif de Prix BP} 1982 4 SA 625 (C) 630G: "I am in respectful agreement with the view expressed in the above decisions [discussed at 628-630] that s 6 is framed in large and general terms ..."; Staniland 1988 \textit{SALJ} 325. In the \textit{Aegean Sun} case the court found that a cargo of bagged rice was "carried into" Cape Town, even though the ship was forced into the port after sustaining damage at sea because of bad weather (630H). Also see \textit{The Bahia} (1863) Br & L 61 (167 ER 298) at 62; \textit{Giovanni Dapueto v James Wyllie & Co (The Pieve Superiore)} (1874) LR 5 PC 482 at 490-493. In \textit{The Danzig} (1863) Br & L 102 (167 ER 315) the court entertained a claim for damages due to the short delivery of a cargo of wood. The argument of the defence was that there was no jurisdiction as the wood not delivered was therefore never carried into England or Wales. The argument was of course rejected by Dr Lushington (104): "If this position could be maintained the consequence would be that if separate articles constituting half a cargo, or, indeed, if an entire cargo was totally lost by the negligence of the master, the owner or consignee would have no remedy under the provisions of the statute. ... Such a construction would in the majority of cases render the statute wholly ineffectual." The court held that "carried" means "carried or to be carried".
carried into any port in England or Wales". The section further limits jurisdiction to a claim by the owner, consignee or assignee of a bill of lading. As will be seen below, this is not the end of the matter. It is still possible that the 1890 English Admiralty Court did have original or inherent jurisdiction over all bills of lading (or other matters). According to Van Niekerk inherent jurisdiction should be continuously exercised by the Admiralty Court, and it must also be an uncontested jurisdiction. Even if admiralty jurisdiction existed at some stage before 1890, one cannot derive from the previous existence of jurisdiction that similar jurisdiction still existed in 1890.

Staniland wrote an article about whether a claim based on an indemnity issued in return for misrepresenting the port of loading in a bill of lading (to circumvent sanctions) is enforceable. As mentioned above, although the jurisdiction of the Admiralty Court was originally very wide, legislation and writs of prohibition issued by common law courts severely curtailed the original and inherent jurisdiction. After comprehensively scrutinizing the inherent jurisdiction of the English Admiralty Court Staniland concluded, "To sum up, whether or not the admiralty court had jurisdiction to hear a claim based upon an indemnity is shrouded in obscurity."

In the case of an extension to existing jurisdiction, English law would probably still be applied. When dealing with a new head of jurisdiction, such as charterparties, Roman-Dutch law must

90 Girdwood 1995 SA Merc LJ 330. Regarding the possibility of examining decisions in the Admiralty Court to determine whether such court had jurisdiction, Hare Shipping Law 20 painted the following bleak picture: "For evidence that the Admiralty Court tried a suit unhindered by a writ of prohibition, is not necessarily a confirmation that the Admiralty Court had jurisdiction to do so. It may merely indicate that the Common Pleas did not choose to issue prohibition."
91 1988 SALJ 322.
92 It must also be determined if such prohibition was lawful: Staniland 1988 SALJ 325.
93 The purpose once again is to decide whether English or Roman-Dutch law should be applied today.
94 328. He further wrote, "Nevertheless, it is tentatively submitted that the admiralty court probably did have jurisdiction to entertain such a claim, although it is uncertain whether such jurisdiction was lawfully lost in the attack launched by the courts of common law."
95 Shaw Admiralty Jurisdiction 10; contra Boosyen 1984 BML 83-84 and 1991 THRHR 642.
96 Admiralty Jurisdiction Regulation Act 105 of 1983 s 1(1)(1) sv "maritime claim" (j).
ostensibly be applied. Staniland, however, after examining the original and inherent jurisdiction of the 1890 English Admiralty Court, found that there was indeed inherent jurisdiction over charterparties, and therefore English law should be applied to charterparties in South Africa today. Of course, it is probably not desirable that Roman-Dutch law be used in the case of charterparties. Earlier Staniland wrote, “It seems, therefore, that recourse will, perforce, be made to the English law, unless or until the Roman-Dutch law on charter parties is discovered to be a complete and up to date system, an event that is hardly likely to occur.” To apply English law to at least some bills of lading and Roman-Dutch law to charterparties, is absurd.

3.8 Bills of Lading

Clearly the English Admiralty Court did have jurisdiction over “inward” bills of lading, and possibly also over “outward” bills of lading by virtue of its inherent jurisdiction. It is submitted that English law should be applied to disputes relating to bills of lading, regardless whether they are “inward” or “outward”. It seems that Van Niekerk agreed: “The law which a South African court exercising its admiralty jurisdiction is to apply to questions of carriage of

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97 The Shipping Corporation of India Ltd v Evdomon Corporation (The Vallabhbhai Patel) 1994 1 SA 550 (A) 562I-J (though obiter); Waring Charterparties 8; Dillon and Van Niekerk Maritime Law 27; Booysem 1984 MBL 76; Staniland 1985 LMCLQ 466; Hofmeyr 1982 Acta Juridica 35; Hare Shipping Law 480-481.

98 1992 SALJ 532-534; contra Girdwood 1995 SA Merc LJ 301 who found that Roman-Dutch law is indeed applicable to charterparty disputes. Also see the doubt expressed about Staniland’s point of view by Van Niekerk 1994 SA Merc LJ 55 n 129; Hare Shipping Law 480.


100 Admiralty Court Act 1861 (24 Vict c 10) s 6.

101 It may not be possible to determine conclusively if such inherent jurisdiction existed: see eg Staniland 1988 SALJ 328 and 1994 SA Merc LJ 25 where he did not reach a definite conclusion as to whether the 1890 Admiralty Court did exercise inherent jurisdiction regarding an indemnity and marine insurance respectively.

102 It is not clear why Waring Charterparties 8 wrote (before the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983), “Present Admiralty law does not apply to contracts of carriage by sea, either charterparties or bills of lading.”

103 1993 SA Merc LJ 83. Hare Shipping Law 542 disagreed: “To the extent that cargo is considered carried into South Africa upon a bill of lading, any dispute arising will be will be subject to English law as it was in November 1983. All other bill of lading contractual disputes will be subject to the Roman Dutch law applicable in South Africa today.” Hare also indicated that “it is unlikely that the application of either of the two systems would produce different results.”
goods by sea and bills of lading is English law. The reason for the application of English law is that such questions would prior to the passing of this Act have been within the admiralty jurisdiction of South African courts.104

It is also possible to argue that because a Colonial Court of Admiralty had jurisdiction over at least some bills of lading,105 and such jurisdiction is now extended by the Admiralty Jurisdiction Regulation Act 105 of 1983,106 English law should still be applied to such extensions.107 Page J approved Shaw's point of view in Peros v Rose: 108 “This provision [s 6(1)(a)] probably includes extensions of jurisdiction in respect of such matters ...”.

If English law is applied, the English Bills of Lading Act 1855,109 for example, forms part of our law.110 The Bills of Lading Act 1855 was applied in First National Bank of Southern Africa Ltd in re Bank of India v Kien Hung Shipping SA (Pty) Ltd.111 It should also be remembered that the law relating to bills of lading may be largely regulated by the Carriage of Goods by Sea Act112 incorporating the Hague-Visby Rules in a schedule, and granting these rules “the force of

104 However, in one of the cases Van Niekerk cited as authority, Alahaji Mai Deribe & Sons v The Ship Golden Togo 1986 1 SA 505 (N), it was actually decided that “the jurisdiction of a South African court sitting as a Colonial Court of Admiralty to adjudicate upon cargo claims was confined to goods carried into any port in South Africa” (507G). The court also incorrectly stated that the “only jurisdiction conferred upon the High Court of Admiralty to adjudicate upon cargo claims as at 1 July 1891 ... was that conferred upon it by s 6 of the Admiralty Court Act 1861 ...” (507D-E), without even mentioning the original or inherent jurisdiction of the English Admiralty Court. The other case Van Niekerk cited, Owner of MV Aegean Sun v Caisse Generale de Perequation Aif de Prix BP 1982 4 SA 625 (C) only dealt with goods carried into a South African port. In the Aegean Sun case the court also did not refer to the original or inherent jurisdiction of the Admiralty Court, but it did not imply that jurisdiction was regulated by statute only (627F).

105 Admiralty Court Act 1861 (24 Vict c 10) s 6.

106 By virtue s 1(1) sv “maritime claim” (ee) already quoted in §3.4 supra, that includes any matter that by virtue of its nature or subject matter is a maritime matter.

107 Malan and Faul 1989 SA Merc LJ 331-332; Shaw Admiralty Jurisdiction 10.

108 1990 1 SA 420 (N) 423I.

109 18 & 19 Vict c 111.


111 [1994] CLD 96 (W) 103-194.

112 1 of 1986. See Staniland 1987 LMCLQ 305 et seq.
Chapter 3: Jurisdiction and Applicable Law

3.9 English, Roman-Dutch or South African Law?

As the golden age of the Netherlands drew to a close at the end of the eighteenth century, its maritime power diminished. England became the most powerful seafaring nation and English and American lawyers subsequently developed modern admiralty law. Hofmeyr made the following comment about Plakaaten of Charles V and Philip II dating from the sixteenth century:

"Notwithstanding all this, however, having regard to the limited ground covered, the subsequent development of the action in rem and the maritime lien (which have been the dominating features of the Admiralty) and the role of maritime conventions, these sources, and, indeed, the Roman-Dutch maritime law, must be seen in perspective and it must not be supposed that they will in future enjoy a commanding influence."

Determining exactly what the Roman-Dutch law relating to bills of lading would be is indeed complex. Many academics criticised the continued use of Roman-Dutch law.

\[113\] Hofmeyr 1982 Acta Juridica 33, 43; Waring Charterparties 6.

\[115\] Hofmeyr 1982 Acta Juridica 33 n 20.

\[116\] See eg Staniland 1984 Acta Juridica 275; Rycroft 1984 LMCLQ 418: "A query must be made concerning the application of archaic Roman-Dutch shipping law to a highly technological and complicated area of the law." Only Booysen 1984 BML 83 called the Act a "legal maritime disaster", mainly because of the probable (according to him — actually it is definite) abolition of the concurrent jurisdiction of ordinary courts (continued...
commented, “Without wishing to detract from the greatness of our Roman-Dutch writers of the seventeenth and eighteenth centuries, one must point out that much of what they had to say about many aspects of maritime law have little application and cannot be readily adapted, to modern situations.” Staniland wrote that the partial retention of Roman-Dutch law is a “retrogressive step that is neither likely to attract foreigners to South African courts, nor to provide the means of keeping the Republic’s maritime law abreast of international developments.” According to Waring “[Roman-Dutch law] can be authoritative as a general rule only in general principle, because the needs of modern, complex, and sophisticated shipping have far outstripped the usefulness of most of the Roman-Dutch law on the subject ...”.

Ramsden called the application of Roman-Dutch law a “retrograde step”. In practice, even though the law to be applied is Roman-Dutch law, a court would rely heavily on English decisions. As Friedman stated, “Although I was required to apply the principles of Roman-Dutch law in the case, quite obviously when it came to interpreting certain clauses in the policy I relied heavily on English judgements in which those selfsame clauses had been interpreted.” English law will therefore always be of persuasive authority. An interesting suggestion by Staniland is that the Roman-Dutch law should, as with English law, only be applied “in so far as that law can be applied”.

There is much to be said for the use of English admiralty law. The carriage of goods by sea will

116 (...continued)
applying South African law. He also wrote (p 84) that the incorporation of a “foreign legal system ... reflects unfavourably on a state's sovereignty and its parliamentary, judicial and administrative ability to develop its own laws.”

117 Friedman 1985 SALJ 45.

118 1985 LMCLQ 477.

119 Charterparties 5-6 (writing before the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983). Also see 8-9.

120 1988 BML 71.

121 1985 SALJ 58.


123 See Dillon and Van Niekerk Maritime Law 108-109, although they wrote that “the true value of this source for the development of a modern South African law of marine insurance is still to a large extent undetermined and uncertain ...”. As to the law to be applied to contracts of marine insurance see Staniland 1994 SA Merc LJ 16 et seq and Van Niekerk 1994 SA Merc LJ 26 et seq.
invariably have an international character and the applicable law should be certain and well known wherever a dispute arises.\textsuperscript{124} English admiralty law forms the basis of admiralty law in most of the English-speaking world including America.\textsuperscript{125} Considerations such as convenience, comity and uniformity play an important role.\textsuperscript{126} Often a choice of law clause would indicate English law anyway.

Malan and Faul\textsuperscript{127} suggested that admiralty courts should rather apply “South African law (into which English admiralty law has been received and not ‘Roman-Dutch’ law.” It is submitted that admiralty law, including the law relating to (all) bills of lading, should be based on English law, but that care should be taken that these rules are fitted into the fabric of existing South African law. As Waring\textsuperscript{128} wrote, “While there is a need to consider the legal approach of great maritime nations to particular aspects of international shipping, it is undesirable to import indiscriminately general principles that are fully and adequately developed in our own law.”

3.10 Electronic Bills of Lading

Before concluding, a final remark is needed regarding the possible applicability of section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 to an electronic bill of lading. Hare\textsuperscript{129} wrote, “In relation to charterparties, and in future no doubt also in relation to non-bill of lading cargo shipments upon documents such as a sea waybill or non-negotiable receipt, or even by EDI, the effect of s 6 is particularly anomalous.” Therefore if some form of an electronic bill of lading is used, a court might decide to apply Roman-Dutch law to such a document — with uncertain consequences, and at the very least consequences that might differ from the paper bill of lading. As Hare indicated, “The arbitrary nature in which s 6 distinguishes between bills of lading claims in respect of which the Colonial Courts had jurisdiction, and other cargo claims

\textsuperscript{124} See Forsyth 1982 \textit{SALJ} 251.
\textsuperscript{125} Hofmeyr 1982 \textit{Acta Juridica} 43; Ramsden 1988 \textit{BML} 71.
\textsuperscript{126} Hofmeyr 1982 \textit{Acta Juridica} 48-49; Waring \textit{Charterparties} 4.
\textsuperscript{127} 1989 \textit{SA Merc LJ} 332 n 63. Also see Hare \textit{Shipping Law} 4.
\textsuperscript{128} \textit{Charterparties} 8-9. Also see the discussion in §3.6.
\textsuperscript{129} \textit{Shipping Law} 480.
for which it did not, is in no way rational.” It will be submitted at the end of Chapter 12\(^\text{130}\) that an electronic bill of lading is still a bill of lading. Therefore it is submitted that a court should firstly still exercise admiralty jurisdiction over an electronic bill of lading, and that the same law applied to a paper bill of lading (English law subject to the remarks made in the next paragraph) must also be applied to an electronic bill of lading. As the submission is that an electronic bill of lading is still a bill of lading, it does not make any difference that in 1890 or 1983 the concept of an “electronic” bill of lading as such was unknown in English law.

### 3.11 Conclusion

Regarding all bills of lading now, it is submitted that the emphasis should start to shift to South African law rather than English law or Roman-Dutch law per se. Hare wrote,\(^\text{131}\)

> “As will be seen in relation to many heads of jurisdiction in South Africa today, s 6 stultifies South African admiralty law. It conflicts with the freedom given to judges by our common law system to shape the law. And it often introduces the very uncertainty it sought to avoid. In certain cases it leads to unsound and absurd results. It is potentially inequitable as it is ubiquitous. The legislature should waste no time amending it, allowing South African admiralty law to come of age by standing on the considerable foundations of its rich legal history.

> ...

> Perhaps the legislature should take a leaf from the book of the South African constitution and, in doing away with s 6, point the South African High Court in Admiralty mandatorily to international law, directing it also to have reference to all appropriate foreign law to decide what is the current South African law upon any matter.”

The problem is of course exactly how this should be achieved. Statutory intervention seems necessary, but to plunge admiralty law into uncertainty should also be avoided. Section 6(1) should preferably be repealed. It is submitted that a simple statement requiring admiralty courts to apply South African law will be sufficient, with perhaps the added provision that due reference should be made to English law forming the basis of our maritime law, as long as it is ensured that all concepts used are compatible with South African law.

\(^{130}\) §12.9.

\(^{131}\) Shipping Law 24. Also see Hare 9 n 41: “South African shipping law should now be allowed to stand on its own merits, without the necessity of the artificial crutches of s 6”.

Having said all that, it is nevertheless submitted that if the courts make a conscious effort to apply South African law the same result could even be achieved within the confines of section 6. Roman-Dutch law as such should not be exclusively applied to charterparties, for example, but rather South African law that includes English law. It is unlikely that (notwithstanding the fact that a court might state expressly that it applies Roman-Dutch law) a court will effectively be applying pure Roman-Dutch law to a charterparty dispute. In practice English law will therefore play a very important role anyway, and it can be said that the law effectively applied, is South African law.

It is submitted that there are two main reasons why applying South African law will be beneficial. Firstly, applying South African law instead of English law will mean that the law to be applied is not nearly two decades old — the applicable English law is frozen in 1983. The second advantage of applying South African law instead of English law, is that this will mean that care will be taken to ensure that all English concepts used are compatible with South African law. English law will not be applied exclusively, to the detriment of for example South African contract law and property law. Our courts will therefore apply South African law, which means that a court must firstly recognise that our maritime law is based on English law, but such a court will also ensure that the English law used is not in conflict with the general principles of South African law.
Chapter 4
The Nature of the Bill of Lading

4.1 Introduction

Before examining the functions of the bill of lading in the next chapter, it is necessary to determine what the legal nature of the bill of lading is. The development of the bill of lading as we know it today, took place mainly within the context of English law. It should therefore be ensured that the theoretical basis of the bill of lading is reconcilable with South African law. As will subsequently be shown, the concept of commercial paper (Wertpapier) is particularly suitable to explain the nature of the bill of lading in our law. The bill of lading as commercial paper made it possible to buy and sell the goods — or the "schwimmende Ware / Güter" as often referred to in German works — while the goods were still at sea. It should, however, be understood that although the concept of commercial paper provides an excellent illustration of the nature of the bill of lading, one cannot argue that the concept is indispensable to the existence of the bill of lading. In English law the bill of lading survived and developed with ease in the absence of the German concept of Wertpapier.

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1 Hildebrandt Wertpapierrecht 3, 132; Locher Wertpapiere 148; Müller-Christmann and Schnauder Wertpapierrecht 145, 146; Von Gierke Wertpapiere 115. As indicated in the Geleitwort, Hildebrandt only completed the general section of the proposed work. He died in aerial raids on Freiburg in 1944, and thus never completed the second part that would have dealt with individual Wertpapiere.
4.2 **Wertpapier: German Concepts**

Hueck-Canaris defined commercial paper or *Wertpapier* in the following way:

"Ein Wertpapier ist eine Urkunde, in der ein privates Recht in der Weise verbrieft ist, daß zur Geltendmachung des Rechts die Innehabung der Urkunde erforderlich ist."

According to Brunner there must be "ein gewisser rechtlicher nexus zwischen Recht und Papier". Put another way, "Das differenzierende Merkmal liegt in einer besonderen Verknüpfung zwischen dem verbrieften Recht und dem Papier." Locher wrote, "In dem Doppelgesicht des Wertpapiers liegt ein ganzes 'Geheimnis': es ist Recht in Gestalt einer Sache und Sache als Ausdrucksform eines Rechts." What is special about this bond or nexus between right and paper, is the fact that it is necessary to hold the paper to enforce the right.

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2 The discussion of commercial paper in this paragraph is not an attempt at an exhaustive exposition of the law relating to commercial paper, but rather to show the use of the concept as a theoretical foundation for the bill of lading.

3 *Wertpapiere* 1. The original definition by Heinrich Brunner "Die Werthpapiere" in Endemann II *Handbuch des deutschen Handels-, See- und Wechselrechts* (1882) 147 (as quoted by Richardi *Wertpapierrecht* 15) was: "Werthpapier ist eine Urkunde über ein Privatrecht, dessen Verwertung durch die Innehabung der Urkunde privatrechtlich bedingt ist." The definition of Zöllner *Wertpapierrecht* 1 is nearly exactly the same as that of Hueck-Canaris. Zöllner 17-18 wrote that the definition of Hueck-Canaris is more comprehensive and clearer than that of Brunner, but "Sachlich aber hat die h. L. [herrschende Lehre] der Definition Heinrich Brunners nichts hinzugefügt." Further see Stanzl *Wertpapierrecht* 138-139; Von Gierke *Wertpapiere* 1-3; Jacobi *Wertpapier* 2; Locher *Wertpapiere* 1-7.

4 Malan and Pretorius *Bills of Exchange* 4 noted, "The term 'commercial paper' is a rather inadequate rendering of the German *Wertpapier* and Afrikaans *waardepapier*.” Cowen and Gering *Negotiable Instruments* 7-8 n 24, 94 also objected to the use of the term "commercial paper" because of a more restricted meaning that was given to the phrase in the Uniform Commercial Code (UCC) in the USA codifying only the law relating to bills, cheques, notes and certificates of deposit in Article 3 under the heading "Commercial Paper". Today this aspect of their criticism does not apply anymore, as the revised 1990 UCC Article 3 was renamed "Negotiable Instruments" and according to §3-101 the article should now be cited as "Uniform Commercial Code — Negotiable Instruments". (For the text of Article 3 see Cooper (ed) *Portable UCC* 85-109.) It is indeed true that it is difficult to find a precise translation in English of *Wertpapier*, but following Malan the term "commercial paper" will subsequently be used. In Afrikaans the word *waardepapier* is used.

5 Described even more precisely as *ein privates Vermögensrecht* by Baumbach-Hefermehl *Wechselgesetz* 3.

6 Quoted by Malan *Beelmatige Hower* 217.

7 Zöllner *Wertpapierrecht* 16; Müller-Christmann and Schnauder *Wertpapierrecht* 11; Locher *Wertpapiere* 2, 3. For more ways in which this nexus have been described, see Malan 1976 *TSAR* 8.

8 *Wertpapiere* 2.

9 Zöllner *Wertpapierrecht* 17; Jacobi *Wertpapier* 2; Hueck-Canaris *Wertpapiere* 4; Sedatis *Wertpapierrecht* 169.
When dealing with commercial paper, one can distinguish between a right embodied in the instrument (*Recht aus dem Papier*) and the ownership of the instrument (as a thing) itself (*Recht am Papier*).\(^{10}\) It is therefore often said that the following maxim always applies in the case of commercial paper: *Das Recht aus dem Papier folgt dem Recht am Papier.*\(^{11}\) As any sort of general statement relating to commercial paper this maxim should not be used today. Zöllner\(^{12}\) wrote,

"Erst recht verfehlt is der berühmte und viel zitierte Satz, bei Inhaberpapieren folge das Recht aus dem Papier dem Recht am Papier. Der Satz war als dogmatishce Regel seit jeher unbrauchbar, weil selbstverständlich nicht jede Veränderung der Eigentumslage zu einer Veränderung der Glaubigerstellung führen konnte .... Demgemäß wollte man den Satz nicht als dogmatische, sondern legiglich als didaktische Regel für den Normalfall der Verkehrsgeschäfte verstanden wissen. Auch insoweit ist er jedoch heute wegen der veränderten Formen, in denen sich Verkehrsgeschäfte vollziehen, nicht mehr sinnvoll."\(^{13}\)

Especially in the case of *Rektapapiere* the maxim should not be used: "Die Übereignung des Papiers bewirkt bei diesen Papieren also an sich keinen Rechtstibergang, vielmehr folgt das Papiereigentum automatisch dem Übergang des verbrieften Rechts ...."\(^{14}\) In the case of

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\(^{10}\) See Hueck-Canaris *Wertpapiere* 2; Müller-Christmann and Schnauder *Werpapierrecht* 2; Stanzl *Wertpapierrecht* 2.

\(^{11}\) See Von Gierke *Wertpapiere* 2; Müller-Christmann and Schnauder *Werpapierrecht* 2, 10; Hueck-Canaris *Wertpapiere* 3; Malan 1976 *TSAR* 6, 7; Roth *Werpapierrecht* 6; Jacobi *Wertpapier* 6.

\(^{12}\) *Werpapierrecht* 10-11. Also see Hueck-Canaris *Wertpapiere* 24; Müller-Christmann and Schnauder *Werpapierrecht* 10.

\(^{13}\) For example, if an artist makes a drawing on the back of an "Inhaberschuldverschreibung", he will become owner of the document, but will not be entitled to the right embodied in the paper: example given by Müller-Christmann and Schnauder *Werpapierrecht* 10 n 16.

\(^{14}\) Zöllner *Werpapierrecht* 11; Sedatis *Werpapierrecht* 172, 53 ("Da das verbrieftete Recht und nicht das Papier bestimmend ist, werden Rektapapiere nach den für das verbrieftete Recht geltenden Regeln und nicht nach sachenrechtlichen Grundsätzen übertragen"); Müller-Christmann and Schnauder *Werpapierrecht* 149 n 24; Richardi *Werpapierrecht* 16-17, 20, 35. See Zöllner 17, 18, 19 (and Von Gierke *Wertpapiere* 2-3) for comments and criticism on the theory stating that the main characteristic of commercial paper is that "die Verfügung über das verbrieftete Recht durch die Verfügung über das Papier erfolgt." Following this theory, adhering to the maxim that the right follows the paper, commercial paper is defined in a narrower sense, often called *Wertpapiere öffentlichen Glaubens*, thus excluding *Rektapapiere* (as opposed to a wider sense, including *Rektapapiere*): see Hueck-Canaris *Wertpapiere* 2-4; Baumbach-Hefermehl *Wechselgesetz* 6-12; Sedatis 168. Hueck-Canaris 4 came to the conclusion that defining commercial paper in a narrower sense would, for example, lead to an inexpedient division between the *Wechsel* and the *Rektawechsel* that should be grouped together (similar conclusions reached by Zöllner 18-19; Baumbach-Hefermehl 10; Sedatis 168-169; Von Gierke 2-3). Sedatis 169 wrote, "Da der Schuldner bei [Rektapapieren] in gleicher Weise wie bei Inhaber- und Orderpapieren nur gegen Vorlage der Urkunde zur Leistung verpflichtet ist, vereint dieses Merkmal sämtliche genannten Urkunden zu einer einheitlichen Kategorie von Wertpapieren." There is therefore no doubt that the (continued...)
Rektapapiere the operative maxim is often put succinctly as: Das Recht am Papier folgt dem Recht aus dem Papier.\textsuperscript{15} It is submitted that even though the maxim Das Recht aus dem Papier folgt dem Recht am Papier might not always be appropriate, there can be no objection against the maxim in South African law as a very general description of the way in which commercial paper operates. When dealing with non-transferable instruments the maxim cannot be used — the operation of the maxim is limited to instruments that are transferable, and can of course only apply when such instruments are in fact transferred. The possibility of ceding the embodied right in a non-transferable instrument exists in South African law,\textsuperscript{16} but such cession will always be the exception rather than the rule, and when the right embodied in a non-transferable instrument is indeed ceded, the maxim (Das Recht aus dem Papier folgt dem Recht am Papier) will not apply.

A bill of lading is commercial paper (Wertpapier).\textsuperscript{17} Commercial paper can be divided according to the type of the embodied right into Mitgliedschaftspapiere, Sachenrechtliche Wertpapiere and

\textsuperscript{14}(...continued) herrschende Lehre based on Brunner, rejecting defining commercial paper in a narrow sense because of systematical anomalies, is to be preferred. Ulmer Recht der Wertpapiere 20-21 defined Wertpapier in a narrow sense in 1938, and regarded the Rektapapiere only as “wertpapierähnliche Urkunden” (93). Although Von Gierke 2 rejected Ulmer’s point of view and regarded the Rektapapiere as Wertpapiere, he did state that the Rektapapiere “sind keine vollkommenen Wertpapiere” (6, 31). Hildebrandt Wertpapierrecht 119-120 similarly regarded the Rektapapiere as Wertpapiere, but also classified them as “unvollkommene Wertpapiere”.

\textsuperscript{15} Von Gierke Wertpapiere 2; Müller-Christmann and Schnauder Wertpapierrecht 3, 19; Sedatis Wertpapierrecht 53; Baumbach-Hefermehl Wechselgesetz 7, 30; Cowen and Gering Negotiable Instruments 86; Locher Wertpapiere 150.

\textsuperscript{16} Müller-Christmann and Schnauder Wertpapierrecht 18-19 (bold type omitted) wrote regarding Rektapapiere, “Der benannte Gläubiger kann das verbriefte Recht weiterübertragen; der Rechtsnachfolger wird jedoch nicht mehr namentlich in der Urkunde ausgewiesen. Daraus folgt, daß beim Rektapapier der Papierbesitz keine Vermutung für die materielle Berechtigung begründen und der Schuldner nicht schon durch Leistung an den Papierinhaber, sondern nur durch Leistung an den wahren Berechtigen frei werden kann. Rektapapiere haben also weder Legitimations- noch Liberationswirkung. Im Vordergrund steht nicht das Papier, sondern das Recht.” Also see Richardi Wertpapierrecht 35-37. In South African law, Malan and Pretorius Bills of Exchange 422 wrote, “It is submitted that, generally, words prohibiting transfer on a non-transferable cheque or other instrument prevent the negotiation of the instrument but not necessarily a cession of the rights embodied in it. ... it is submitted that words on an instrument prohibiting transfer or indicating an intention that it should not be transferable refer to the instrument and not the rights embodied in it ...”.

\textsuperscript{17} See Hueck-Canaris Wertpapiere 1; Zöllner Wertpapierrecht 5; Baumbach-Hefermehl Wechselgesetz 4; Prüssman-Rabe Seehandelsrecht 610; Abraham Seerecht 168; Von Gierke Wertpapiere 113.
Chapter 4: The Nature of the Bill of Lading

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The nature of the bill of lading is of course personal right and not a real right. Being owner of the bill of lading does not mean that one is owner of the goods. Another division is according to the way the party entitled to the rights embodied in the commercial paper is determined: Inhaberpapiere (bearer instruments), Rektapapiere (non-negotiable instruments) and Orderpapiere (order instruments). The bill of lading can of course form part of any of these categories. When dealing with a bill of lading as part of the Orderpapiere, it is further classified as part of gekorene Orderpapiere (as opposed to geborene Orderpapiere). The reason is that in the case

18 Von Gierke Wertpapiere 6-7; Locher Wertpapiere 19; Zöllner Wertpapierrecht 8-9; Hueck-Canaris Wertpapiere 20-21; Baumbach-Hefermehl Wechselgesetz 3; Müller-Christmann and Schnauder Wertpapierrecht 5; Stanzl Wertpapierrecht 140.

19 Zöllner Wertpapierrecht 2-5 divided commercial paper according to economic functions, the bill of lading being part of Wertpapiere des Güterumlaufs (the other two categories are Wertpapiere des Kapitalmarkts and Wertpapiere des Zahlungs- und Kreditverkehrs). See Hueck-Canaris Wertpapiere 19-20; Baumbach-Hefermehl Wechselgesetz 14-15; Richardi Wertpapierrecht 10-11 and Müller-Christmann and Schnauder Wertpapierrecht 21-22 for a similar division.

20 Cf Zöllner Wertpapierrecht 150 (my emphasis) where a bill of lading is described in the following way: “Das Konnossement verbrieft beim Seefrachtgeschäft den Anspruch auf Auslieferung bestimmter zur Beförderung übernommener Güter.” Also see Hueck-Canaris Wertpapiere 194, 200; Prüssman-Rabe Seehandelsrecht 610; Sedatis Wertpapierrecht 180; Richardi Wertpapierrecht 238; Hildebrandt Wertpapierrecht 132. Zöllner 153 (my emphasis) wrote, “Nicht zutreffend is es zunächst, wenn häufig gesagt wird, die besitzübertragende Verfugung über das Papier, etwa seine Übereignung, habe die gleiche Wirkung, wie sie der entsprechenden Verfügung über das Gut selbst unter dessen körperlicher Übergabe zukäme. Die Verfügung über das Papier überträgt nämlich nur den verbrieften schuldbrechtlichen Anspruch auf Herausgabe gegen den Lagerhalter, Frachtführer oder Verfrachter, und die Papierübergabe ersetzt nur die Übergabe des Gutes.”

21 See Müller-Christmann and Schnauder Wertpapierrecht 149.

22 Sedatis Wertpapierrecht 52 n 3 wrote, “Der Ausdruck Rektapapier geht historisch auf den Rektawechsel zurück, bei dem recta = direkt an die bezeichnete Person zu zahlen war”. Also see Von Gierke Wertpapiere 6.

23 See Zöllner Wertpapierrecht 9-14; Hueck-Canaris Wertpapiere 21-25; Baumbach-Hefermehl Wechselgesetz 14; Müller-Christmann and Schnauder Wertpapierrecht 14-20; Richardi Wertpapierrecht 23-38; Stanzl Wertpapierrecht 139-140; Locher Wertpapiere 20-25.

24 See Zöllner Wertpapierrecht 150; Baumbach-Hefermehl Wechselgesetz 29; Prüssman-Rabe Seehandelsrecht 611.

25 See Hildebrandt Wertpapierrecht 122; Sedatis Wertpapierrecht 179; Von Gierke Wertpapiere 25; Müller-Christmann and Schnauder Wertpapierrecht 18, 142; Richardi Wertpapierrecht 233, 234; Locher Wertpapiere 145-146, 147.
of bills of lading specific words (eine positive Orderklausel) are necessary to indicate that the bill of lading is made out to order. Without such words the bill of lading is only a Rektakonnossement (or Namenskonnossement). A cheque, on the other hand, unless non-transferable, is payable to order without further qualification.

A bill of lading can further be described as Traditionsapapier because transfer of the instrument can also serve as transfer of the goods, or has the same effect as the delivery of the goods.

A bill of lading is also Legitimationspapier. Anybody who is in possession of the bill of lading and whose title is established by the instrument, is formally legitimated. The holder of a bearer bill of lading, or in the case of an order bill of lading, the initially named consignee or the indorsee by way of an unbroken chain of indorsements, is therefore formally legitimated (formelle or f"ormliche Legitimation). Because a thief can be in possession of the instrument, there is only a rebuttable presumption of material legitimation (materielle Legitimation) – the mere fact of holding the instrument does not entitle one to material legitimation.

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26 To make a check non-transferable it needs eine negative Orderklausel: see Sedatis Wertpapierrecht 179, also n 27; Richardi Wertpapierrecht 28.

27 According to Von Gierke Wertpapiere 112 (italics omitted), “Traditionspapiere sind Wertpapiere, die auf Herausgabe von Waren abgestellt sind, und bei denen die Übergabe (Tradition) des Papiers die Übergabe der Waren in bestimmten Umfang ersetzt.”

28 Zöllner Wertpapierrecht 5, 152; Locher Wertpapiere 147-148; Jacobi Wertpapier 67; Hueck-Canaris Wertpapiere 20, 199; Baumbach-Hefermehl Wechselgesetz 29; Prüssman-Rabe Seehandelsrecht 610-611, 653, 654; Sedatis Wertpapierrecht 183; Richardi Wertpapierrecht 237; Abraham Seerecht 171; Hildebrandt Wertpapierrecht 3; Roth Wertpapierrecht 98. Bearer bills of lading, order bills of lading and also the Rektakonnossement have Traditionswirkung: see Zöllner 153; Müller-Christmann and Schnauder Wertpapierrecht 149; Locher 147.

29 Not all Wertpapiere are Legitimationspapiere, and not all Legitimationspapiere are Wertpapiere: Zöllner Wertpapierrecht 22; Hueck-Canaris Wertpapiere 12-13; Sedatis Wertpapierrecht 173-174; Müller-Christmann and Schnauder Wertpapierrecht 13-14. One can further distinguish between Legitimationswirkung zugunsten des Schuldners (where the debtor is freed from his obligations by simply performing to the holder of the instrument) and Legitimationswirkung zugunsten des Glaubigers (because the debtor must perform only to the creditor as holder of the instrument – ie the creditor cannot lose the right as long as he is in possession of the instrument): Zöllner 22-23; Müller-Christmann and Schnauder Wertpapierrecht 6-9. Also see Hueck-Canaris 9-13; Abraham Seerecht 169; Hildebrandt Wertpapierrecht 5-9.

30 Prüssman-Rabe Seehandelsrecht 646.

31 Zöllner Wertpapierrecht 23; Baumbach-Hefermehl Wechselgesetz 27; Prüssman-Rabe Seehandelsrecht 646; Müller-Christmann and Schnauder Wertpapierrecht 8-9, 17; Malan 1976 TSAR 9-10; Malan and Pretorius Bills (continued...)
It is further interesting to note that Zöllner regarded bills of lading as abstract commercial paper ("abstrakte Wertpapiere" – as opposed to "kausale Wertpapiere"), although he said that it is a difficult and controversial question whether one is dealing with an abstract or causal obligation to deliver shipped goods. An example of an abstract obligation is the cambial obligation, because the right embodied in a bill of exchange exists (at least formally) separately or independently from the underlying obligation. In the case of a bill of lading the type of underlying obligation, the contract for the carriage of goods by sea, is indicated, but the bill of lading is nevertheless regarded as abstract commercial paper. Hueck-Canaris differentiated between "Nichtakzessorietät" and "Typuslosigkeit" in the case of abstract commercial paper. "Nichtakzessorietät" means that the existence of the embodied right does not depend upon the effectivenes of the underlying obligation. "Typuslosigkeit" means that the embodied right does not make any reference to the type of (underlying) contract. These two characteristics can both be present as in the case of a cheque, but it is not necessarily the case:

31 (...continued)

of Exchange 13. A non-transferable bill of lading (Rektakonnossement) is not "Legitimationspapier" according to Hueck-Canaris. Prüssman-Rabe 646 however wrote that the named consignee of a Rektakonnossement is legitimated.

32 "Wertpapierrecht" 28-29. Zöllner wrote, “Abstrakt in dem dargelegten Sinn können auch solche Papiere sein, bei denen das verbrieft Recht nicht eine gänzlich ‘farblose’ Forderung darstellt, sondern den Typus des Kausalverhältnisses erkennen läßt (typusbestimmtes Wertpapier) wie insbesondere bei den Wertpapieren des Güterumlaufs (Konnossement ...). Hier ist nur die allgemeine Einsicht festzuhalten, daß die Typusbezogenheit derartiger Papiere der Möglichkeit ihrer abstrakten Begebung i. S. der Selbständigkeit der Verpflichtung gegenüber dem konkreten Kausalverhältnis nicht entgegensteht. ... Die Typusbezogenheit hat freilich dennoch Bedeutung. Denn bei den genannten Papiere unterliegt das verbrieft Recht jedenfalls den durch die einschlägigen gesetzlichen Bestimmungen über den Frachtvertrag oder das Lagergeschäft für den Typus gezogenen Grenzen.” Zöllner 29 rejected calling instruments such as the bill of lading a “Zwischengruppe der halbabstrakten Wertpapiere”. Also see Müller-Christmann and Schnaider "Wertpapierrecht" 37-38. Von Gierke "Wertpapiere" 113 (also see 7) wrote though that the bill of lading is "ein kausales Wertpapier": “Es ist also nicht abstrakt auf eine Verpflichtung abgestellt, sondern es setzt einen Seefrachtvertrag nicht bloß voraus, sondern bringt ihn auch ersichtlich in der Urkunde zum Ausdruck.” Also see Smeele "Passieve Legitimatie" 39-44; Sanders "Cognossement" 65 et seq.

The cambial obligation is regarded as formally abstract between immediate parties because it will seldom be the intention of the parties that their relationship be governed exclusively by, for example, a cheque, without being able to raise defences arising from an underlying contract, such as a sales contract: see Malan and Pretorius "Bills of Exchange" 18-21 on the relationship between the cambial and the underlying obligation. Also see Malan 1976 TSAR 15.

34 "Wertpapiere" 26-27. Also see Sedatis "Wertpapierrecht" 182-183; Richardi "Wertpapierrecht" 238; Hildebrandt "Wertpapierrecht" 142.

35 The use of the term is criticized by Zöllner "Wertpapierrecht" 28.
“... so ist z.B. das Recht des Inhabers ... eines Konnossements ... grundsätzlich unabhängig von der Wirksamkeit des zugrunde liegenden Frachtvertrags und folglich in diesem Sinne abstrakt, stellt aber gleichwohl eine spezifische frachtrechtliche Forderung dar, und ist daher nicht typuslos ....”

4.3 Commercial Paper in South African Law

In South African law a bill of lading is also commercial paper, “because its transfer brings about the passing of the contractual rights embodied in it” and it “does constitute commercial paper because exercise of the rights evidenced by it generally presupposes its possession.” Bills of lading, bills of exchange, cheques (including non-transferable cheques) and promissory notes are all examples of commercial paper. Commercial paper facilitates the exercise and transfer of the embodied rights. Müller-Christmann and Schnauder wrote,


One can therefore say that one of the functions of commercial paper is a Mobilisierungsfunktion or Umlaufsfunktion.

When dealing with commercial paper there is always a close connection between the possession

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36 Hueck-Canaris Wertpapiere 27, also see 195. Hueck-Canaris 28 further mentioned that the bill of lading can for example be made part of the kausale Wertpapiere by a comprehensive reference to the contract of carriage.


38 Malan and Pretorius Bills of Exchange 10.

39 Rektapapiere in German law are included in the concept of commercial paper: Zöllner Wertpapierrecht 18; Hueck-Canaris Wertpapiere 4; Baumbach-Hefermehl Wechselgesetz 31. According to Zöllner 19, “das Wertpapierrecht [wäre] ohne Darstellung der Rektapapiere und ihrer Besonderheiten systematisch nicht sinnvoll abgegrenzt ...” The questions surrounding the Rektawechsel are therefore not quite as “disputed” as shown by Cowen and Gering Negotiable Instruments 86.

40 Malan and Pretorius Bills of Exchange 4.


42 Wertpapierrecht 3. Richardi Wertpapierrecht 20 referred to a “Verdinglichung des Rechts”.

43 Müller-Christmann and Schnauder Wertpapierrecht 9. Also see Hildebrandt Wertpapierrecht 5; Roth Wertpapierrecht 2.
of the document and exercising the rights embodied in it. Malan and Pretorius\(^\text{44}\) identified six examples of the close connection between the right and the paper in the case of bills of exchange. A similar close connection exists in the case of the bill of lading. The bill of lading evidences the contract of carriage.\(^\text{45}\) Only the holder of a bill of lading is entitled to receive the goods at the place of destination,\(^\text{46}\) and the carrier must deliver to the holder of the bill of lading in order to escape further liability. The transfer or negotiation of the bill of lading can also effect the transfer of the rights embodied in it,\(^\text{47}\) or even the passing of ownership,\(^\text{48}\) and acquisition of the bill of lading is therefore necessary for the acquisition of the rights embodied in the bill of lading. A bill of lading is often referred to as a "symbol of property"\(^\text{49}\) or a "symbol of the goods".\(^\text{50}\)

However, as in the case of bills of exchange, one must be careful not to overemphasize the connection between the bill of lading and the rights embodied in it.\(^\text{51}\) It is always possible that the possessor of the bill of lading is not entitled to the rights embodied in it. The bill of lading may be stolen, or the current holder of the bill of lading could have received it from someone whose title was defective, and can thus not acquire more rights than the previous holder.\(^\text{52}\) This state of affairs is even more so in the case of the bill of lading than true negotiable instruments, because there can never a "holder in due course" of a bill of lading.\(^\text{53}\) It should further be remembered that the instrument (eg bill of lading) is not the right itself, and the continued existence of the right is not subject to the continued existence of the instrument.\(^\text{54}\) If the bill of

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\(^\text{44}\) Bills of Exchange 5.

\(^\text{45}\) Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492A.

\(^\text{46}\) Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492B.

\(^\text{47}\) Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492B.

\(^\text{48}\) Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492B.

\(^\text{49}\) London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 33; Hughes & Rogers v White, Ryan & Co (1900) 17 SC 236 at 240.

\(^\text{50}\) Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492B.

\(^\text{51}\) See Malan and Pretorius 5-6; Hueck-Canaris Wertpapiere 5.

\(^\text{52}\) As expressed by the maxim nemo plus iuris ad alium transferre potest quam ipse habet.

\(^\text{53}\) See Malan and Faul 1989 SA Merc LJ 329.

\(^\text{54}\) Cowen and Gering Negotiable Instruments 26-27, writing that "there is no complete merger between the right and the document." Further see Barak (1983) 18 Israel LR 54 n 29; Randfontein Estates Gold Mining Co Ltd (continued...)
4.4 Cowen and Gering's Criticism

Cowen and Gering examined whether the concept of commercial paper "(a) throws light on the true nature of a negotiable instrument; and (b) has 'problem-solving' qualities." They came to the conclusion that it is of little use regarding either (a) or (b). It should be kept in mind that Cowen and Gering examined the concept of commercial paper specifically with a view to determine its utility for the learning on negotiable instruments, and not for other documents such as the bill of lading. Because they devoted a significant amount of the second chapter of their book to a criticism of commercial paper, referring to a few of their remarks is necessary.

Cowen and Gering wrote, "While there is much to be gained from a study of the German Dogmatik, one must be on guard against allowing the uncritical importation of a substantive rule of German law under cover of an alluring Dogmatik." Pretorius replied that, "To refer to the German concept of Wertpapier is certainly not to advocate the introduction of substantive rules of German law into South African law ...." Thus the use of the concept commercial paper does not imply an introduction of the rules regarding the German Konnossement into South African law, but rather to use the concept of commercial paper to provide a logical theoretical

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54 (...continued)
v Custodian of Enemy Property 1923 AD 576 at 582; Hueck-Canaris Wertpapiere 5-7; Malan 1976 TSAR 9; Müller-Christmann and Schnauder Wertpapierrecht 12-13.

55 Negotiable Instruments 75.

56 See Negotiable Instruments 81, 95-100. Cowen and Gering 23-26 did approve of Von Savigny's phrase "Verkörperung der Obligation" (II Obligationenrecht 99). De Wet and Van Wyk Kontraktereg 4th ed 744 wrote that bills of exchange, cheques and promissory notes belong to the category of commercial paper. De Beer 1982 TSAR 151 also regarded bills and cheques as commercial paper, with the special characteristic that they are negotiable.

57 71 et seq.

58 Pretorius 1986 SALJ 151 et seq reviewed the book by Cowen and Gering and many of the comments below will be based on Pretorius' book review.

59 Negotiable Instruments 78, also see 78 n 37 and 38.

60 1986 SALJ 154.
framework for the South African bill of lading — as long as those theoretical foundations do not clash with existing South African law. It is true, as pointed out by Cowen and Gering, that a certain amount of care should be taken when dealing with a concept that originated in Germany, but it is submitted that especially the universality of the bill of lading makes the use of the concept of commercial paper conducive to our understanding of the bill of lading.

Cowen and Gering further characterized commercial paper as controversial in German law, calling the category “virtually amorphous” and “ill-defined”. Yet the Germans would surely not base their whole Wertpapierrecht on an amorphous category. Pretorius replied that “the herrschende Lehre still accepts the definition of Heinrich Brunner ...” and that Cowen and Gering’s point of view is “open to criticism”. Immediately after defining a Wertpapier, Hueck-Canaris stated, “Diese Begriffsbestimmung, die auf Heinrich Brunner zurückgeht, ist zwar nicht unbestritten, sie ist aber, wenn auch in manchen Abwandlungen, heute die herrschende.” It is readily admitted that (of course) all questions relating to Wertpapier are not absolutely

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61 And of course the negotiable instrument. See eg Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171 at 189: “Having been derived from the law merchant, bills of lading in that sense are known to all civilised communities.” Also see Prüssman-Rabe Seehandelsrecht 654 and 658-659, quoting from Sanders Brothers v MacLean & Co (1883) 11 QBD 327 at 341.

62 Negotiable Instruments 85-90. In the headnote to chapter 2 (p 71) they quoted Zöllner Wertpapierrecht 15 (the 13th ed was used by Cowen and Gering; since then a new edition has been published and all references here will be to the 14th ed) writing that “Der Begriff Wertpapier ist vieldeutig und umstritten.” Firstly, following that statement, Zöllner 15 indicated that the term is used differently in economic circles, by statutes and by legal science respectively (also see Locher Wertpapiere 1; Richardi Wertpapierrecht 13-15; Von Gierke Wertpapiere 1; Hildebrandt Wertpapierrecht 3). Then he wrote, “Diese [die Rechtswissenschaft] muß vielmehr den Wertpapierbegriff so abgrenzen, wie das für ihre eigenen systematischen Zwecke am sinnvollsten ist.” (Also see Hueck-Canaris Wertpapiere 4.) After looking at some diverging opinions on the meaning of commercial paper for the purposes of legal science, Zöllner 17 (also see 19; Richardi Wertpapierrecht 15) stated (quoted by Pretorius 1986 SALJ 153): “Den Gegensatz zu dieser Theorie bildet die ganz überwiegende Lehre, die von Heinrich Brunner begründet worden ist, und in fast alle Darstellungen des Wertpapierrechts Eingang gefunden hat.” Hueck-Canaris 13, after referring to all the different classifications, wrote, “Dabei ist zu beachten, daß es sich nicht um einander ausschließende Gegensätze, sondern um verschiedenartige Funktionen handelt, die ein und dasselbe Papier in sich vereinigen kann.”

63 84.

64 3 n 7.

65 1986 SALJ 153.

66 Wertpapiere 1.
undisputed in German law, but the concept is basically clear and well defined. Documents such as bills of exchange, cheques and of course the bill of lading are undoubtedly regarded as Wertpapiere.

It seems as if the principal reason of Cowen and Gering's rejection of commercial paper stems from the fact that (according to them) once it is decided that a document is a negotiable instrument, classifying such negotiable instrument as commercial paper, is superfluous. The purpose of classifying certain documents as commercial paper was never to do away with the necessity to classify some documents as negotiable instruments as well, but to show the connection between the document and right that exists for all documents in the commercial paper category. A document is commercial paper first, and if it meets the further requirements of a negotiable instrument, such document will be a negotiable instrument in addition to being commercial paper, or commercial paper with some added qualities. The main objection to Cowen and Gering's preference of regarding an exposition of negotiable instruments as sufficient, is that documents such as the non-transferable cheque, a cheque crossed with the words not negotiable, and indeed the bill of lading are not negotiable instruments. Therefore it is important to classify such documents (together with negotiable instruments) as commercial paper, to indicate their common characteristic of the nexus between the paper and the exercise

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67 The concept is also not used in a uniform way in German legislation; it is often used in a wider and a narrower sense: see Hueck-Canaris Wertpapiere 1; Zöllner Wertpapierrecht 15; Baumbach-Hefermehl Wechselgesetz 12-13.

68 See Negotiable Instruments 95-98 and the examples given there.

69 Cf Pretorius 1986 SALJ 155.

70 Cf Bills of Exchange Act 34 of 1964 s 6(5).

71 Cf Bills of Exchange Act 34 of 1964 s 80.

72 Negus 37 LQR 458; Pretorius 1986 SALJ 155. Cowen and Gering Negotiable Instruments 24 wrote that the "embodying document" is known as an "instrument" or a "documentary intangible". According to Goode Commercial Law 53 (also see 518-519), "Documentary intangibles are of two kinds, namely documents of title to goods and documents of title to payment of money. The latter are termed instruments." Cowen and Gering 54-55, 84 preferred Goode's terminology, even though they admitted, "There exists no widely accepted English term or phrase to designate the documents, embodying rights, with which we are concerned." Even though there may be similarities between a "documentary intangible" and a Wertpapier, it is submitted that at least in South African law the well worked out system of commercial paper is preferable.

73 Of course it is not submitted here that mere mechanical classification of a document adds anything to our wisdom on the subject: what is important is the qualities of a document highlighted by such classification.
Chapter 4: The Nature of the Bill of Lading

4.5 Conclusion: Commercial Paper

It is submitted that characterising the bill of lading as commercial paper or *Wertpapier*, provides an excellent illustration of the nature of the traditional bill of lading. The close relationship between right and paper — one needs the paper to enforce the right — is the basic characteristic of the bill of lading and of *Wertpapiere* in general. It is submitted that the concept of commercial paper illustrates the essential nature of the traditional bill of lading better than any other classification or description. It binds together a group of instruments all exhibiting the close connection between right and paper, keeping in mind that such instruments cannot all be regarded as negotiable instruments in the traditional sense. It is submitted that this logical classification of certain instruments highlighting their common attribute of the *nexus* between right and paper, is the principal advantage of grouping these instruments together as *Wertpapiere*. As already stated in the introductory paragraph, however, one cannot argue that the bill of lading would never have existed without the concept of commercial paper. When the bill of lading is discussed in this thesis, it will be seen that one can for example study the functions of the bill of lading without the need to refer to the bill of lading as commercial paper. While this is therefore not an attempt to propagate any magical properties of commercial paper, it is nevertheless submitted that the concept is useful in illuminating what the true nature of the bill of lading is.

4.6 The Relevance of Commercial Paper in the Twenty-First Century

The title of a German book dating from 1988 begins with the question: “Abschied vom

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74 According to Malan 1978 *TSAR* 113 the concept of commercial paper “is one of great systematical value and gives great clarity to the true nature of a negotiable instrument.” Malan and Pretorius 11 wrote that commercial paper “provides a useful theoretical framework within which the legal problems relating to negotiable and similar instruments can be resolved.”
Chapter 4: The Nature of the Bill of Lading

Wertpapier?\textsuperscript{75} The concept of commercial paper shows the close relationship between right and paper in the case of the traditional bill of lading, but as will be seen in later chapters it is exactly this relationship that will be of no importance when devising an electronic bill of lading. Without the continued existence of paper, the concept of commercial paper will be of little use in the future. It is also submitted that it will be difficult if not impossible to adapt the concept for use in a paperless world. To state that the bill of lading is commercial paper will therefore be of value to some extent when examining characteristics of the bill of lading that must be replicated in an electronic environment, but no more. Novel solutions will provide answers in an electronic environment when seeking an alternative to an original piece of paper in the coming years.

4.7 Nature: Negotiable Instrument?\textsuperscript{76}

Negotiable instruments have the following characteristics:\textsuperscript{77} the rights embodied in the instrument may be transferred by delivery (and indorsement if necessary), the \textit{bona fide} transferee for value acquires a good and complete title to the instrument and the rights embodied therein, and the holder can sue on the instrument in his own name. The traditional test to determine whether a document is a negotiable instrument, is therefore whether the instrument, by the custom of trade, is transferable like cash by delivery and capable of being sued upon by

\textsuperscript{75} Kreuzer (ed) \textit{Abschied vom Wertpapier? Dokumentelose Wertbewegungen im Effekten-, Gütertransport- und Zahlungsverkehr} (1988).

\textsuperscript{76} For the development of the negotiable instrument see Malan and Pretorius \textit{Bills of Exchange} 7-8; Cowen and Gering \textit{Negotiable Instruments} 16-23 and generally Holden \textit{History}.

\textsuperscript{77} As set out by Malan and Faul 1989 \textit{SA Merc LJ} 329, based on the definition proposed by Cowen and Gering \textit{Negotiable Instruments} 52. Pretorius 1986 \textit{SALJ} 157 criticized this definition because it mentioned the fact that the holder can sue on the instrument in his own name, as generally any person can sue in his own name: "It is wrong to elevate one aspect of the powers of the holder as an attribute of a negotiable instrument, especially if that power is of historical importance only." It is true that Cowen and Gering regarded the rights and powers of the holder \textit{pro tempore} as a \textit{consequence} of negotiability rather than a \textit{requirement} for a negotiable instrument (33, 35, 36). Therefore they clearly favoured a "twofold enumeration" (see the first two characteristics mentioned in the text) when defining a negotiable instrument (33, 37-43), but nevertheless still went on to include the power of the holder to sue in his own name in their definition (52). Cowen and Gering 36, 97 also distinguished between the "legal right" of the owner of the instrument to sue and the "legal power" to sue that flows from the possession of the instrument as holder (who is not necessarily the owner of the instrument). It seems much simpler, however, to use the concepts of formal and material legitimation. Also see the attributes of negotiable instruments as set out by Malan and Pretorius \textit{Bills of Exchange} 11; \textit{Impala Plastics (Pty) Ltd v Coetzee} 1984 2 \textit{SA} 392 (W) 395A-D.
the person holding it pro tempore. A further requirement is that, "Probably the instrument must be a contract to pay money or to deliver another negotiable security representing money." Referring to this requirement, Holden wrote, "If this is so, documents of title to goods are forever excluded from the category of negotiability — apart, of course, from express statutory provision." The reason Holden used the words "Probably" and "If", is that the case cited as authority for this requirement, Dixon v Bovill, where the House of Lords held that a written promise to deliver 1000 tons of iron to bearer was not a negotiable instrument, was not based on this further requirement, but on the fact that no evidence had been given to show a general commercial usage regarding these instruments. However, the validity of the Dixon case as

78 Blackburn J in Crouch v The Credit Foncier of England Ltd (1873) LR 8 QB 374 at 381 relying on the notes to Miller v Race (1758) 1 Burr 452 (97 ER 398) in Smith's Leading Cases (2nd ed at 259); Hill v The Colonial Banking and Trust Co 1927 TPD 138 at 148, citing the Crouch case; The London and County Banking Co Ltd v The London and River Plate Bank Ltd (1887) 20 QBD 232 at 238-239 relying once again on Smith's Leading Cases (9th ed at 505); Holden History 268. Malan and Pretorius Bills of Exchange 8 n 51 indicated that the definition was first published in Smith's Leading Cases 2nd ed at 259. Although in both the definition in Smith's Leading Cases and the Hill case (at 148, 149) it is subsequently stated or implied that the bona fide transferee for value obtains a good and complete title, it would be clearer to explicitly state this as a characteristic or requirement for a negotiable instrument: see Cowen and Gering Negotiable Instruments 36.

79 Holden History 269. Holden actually listed three additional requirements that should be added to the general test for negotiability, the one mentioned in the text being the third. The other two are, first, that the custom of trade must be that of the English market (obviously not applicable in South Africa) and second that the wording of the instrument must not indicate an intention that the instrument is not negotiable. The second additional requirement is of course true, but rightly does not warrant inclusion in the definition as such. Also see Malan and Pretorius Bills of Exchange 8; Aigler (1924) 24 Columbia LR 585. Cowen and Gering Negotiable Instruments 52 did include the fact that a negotiable instrument embodies "rights to the payment of money or a security for money" in their definition. Cf the definitions of a bill of exchange (s 2(1)) and a promissory note (s 87(1)) in the Bills of Exchange Act 34 of 1964 where "a sum certain in money" must be paid.

80 History 260-261.

81 (1886) 3 Macq 1 (facts and decision taken from Holden History 260).

82 Holden History 260. Chorley 48 LQR 56 wrote, "Dixon v Bovill is often quoted to the same effect, [i.e that negotiability is confined to instruments that are in their nature monetary] though if anything it is an authority the other way. ... In Dixon v Bovill the burden of the Lord Chancellor's speech was that the usage had not been properly proved." Merchant Banking Company of London v Phoenix Bessemer Steel Co (1877) LR 5 ChD 205, another case often referred to in this context (Holden 260 n 5; Chorley 56) dealt with delivery warrants for steel rails. Although Jessel MR mentioned that whether such a warrant is a negotiable instrument is "immaterial" he nevertheless held that the bona fide purchasers of the warrants were entitled to the goods free from any claims by the vendor (at 215). Referring to the Merchant Banking case, Chorley 56 wrote, "This usage [regarding these iron warrants] does not strictly establish anything more than quasi-negotiability, but with the exception of the bill of lading that position was not attained [at common law] in the case of any other document representing goods." The reason for this, according to Chorley 57, is that, "Goods were, of course, a very different matter from choses in action. Bills of exchange were the concern of the trading classes only, goods (continued...
authority for this proposition, is not of much practical importance regarding bills of lading. Although there is no **numerus clausus** negotiable instruments, it may be safely assumed that there is no usage or custom in existence today by which the bill of lading will acquire the attributes of negotiability.

The bill of lading is therefore not a negotiable instrument in the technical or traditional sense. Although it may be transferred freely (unless it is non-transferable or straight), the *bona fide* transferee for value of a bill of lading, does not necessarily acquire good and complete title to the instrument. A bill of lading is therefore only negotiable in the sense that it is transferable. The transferee, however, cannot obtain better title than the transferor. In *Gurney v Behrend*, decided in 1854, it was stated,

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

(...continued)

82 See Holden *History* 254-256; Malan and Pretorius *Bills of Exchange* 8 n 49; Negus 37 *LQR* 444.

83 See Holden *History* 254-256; Malan and Pretorius *Bills of Exchange* 8 n 49; Negus 37 *LQR* 444. But even with no evidence of such a custom today, the words of Negus 37 *LQR* 444 (also see 460) are still true: "Therefore, in attempting to arrive at the truth concerning the negotiability of bills of lading, the very first thing to bear in mind is that if it be to-day or to-morrow the general custom of merchants to treat bills of lading as negotiable instruments, courts of law will very readily give judicial sanction to that custom."

84 Unlike, for example, a treasury bill: see *Secfin Bank Ltd v Mercantile Bank Ltd* 1993 2 SA 34 (W) and *Kahn v Volschenk* 1986 3 SA 84 (A) (dealing with defence bonus bonds).

85 (1854) 3 *EL & BL* 622 (118 ER 1275) at 633-634.
Chapter 4: The Nature of the Bill of Lading

This position was confirmed once again by Lord Devlin in *Kum v Wah Tat Bank Ltd*,\(^8\)

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

There are however three instances listed by Scrutton\(^8\) where "the indorsee gets more than the indorser has", though, as they wrote, "whether it can be called 'a better title' is a nice question ...." The first of these is the vendor’s right of stoppage *in transitu*.\(^9\) While the goods are in transit, an unpaid vendor may exercise his right of stoppage *in transitu* when the vendee becomes insolvent. This right cannot be exercised against an indorsee of the bill of lading who has taken the bill of lading *bona fide* and for value. Thus while this right can be exercised against the vendee (indorser), it might not be enforceable against an indorsee, placing the indorsee in a better position than the indorser. In *Fuentes v Montis*\(^9\) it was mentioned that "negotiable instruments [include] bills of lading, as against stoppage in transitu only." It is submitted that the indorsee in such a case does not receive better title as such.\(^9\) The second example listed by Scrutton is one where the indorsee may get better contractual rights than the indorser. In *Leduc v Ward*\(^9\) the plaintiffs (indorsees) purchased goods to be carried from Fiume to Dunkirk. From Fiume the ship sailed for Glasgow, a port not on the ordinary course of the voyage, and the ship was subsequently lost. The plaintiffs sued the shipowners for non-delivery at Dunkirk. As the shippers apparently knew that the ship would call at Glasgow, they would presumably not have succeeded with a claim against the shipowners. The plaintiffs (indorsees) nevertheless succeeded with their claim. It seems, though, as if the court arrived at this decision mainly because it would

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\(^8\) [1971] 1 Lloyd’s Rep 439 at 446.

\(^9\) 185 n 8.

\(^9\) Regarding stoppage *in transitu* see Scrutton 196; Carver 1151-1163; Hare *Shipping Law* 461-463. For a brief historical note on stoppage *in transitu* see Chorley 48 *LQR* 57-59.

\(^9\) (1886) LR 3 CP 268 at 276.

\(^9\) Referring to this first example Negus 37 *LQR* 449 wrote, "... the answer to the 'nice question' is clearly 'no,' unless one is to adopt a quibble upon the meaning to the word 'title,' for the right to possession of goods is not the same thing as the right to the property in them, and stoppage *in transitu* does not affect property but only possession." Having exercised his right to stoppage *in transitu*, the vendor does not regain ownership of the goods, but only the "right to hold possession until the price is paid ....": see Carver 1152.

\(^9\) (1888) 20 QBD 475.

\(^9\) Scrutton’s argument is not explicitly put into words, but this seems to be the drift of it.
not allow evidence outside the written contract evidenced by the bill of lading. It is therefore doubtful whether the case can support Scrutton's second proposition. The third example listed by Scrutton is formulated in the following way: "... the assignor who has a defeasible title (e.g. one liable to be put aside on the ground of his fraud) may validly pass the property to an assignee ...." As authority for this proposition Scrutton cited Pease v Gloahec. One must agree with Negus who wrote, "... it is misleading in the extreme to found upon Pease v. Gloahec any proposition whatsoever as to negotiability."

Because of the reasons listed above, and especially the position surrounding stoppage in transitu, a bill of lading is sometimes called "quasi-negotiable" or "semi-negotiable". For the reasons stated above it is submitted the "exceptions" discussed above do not confer better title and a bill of lading should rather not be described as either negotiable or quasi-negotiable.

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95 See the judgement of Fry LJ at 484-485.

96 Referring to the second example Negus 37 LQR wrote, "Leduc v. Ward does not exemplify or support any such proposition .... The result would have been the same if the indorser, and not the indorsee, of the bill of lading had been plaintiff."

97 (1866) LR 1 PC 219.

98 37 LQR 449.

99 Although the assignors / indorsers (Scarborough & Tadman) fraudulently obtained the bill of lading, they were the owners of the goods anyway, and the bona fide assignee / indorsee (Pease) for value could defeat the right of stoppage in transitu of the vendor (Maxwell & Dreossi) (see pp 228, 229). The circumstances of the case "were very peculiar", but the decision can nevertheless be supported on the facts: Negus 37 LQR 449-450.

100 Holden History 261 n 3; Aigler (1924) 24 Columbia LR 585; Chorley 48 LQR 57-58.

101 Also see Negus 37 LQR 460: "Whilst nothing but harm and confusion can result from attempting to classify bills of lading as negotiable instruments, confusion is worse confounded by any application to them of the flimsy scholastic theory of 'quasi-negotiability' ...."
4.8 Should the Bill of Lading be a Negotiable Instrument?

Holdsworth\textsuperscript{102} wrote,

"It is probable that the court of Admiralty was prepared to go further, and hold that it [the bill of lading] was not only assignable but negotiable. In Charles I.'s reign a shipmaster was sued in the Admiralty for delivering a bar of silver to one who had fraudulently obtained the bill of lading. Judgement was given for the defendant; but the owner of the silver got a prohibition and brought an action at common law. It is probably this action of the common law courts which has prevented a bill of lading from becoming a negotiable instrument."

Purchase\textsuperscript{103} similarly stated,

"It was the desire of the English Court of Admiralty that the bill of lading should be equal to the bill of exchange, and should be negotiable, but this was prevented by the common law Courts in the eighteenth and nineteenth centuries, when the rules of the bill of lading were elaborated."

One can only speculate on the precise reason why the bill of lading never evolved into a negotiable instrument. An interesting question from a legal policy point of view is nevertheless whether the bill of lading \textit{should be or should have been} regarded a negotiable instrument. In 1921 Negus wrote, "The most complicated negotiable instrument is the soul of simplicity when compared with the most simple of modern bills of lading.\textsuperscript{104} To a certain extent this is still true today, and the inevitable question is whether it would be advantageous for the bill of lading to be a negotiable instrument. Of negotiability, it has been written that it "has been an extremely valuable concept, which has kept open channels of commerce and permitted transactions to take place with a minimum of inquiry and investigation.\textsuperscript{105} It is submitted that to achieve this today

\textsuperscript{102} \textit{English Law} 257; Chorley 48 \textit{LQR} 57 n 32.

\textsuperscript{103} \textit{Documents of Title} 73 n 10.

\textsuperscript{104} 37 \textit{LQR} 460. He also wrote, "There is no \textit{a priori} objection to investing bills of lading with the full and complete attributes of negotiability." According to Negus businessmen would not attempt to turn the bill of lading into a full-blown negotiable instrument, mainly because there is still no authoritative definition of a bill of lading: "But what bills of lading really are is a question which, in spite of the great antiquity of such documents, has hitherto remained unanswered, and, one fears, remains, in the present state unanswerable. This being so, it would need a very daring or very foolish man to include them in the list of those sharply defined documents properly termed negotiable instruments" (460-461). It is to be hoped that today there is a clearer picture of the nature of the bill of lading than in 1921, and the question therefore remains: with this better understanding of the bill of lading, should it be regarded as a negotiable instrument?

\textsuperscript{105} Rosenthal (1971) 71 \textit{Columbia LR} 401.
— keeping open channels of commerce and transacting with as little investigation as possible — the answer lies in developing a secure electronic bill of lading. A decision as to negotiability, is also a decision as to which of the parties (often both innocent) should bear the loss.\textsuperscript{106} There are no cogent reasons why this burden should be shifted in the case of the bill of lading. Any shift of this burden will probably not expedite commercial transactions because of the extra precautions that the indorser will now invariably have to take. Parties may even refuse to trade the goods while at sea. Any attempt to elevate the bill of lading to the status of a negotiable instrument will also create endless uncertainty regarding an instrument of which the legal consequences were reasonably sure for more than a century. It is also submitted that the requirement that negotiable instruments embody a right to the payment of \textit{money}, is a sound one.

\textsuperscript{106} Rosenthal (1971) \textit{Columbia LR} 376. The law seldom favours a \textit{division of losses} between the two innocent parties, as one cannot decide which of the two is more noble (or acted more in good faith) than the other. That is why decisions on who should bear the loss are rather based on considerations also involving commerce: see Rosenthal 376, also n 4. Rosenthal 376 n 3 wittily wrote about the inevitable dishonest third party: \textquotedblleft Regardless of how a student of negotiable instruments may view capital punishment generally, it is difficult for him to avoid feeling some satisfaction over the fate of one Lee, who was hanged for the forgery that gave rise to the troublesome case of Price v. Neil\textquotedblright.
Chapter 5
The Functions of the Bill of Lading

5.1 Introduction

In *Owners of the Cargo Lately Laden on Board The MV Menalon v MV Menalon*\(^1\) the court held, "It is ... trite that there is no hard-and-fast rule for interpreting [the bill of lading's] true nature. This is to be gathered from the circumstances giving rise to its issue." To some extent that may be true,\(^2\) but it is stating the matter too widely, as a bill of lading generally has three well-known functions: it serves as evidence of the contract of carriage, it is a receipt for the goods shipped and it is a document of title. The functions of the bill of lading are important not only with regard to the daily commercial use of the bill of lading, but also because it is these functions that must be replicated (or reinvented, or replaced) when designing an electronic bill of lading. An electronic bill of lading should be able to perform all the functions examined in this chapter to be of any value to merchants. As mentioned in the previous chapter, it is also important to determine what the nature and functions of the bill of lading are in South African law, especially regarding the bill of lading as a document of title, and it should be ensured that the concepts used are reconciled with South African law. Especially the way to construct the transfer of the bill of lading, and the effect of such transfer, without losing sight of the general principles of South African law, will be emphasized. One of the aims of this chapter is to show how South African law can be applied to bills of lading, without ever denying that the applicable law relating to bills of lading is based on English law.

In *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola,*\(^3\) Corbett JA set out the

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\(^1\) 1995 3 SA 363 (D) 367E.

\(^2\) Especially where bills of lading are issued under charterparties: see §5.2.3 *infra.*

\(^3\) 1976 4 SA 464 (A) 492A-D; also quoted in *Primesite Outdoor Advertising (Pty) Ltd v Salviati & Santori (Pty) Ltd* 1999 1 SA 868 (W) 876F-I.
Chapter 5: The Functions of the Bill of Lading

The most significant of shipping documents is the bill of lading. This constitutes an acknowledgement by the master of the ship, on behalf of the shipowner, that the goods have been delivered on board and evidences an undertaking to carry the goods to the stated place of destination. The person in whose name or to whose order the bill of lading is made out may by endorsement and delivery transfer his rights under the bill to another. The holder of the bill, i.e., the person in whose favour it was originally made out or the endorsee thereof, is entitled, to the exclusion of all others, to receive the goods from the ship at the place of destination. He is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognised as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery. It is usual under a c.i.f. contract for the seller to take the bill of lading in his own name, or to his order, and for the bill, duly endorsed, to be tendered, together with the other shipping documents, against payment of the invoice price, either in cash or by the acceptance of a draft. Ownership in the goods normally passes to the purchaser upon the transfer of the bill of lading and concurrent payment.”

5.2 Evidence of Contract of Carriage

5.2.1 Introduction

The bill of lading evidences the contract of carriage, but it is not the contract itself. The reason why the bill of lading does not constitute the contract as such, is that it is usually signed and issued only after the shipment of the goods and the conclusion of the contract of carriage. Therefore parties may be in a position to lead evidence regarding any agreements derived from, for example, the mate’s receipt or other documents, oral discussions or any other undertakings.

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4 North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd 1932 NLR 1 especially at 17; Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492A; Roos v Rennie (1859) 3 S 253 at 261, 263; Crooks & Co v Allan (1879) 5 QBD 38 at 40-41; Chattanooga Tilters Supply Co v Chenille Corporation of South Africa (Pty) Ltd 1974 2 SA 10 (E) 15C-D; Frank Wright (Pty) Ltd v Corticas “BCM” Ltd 1948 4 SA 456 (C) 464; Partenreederei M/S “Heidberg” and Vega Reederei Friedrich Dauber v Grosvenor Grain and Feed Co Ltd, Union Nationale des Cooperatives Agricoles de Cereales and Assurances Mutuelles Agricoles (The “Heidberg”) [1994] 2 Lloyd’s Rep 287 at 310.

5 Scrutton 67; Dillon and Van Niekerk Maritime Law 57-58; Ivamy Carriage of Goods 71; Pyrene Co Ld v Scindia Navigation Co Ld [1954] 2 QB 402 at 419; The Ardenmes [1951] 1 KB 55 at 59; Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1037. According to Todd Modern Bills of Lading 90, “Technically the bill of lading is a statement by the carrier of his view of the terms of the carriage contract. It is therefore strong evidence of the terms of that contract, but it is not conclusive.”
or warranties by the carrier or his agents. The bill of lading nevertheless provides "excellent evidence" of the contents of the contract of carriage. The parol evidence rule does not apply to bills of lading, because the bill of lading is not the contract itself. It is difficult to determine at exactly what moment the contract of carriage is concluded. There is no general rule, and therefore the time of the conclusion of the contract of carriage should be derived from the facts of each individual case and the general principles governing contracts.

5.2.2 Bill of Lading in Hands of Indorsee

When the bill of lading has been transferred to an indorsee, it is the only evidence of the contract of carriage, or put somewhat differently, the contract evidenced by the bill of lading "must presumably be taken to exclude terms or incidents of the contract which are not evidenced by the document itself, and of which the transferee or consignee has no notice." This proposition is based on Leduc v Ward. The decision, in turn, was based on section 1 of the Bills of Lading

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7. Lord Bramwell in Sewell v Burdick (1884) 10 AppCas 74 at 105; The Ardennes [1951] 1 KB 55 at 59.
8. According to Waring Charterparties 277, "The reason for this is that, historically, the bill of lading was primarily a document of title to enable the owner of the goods, by the transfer of the document representing them, to sell and pass ownership in the goods while they are in lengthy transit, simultaneously enabling the holder of the bill of lading to obtain possession of the goods from the shipowner. Hence, the bill of lading was never intended to be a contract between the parties and contained only what was necessary to notify the consignee of the conditions upon which he could obtain delivery from the shipowner, such as the amount of freight and any other charges upon the goods. Thus, the bill of lading was originally an inappropriate instrument for setting out terms extraneous to its purpose, such as an arbitration clause."
10. Debattista 45 MLR 653.
11. Scrutton 67; Malan and Faul 1989 SA Merc LJ 327; Goode Commercial Law 1055; Ivamy Carriage of Goods 109-110; Carver 64-65, Partenreederei M/S "Heidberg" and Vega Reederei Friedrich Dauber v Grosvenor Grain and Feed Co Ltd, Union Nationale des Cooperatives Agricoles de Cereales and Assurances Mutuelles Agricoles (The "Heidberg") [1994] 2 Lloyd's Rep 287 at 310. In The Heidberg Judge Diamond QC held, "This rule facilitates the use of bills of lading in international commerce since it enables a prospective transferee of a bill of lading to see, merely by inspecting the bill, whether it conforms to his contract ... and what rights and obligations will be transferred to him if he takes up the bill."
13. (1888) 20 QBD 475. See the discussion by Goode Commercial Law 1055-1056; Todd Modern Bills of Lading 181-182; Debattista 45 MLR 652 et seq. Debattista 652 also regarded the Leduc case as authority for the proposition that the bill of lading contains the contract of carriage (as opposed to evidencing it) also between
Chapter 5: The Functions of the Bill of Lading

Act 1855:14

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

According to Fry LJ, "Here is a plain declaration of the legislature that there is a contract contained in the bill of lading, and that the benefit of it is to pass to the indorsee under such circumstances as exist in the present case. It seems to me impossible therefore now to contend that there is no contract contained in the bill of lading, whatever might have been the case before the statute."15 Lord Esher MR also based his decision on the inadmissibility of parol evidence when dealing with a written contract.16 As Goode17 pointed out, however, the difficulty with this

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13 (...continued)

the carrier and the original shipper, although he admitted that "[this] reading goes directly counter to the received interpretation of the case and, if accepted, would necessitate a close reassessment of the case law in the area." It is indeed true, as indicated by Debattista 658-660, that in the judgements of Lord Esher MR (at 479-480) and Fry LJ (at 483) no clear distinction is made between the relationship between the original shipper and the carrier and the relationship between an indorsee and the carrier, and that possibly their intention might have been that contract of carriage is normally (except between charterer and carrier) found exclusively in the bill of lading (also see Todd 181). There are nevertheless reasons why Debattista's argument should not be followed. Firstly, although the wording of the judgements may be interpreted widely, the facts of the case dealt with the relationship between a carrier and an indorsee, and the decision cannot serve as authority regarding the relationship between the shipper and an indorsee (contra Debattista 662). Secondly, later cases, both South African and English, made it clear that the bill of lading is only evidence of the contract of carriage (contra Debattista 661-662 because subsequent judgements were mostly given in lower courts). Thirdly, just as there are good reasons to regard the bill of lading as conclusive evidence of the contract of carriage between an indorsee and the carrier, there are good reasons why it should be no more than evidence between the shipper and the carrier, for example to give effect to any prior agreements not stipulated by the bill of lading (agreed to by Debattista 662-663). Fourthly, any change in the legal position now would create endless uncertainty. Having stated what he believes the decision in Leduc v Ward to be, Debattista 660-661 nevertheless also criticized the way in which the court arrived at their decision. He said that it was not necessary to interpret the word "contained" in the Bills of Lading Act 1855 literally, as it can also be interpreted as "evidenced": "thus section 1 of the Bills of Lading Act 1855 might just as well transfer a contract evidenced by a bill of lading ... as one literally 'contained in' the bill of lading." This is also confirmed by Lord Bramwell in Sewell v Burdick (1884) 10 AppCas 74 at 105, calling the contract contained in the bill of lading an "inaccuracy in the statute".

14 My emphasis.

15 At 483. According to Lord Esher MR at 480, "The terms of the Bills of Lading Act shew that the legislature looked upon a bill of lading as containing the terms of the contract of carriage." Also see The Ardenes [1951] 1 KB 55 at 60: "Leduc & Co. v. Ward ... was a case between a shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract."

16 At 479-480. The reason might be because he did not distinguish between the relationship between the original (continued...)
is that one might then just as well apply the parol evidence rule when dealing with the relationship between the original shipper (as opposed to an indorsee) and the carrier — but as indicated above the parol evidence rule does not apply to bills of lading, because the contract of carriage is concluded before the bill of lading is issued.

Goode examined the English Carriage of Goods by Sea Act 1992 (replacing the Bills of Lading Act 1855) which in section 2(1) speaks of “rights of suit under the contract of carriage”, the contract of carriage being defined in section 5(1) as “the contract contained in or evidenced by” a bill of lading. Goode wrote,

“Accordingly, if the principle established in *Leduc v. Ward* is still good law it is best explained on the basis that as against a transferee of the bill of lading without notice of any prior inconsistent contract the carrier is estopped from disputing that the terms of the contract of carriage (albeit concluded before issue of the bill of lading) are different from those set out in the bill of lading.”

Todd referred to two ways of explaining the decision, the first also being estoppel. According to Todd, if one follows the interpretation based on estoppel, the shipowner will only be estopped from relying on more favourable terms “where the bill of lading terms are less favourable to the carrier than the orally agreed terms, because only in such circumstances could an estoppel against the carrier work.” Therefore Todd preferred an explanation based on an interpretation

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16 (...continued)

shipper and the carrier and the relationship between an indorsee and the carrier, and believed that in both cases the contract of carriage will be found exclusively in the bill of lading: see Debattista 45 MLR 659.

17 *Commercial Law* 1055. Also see Todd *Documentary Credits* 207; Benjamin 1044; Wilson *Carriage of Goods* 134-135.

18 *Commercial Law* 1056.

19 Further see Chapter 6 §6.8.2.

20 *Commercial Law* 1056. Wilson *Carriage of Goods* 134 also regarded the case as an application of estoppel.

21 *Modern Bills of Lading* 181-182.

22 This was the factual situation in casu.

23 See however Todd *Documentary Credits* 208 (written after *Modern Bills of Lading*) where he wrote that the explanation based on the wording of the 1855 Act is not satisfactory because the word “contained” was probably used simply my mistake. In Todd *Documentary Credits* 208-209 [apparently because of a misprint some words are missing between pages 208 and 209], published after the Carriage of Goods by Sea Act 1992, Todd submitted that the estoppel interpretation of the decision would survive the 1992 Act, while the interpretation on the words of the 1885 Act does not (because of the addition of the word “evidenced”). It will be submitted in Chapter 6 §6.8.2 that the word evidenced should be interpreted as referring only to the (continued...)
of the 1855 Act, so that the indorsee can always rely on the contractual terms evidenced by the bill of lading, irrespective of whether they are more or less favourable to the carrier than other terms agreed upon.\(^{24}\)

It is submitted that it will be difficult for the indorsee to rely on estoppel in South African law, because there is no reason why the carrier would have acted negligently.\(^{25}\) There can be no negligence on the part of the carrier only because a contract of carriage concluded earlier is not fully reflected in the bill of lading — as indicated, that might actually happen quite often. Therefore the fact that an indorsee can regard the bill of lading as conclusive evidence of the contract of carriage, should rather be achieved by giving the wording of section 1 of the Bills of Lading Act 1855 (or the proposed South African legislation\(^{26}\)) the same construction as in *Leduc v Ward*. It is therefore submitted that the *Leduc* decision is based upon an interpretation of the 1855 Act and not upon estoppel. Finally, from a legal policy point of view it is also desirable that the indorsee can rely on the contract as evidenced by the bill of lading as conclusive evidence of the contract of carriage. The indorsee would not be in a position to know of any other agreements: he can only examine the available shipping documents.\(^{27}\)

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\(^{23}\) (...continued)

\(^{24}\) A similar position is taken by Benjamin 1044, writing after the enactment of the Carriage of Goods by Sea Act 1992, stating that “such evidence [that will be admissible between the carrier and the shipper] does not affect the relations between carrier and transferee of the bill, whether the evidence would (if admitted) operate in favour of, or against, the carrier.” He also based his interpretation on the words of the 1992 Act.

\(^{25}\) See Rabie *Estoppel* 83 et seq.

\(^{26}\) The Sea Transport Documents Bill s 4(1)(a) contains the phrase “as if the holder were a party to a contract with that person on the terms of the document” and can therefore be interpreted in the same way as the 1855 Act. The Sea-Carriage Documents Act 1998 (South Australia) s 7(6) (also see s 9(4) regarding liabilities) contains an interesting provision, stating that “a reference to a contract of carriage, in relation to the transfer of rights under the contract, is to be taken to be a reference to the contract as varied by any variation of which the transferee has notice at the time of the transfer.” So if the transferee is aware of a variation of the contract as contained in the bill of lading, such variation will be of full force and effect.

\(^{27}\) See Todd *Modern Bills of Lading* 181; Debattista 45 *MLR* 656. It is of course possible that the indorsee might want to rely on an agreement outside of the bill of lading and the carrier would want to regard the bill of lading as the only evidence of the contract of carriage, but also in such a case the bill of lading terms would prevail: see *The “El Amria” and “El Minia” [1982] 2 Lloyd’s Rep 28 at 32.*
An interesting question raised by Benjamin is what the position will be where the bill of lading that is in the hands of an indorsee (and therefore contains the contract of carriage) is thereafter transferred back to the shipper again, where the goods are for example resold to the shipper. The question is whether the rights of suit transferred to him can only be found by reference to the bill of lading, or whether other terms of the contract can still be proved as was originally the case between the shipper and the carrier. According to Benjamin, “It is submitted that the rights of the original shipper should be governed by the actual terms of the original contract for the fiction which governs the rights of intermediate transferees — ‘as if he had been a party to [the] contract [of carriage]’ — is inappropriate in the case of a holder who actually was a party to that contract.”

5.2.3 Bill of Lading Issued under Charterparty

A charterparty will contain the contract of carriage when goods are carried under a charterparty, and the bill of lading in such a case will not be evidence of the contract of carriage, especially when the bill of lading is issued “in pursuance of the charterparty.” It remains a receipt and a document of title. The matter is, however, not quite so uncomplicated. The first possibility is that the bill of lading is in the hands of the charterer, either where the charterer is the original shipper or where the charterer is the indorsee of the bill of lading. In such a case, as indicated above, the bill of lading will indeed not serve as evidence of the contract — at least “prima facie

28 Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen 1982 3 SA 534 (N) 536-539, relying on President of India v Metcalfe Shipping Co Ltd [1969] 3 All ER 1549 (CA) at 1552-1553 as authority; Rodocanachi, Sons & Co v Milburn Brothers (1886) 18 QBD 67 at 75; Dillon and Van Niekerk Maritime Law 58; Ivamy Carriage of Goods 71-72; Carver 514. Often the charterparty will contain a clause that obliges the master to sign bills of lading “without prejudice to this charterparty”. In the Intercontinental Export case the clause was deleted (536B), but this did not affect the court’s decision as the bill of lading was issued in pursuance of the charterparty and was never intended to supplant the charterparty (538H-539B). For the way in which the terms of a charterparty can be incorporated into a bill of lading see Scrutton 75-80; Todd Modern Bills of Lading 101-104; Waring Charterparties 290-293.

29 Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen 1982 3 SA 534 (N) 539B.

30 Intercontinental Export Company (Pty) Ltd v MV Dien Danielsen 1982 3 SA 534 (N) 539B; Ivamy Carriage of Goods 71; Carver 514.

31 The President of India v Metcalfe Shipping Co Ltd [1970] 1 QB 289 at 307-308, 310.
and in the absence of any intention to the contrary.” 33 It is of course possible that it is the intention of the shipowner and the charterer to vary their contract by means of a bill of lading.34 The second possibility when dealing with bills of lading issued under charterparties, is that the bill of lading is in the hands of an indorsee other than the charterer. In this case the bill of lading will be evidence of the contract of carriage between the shipowner and the indorsee.35 According to Scrutton,36 “This view is so long established that it is scarcely open to question. It is, however, not easy to explain.” How a contract and rights that previously did not exist, can now come into existence, will be explained later.37

5.2.4 Himalaya Clauses

One special clause in a contract of carriage that should be discussed, is a “Himalaya clause”.38 These clauses were inserted in contracts in reaction to the decision Adler v Dickson,39 dealing with the ship Himalaya, and hence their name. A Himalaya clause in a contract seeks to protect independent contractors such as stevedores who are strangers to the contract so that they can also rely on exemption clauses in the contract of carriage when being sued. In Santam Insurance Co Ltd v SA Stevedores Ltd 40 the stevedores damaged engines that they were unloading from the vessel, the damage allegedly due to the negligence of the stevedores. When the plaintiff sued them, they relied on clauses in the bill of lading stating suit must be brought within one year as well as a clause limiting liability. The stevedores submitted that defences and limitations of

33 Scrutton 71; Ivamy Carriage of Goods 72.
34 Scrutton 71, 73-74; Waring Charterparties 280-281.
35 North of England Steamship Co Ltd v East Asiatic Co (SA) Ltd 1932 NLR 1 at 15; Rodocanachi, Sons & Co v Milburn Brothers (1886) 18 QBD 67 at 75; The “Marga” v Searle (1903) 20 SC 485 at 494; Leduc v Ward (1888) 20 QBD 475 at 479; The “Al Battani” [1993] 2 Lloyd’s Rep 219 at 222. Also see Foster v Colby (1858) 3 H & N 705 (157 ER 651) especially at 717; Rudolf A Oetker v IFA Internationale Frachtagentur AG (The “Almak”) [1985] 1 Lloyd’s Rep 557 at 560.
36 74. If no bill of lading is issued, and there is also no previous standard bill of lading to rely on (which surely would seldom be the case today), the contract of carriage must be construed from arrangements and announcements before the shipment of the goods: Carver 40-41.
37 See Chapter 6 §6.7.
38 For a detailed discussion in English law see Girvin 1997 SA Merc LJ 106-111; Todd Modern Bills of Lading 215-224.
40 1989 1 SA 182 (D).
liability incorporated in the bill of lading to which the carrier was entitled were vested in them by virtue of a Himalaya clause. It was common cause between the parties that South African
law should be applied to determine whether the Himalaya clause is effective. Girvin submitted that “this argument is fallacious, given that the Himalaya clause was contained in a bill of lading.” Staniland also indicated that English law should have been applied. It is nevertheless submitted that South African (as opposed to English or Roman-Dutch) law of contract should govern a Himalaya clause, having regard of course to how similar clauses were interpreted in English law (as the court did indeed do). Wilson J said, “In these circumstances it appears to me recognition of such a general practice should be conferred by the South African Admiralty Courts subject to the practice conforming to our Roman-Dutch system.” It is submitted that this approach should be followed, and that the words “South African law” should be substituted for “our Roman-Dutch system”. There are also convincing policy considerations why English law in its entirety should not have been applied: it would have meant the adoption of the doctrine of consideration. The positive result of the decision is that the court avoided adopting the doctrine of consideration but nevertheless achieved a result that is also wholly consistent with English law. The court comprehensively examined English, American, Australian and Canadian law. Wilson J held that there is no reason why a Himalaya clause should not be given effect by a South African court if the following requirements are met:

\[\text{For the text of the clause see 190E-G.}\]

\[\text{189H.}\]

\[\text{1997 SA Merc LJ 119.}\]

\[\text{1992 LMCLQ 318-320. Staniland 319 wrote, “It may be argued that the Colonial Court of Admiralty would have had no such jurisdiction because the Himalaya clause only came into use in the 20th century, and was only established as a legal principle in Adler v Dickson. But that is to miss the point. Had Himalaya clauses been in existence in the 19th century, they would have appeared in connection with bills of lading over which the Colonial Court of Admiralty clearly did have jurisdiction where the cargoes were carried into South Africa .... Since Himalaya clauses are, of course, inextricably linked to bills of lading, it follows that they, like bills of lading, must have also fallen within the jurisdiction of the Colonial Court of Admiralty.” A court might of course adopt this approach, but strictly speaking the Colonial Court of Admiralty did not have jurisdiction over Himalaya clauses.}\]

\[\text{Further see Chapter 3 §3.6.}\]

\[\text{To overcome difficulties regarding consideration moving from the stevedores was the fourth requirement in Scrutons Ltd v Midland Silicones Ltd [1962] 1 All ER 1 (HL) at 10.}\]

\[\text{184B-189G.}\]

\[\text{189J-190A. These requirements are based on Scrutons Ltd v Midland Silicones Ltd [1962] 1 All ER 1 (HL) (continued...)}\]
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"(1) the bill of lading makes it clear that the carrier intended by its terms to protect the stevedores;
(2) the carrier by the bill contracted for the stevedores' protection as well as for his own; and
(3) the authority of the carrier to act for the stevedore in this respect whether antecedently or by ratification was made out”.

Wilson J further observed that it is also possible that a Himalaya clause is phrased in such a way that a stipulatio alteri can be construed, but found on the facts that there was none. It is submitted that the approach on which the decision was based is the better one. Wilson J also referred to aspects such as “current international requirements in connection with the carriage of goods by sea” and “the protection normally conferred in international shipping circles”. The court held that the defendant is entitled to the protection of the relevant clauses. In Bouygues Offshore v Owner of the MT Tigr Farlam J held that a tug owner could not rely on an exemption clause as the charterer of the tug would not be protected by the clause either. Put differently, if the carrier is not protected by an exemption clause, somebody like an independent contractor cannot be protected either, even if there is a wide enough Himalaya clause in the contract.

5.2.5 General Contractual Issues

Where a shipper and a carrier regularly use a standard bill of lading without objection, the parties would be bound by its terms, even in future transactions where no bill of lading is issued. In Anticosti Shipping Co v Viateur St-Amand a truck was shipped in accordance with the shipowners' regular practice, but the bill of lading, although filled in, was never signed and

48 (...continued)
at 10. The fourth requirement laid down by Lord Reid in the House of Lords dealt with consideration, which of course does not apply in South African law. Staniland 1992 LMCLR 320-321 is however right where he wrote that the proviso to the fourth requirement, ie that for the clause to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act 1855 apply, should have been included in the test.

49 190B, 194C, H. Girvin 1997 SA Merc LJ 120 wrote that even so, the court should rather not have opened up the possibility of making use of a stipulatio alteri.

50 194F-G.

51 1995 4 SA 49 (C) 72G-J.

52 Armour and Company Ltd v Leopold Walford (London) Ltd [1921] 3 KB 473 at 475-476; Scrutton 68; Goode Commercial Law 1055; Todd Modern Bills of Lading 91.

issued. The court held that the contract of carriage was nevertheless covered by the bill of lading. The opposite is of course also possible. Even though a bill of lading was issued, it is possible that no contract of carriage was concluded. In such a case "the bill of lading is a nullity .... It could never have been more than a bit of paper purporting to record a bargain that had never been made." A related question is whether extraordinary clauses contained in the small print reflect the contract of carriage. In Crooks & Co v Allan, Lush J held, "If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution ... he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it."

It is submitted that this is a sensible approach. Scrutton also preferred the approach in the Crooks case, and wrote that a dictum in Parker v The South Eastern Railway Co; Gabell v The South Eastern Railway Co to the effect that a person receiving a bill of lading will be bound by it, even if he never read it, because in the great majority of cases a person knows the bill of lading contains the contract of carriage, "seems a little too sweeping in view of the actual course of business." In Lewis v M'Kee the defendant (consignee) effected the following restrictive indorsement on the bill of lading: "Deliver to Messrs. Watney & Keene, or order, looking to them for all freight, dead freight, and demurrage, without recourse to us". When the defendant was sued for freight, the court held that the captain did not in fact assent to the indorsement, as the captain was not aware of it.

Without going into a detailed discussion of the contract of carriage as such, it is submitted that

54 Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1044-1045.

55 Described in Crooks & Co v Allan (1879) 5 QBD 38 at 40 as "printed in a type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice."

56 See Scrutton 68.

57 (1879) 5 QBD 38 at 40.

58 The matter is similar to the so-called "ticket cases". For an exposition of South African law (based on rules developed in English law) see Van der Merwe et al Contract 217-218.

59 68.

60 (1877) 2 CPD 416 at 422.

61 (1868) LR 4 Ex 58.
matters such as the formation of the contract, mistake, duress, illegality and construction of the contract, should be determined according to the general principles of the South African law of contract, while still having regard to English law especially where similar clauses have been interpreted and used extensively in English law. A court should always strive at a result consistent with English law, without discarding the South African law of contract.

5.3 Receipt

5.3.1 General

The bill of lading is a receipt for the goods shipped. According to De Villiers JA it "is an acknowledgement by a shipowner, a master or other agent that certain goods have actually been delivered on board a definite vessel." De Villiers JA also quoted the following passage in Van der Linden:

"Van de in het schip ingeladene goederen geeft de Schipper aan den afzender een schriftelijk bewijs, behelzende de opgave der waaren, derzelver hoedanigheid, merken en nummers, de plaats der bestemming, de naam van den bevragter, en dikwils ook van den ontvanger, en de bedongene vraagt. Men geeft hier aan den naam van Cognoscement."

Traditionally the master signs and issues the bill of lading after the goods have been shipped. Today it is more likely that the bill of lading will be signed by a loading broker acting as agent.
for the shipowner. A further possibility is that a “mate's receipt” is issued by the master or the loading broker when the goods have been received at the docks and that receipt is then later exchanged for the bill of lading. The bill of lading is based on the mate's receipt, and any clauses on the mate's receipt should be reflected in the bill of lading as well. The effect of a mate's receipt was explained in *Nippon Yusen Kaisha v Ramjiban Serowgee*:

“The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed with the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received, and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him.”

It is submitted that a mate's receipt is also not commercial paper, as it embodies no right and the bill of lading can be delivered to the owner of the goods without presentation of the mate's receipt.

### 5.3.2 Quantity and Condition

As a bill of lading normally indicates the quantity of the goods (e.g., by weight or by number of packages), it provides *prima facie* evidence in favour of the shipper that the stated number of goods were indeed shipped, in the specified condition. Of course it is still possible for the

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67 See Dillon and Van Niekerk *Maritime Law* 55 n 4; Ivamy *Carriage of Goods* 74. According to Todd *Modern Bills of Lading* 13, “Loading brokers are commonly used by liner operators, one of the advantages being that the ship can sail before all the paperwork has been completed, thereby reducing delays which reduce the freight earning potential of the vessel.”

68 It is called a “dock receipt” in the USA: see Proctor *Legal Role* 51.

69 See *Craven v Ryder* (1816) 6 Taunt 433 (128 ER 1103) at 435: The holder of the receipt is entitled to the bill of lading, and therefore the holder of the receipt retains control over the goods until the receipt is exchanged for the bill of lading.

70 See Mitchelhill *Bills of Lading* 52; Ivamy *Carriage of Goods* 44-45, 116-117; Carver 89; Scrutton 176-178.


72 As happened in the *Nippon* case, where the bills of lading could be delivered to the “Export Company”, as they were indicated as the shippers on the mate's receipt and were also the owners of the goods, even though they were not the holders of the mate's receipt. The situation would be different if notice of the circumstances (and that the shipowners should thus not issue bills of lading) had been given in time by the respondents to the shipowners (appellants). Also see *Cowas-Jee v Thomson* (1845) 5 Moore 165 (13 ER 454) at 175; *Hathesing v Laing* (1873) LR 17 Eq 92 at 108, 104-105.

73 Dillon and Van Niekerk *Maritime Law* 55; Carver 74.
carrier to prove (although a “heavy onus” rests upon the carrier) a contradiction to the quantity stated in the bill of lading.\footnote{As happened in Plywoods Ltd v Thesen’s Steamship Co Ltd 1955 4 SA 491 (C) 494-495, relying mainly on Henry Smith & Co v The Bedouin Steam Navigation Co Ltd [1896] AC 70. A bill of lading can also contain a clause stating that the bill of lading is conclusive evidence of the quantity or condition of goods shipped: see Dillon and Van Niekerk 56; Scrutton 118-119; Carver 77-78; Bools Bill of Lading 146-147.}

This position will to a certain extent be confirmed in the Sea Transport Documents Bill section 6 dealing with evidence of shipment:

A sea transport document that —

(a) represents that goods have been shipped on board a vessel or have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by another person who had the actual authority, whether express or implied, or the ostensible authority of the carrier to sign that document, is, as against the carrier —

(i) \textit{prima facie} evidence in favour a holder of the document, who is the shipper or other person to whom it was issued; and

(ii) conclusive evidence in favour of a subsequent holder, of the shipment of the goods or of their receipt for shipment, as the case may be.

It should firstly be noted that the section deals only with the question of whether goods have in fact been shipped, and does not deal with the condition or quality of such goods.\footnote{The English Act is virtually the same (as is the Sea-Carriage Documents Act 34 of 1998 (South Australia) s 11), but only refers to the \textit{lawful holder of the bill} in favour of whom the bill will be conclusive evidence against the carrier of the shipment of the goods, and does not say that in favour of the \textit{shipper} the bill of lading is only \textit{prima facie} evidence of the shipment of the goods. Presumably the English Act only applies to the \textit{transferee} of the bill of lading (Scrutton 114; Reynolds 1993 \textit{LMCLQ} 443) and not to the original shipper — perhaps this can be derived from the words “a person \textit{who has become} the lawful holder of the bill” (my emphasis; see Benjamin 1007-1008). According to Benjamin there must be a “change” in who the lawful holder of the bill of lading is. It is possible that in a chain transaction the shipper \textit{becomes} the lawful holder of the bill of lading when the goods are resold to him: Benjamin 1008. It is submitted that in this respect the South African Bill is clearer. Section 4 of the English Act also refers only to a bill of lading, so a straight or non-negotiable bill of lading is not included (s1(2)(a)), and s 6 of the Sea Transport Documents Bill only applies to transferable or negotiable transport documents by virtue of s 2(2). The reason for this is that the Hague-Visby Rules Art III(4) (second sentence) states that “proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith” (my emphasis), and therefore a straight bill of lading or a waybill is not covered by the second sentence of Art III(4), and the purpose of the (continued...)}
that if no goods were shipped, and the master has no authority to issue a bill of lading, the shipowner will escape liability. A failed attempt to remedy this state of affairs was made in section 3 of the Bills of Lading Act 1855 (still applying in South Africa\(^ {78} \)) whereby a bill of lading in the hands of a consignee or indorsee for value, will be conclusive evidence of the shipment against the master or other person signing the bill of lading, even if all the goods have not been shipped. This provision still made it possible for the carrier to escape liability, thus having little if any practical impact, and therefore leading to the new provisions quoted above.

A bill of lading usually also includes a statement as to the condition of the shipped goods. Where it is stated that the goods are shipped "in good order and condition", such a clause will not be held to be conclusive evidence regarding the condition of the goods, as long as the damage was not externally visible.\(^ {79} \) The plaintiff will have to prove that the damage was done while the goods were on the ship, or that the goods were indeed shipped in good order.\(^ {80} \) It is not incumbent upon the plaintiff to show exactly how or when the damage was done, as the defendant (carrier) will have to displace the \textit{prima facie} evidence of the plaintiff by proving, for example, that the damage existed when he accepted the goods for carriage.\(^ {81} \) In favour of a consignee or indorsee for value of the bill of lading, the carrier (shipowner) will be estopped\(^ {82} \)

\(^{76} \) (...continued)

Carriage of Goods by Sea Act 1992 was not to change the Hague-Visby Rules (see Scrutton 114; Beatson and Cooper 1991 \textit{LMCLQ} 207). Bradgate and White 56 \textit{MLR} 205 submitted that no distinction should be made between transferable and non-transferable bills of lading in this respect.

\(^{77} \) (1851) 10 CB 665 (138 ER 263). See Ivamy \textit{Carriage of Goods} 74-76; Todd \textit{Modern Bills of Lading} 204-214.

\(^{78} \) See Chapter 3 §3.8.

\(^{79} \) \textit{Arndt & Cohen v DA Dampfchiffs Gesellschaft} (1906) 23 SC 324 at 327: "The admission, therefore, in the bill of lading that the case containing glass had been received in good order and condition could only refer to the external appearance of the case, and not to the carefully-concealed contents." Also see \textit{The Peter der Grosse} (1875) 1 PD 414 at 420; \textit{"British Yeoman" v Hunt, Leuchars & Hepburn Ltd} (1912) 33 NLR 418 at 428; Dillon and Van Niekerk \textit{Maritime Law} 56.


\(^{81} \) \textit{The Peter der Grosse} (1875) 1 PD 414 at 420; \textit{J Kaufman Ltd v Cunard Steam-Ship Co Ltd} [1965] 2 Lloyd's Rep 564 at 565-566.

\(^{82} \) Here South African principles relating to estoppel should preferably be applied (see Chapter 3), and one of the difficulties in such a case is that estoppel is a defence and not a cause of action: see Rabie \textit{Estoppel} 7-8. It is nevertheless possible to use estoppel in an indirect way to establish a cause of action, used especially where (continued...)
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from proving the goods were not in good order and condition, where there were at shipment external defects which were apparent to reasonable inspection.\(^8^3\)

According to the Hague-Visby Rules,\(^8^4\) after receiving the goods, the carrier shall, on demand of the shipper, issue a bill of lading showing among other things, the leading marks necessary for identification of the goods, either the number of packages or the quantity or weight, and the apparent order and condition of the goods. It is not necessary for the carrier to state in the bill of lading any marks, number, quantity or weight which he suspects do not accurately reflect the goods received, or which he has no reasonable means of checking. A bill of lading will be *prima facie* evidence of the receipt by the carrier of the goods as therein described, but proof to the contrary will not be admissible when the bill of lading has been transferred to a third party acting in good faith.\(^8^5\) The shipper shall be deemed to have guaranteed to the carrier the accuracy of the marks, number, quantity and weight as furnished by him, and the shipper shall indemnify

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\(^8^2\) (...continued)

the defendant denies the authority for an agent. Regarding bills of lading, the holder of the bill (A), will for example claim damages from the carrier (B) because the goods were not delivered in the condition described in the bill of lading. B's defence will be that the goods were shipped in a defective condition. If the defects were apparent to a reasonable inspection, B will be estopped from denying the accuracy of the bill of lading, and A's claim will succeed. Apart from estoppel, Scrutton 115-118 also indicated that a representation can give rise to an action in tort, by the person relying on such a representation and subsequently suffering loss. In South Africa such an action should be based on the general principles of our law of delict. A further point to be made here, is that the "words [shipped in apparent good order and condition] are not words of contract but only representations which may give rise to an estoppel" (Silver v Ocean Steamship Co Ltd [1930] 1 KB 416 at 433). In Compania Naviera Vasconzada v Churchill & Sim; The Same v Burton & Co [1906] 1 KB 237 at 247 it was said: "The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking." The contract of carriage was concluded before any of these representations were made: Goode Commercial Law 904. For the historical reasons why these representations never formed part of the contract of carriage, see Bools *Bill of Lading* 119. For criticism of this approach see Bools 120-121, 136, 148.

\(^8^3\) Scrutton LJ in Silver v Ocean Steamship Co Ltd [1930] 1 KB 416 at 424; "British Yeoman" v Hunt, Leuchars & Hepburn Ltd (1912) 33 NLR 418 at 428; Goode Commercial Law 904, 1069. Also see Koch v Union-Castle Steamship Co Ltd 1913 EDL 286 at 287, where it was held that the shipping company was not estopped from proving that damages suffered were caused by an inherent defect or weakness in the cases used to transport cars. In Compania Naviera Vasconzada v Churchill & Sim [1906] 1 KB 237 it was held that the shipowners were estopped (as against the indorsers of the bill of lading) from denying the truth of the statement "shipped in good order and condition" where the timber was damaged before shipment, and the damage was apparent.

\(^8^4\) Art III(3). The Rules were Introduced into our law by the Carriage of Goods by Sea Act 1 of 1986. For the applicability of the Rules see Chapter 3 §3.8. For the effect of the Hague-Visby Rules (and also the Hamburg Rules) see Proctor *Legal Role* 43-46; Goode Commercial Law 1059-1060; Kozolchyk (1992) 23 *J Mar L & Com* 185-196; Mitchellhill *Bills of Lading* 6-17.

\(^8^5\) Hague-Visby Rules Art III 4.
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the carrier against damages resulting from inaccuracies in such particulars. 86

5.4 Document of Title 87

5.4.1 Introduction

The bill of lading is also a document of title. In England an indication of this was given more
than two hundred years ago in Lickbarrow v Mason, 88 and closer home in 1875 in London and
South African Bank v Donald Currie & Co. 89 According to De Villiers CJ the holder of the bill
of lading has “the right of dealing with the property and demanding possession from the

86 Hague-Visby Rules Art III 5.

87 For an entertaining discussion of how the English concept of a document of title found its way in the Hague
Rules, see Du Toit 1980 SALJ 402-404, 407-408. Continental jurists attending the September 1921 conference
of the International Law Association in The Hague were offended by the British or common law dominance
at the conference. These countries also had endless difficulty translating “document of title” into their own
languages (408, also n 42). In Afrikaans the best translation is probably titelbewys (used in the Afrikaans
translation of the Hague-Visby Rules Art 1; the Rules were introduced into South African law by the Carriage
of Goods Act 1 of 1986) or perhaps simply titeldokument.

88 (1787) 2 TR 63 (100 ER 35).

89 1875 Buch 29 at 33-34; Mercantile Bank of India Ltd v Davis 1947 2 SA 723 (C) 730; Barlows Tractor &
Machinery Co v Oceanair (Transvaal) (Pty) Ltd 1978 3 SA 175 (T) 178A-G; Hughes & Rogers v White, Ryan
& Co (1900) 17 SC 236 at 240; Knight Ltd v Lensveldt 1923 CPD 444 at 447, 448; McIntosh & Co v English,
Scottish and Australian Bank Ltd 1921 NPD 87 at 91; Standard Bank of SA Ltd v The McKinery Construction
Co 1921 CPD 373 at 374; Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd
1974 2 SA 10 (E) 15E, G; Ambassador Factors Corporation v K Koppe & Co; K Koppe & Co v Accreylon
Co Inc 1949 1 SA 312 (T) 316, 318; Garavelli and Figli v Gollach and Gomperts (Pty) Ltd 1959 1 SA 816
(W) 821A-B; Frank Wright (Pty) Ltd v Corticas “BCM” Ltd 1948 4 SA 456 (C) 463-464; Standard Bank of
South Africa Ltd v Efroiken and Newman 1924 AD 171 at 189-190; Lendalease Finance (Pty) Ltd v
Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 491-493; Hochmetals Africa (Pty) Ltd v Otavi Mining
Co (Pty) Ltd 1968 1 SA 571 (A) 579C-D. In the judgement of Van Blerk JA in the Hochmetals case, he said
that the applicant “took possession” of the clay (579H, 579A). It was however not possible for the applicant
to be in possession of the clay while the respondent still held the bills of lading. Van Blerk JA also said that
the bills of lading in the hands of the respondent “constituted a form of security for payment of the purchase
price as the shipowners would be entitled to refuse to unload the cargo at the port of destination unless placed
in possession of the bills of lading ....” It would be more likely that the respondent was simply still the owner
of the goods, as delivery to the applicant never took place — the respondent still held the bills of lading.
Ogilvie Thompson JA more correctly refrained from expressing an opinion as to whether the applicant is the
owner of the clay without the full facts being before the court (581H-582A), and also refrained from expressing
an opinion as to whether the bills of lading constitute no more than a security in the hands of the respondent
(582G).
captain.’

However, as Goode wrote, “Many people — even lawyers — have only the haziest notion of
the function of a document of title to goods.” At the outset it should be kept in mind that the
name “document of title” is perhaps a slight misnomer: “it would be more accurate to describe
it as a ‘control document’ rather than a document of title.” Debattista suggested a “document
of possession”.

5.4.2 Ambit of Lickbarrow v Mason

As already mentioned in Chapter 2, Lickbarrow v Mason is often regarded as the birth of the
modern bill of lading, as the first case that considered the nature of the bill of lading as a
document of title (though not calling it a document of title), or as put by Bools, the question
was “whether the bill had a proprietary function and, if so, what it was.” The special verdict of
the jury of merchants was quoted in Chapter 2. Because of the near mythical status thrust upon
this case regarding the bill of lading, it is important to determine exactly what was decided.

The facts, simplified, were the following: The merchants Turing and Son of Middlebourg.

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90 London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 34. It is of course not necessary
for the holder of a bill of lading when instituting an action to prove that he gave value for the bill of lading (at 35).

91 Proprietary Rights 59.

92 Goode Proprietary Rights 59-60.

93 Sale of Goods 35.

94 Bools Bill of Lading 8-19 provided a very comprehensive and insightful discussion of Lickbarrow v Mason
and the cases upon which this paragraph is based. His views and conclusions will be referred to in this
paragraph. In 1921 Negus 37 LQR 454 wittily wrote, “writers to this day are still busily engaged in attempting
to determine what was decided, or intended to be decided, and more particularly what precisely Buller J.
intended to decide.” Hence a few pages on the case.

95 The decisions are: (1787) 2 TR 63 (100 ER 35) (King’s Bench), (1790) 1 H Bl 357 (126 ER 209) (Exchequer
Chamber) [Mason v Lickbarrow], (1793) IV Brown 57 (2 ER 39), (1793) 5 TR 367 (101 ER 206), (1793) 2
H Bl 211 (126 ER 511) (House of Lords), (1794) 5 TR 683 (101 ER 380) (venire de novo), (1794) 6 TR 131
(101 ER 473) (costs).

96 Bill of Lading 8.

97 Also spelt Middleburgh and Middleburg in the various other reports of the case.
shipped goods on board the "Endeavour" bound for Liverpool. The master, Holmes, issued four bills of lading "unto order or assigns". One was kept by the master, another by Turing and Son, and the other two were indorsed in blank by Turing and Son and sent to Freeman of Rotterdam for whom the shipment was made. Freeman sent the plaintiffs the bills of lading, and the plaintiffs duly paid Freeman. Freeman then became bankrupt before bills of exchange drawn by Turing and Son, and accepted by Freeman, became due. When Turing and Son heard about Freeman's bankruptcy, they indorsed the bill of lading they have retained to the defendants (as vendors Turing and Son therefore attempted to stop the goods in transitu), and Holmes eventually delivered the goods to the defendants. Before instituting this action, the plaintiffs demanded the goods from the defendants, without success.98

According to Bools,99 "the decision is only authority for the proposition that the transfer of the bill, \textit{prima facie}, transfers the property in the goods." Bools correctly indicated that the case made no decision as to whether a bill of lading is a negotiable instrument similar to the bill of exchange.100 In the original King's Bench decision, Ashhurst J (as opposed to Buller J and Grose J) did indeed base his decision on negotiability. He held, "So it [the bill of lading] is like a bill of exchange; in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee ..."101 According to Ashhurst J, therefore, the unpaid vendor cannot stop the goods in transitu against third persons. It is only possible to stop the goods against the vendee himself. The King's Bench was reversed by the Exchequer Chamber.102 Lord Loughborough also based his decision on negotiability, but came to a conclusion directly contrary to that of Ashhurst J. He held that the bill of lading is not a negotiable instrument, thus only passing "such right, and no better, as the person assigning had in it."103 Too much weight cannot be attached to the decision of the Exchequer Chamber, as the House of Lords overturned the Exchequer Chamber and restored the decision of the King's Bench. As the Exchequer Chamber was overturned by the House of Lords, and the ratio of the

98 (1787) 2 TR 63 at 63-64. The defendants demurred to this evidence, and the plaintiffs joined in the demurrer.
99 \textit{Bill of Lading} 10.
100 See \textit{Bill of Lading} 9, 10-12.
101 (1787) 2 TR 63 (100 ER 35) at 71.
102 \textit{Mason v Lickbarrow} (1790) 1 H Bl 357 (126 ER 209).
103 At 361 and 362.
King’s Bench decision is to be found in the judgements of Buller J and Grose J, the case cannot be said to decide anything about whether the bill of lading is a negotiable instrument or not.

Buller J based his decision on the question of whether the bill of lading transfers property, and he decided that it does. It may therefore be argued that Buller J is solely responsible for the

104 Grose J agreed with Buller J, in that he saw the question as whether the bill of lading transfers the property, and decided that it does. See Lickbarrow v Mason (1787) 2 TR 63 (100 ER 35) at 76; Bools Bill of Lading 16.

105 (1787) 2 TR 63 (100 ER 35) at 73, 75. Much more comprehensive than the original judgement of Buller J, is his opinion to the House of Lords which can be found in Newsom v Thornton (1805) 6 East 17 (102 ER 1189) at 20 note (a) (also see Bools Bill of Lading 12 n 53). In his opinion Buller J divided the case into “two great questions”, the first being whether the indorsement of a bill of lading passes the property of goods at sea, and the second whether the defendants could stop the goods in transitu (the second question is discussed by Bools 15-16). Regarding the first question, Buller J came to the conclusion “that for upwards of 100 years past it has been the universal doctrine of Westminster-Hall, that by a bill of lading, and by the assignment of it, the legal property does pass.” Bools 12-15 indicated that the cases relied upon by Buller J do not support his conclusion, except perhaps his own two previous decisions. Bools’ conclusions regarding these cases will be stated very briefly. Wiseman v Vandeputt (1690) 2 Vern 203 (23 ER 732) and Fearon v Bowers (found in Mason v Lickbarrow (1790) 1 H Bl 357 (126 ER 209) at 364 note (a)) did not deal with the effect of bills of lading. In the Wiseman case a bill of lading was not even mentioned, but in the Fearon case there is a statement that merchants agreed “that the indorsement of a bill of lading vests the property” and Lee CJ remarked, “to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement”. This remark may however be regarded as an obiter dictum as the case dealt with the right of the consignor to stop the goods in transitu and the fact that the captain may deliver the goods against any of the three bills of lading (see Bools 13 n 61). In Evans v Martell (1697) 1 Ld Raymond 271 (91 ER 1078) [presumably incorrectly called Evans v Marlett]; (1697) 3 Salkeld 290 (91 ER 831); (1697) 12 Mod 156 (88 ER 1231) the bill of lading (called a “bill of loading” in 12 Mod 156 (88 ER 1231)) plays a subordinate role (it was not even mentioned in 3 Salkeld 290 (91 ER 831)), and the main issue in the reports was who has standing to bring the action. This notwithstanding, the reports also stated that “the consignment in a bill of loading gives the property” (12 Mod 156 (88 ER 1231)) and “[i]f goods by bill of lading are consigned to A. A. is the owner ...” (1 Ld Raymond 271 (91 ER 1078)). Holt CJ (1 Ld Raymond 271 (91 ER 1078)) said, “the consignee of a bill of lading has such a property as that he may assign it over.” According to Bools, the pronoun “it” in that sentence “surely refers to property and not the bill of lading.” According to Bools, therefore, the statement does not mean that the bill of lading may be assigned, causing the passing of property, but only that the property as such may be assigned. As pointed out by Bools, a decision in 1697 that the transfer of the bill of lading can also transfer ownership, “would be surprising” (contra Cashmore Parties 18; also see Chapter 2). In Wright v Campbell (1767) 4 Burr 2046 (98 ER 66); (1767) 1 Black W 628 (96 ER 363) Lord Mansfield regarded the fact that the transfer of the bill of lading transfers property, as a mere possibility: “If the property of a cargo at sea is transferable by indorsement ...” (1 Black W at 629). Also see Bools 14 for an indication of how counsel in the case distorted the word of the Evans decision. Bools 15 n 75 wrote, “By the time Buller J gave his opinion to the House of Lords he had realised that the report of the case [Wright v Campbell] did not support him and he referred to his own note of Lord Mansfield’s judgement taken in court.” It is true that Buller J referred to a statement of Lord Mansfield which was not stated in the printed reports of the Wright case, but the statement of Bools (perhaps inadvertently) made it appear as if there were some sort (continued...)
fact that transfer of the bill of lading passes the property in the goods, was received into the common law, especially because the authority of the cases relied upon by Buller J, is in doubt.\footnote{Bools \textit{Bill of Lading} 15. See the previous footnote.} This statement may however be somewhat too ambitious. Although it may technically be argued that some statements in previous decisions were \textit{obiter} and others were no more than possibilities, the decision of Buller J put into words what was no doubt for some time regarded as the law. Because the question of whether the bill of lading transferred the property in the goods was never specifically considered, there were some ambiguities and possibilities for someone in the twentieth century to look for inconsistencies in the cases upon which Buller J based his decision. It is submitted that the judgement of Buller J did no more than clearly state what was for some time hinted at by previous decisions.

The House of Lords\footnote{(1793) IV Brown 57 (2 ER 39) at 65.} overturned the judgement of the Exchequer Chamber, and by implication approved of the approach of Buller J and Grose J in the King's Bench.\footnote{Bools \textit{Bill of Lading} 17. However, in \textit{Sewell v Burdick} (1884) 10 AppCas 74 at 99-100 Lord Blackburn remarked, “I should have thought, if anything was clear, it was that this House [House of Lords] did not decide anything [in \textit{Lickbarrow v Mason}] , except that on that demurrer to the evidence no judgement could be given ....”} The House of Lords ordered that the King's Bench award a \textit{venire facias de novo}, apparently because of a defect in

\footnote{(...continued) of a conspiracy by Buller J to support his own judgement. In all probability Buller J did hear Lord Mansfield say something to the effect that the property of goods at sea is transferred by the delivery of a bill of lading. It should further be noted that Buller J referred to the note which he took in court about the \textit{Wright} case already in his judgement in \textit{Lickbarrow v Mason} (1787) 2 TR 63 (100 ER 35) at 74, and not for the first time in his opinion to the House of Lords as implied by Bools. Bools' interpretation of the reported words of Lord Mansfield is of course strictly speaking correct, but the sentence in question (quoted above) might just as well have been an unhappy choice of words. The final two cases to be discussed, are both decisions of Buller J himself. In \textit{Caldwell v Ball} (1786) 1 TR 205 (99 ER 1053) at 216 he held that the bill of lading "is assignable in its nature; and by indorsement the property is vested in the assignee." Buller J relied on the \textit{Evans} and \textit{Wright} cases as authority for this statement, but as indicated it is doubtful whether either of these cases can serve as authority for this proposition. According to Bools 15, the \textit{Caldwell} case "was the first recognition by the common law that the bill of lading performs an unusual function: its transfer transferred the property in the goods." The second decision by Buller J was \textit{Hibbert v Carter} (1787) 1 TR 745 (99 ER 1355) at 748 note (a)\textsuperscript{2}, where Buller J held that the transfer of the bill of lading only \textit{prima facie} transferred the whole property in the goods, as one must also have regard to the intention of the parties. According to Bools 15, "\textit{Hibbert v. Carter} plays an unusual role in \textit{Lickbarrow}. It might even be called a 'self supporting decision'. It was decided after the King's Bench decision in \textit{Lickbarrow} and, of course, approved of it. Buller J then referred to \textit{Hibbert} as supporting his submission to the House of Lords that his own decision in \textit{Lickbarrow} in the King's Bench was correct: an efficient use of authority indeed!"}
pleading, and not because of any doubts about the correctness of the King’s Bench decision. At the second trial a special verdict was found by a merchant jury which was “on all fours” with the judgments of Buller J and Grose J. The King’s Bench declined to discuss the case again, saying they retained the opinion delivered in the previous case, and once again gave judgement for the plaintiffs. Bools came to the conclusion that, “Most importantly, the decision of the custom of merchants did not give the bill of lading its capacity to transfer symbolic possession, which must, therefore, be otherwise explained. The decision was merely that it was a document which was capable of transferring property.” That is of course true, but perhaps a bit more credit should be given to Lickbarrow v Mason. The decision firstly made it clear that the bill of lading can be transferred by way of indorsement and delivery — a very significant proposition. Secondly the decision made it clear that the transfer of the bill of lading can affect the ownership in the goods. Though these two aspects may not indicate exactly what the essence of a document of title is, leaving out the possessory function of the bill of lading, these are nevertheless two very significant characteristics of being a document of title.

It should be mentioned here that later decisions made it clear that the mere indorsement and delivery of the bill of lading does not necessarily transfer the ownership in the goods. According to Lord Selborne, “I do not understand it [the words of the special verdict of the jury of merchants in Lickbarrow v Mason] as necessarily meaning more than that ‘the property’ which it might be the intent of the transaction to transfer ... passes by such indorsement ....” The intention of the parties may for example be to pledge the goods, in which case ownership will not be transferred. In English law property will pass by the underlying contract in pursuance

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109 Bools Bill of Lading 17. See Bools 17-18 and Sewell v Burdick (1884) 10 AppCas 74 at 99 for the reasons for the many delays in delivering judgement in the case.

110 Bools Bill of Lading 18.

111 (1794) 5 TR 683 (101 ER 380) at 686.

112 Bill of Lading 18.

113 Todd Documentary Credits 89 somewhat optimistically remarked about the special verdict of the jury, “No doubt, had it been an issue, bills of lading would also have been taken to transfer constructive possession in the goods to the transferee.”

114 Sewell v Burdick (1884) 10 AppCas 74 at 79-80.

115 See eg Sewell v Burdick (1884) 10 AppCas 74.
of which the bill of lading is transferred.\textsuperscript{116} In South African law the transfer of the bill of lading plays a more vital role in that delivery of the goods is necessary for the transfer of ownership.

5.4.3 The Bill of Lading and Being in Possession of the Goods

As was indicated above, \textit{Lickbarrow v Mason} did not decide that the holder of the bill of lading is in possession of the goods. It will later be indicated that the fact that the holder of a bill of lading is in possession of the goods, and that the transfer of the bill of lading serves as symbolic delivery, is central to a document being classified as a document of title. Therefore it is important to determine how and when this development took place subsequent to the decision in \textit{Lickbarrow}.

Cases decided in 1816\textsuperscript{117} and 1820\textsuperscript{118} indicate that the holder of the bill of lading at that stage could not have been in possession of the goods. Contrary to these decisions, in 1806 it was remarked loosely by Lord Ellenborough that the bill of lading is a symbol representing possession, although this comment may be described as \textit{obiter}, and is in conflict with the two later cases mentioned above, one of them also a decision by Lord Ellenborough.\textsuperscript{119}

The bill of lading was referred to as a “symbol of property” as far back as 1813.\textsuperscript{120} As indicated by Bools,\textsuperscript{121} the word “property” may mean ownership or the goods themselves, and the bill of lading can therefore, according to this phrase, be regarded as the “symbol of ownership” or the “symbol of the goods”. At the time of the \textit{Lickbarrow} decision (although not explicitly stated as such in that case) and for at least fifty years hence, the bill of lading was regarded as nothing

\textsuperscript{116} Lord Bramwell in \textit{Sewell v Burdick} (1884) 10 AppCas 74 at 105. The preamble to the Bills of Lading Act 1855 only states that the “property in the goods \textit{may} thereby pass to the endorsee” (my emphasis): see Lord Bramwell at 104; Lord Selborne at 84.

\textsuperscript{117} \textit{Patten v Thompson} (1816) 5 M & S 350 (105 ER 1079). See the discussion by Bools \textit{Bill of Lading} 174-175.

\textsuperscript{118} \textit{Sargent v Morris} (1820) 2 B & Ald 277 (106 ER 665). See the discussion by Bools \textit{Bill of Lading} 174.

\textsuperscript{119} \textit{Newsom v Thornton} (1806) 6 East 17 (102 ER 1189) at 41; Bools \textit{Bill of Lading} 174 n 8. See the decision by Lord Ellenborough CJ in \textit{Patten v Thompson} (1816) 5 M & S 350 (105 ER 1079) especially at 357-360.

\textsuperscript{120} See \textit{Martini v Coles} (1813) 1 M & S 140 (105 ER 53) at 148.

\textsuperscript{121} \textit{Bill of Lading} 177.
more than a symbol of ownership. In due course the phrase “symbol of property” began to be interpreted as “symbol of the goods”. In Pease v Gloahec, decided in 1866, a bill of lading is referred to as a “symbol of the goods”. Then in 1870, in Barber v Meyerstein, Lord Hatherley said,

“There has been adopted, for the convenience of mankind, a mode of dealing with the property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them.”

In 1883 Bowen LJ held,

“The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is...”

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122 See Barber v Taylor (1839) 5 M & W 527 (151 ER 223) at 534; Hoare v Dresser (1859) 7 HLC 290 (11 ER 116) at 322: “A cargo is always represented by its title deed, the bill of lading.”

123 See eg the submission by counsel in Hatfield v Phillips (1845) 12 Clark & Finnelly 343 (8 ER 1440) at 355. The judges did not use the phrase “symbol of the goods”, except for the Lord Chancellor during argument by counsel (at 351). Bools Bill of Lading 178 called this “one lapse”, but it is probably more than a mere lapse, as the Lord Chancellor (at 361) also said in his judgement, “as entrusted with the bill of lading, they [the consignees] were also entrusted with the possession of the goods...” Further see Bools Bill of Lading 175-176 as to the how the Factors Act, 1842 furthered this development.

124 (1866) LR 1 PC 219 at 227-228. Before that, in Gurney v Behrend (1854) 3 El & Bl 622 (118 ER 1275) at 634, Lord Campbell CJ held, “The bill of lading only represents the goods: and, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented.”

125 (1870) LR 4 HL 317. According to Bools Bill of Lading 178 this was the most important decision regarding bills of lading since Lickbarrow v Mason.

126 329-330. Lord Hatherley also quoted from the judgement of Willes J in the court below calling the bill of lading a “symbol of possession” (332). Lord Chelmsford called the bill of lading “the symbol and representative of the goods” (334). Lord Westbury said the bill of lading “is at once both the symbol of the property and the evidence of the right of possession” (337).

127 Sanders Brothers v MacLean & Co (1883) 11 QBD 327 at 341. In Biddell Brothers v E Clemens Horst Co [1911] 1 KB 934 at 955-956 Kennedy LJ approved of the quoted passage of Bowen LJ in the Sanders case, and also said, “The bill of lading in law and fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser.” In C Sharpe & Co Ltd v Nosawa & Co [1917] 2 KB 814 at 818 Atkin J also approved of Bowen LJ calling the bill of lading a “key”, and further said that delivery of the bill of lading is constructive delivery of the goods, the transferee having control of the goods. In The “Future Express” [1992] 2 Lloyd’s Rep 79 at 95 Judge Diamond QC remarked that the expression “key of the warehouse” as used in the Sanders case, although admittedly a “hallowed” expression, is an inexact metaphor. Bools Bill of Lading 184 countered by saying that the expression is in fact a “perfect metaphor”, as holder of a key may be in symbolic possession of goods kept in a warehouse in the same way that the transferee of a bill of lading may be in symbolic possession of the goods.
universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo ... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.”

Therefore “symbol of property” now also included the meaning of “symbol of the goods”, or symbol of possession. It is doubtful whether this happened “[w]ithin the space of one case”, as the Barber case is probably rather the culmination of a process that started somewhere in the first half of the century. The case nevertheless is the first to make a clear statement on the fact that the holder of the bill of lading is in possession of the goods.

5.4.4 Possession and Document of Title: Bools

In order to make meaningful comments on the role of the bill of lading as a document of title as explained by Bools, it is necessary to set out his views at some length. In the process the concept of possession in the English law will also be discussed, and differences between South African and English law will be pointed out in subsequent paragraphs.

Starting with possession, Bools distinguished between “custody”, “legal possession”, “constructive possession” and “symbolic possession”. It should be kept in mind, as also admitted by Bools, that the definitions given by him to these terms cannot be regarded as being part of a standardized system accepted throughout the English common law. The same term is often used in different ways by both academics and the courts. “Custody” is the physical control of the goods, and it can therefore be said that the goods are in the custody of the carrier during the voyage. “Legal possession” does not necessarily amount to custody, but it puts the legal possessor in the same position as the person in custody of the goods. Bools then divided legal possession into “constructive possession” and “symbolic possession”. Constructive

128 The use of the term “symbol of the goods” is criticized by Negus 37 LQR 451, for not wholly convincing reasons.
129 As submitted by Bools Bill of Lading 179.
130 Bill of Lading 180-192.
131 Bill of Lading 180-181.
132 Goode Proprietary Rights 8 similarly distinguished between three principal forms of possession, firstly physical possession (called custody by Bools), secondly “possession of goods giving physical control” (continued...)
possession is basically legal possession, with the added qualification that the person in constructive possession does not have custody of the goods, as another person holds the goods on his behalf. The shipper of the goods will have constructive possession of the goods, as the carrier will be his bailee. Symbolic possession must be differentiated from constructive possession. In the case of symbolic possession the goods are not held by someone (e.g. the carrier) on behalf of the person being in symbolic possession of the goods. A transferee of the bill of lading (thus not the shipper himself) has symbolic possession of the goods. The carrier does not hold the goods on behalf of the transferee, and therefore the transferee does not have constructive possession of the goods.

According to Bools there are three factors that explain the bill of lading's ability to transfer symbolic possession:

1. The bill of lading manifests the carrier's intention to deliver the goods to the presenter of the bill and not to interfere with the presenter's ability to obtain custody of the goods on arrival.
2. The transfer of a bill raises a presumption that the transferor no longer intends to exercise control over the goods or to interfere with the transferee's ability to obtain possession of the goods.
3. The transfer of the bill raises a presumption that the transferee intends to exercise control over the goods and to exclude all others from exercising control over the goods.

As all three factors are no more than presumptions, they may be rebutted, and once a presumption is rebutted the transferee of the bill of lading will not have symbolic possession of

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132 (...continued)
(symbolic possession according to Bools) and thirdly “possession through a bailee at will” (called constructive possession by Bools; Goode also calling it constructive or shared possession). Bools Bill of Lading 180 n 53 pointed out that Goode is one of “few writers” to distinguish between constructive and symbolic possession in a way similar to himself. It should therefore not be concluded from the discussion in the text that this distinction is generally accepted.

133 In Barclays Bank Ltd v Commissioners of Customs and Excise [1963] 1 Lloyd's Rep 81 at 88-89 Diplock LJ held (my emphasis), “The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners.” Also see Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] 1 AC 785 at 818 and for a similar indication in South African law London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 33. It will perhaps be useful to explain briefly what is meant by the English concepts of bailor and bailee. A bailee holds goods on behalf of a bailor. There will be an attornment when the bailee acknowledges that he holds the goods on behalf of somebody other than the original bailor.

134 Bill of Lading 183.
Chapter 5: The Functions of the Bill of Lading

the goods.135 In The “Future Express”,136 the bills of lading were presented to the bank, but that happened nearly a year after the goods were discharged, and at that stage the bank was also aware that the goods had been delivered long before and were in possession of another party.137 One of the questions to be decided was whether the bank had become a pledgee of the goods, and to be a pledgee the goods had to be delivered to the bank. The court gave two reasons why the bank could not be a pledgee, the second reason being important for the present purposes:138

"... at the time when the bills of lading were negotiated to the bank in March, 1986 it was known to Tradax as transferors and to the bank as transferees that the goods had long since been discharged and dispersed and it cannot therefore have been intended by either party that a transfer of the bills should operate as a transfer of constructive possession of the goods."

Neither the transferor nor the transferee had the intention to transfer possession of the goods, and therefore the transferee cannot be said to be in symbolic possession of the goods.

Bools139 further wrote that a non-negotiable or straight bill of lading cannot be a document of title at common law because in such a case the first presumption will be rebutted, as the carrier will then not intend to deliver the goods to the “presenter” of the bill of lading. In Lickbarrow v Mason140 the special verdict referred to bills of lading that are “negotiable and transferable”.141 Therefore a straight bill of lading is not really a bill of lading.142

According to Bools143 the three factors explaining the bill of lading's ability to transfer symbolic possession can be reworded more generally (eg not referring to a carrier), and that other

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135 Bools Bill of Lading 190-192.
137 The facts are of course much more complicated: for a full account see 81-87. In The “Future Express” [1993] 2 Lloyd’s Rep 542 at 545 Lloyd LJ said, “Accordingly they [the bank] knew ... that the bills of lading could no longer be used as the key to the warehouse. The warehouse was already empty.”
138 93. The first reason was that when the bank obtained possession of the bills of lading, another party (Dalali) had already obtained property and possession in the goods. This was also the basis of the Court of Appeal’s decision: see The “Future Express” [1993] 2 Lloyd’s Rep 542 at 548.
139 Bill of Lading 190. Also see Toh Kian Sing 1996 LMCLQ 417.
140 (1794) 5 TR 683 (101 ER 380).
141 In Kum v Wah Tat Bank Ltd [1971] 1 Lloyd’s Rep 439 at 446 Lord Devlin nevertheless stated that it has never been settled whether delivery of a non-negotiable bill of lading transfers possession.
142 Goode Commercial Law 903 n 60; Benjamin 1023.
143 Bills of Lading 184-186.
documents can be documents of title if the three factors are satisfied. Bools further argued that not only mercantile custom but also the wording of the document can show the existence of the necessary presumptions, and that parties can therefore create new documents of title by using suitable terminology in the document itself. However, in The “Future Express”¹⁴⁴ the court held,

“A bill of lading is not a document of title merely because of its terms. If a document could become a document of title merely by virtue of its terms, it is hard to see why a custom as to the transferability of bills of lading had to be proved in *Lickbarrow v. Mason* .... A document can only, it seems, achieve the status of a document of title to goods by mercantile custom or by statute.”

According to Bools, because nothing was decided in *Lickbarrow* about the bill of lading’s ability to transfer symbolic possession, parties can indeed create documents of title, as a document of title only gives the transferee of the document symbolic possession of the goods. It will be submitted later, however, that the transferability of the bill of lading and the effect such a transfer may have, form an important part of being a document of title. Therefore a custom as proved by the special jury of merchants in *Lickbarrow* (or a statutory provision) is indeed a necessity before one can regard a document as a document of title. Bools further argued that there are no policy objections to parties creating their own documents of title. His conclusion stems from his limited view of what the effect of a document of title is, ie only relating to possession. It is submitted that parties should not be allowed to transfer possession of goods by negotiating a document outside the known sphere of the bill of lading in the absence of a proven custom. It is often crucial to determine who is in possession of goods. In the absence of any mercantile custom, it would lead to confusion and legal uncertainty to allow parties to create their own mode of transferring possession, especially when attempting to do it by way of transferring a document. It is therefore submitted that in the absence of proven mercantile usage parties should not be allowed to create new documents of title.¹⁴⁵

¹⁴⁴ [1992] 2 Lloyd’s Rep 79 at 95. Bools *Bill of Lading* 186 referred to the arguments in the decision without naming the decision. Also see Benjamin 1126, 1130-1131: the proven custom will have to show that a transferee of the document is in possession of the goods.

¹⁴⁵ In *The Ship “Marlborough Hill” v Alex Cowan and Sons Ltd* [1921] 1 AC 444 at 453 the Privy Council held that a received for shipment bill of lading is indeed a bill of lading On p 453 of the case Bools *Bill of Lading* 187 found evidence of all the requirements for the creation of a document of title according to his construction, and therefore concluded that the decision was correct. The case, though, dealt with a definition in the Admiralty Court Act 1861 and is *obiter* on whether such a received for shipment bill of lading fell within the Bills of Lading Act 1855 (Negus 37 *LQR* 445). In contrast, therefore, in *Diamond Alkali Export Corporation v FL Bourgeois* [1921] 3 KB 443 at 448-453 the court held that a received for shipment bill of lading with regard (continued...)
Possession can be described in the following way: Possession is therefore not a real right. This differs from English law where possession is regarded as a real right. Possession consists of effective physical control (the corpus element) and the intention to possess (the animus possidendi). In Ex Parte Van der Horst: In re Estate Herold a twofold test was laid down for the corpus element of possession. Firstly, no third party may be in a better corporeal relationship to the thing. Secondly, “What is required is that the person in question should manifest the power at his will to deal with the property as he likes and to exclude others.” The second part of the test is formulated by Sonnekus and Neels in the following way: “die beheerder moet ter keuse die intensiteit van sy beheersverhouding kan intensiveer.” This test can be applied to goods carried under a bill of lading in the following way. Firstly, although the goods are carried in a ship usually not under any sort of control of the holder of the bill of lading, it is submitted that the bill of lading as a symbol of the goods places its holder in a better corporeal relationship to the goods than any third party, including the

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146 There is authority for the fact that the word possession should only be used to describe the unlawful control of a thing and control should be used to describe lawful control of a thing: see Sonnekus and Neels Sakereg Vonnisbundel 123. The two words are however not used in an accurate way by the courts and authors, and only the word possession will be used here.

147 Sonnekus and Neels Sakereg Vonnisbundel 125. Van der Merwe Sakereg 95 wrote that it is impossible to give a single definition of possession.

148 Further see Sonnekus and Neels Sakereg Vonnisbundel 125-126. Van der Merwe Sakereg 92 does not provide a final answer as to whether possession is a factual condition or a right.

149 Goode Proprietary Rights 1, 7; Du Toit 1980 SALJ 405 n 22.

150 See Sonnekus and Neels Sakereg Vonnisbundel 126-132; Van der Merwe Sakereg 97-107.

151 1978 1 SA 299 (T).

152 301G.

153 Sakereg Vonnisbundel 127.
carrier.\textsuperscript{154} Regarding the second part of the test, the holder is indeed capable of dealing with the goods, at will, by virtue of being the holder of the bill of lading. Generally, however, apart from any tests, the corporeal relationship between a presumed possessor and the goods is determined by many factors, such as the nature of the thing and including "verkeersopvattingen en prakties uitgekristalliseerde riglyne van die regspraak".\textsuperscript{155} The amount of control required will differ according to the circumstances of each case.\textsuperscript{156} Both commercial considerations and, as will be seen below, case law clearly indicates that the holder of the bill of lading is in possession of the goods. Apart from the corpus element, the holder of the bill of lading must also have the intention to secure some benefit for himself by possessing the goods (\textit{animus ex rebus commodum acquirendi}).\textsuperscript{157} As the carrier would not have the required intention to possess, the carrier would not legally be in possession of the goods on his ship.\textsuperscript{158} It is submitted that from the fact that a carrier issues a bill of lading it can be derived that the carrier has no intention to possess the goods.

Van der Merwe\textsuperscript{159} indicated that one can control the contents of a building by holding the key of the building, but that such key must be the only key and another person may not have a duplicate of such key.\textsuperscript{160} Similarly if the transferor keeps a duplicate key with the consent of the transferee there can also be no transfer of possession.\textsuperscript{161} Although there may be some similarities between a key and a bill of lading, a holder of one of the bills of lading issued can be in possession of the goods even though more than one original bill of lading was issued — and that would often be the case. Perhaps it can be said that the issue of more than one original bill of lading is approved of by mercantile custom over many years and also subsequently sanctioned by case law. Multiple original bills of lading will be discussed again later in the chapter.\textsuperscript{162}

\textsuperscript{154} Cf Bools \textit{Bill of Lading} 183.

\textsuperscript{155} Sonnekus and Neels \textit{Sakereg Vonnisbundel} 127-130; Van der Merwe \textit{Sakereg} 97-103.

\textsuperscript{156} Van der Merwe \textit{Sakereg} 97-98.

\textsuperscript{157} \textit{Yeko v Qana} 1973 4 SA 735 (A) 739; Sonnekus and Neels \textit{Sakereg Vonnisbundel} 132.

\textsuperscript{158} Cf Bools \textit{Bill of Lading} 183.

\textsuperscript{159} \textit{Sakereg} 99.

\textsuperscript{160} \textit{S v Magxwalisa} 1984 2 SA 314 (N) 321C. Also see \textit{Shaw v Hendry} 1927 CPD 357.

\textsuperscript{161} Van der Merwe \textit{Sakereg} 316 n 109, followed by \textit{S v Magxwalisa} 1984 2 SA 314 (N) 321C-D.

\textsuperscript{162} §5.4.8 and §5.4.9.
A further question is whether the holder of the bill of lading is not perhaps in possession of the goods by virtue of the carrier holding the goods on his behalf.\textsuperscript{163} It was indicated in the discussion above, that according to Bools\textsuperscript{164} the shipper of the goods has constructive possession of the goods (as opposed to symbolic possession) as the carrier is the shipper's bailee. It is submitted that in South African law, however, it would seldom, if ever, be the intention\textsuperscript{165} of the parties that the carrier holds the goods on behalf of the shipper.\textsuperscript{166} When dealing with a transferee of the bill of lading (ie not the shipper) it will definitely not be the intention of the carrier and the transferee (who might not even be aware of each other) that the carrier holds the goods on behalf of the holder of the bill of lading. This is similar to the position in English law where there is no bailment relationship in this scenario, and Bools explained that the holder of the bill of lading has symbolic possession (and not constructive possession) in this case.

In the discussion in the previous paragraph it was indicated that Bools distinguished between custody, legal possession, constructive possession and symbolic possession. In South African law there is no similar distinction between different types of possession.\textsuperscript{167} Regarding the corpus element one must simply apply the test as found in the \textit{Van der Horst} case, look at the nature of the thing and consider the general guidelines of the courts to determine whether a person is in possession. It does not matter whether such possession is through an agent\textsuperscript{168} or by virtue of a bill of lading. Possession is still possession.

Although delivery is often loosely referred to as the transfer of possession, possession can strictly speaking not be "transferred" because of the personal nature of the relationship between

\textsuperscript{163} Also see the discussion about attornment in §5.4.12 \textit{infra}.

\textsuperscript{164} \textit{Bill of Lading} 181.

\textsuperscript{165} The carrier must form the \textit{animus non sibi sed alteri possidendi} or the \textit{animus tenendi}: see Sonnekus and Neels \textit{Sakereg Vonnisbundel} 244; \textit{Van der Merwe Sakereg} 106, 113.

\textsuperscript{166} There is also no reason in English law why the shipper cannot be said to have symbolic possession (in the sense the term is used by Bools) of the goods. Although there is apparently a bailment relationship between the shipper and the carrier and it can therefore be said that the shipper has constructive possession of the goods, as holder of the bill of lading the shipper is surely in the same position as a transferee of the bill of lading who has symbolic possession of the goods.

\textsuperscript{167} One can distinguish in South African law between lawful and unlawful possession and in the case of unlawful possession between \textit{bona fide possessio} and \textit{mala fide possessio}: see eg Sonnekus and Neels \textit{Sakereg Vonnisbundel} 242-244; \textit{Van der Merwe Sakereg} 111-112.

\textsuperscript{168} See eg \textit{Van der Merwe Sakereg} 113-115.
a person and a thing. What actually happens is that when the thing is delivered the transferor withdraws his physical control of the thing and the transferee establishes physical control and forms the necessary intention. Therefore, according to Sonnekus and Neels, one should rather refer to the acquisition of possession than the transfer of possession. However, if purely for linguistic reasons, I will indeed often refer to the "transfer of possession" in this chapter. Lastly it should be mentioned that there is a presumption that the person in possession of a movable thing is also the owner thereof.

5.4.6 Transfer of Ownership in South African Law

The requirements common to the derivative acquisition of ownership of movables, can generally be regarded as the following: Firstly, both the transferor and the transferee must have contractual capacity (or the necessary assistance). Secondly the transferor must have the capacity to dispose of the thing in question. This means the transferor must either be the owner of the thing, or that he has the *ius disponendi* to transfer ownership on behalf of the real owner. Thirdly there must be a real agreement between the transferor and the transferee. This is a subjective requirement, and it means that the transferor must have the intention to transfer ownership and the transferee must have the intention to receive ownership. Therefore there must be consensus between the parties regarding the transfer of the real right. The transfer of

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169 Sonnekus and Neels *Sakereg Vonnisbundel* 123, 245.
170 Sonnekus and Neels *Sakereg Vonnisbundel* 124-125, 126-127; Van der Merwe *Sakereg* 94.
171 Regarding "ownership", "property" and "title" in English law see Goode *Proprietary Rights* 3-6; Du Toit 1980 *SALJ* 405-406.
172 For the derivative acquisition of ownership the cooperation of a predecessor in title is necessary, and the right acquired is dependent upon the right of the predecessor in title. Therefore the transferee can at most acquire the same right as the transferor: see Sonnekus and Neels *Sakereg Vonnisbundel* 287, 389.
173 See the discussion by Sonnekus and Neels *Sakereg Vonnisbundel* 390-396. Also see Van der Merwe *Sakereg* 301-305.
174 Afrikaans: *saaklike ooreenkoms*.
175 In *Ambassador Factors Corporation v K Koppe & Co; K Koppe & Co v Accreylon Co Inc* 1949 1 SA 312 (T) 317, for example, the holders of the bill of lading did not become owners of the goods, as they never intended to buy the goods in question, and the other party never intended to sell the goods to them. Where the requisite intention is present, ownership may indeed be transferred (318). In *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 1 SA 816 (W) 821A Boshoff J held, "Property in the goods passes by such endorsement whenever it is the *intention* of the parties that the property should pass, just as in similar circumstances the property would pass by actual delivery of the goods" (my emphasis).
the bill of lading can raise a presumption that the requisite real agreement is present. In English law the transfer of the bill of lading “is often very important evidence as to the intention to transfer the property in the goods”. This presumption can nevertheless be rebutted, where for example there is a reservation of ownership until the buyer has paid the purchase price. Lastly, in the case of movables, delivery of the thing is necessary. This is an objective requirement. Waring wrote, “It follows that ownership of the goods may be transferred independently of the transfer of the bill of lading, transfer of ownership depending upon the intention of the transferor and transferee.” This may indeed be true in English law, but in South African law transfer of ownership while the goods are at sea without the transfer of the bill of lading will be virtually impossible as the requirement of delivery of the goods will not be met. In the case of a cash sale payment of the purchase price is also necessary before ownership can pass.

It is thus important to keep in mind that all these requirements should be satisfied before ownership of the goods in a ship at sea can be transferred. The transfer of the bill of lading may indeed transfer possession, but ownership cannot pass if the transferor is not owner or has the ius disponendi.

5.4.7 Symbolical Delivery in South African Law

Symbolical delivery (also called clavium traditio or traditio symbolica) is employed where delivery of a symbol of the goods (such as the keys of a warehouse or a bill of lading) is regarded as delivery of the goods themselves. It is important that the mere transfer of a symbol is not sufficient, as the symbol must enable the transferee to exercise control over the goods.

176 Negus 37 LQR 451; Bovill CJ in Dracachi v The Anglo-Egyptian Navigation Co (1868) LR 3 CP 190 at 192; Haille v Smith (1796) 1 Bos & Pul 563 (126 ER 1066) at 570.

177 See Bools Bill of Lading 48-49; Scrutton 192.

178 Charterparties 282.

179 Assuming of course that South African law is the applicable law.

180 See Sonnekus and Neels Sakereg Vonnishbundel 398-399; Van der Merwe and De Waal Law of Things 157-158; Van der Merwe Sakereg 315-317; S v Buitendag 1980 2 SA 153 (T) 154D-F.

181 Van der Merwe and De Waal Law of Things 157; Heydenrich v Saber (1900) 17 SC 73 at 76-77; S v Magxwalisa 1984 2 SA 314 (N) 321A; S v Buitendag 1980 2 SA 153 (T) 154F. For this reason Van der Merwe Sakereg 315 regarded the use of the terms symbolic delivery or traditio symbolica as “onsuiwer”.

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176 Negus 37 LQR 451; Bovill CJ in Dracachi v The Anglo-Egyptian Navigation Co (1868) LR 3 CP 190 at 192; Haille v Smith (1796) 1 Bos & Pul 563 (126 ER 1066) at 570.

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180 See Sonnekus and Neels Sakereg Vonnishbundel 398-399; Van der Merwe and De Waal Law of Things 157-158; Van der Merwe Sakereg 315-317; S v Buitendag 1980 2 SA 153 (T) 154D-F.

181 Van der Merwe and De Waal Law of Things 157; Heydenrich v Saber (1900) 17 SC 73 at 76-77; S v Magxwalisa 1984 2 SA 314 (N) 321A; S v Buitendag 1980 2 SA 153 (T) 154F. For this reason Van der Merwe Sakereg 315 regarded the use of the terms symbolic delivery or traditio symbolica as “onsuiwer”.
The requirements of symbolical delivery are set out by Van der Merwe and De Waal (bills of lading can be substituted for the keys): 182

(a) the parties must have the intention to resort to this form of delivery;
(b) the keys must be delivered with the intention that the contents of the warehouse etc are thereby transferred; and
(c) the keys must supply the transferee with exclusive control over the contents of the warehouse etc.

It will be seen that intention plays an important role in requirements (a) and (b). If the intention is only to deliver a bill of lading for safekeeping, symbolical delivery of the goods will not take place. 183 Regarding requirement (c), a bill of lading will normally provide the transferee with exclusive control over the goods at sea, even though more than one original bill of lading was issued. 184 Returning to requirements (a) and (b), as a whole they are basically similar to factors 2 and 3 of Bools. It is submitted that the transfer of the bill of lading should be construed in the following way in South African law. When transferring the bill of lading there is a presumption that the intention of the parties is to deliver the goods by way of symbolical delivery. Where there are clear indications that the intention to deliver the goods is lacking from either the transferor or the transferee delivery of the goods will not take place. The presumption can be rebutted in court, as happened in The “Future Express” 185 discussed above. It is submitted, however, that a court should be very loathe to find that symbolical delivery did not take place because that was not the intention of the parties in the absence of sound reasons. 186 It will be indicated in the following paragraph that the transferor can still lose possession of the goods whatever his intention was.

182 Law of Things 157. For the same exposition of the requirements in Afrikaans see Van der Merwe Sakereg 316. Van der Merwe and De Waal discussed this form of delivery under the heading “Clavium traditio” and wrote that the delivery of documents of title is “[c]losely analogous” to clavium traditio, and the requirements to be fulfilled (quoted in the text) are the same.

183 Cf Van der Merwe Sakereg 316 n 108.

184 See §5.4.5 supra.


186 Cf Bools Bills of Lading 192.
5.4.8 Transferee Received Bill of Lading from Person not in Possession of Goods

Bools suggested that, "If there were only one part to the bill of lading the third factor [probably the second factor is meant here] would be unnecessary because, upon the transfer of that part, the transferor, whatever his intention, could not interfere with the transferee's ability to take possession." It is of course possible that the transferor might transfer the bill of lading to someone, for example for safekeeping, without any intention not to exercise control anymore, and that in such a case he might lose possession to a third party by the fraud of the person in whose safekeeping the bill of lading is supposed to be. There can be no objection to this: possession can be lawful or unlawful and a thief can also be in possession of a thing. Being in possession does not mean that one has the entitlement to lay claim to possession (the ius possidendi).

Bools thus raised the following interesting question. It was seen above that it is possible that the possessor (B) of the bill of lading will not be in possession of the goods, for example if neither the transferor (A) nor the transferee (B) intended to transfer possession. If such a holder of the bill of lading (B), although not in possession of the goods, then transfers the bill of lading once again, the question is whether the transferee (C) will be in possession of the goods. Bools suggested that if more than one original bill of lading was issued, and the original transferor (A) still holds one of the original bills of lading, the transferee (C) will not have possession of the goods, if A still intends to control the goods. It is submitted that this is correct for the following reason. If A had possession of the goods the whole time, then C cannot obtain "another" possession from B. If A does not still hold an original bill of lading, A’s intention, according to Bools, is irrelevant, and C will have possession of the goods. As indicated above, A will indeed lose possession in such a case, even if he is defrauded.

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187 Bill of Lading 184.

188 This means only one original bill of lading was issued, as opposed to three original bills of lading that are often issued.

189 See Sonnekus and Neels Sakereg Vonnisbundel 123-124; Van der Merwe Sakereg 90.

190 Bill of Lading 192.
5.4.9 Multiple Original Bills of Lading

More than one original bill of lading can be issued by the carrier,\(^{191}\) and here the possible effect of multiple bill of lading on the delivery of the goods while at sea (or at least before delivery is made by the carrier) and the transfer of ownership will be examined. The fact that the carrier is normally discharged when delivering the goods against production of any of the bills of lading, can have no effect on who the owner of the goods is.\(^ {192}\) The person receiving delivery of the goods might not be the owner of the goods, as the holder of another part of the bill of lading is owner.\(^ {193}\) It is submitted that while the goods are at sea the first transfer of a part of the bill of lading meeting all the requirements of symbolical delivery will transfer possession of the goods,\(^ {194}\) with the further possibility of transferring ownership if all the requirements are met. Thereafter possession can only be transferred further by the transfer of that specific part of the bill of lading, the transfer of the other parts of the bill of lading not being symbolical delivery of the goods or placing the transferee in possession of the goods. After the carrier has delivered the goods on production of a bill of lading, the person physically receiving the goods will of course be in possession of them. Such a person might however not be owner of the goods as the transfer of that person's part of the bill of lading while the goods were at sea might have been ineffective in making symbolical delivery of the goods.

A bill of exchange can also be drawn in a set. The reason for this practice is similar to that in the case of bills of lading: to guard against the risk of loss in the post, especially when foreign bills are used.\(^ {195}\) If each part of the set is numbered and contains a reference to the other parts, the whole of the parts constitutes one bill.\(^ {196}\) There is no such requirement regarding a bill of lading in a set, but probably a similar practice will be customary. If the holder of a set indorses

\(^{191}\) For a discussion see Chapter 7 §7.3.3.

\(^{192}\) Barber v Meyerstein (1870) LR 4 HL 317 at 336.

\(^{193}\) See the facts of Barber v Meyerstein (1870) LR 4 HL 317 at 327-328.

\(^{194}\) Cf Lord Westbury in Barber v Meyerstein (1870) LR 4 HL 317 at 336, although there dealing with ownership, where he said: "There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to the first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading."

\(^{195}\) Malan and Pretorius Bills of Exchange 198.

\(^{196}\) Bills of Exchange Act 34 of 1964 s 69(1).
two or more parts to different persons, he is liable on each part, and every subsequent indorser is liable on the part he has indorsed as if the parts were separate bills. If two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed to be the true owner of the bill. It was submitted above that possession of the goods will be transferred by the first transfer of a part of the bill of lading.

The acceptance of a bill in a set may be written on any part thereof, but it must be written on one such part only. If the drawee accepts more than one part, and the accepted parts get into the hands of different holders in due course, he is liable on each part as if it were a separate bill. If the acceptor of a bill in a set pays it without requiring the part bearing his acceptance to be delivered to him, and that part at maturity is outstanding and in the hands of a holder in due course, he is liable to the holder thereof. A carrier can sustain extensive damages if he delivers without obtaining a bill of lading. Subject to the abovementioned provisions, if any single part of a bill in a set is discharged by payment or otherwise, the whole bill is discharged. A carrier will generally also be discharged after delivering in exchange for the first bill of lading presented to him.

5.4.10 Effect of Transfer of Bill of Lading in South African Law

The transfer of the bill of lading will normally serve as delivery of the goods specified in it.

197 Bills of Exchange Act 34 of 1964 s 69(2).
198 Bills of Exchange Act 34 of 1964 s 69(3).
201 Bills of Exchange Act s 69(5).
202 See Chapter 7 §7.3.
203 Bills of Exchange Act s 69(6).
204 See Chapter 7 §7.3.3.
205 Subject to what was said in §§ 5.4.7, 5.4.8 and 5.4.9.
206 Generally the posting of a bill of lading would not amount to delivery of the goods to the purchaser, as the purchaser would not be able to exercise control over the goods until the bill of lading reached him — especially where the purchaser is in addition not aware of the posting: see Knight Ltd v Lensvelt 1923 CPD 444 at 448. The posting of a bill of exchange will not amount to delivery of the bill unless the creditor has requested that (continued...)
Delivery of the goods while at sea cannot take place unless the bill of lading is transferred, with any indorsements if necessary. According to Corbett JA,

"The holder of the bill ... is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognized as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery." 

"... the transfer of the bill of lading would symbolically represent delivery of possession of the maize to the buyer, the seller simultaneously divesting himself of control and relinquishing his animus possidendi." 

In the absence of a special agreement to the contrary, it is also not possible for the purchaser to demand actual delivery rather than symbolic delivery under a c.i.f. contract. The loading of the cargo into the ship is further generally not regarded as delivery:

"It is true that upon the maize being loaded into the ship's hold the seller could be said to surrender custody thereof to the master of the ship but this would be on the understanding that within a reasonable time the master would issue to it a proper bill of lading, which would thereafter symbolise possession and control of the cargo. There would thus be no surrender at that stage of either corpus or the animus possidendi."

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206 (...continued)

the bill be posted: see Malan and Pretorius Bills of Exchange 321-323.

207 Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 493C. Unless one is dealing with a bearer bill of lading, an indorsement would be necessary "to render the bills of lading in a deliverable state ...": see Barlows Tractor & Machinery Co v Oceanair (Transvaal) (Pty) Ltd 1978 3 SA 175 (W) 179B.

208 Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492B-C.

209 493C. In London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 34 De Villiers CJ said that Roman-Dutch Law recognises the validity of constructive delivery as opposed to actual delivery: "The key is the symbol of the property in the goods placed in the warehouse, in the same way as the bill of lading is the symbol of the property of the goods shipped on board." Further see Knight Ltd v Lensvelt 1923 CPD 444 at 447; Garavelli and Figli v Gollach and Gomperts (Pty) Ltd 1959 1 SA 816 (W) 821A; Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171 at 190.

210 Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd 1974 2 SA 10 (E) 15D-E: "The essential feature of a C.I.F. contract is that the seller's obligation is performed by the delivery of the documents and not by the actual physical delivery of the goods." Further see Frank Wright (Pty) Ltd v Corticas "BCM" Ltd 1948 4 SA 456 (C) 464; Garavelli and Figli v Gollach and Gomperts (Pty) Ltd 1959 1 SA 816 (W) 821C. The Chattanooga, Frank Wright and Garavelli cases therefore rejected Birkbeck [although the name of the case indicates Birkbeck the correct name is Birbeck] and Rose-Innes v Hill 1915 CPD 687 at 706, 707 where it was held that there is no obligation on the purchaser to accept symbolical delivery instead of physical delivery when the documents were tendered to him, even though symbolical delivery will be good delivery when so accepted by the purchaser. Also see Thomas & Co Ltd v White & Co Ltd 1923 NPD 413 especially at 422; Lockie Bros v Epstein 1921 EDL 154 at 158-159; Alli v Daniel Bros & Co Ltd 1921 AD 292 especially at 295.

211 Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 493D-E; London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 33; Knight Ltd v Lensvelt 1923 CPD 444 at
According to Corbett JA, “Ownership in the goods normally passes to the purchaser upon transfer of the bill of lading and concurrent payment.”\textsuperscript{212} In the Lendalease Finance case ownership in the maize could not pass to the purchaser because delivery of the maize did not take place. At the time in question the bill of lading was still in the hands of the seller, and “the seller, as holder of the bill, would retain control of the maize as effectively as if it were in a warehouse and the seller were in possession of the key.”\textsuperscript{213}

Regarding the effect of the transfer of the bill of lading, one can conclude that when the bill of lading is transferred, the transferee will become the possessor of the goods. Delivery of the goods from transferor to transferee will therefore take place. Any further effects, such as the passing of ownership, will depend on whether the requirements for the passing of ownership are satisfied. Support for this proposition can be found in the words of Corbett JA who held that the bill of lading would “symbolise possession and control of the cargo.”\textsuperscript{214}

5.4.11 Delivery Using Copy of Bill of Lading or Replacement Bills of Lading

In Numill Marketing CC v Sitra Wood Products Pte Ltd\textsuperscript{215} one of the questions to be decided was whether delivery of the goods can be made (and thus ownership transferred) by transferring

\textsuperscript{211} (...continued)

\textsuperscript{212} Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 492D. From the use of the word “normally” one can perhaps derive that all the requirements for the passing of ownership should still be satisfied. Also see Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd 1974 2 SA 10 (E) 15E, 16G as to the passing of ownership.

\textsuperscript{213} 493C. Also see Mercantile Bank of India Ltd v Davis 1947 2 SA 723 (C) 730; McIntosh & Co v English, Scottish and Australian Bank Ltd 1921 NPD 87 at 90, 91. According to Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel and Another Intervening); Sunnyface Marine Ltd v Great River Shipping Inc 1992 2 SA 653 (C) 655H-656A when dealing with strangers to the contract (eg creditors), one must have regard to the bill of lading to establish who is in possession of the cargo, and not to any contractual provisions deeming delivery to have taken place.

\textsuperscript{214} Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 4 SA 464 (A) 493E (my emphasis).

\textsuperscript{215} 1994 3 SA 460 (C). Olivier J (471H-472A) noted that the question whether ownership was transferred must be decided according to South African law, although for private international law reasons. It is submitted that South African law should indeed be applied to questions of ownership for the reasons stated in Chapter 3; contra Staniland 1994 Annual Survey 639.
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a copy of the bill of lading or a replacement bill of lading\textsuperscript{216} instead of the original bill of lading. Put another way: can effective symbolical delivery only take place by delivery of the original bills of lading? Olivier J held:

"There is no magic in an original bill of lading. A bill of lading is a symbol of delivery, the handing over of which to the purchaser will, if the necessary mutual intention is also present, transfer ownership. Before such handing over of the symbol, the seller can change its mind and transfer ownership to a new purchaser by effective delivery of the goods purchased. This he can do by agreeing with the carrier to endorse the original bill of lading from 'to order of shipper' to the order of the new purchaser and delivering it,\textsuperscript{217} or he can, by agreement with the carrier, cancel the original and issue a copy suitably indorsed, and deliver that to the new purchaser.\textsuperscript{218} In principle he should also be able to give effective possession in any other manner, with the cooperation, naturally, of the carrier, who must be released from his obligation to the shipper to act in terms of the original bill of lading.\textsuperscript{219} To use the common-law analogy: I give the key to a warehouse wherein the goods are stored to my agent with instructions to deliver it to the purchaser to be identified by myself. I have purchaser A in mind. I decide not to transfer ownership to A (for example, because of a breach by him of the contract of sale). I then sell to B. I give a duplicate key of the warehouse to B and inform my agent to return the key in his possession to me, which he does. On what basis can it be denied that effective delivery of the goods to B has taken place and that ownership has passed to him?\textsuperscript{220}

It is therefore submitted that delivery of the goods can be effected by way of a copy of the bill of lading or by way of a replacement bill of lading if that is the intention of the parties, \textit{but only} if possession has not already been transferred to a party holding the original bill of lading,\textsuperscript{221} as that party will then be in possession of the goods. The principles to be applied here are therefore analogous to the principles applied in the case the case of multiple original bills of lading,\textsuperscript{222}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{216} For a discussion see §5.4.14 \textit{infra}.
\item \textsuperscript{217} See §5.4.13 \textit{infra}.
\item \textsuperscript{218} See §5.4.14 \textit{infra}.
\item \textsuperscript{219} It is submitted that the carrier will not be released in such a case from his obligation to the holder of the original bill of lading, if such a bill of lading is still in circulation.
\item \textsuperscript{220} 474H-475B.
\item \textsuperscript{221} This did not happen in the case as Boland Bank held the original bills of lading on behalf of the shipper (Sitra Wood) (474E). Olivier J (476G) also stated that when symbolic delivery was effected in the case "[t]he original bills of lading in the hands of Boland Bank ceased to be able to serve as symbols of effective delivery of the timber." It is submitted that on the facts of this particular case the conclusion is correct, because the bank was the agent of the shipper who made use of the copies and replacement bills of lading, but if the bank held the original bills of lading for themselves, they would have remained in possession of the goods before the delivery of the goods by the carrier at the port of destination, despite the use of any copies or replacement bills of lading.
\item \textsuperscript{222} See §5.4.9 \textit{supra}.
\end{itemize}
\end{footnotesize}
with the added caveat that any original bills of lading still in circulation will always enjoy preference over any copies of the bill of lading or replacement bills of lading when determining whether possession or ownership was transferred.

5.4.12 Attornment?

A further interesting question to consider is whether delivery of the goods cannot take place by way of attornment, instead of symbolical delivery. The requirements for attornment in South African law\(^{223}\) are that the three parties must have consensus that the holder will now hold the thing on behalf of the transferee and not the transferor anymore, and the holder must be in factual control of the thing at the time of attornment.\(^{224}\) When a bill of lading is transferred, the carrier will indeed hold the goods during the voyage, and the transferor and transferee might both have the intention that the carrier now holds the good on behalf of the transferee instead of the transferor. It is however doubtful that in most cases the carrier will even be aware when such a transfer takes place, and who the transferee is — the carrier is not notified of the dealings in the bill of lading. Therefore the carrier cannot form the intention to hold the goods on behalf of the transferee instead of the transferor.

In *Caledon & Suid-Westelike Distrike Eksekuteurskamer Bpk v Wentzel*\(^{225}\) the court extended the traditional requirements of attornment by deciding, inter alia, that the holder of the thing can agree beforehand already that he will hold the goods on behalf of a new owner in future,\(^{226}\) even if there is no certainty yet as to who such new owner will be, and even if the holder is not aware of when the transfer will take place.\(^{227}\) This particular extension was accepted *obiter* in *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein*.\(^{228}\) So one might argue that by issuing the bill of

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\(^{223}\) The concept was taken over from English law: see Van der Merwe *Sakereg* 326.

\(^{224}\) Van der Merwe *Sakereg* 327.

\(^{225}\) 1972 1 SA 270 (A).

\(^{226}\) 274A-C.

\(^{227}\) 274E.

\(^{228}\) 1980 3 SA 917 (A) 924F. In the case it was not proved that the holder of the car formed the necessary intention to hold the car on behalf of the transferee and not the transferor (926H-927A). Courts will not accept lightly that this requirement or the other requirements have been met: see Sonnekus and Neels *Sakereg Vonnisbundel* 401, 458.
lading, the carrier agrees to hold the goods on behalf of not only the shipper, but also on behalf of any future transferee of the bill of lading, even though the carrier would not be aware of such a transferee's identity. Thus, according to this argument, when the bill of lading is transferred, possession of the goods is also transferred by way of attornment. It is submitted, however, that delivery of the goods does not take place by way of attornment. There is no case supporting this proposition in South African law, and as will be indicated below, although the courts considered the notion in English law, such a construction was rejected there as well.

To move on to English law then, Goode advanced the theory of an “attornment in advance”:

“A particular form of attornment is the issue of a document of title giving legal control of the goods. ... Suffice it to mention that to give control it must be issued or accepted by the bailee of the goods, must therefore embody his undertaking to hold the goods for, and release them to, whoever presents the document and must be recognised by statute or mercantile usage as a document which enables control of the goods to pass by delivery of the document with any necessary indorsement. Such a document of title (and it will be seen, not all documents of title do give control in this way) is in effect an attornment in advance. The undertaking to each transferee of the document is embodied in the document itself and does not have to be given separately after the transfer has taken place.”

In The “Future Express”, the submission advanced by the [plaintiff] bank was that the bills of lading constituted an attornment by the owners [of the ship / carrier] to the bank as the consignee named in the bill of lading which attornment was completed when the bank obtained possession of the bills of lading. It was contended that the attornment was completed without any direct communication having to pass between the owners and the bank.” Judge Diamond first pointed out that the “concept of attornment plays no part in the discussion to be found in the classic authorities on the status in English law of a bill of lading as a document of title to the goods.” Although the court found that on the facts there could not have been an attornment,

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229 It is also conceivable that the bill of lading can explicitly state that the carrier will hold the goods on behalf of any transferee of the bill of lading.

230 Proprietary Rights 9-10. A few years later Goode Commercial Law 49 wrote that “[a] person can in a loose sense attorn in advance by issuing a bill of lading ...” (my emphasis) and “it would seem that attornment in advance is not recognized by the common law” (49 n 112).


232 94.
Judge Diamond went on to say:\textsuperscript{233}

"I should add that while I have assumed for the purpose of this analysis that, if an attornment can be
established, the transferee may sue the carrier for breach of the relationship of bailment, I see difficulties in
the way of adopting this proposition. The twin concepts of bailment and attornment cannot sensibly be
employed to bypass the conditions upon which, according to the Bills of Lading Act, 1855 or other relevant
legislation, a consignee or indorsee is entitled to sue on the contract contained in or evidenced by the bill. If
the ‘attornment in advance’ theory were to be adopted, at any rate in its broad form, then any consignee or
indorsee of the bill could, merely by proving he was the lawful holder of the bill, make a demand on the carrier
for delivery up of the goods and, if the demand was not complied with at all or if there was then a short
delivery or a delivery of damaged goods, sue the carrier for breach of his duty as bailee to deliver the goods
at the port of discharge in the same good order as when shipped. If this were held to be the law then ... there
would have been no need for the 1855 Act."

Therefore one of the main objections of working with a relationship of bailment, is that the
consignee can then always sue in bailment without the need for statutory intervention as in the
Bills of Lading Act 1855 — and for 200 years there was never such a case. In the Court of
Appeal\textsuperscript{234} Lloyd LJ agreed with Judge Diamond, and held:

"As I understand it, Professor Goode is drawing an analogy between the rights and obligations created by the
issue and transfer of a bill of lading, and the rights and obligations created by attornment. It is not suggested
that the concept of attornment adds anything by way of substance to the rights of the consignee or indorsee."

Bools\textsuperscript{235} is correct when saying that Goode probably did not have a mere “analogy” in mind
when devising his concept of “attornment in advance”, but Lloyd LJ nevertheless clearly
indicated that the concept has no practical significance. In the earlier case \textit{Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd}\textsuperscript{236} the House of Lords came to the same conclusion, also
mentioning that if there was a relationship of bailment between the buyers of the goods as
bailors (in the place of the original sellers) and the shipowners as bailees, there would be no
need for the Bills of Lading Act 1855.

\subsection{5.4.13 Manner of Transfer}

Throughout this paragraph reference will be made the law of negotiable instruments generally,

\textsuperscript{233} 96. Also see \textit{Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The “Captain Gregos”) (No 2)}
\[1990\] 2 Lloyd’s Rep 395 at 406.
\textsuperscript{235} \textit{Bill of Lading} 156.
\textsuperscript{236} [1986] 1 AC 785 at 818.
because of the many similarities (as well as some contrasts) with the negotiation of documents such as bills of exchange, although it will be kept in mind that “[i]f you are dealing with bills of lading you are only seeking trouble if you seek analogies in bills of exchange.”

The goods contained in a bill of lading may be deliverable to a named party, the name may be left blank, or the goods may be deliverable to bearer. A bill of lading stating that the goods are deliverable to a named party or where the name is left blank, may in addition also state that the goods are to be delivered to “order” or to “order or assigns” — any other words indicating transferability may of course also be used. Where a bill of lading is only made out to order without naming the consignee, it is the shipper who can transfer the bill. Any order bills of lading (ie where the goods are also deliverable to order) may be indorsed, either by way of an indorsement in blank or by way of an indorsement in full, also called a special indorsement. Similar to the law relating to bills of exchange, an indorsement in blank will contain only a signature without specifying a consignee, while an indorsement in full will contain not only a signature, but also the name of the consignee (or order) to whom the goods must be delivered.

It is submitted that, as in the case of negotiable instruments generally, the concept of a signature should be construed as widely as possible, including any mark placed on the document with the

237 Negus 37 LQR 458.

238 Scrutton 184.

239 Scrutton 184; Benjamin 986.

240 Benjamin 986. The Bills of Exchange Act 34 of 1964 s 2(1) (defining a bill of exchange) provides that a bill of exchange must be payable to “a specified person or his order, or to bearer.” According to s 5(1), “If a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty therein.” Notwithstanding this, a bill payable to “— order” is payable to the drawer’s order, and probably a bill payable to “— or order” as well: Malan and Pretorius Bills of Exchange 56.

241 Lickbarrow v Mason (1794) 5 TR 683 (101 ER 380) at 685-686 (the special verdict is fully quoted in Chapter 2 §2.11). The Bills of Exchange Act 34 of 1964 s 31 refers to a special indorsement. In Sewell v Burdick (1884) 10 AppCas 74 at 83 a special indorsement is called a “personal indorsement”. In National Bank v Paterson 1909 TS 322 at 326-327 it was indicated that the term indorsement, as applied to negotiable instruments, is capable of three meanings. The literal meaning is any signature written on the back of an instrument, even for the purposes of identification or receipt. The ordinary legal meaning is the signing of a name animo indorsandi, thus with the intention of undertaking the liabilities of an indorser. The third meaning of an indorsement is an indorsement completed by delivery (see Bills of Exchange Act 34 of 1964 s 1 sv “indorsement”). See Malan and Pretorius Bills of Exchange 138-139.

242 Cf Bills of Exchange Act 34 of 1964 s 31(1)-(2).
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purpose of identifying a party. Scrutton mentioned that the shipper or consignee writes “his name on the back of the bill of lading ....” It is submitted, as in the case of bills of exchange, that it is not necessary for an indorsement to appear on the back of the bill of lading.

For the negotiation or transfer of an order bill of lading indorsement alone is not enough, as the bill of lading must also be delivered. Of course for the delivery by the shipper to the named consignee no indorsement is necessary. Where a bill of lading contains an indorsement in blank, the goods become deliverable to bearer. The following three bills of lading may be transferred by delivery alone: an order bill of lading containing an indorsement in blank, a bill of lading where the name of the consignee is left blank and a bearer bill of lading.

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243 See Malan and Pretorius Bills of Exchange 99. A signature can therefore include initials, a full name, a mark or the name of a company. In the case of an indorsement the signature fulfils a “transport function”: see Malan and Pretorius Bills of Exchange 98. When dealing with bills of lading, a signature constituting an indorsement does not function as a guarantee (cf Malan and Pretorius 97). According to Zöllner Werppapierecht, “Einen gravierenden Unterschied weist das Indossament auf kaufmännischen Orderpapiere gegenüber dem Wechselindossament auf: Es besitzt keine Garantiefunktion ....” Also see Hueck-Canaris Wertpapiere 23. For the history of the indorsement in the case of bills of exchange see Malan and Pretorius 40, 138.

244 184. He did not explicitly state that an indorsement may only be written on the back of a bill of lading.

245 See Malan and Pretorius Bills of Exchange 139 n 89 and cases cited there, even though, as Malan and Pretorius wrote, “The word ‘indorsement’ is derived from in dorso, meaning ‘on the back’”. The special verdict in Lickbarrow v Mason (1794) 5 TR 683 (101 ER 380) did not mention anything about effecting the indorsement on the back of the bill of lading.

246 Lickbarrow v Mason (1794) 5 TR 683 (101 ER 380) at 685 used the words “negotiable and transferable”.

247 Lickbarrow v Mason (1794) 5 TR 683 at 686; cf Bills of Exchange Act 34 of 1964 s 29(3).

248 Benjamin 986. Regarding a bill of exchange payable to order, delivery to the payee will not be a negotiation according to the Bills of Exchange Act 34 of 1964 s 29(3), because there will be no indorsement.

249 Cf Bills of Exchange Act s 31(1).

250 Cf Bills of Exchange Act 34 of 1964 s 29(2).

251 Scrutton 184 n 4 wrote (based on remarks by Lord Selborne in Sewell v Burdick (1884) 10 AppCas 74 at 83), “The inference that an assignment of property is contemplated will be weaker from an indorsement in blank than from one in full.” In South African law it might be said that the chances of the parties concluding a real agreement might be less from an indorsement in blank than from an indorsement in full. Lord Selborne, although he thought that for some purposes there is indeed a difference between an indorsement in blank and a personal indorsement, and made remarks similar to that of Scrutton quoted above, did not rely upon any such distinction between indorsements in blank and personal indorsements for his decision in the case (also see Lord Blackburn at 93). It is submitted therefore that there is no logical reason to distinguish between the effects of an indorsement in blank and an indorsement in full.

252 Sewell v Burdick (1884) 10 AppCas 74 at 83; Cowen Negotiable Instruments 261; Goode Commercial Law (continued...
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According to Scrutton, "the holder of the bill may at any time fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such bill of lading." Where a bill of lading has an indorsement in blank, the holder of the bill of lading can fill in the name of the person to whom delivery must be made. If a bill of exchange has been indorsed in blank, the holder may convert the blank indorsement into a special indorsement. The second part of Scrutton's statement differs from the position regarding bills of exchange, where a bill of exchange originally payable to bearer, cannot be converted into a bill payable to order by way of a special indorsement.

A shipper who still has the *ius disponendi* over the goods after the bill of lading has been issued,

(...continued)

903. Scrutton 184 n 4 also quoted the *Sewell* case as authority for this proposition. It is possible that there may be a misunderstanding here. Lord Selborne said, "Whether it is or is not usual in practice to fill up the *blank* with any name before taking delivery, it is certainly not to be implied from the custom as thus found that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery ..." (my emphasis). The "it" referred to in the passage is the indorsement, i.e., a blank indorsement, and not the bill of lading as such. What is referred to here is not a blank bill of lading in the sense of one without a named consignee, but an indorsement in blank. Therefore it is doubtful whether a bill of lading stating that the goods are deliverable to a name left blank, can be transferred by delivery alone. It is however generally accepted by all the authors (without citing authority apart from Scrutton) that a bill of lading where the name of the consignee is left blank is transferable by delivery alone. As will be discussed below, this state of affairs can perhaps be explained by the fact that anyone in possession of the bill of lading can apparently fill in a name on the bill — although it will be submitted that this is a doubtful proposition as well.

253 Scrutton 184.

254 Scrutton 184; *Lickbarrow v Mason* (1794) 5 TR 683 (101 ER 380) at 686; *Sewell v Burdick* (1884) 10 AppCas 74 at 83. Regarding the "blank ... in the bill" mentioned by Scrutton, neither the *Sewell* case (as indicated above) nor the *Lickbarrow* case dealt with bills of lading in blank (where no consignee is named) as opposed to indorsements in blank. In *Lickbarrow v Mason* (1794) 5 TR 683 (101 ER 380) at 686 it is said that "indorsements of bills of ladings in blank, that is to say, by the shipper or shippers with their names only" may be filled up by the holder of the bill of lading. It is not said that bills of lading without any consignee being named may be filled up by the holder.

255 The Bills of Exchange Act 34 of 1964 s 18(2) provides that if a bill is wanting in any material particular, the person in possession has *prima facie* authority to fill up the omission. This authority is called "transferable authority to complete the bill" and the delivery of the bill is seen as an invitation to complete the bill. See Malan and Pretorius *Bills of Exchange* 205-206; *Van der Merwe v Myburgh* 1929 OPD 114 at 120; *Herbert v Steele* 1953 3 SA 271 (T) 274H.

256 Bills of Exchange Act 34 of 1964 s 31(4).

257 *Interlease Ltd v Massyn* 1979 3 SA 801 (O); *Pienaar v Maritz h/a Coal Suppliers* 1985 1 SA 547 (T). Policy considerations justify this state of affairs in the case of bills of exchange: see Malan and Pretorius *Bills of Exchange* 145-146.
can delete the name of the consignee and substitute the name of a new consignee, or he can leave the name of the consignee blank after the deletion. The courts justify this alteration by arguing that the "whole object of reserving the jus disponendi is to enable the seller to divert the goods if the buyer is unable or unwilling to pay." Just as a shipper can take the bill of lading to the order of the shipper, thereby enabling the shipper to insert the consignee of his choice, the same result can be arrived at by the shipper changing the name of the consignee. In *Mitchell v Ede* Lord Denman CJ held,

> "As between the owner and shipper of the goods and the captain, it [the bill of lading] fixes and determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B. instead of to A."

The position is the same in South African law. According to the *Mitchell* case, the shipper will therefore not be able to change the name of the consignee where he is not the owner of the goods anymore, where delivery of the goods has already taken place or where the shipper is not in possession of the bill of lading anymore. Bools indicated that the requirement that the shipper must still be the owner of the goods when making the alteration, can cause a problem for the carrier when delivering the goods, as it would be difficult for the carrier to know whether the shipper was the owner of the goods at the relevant time, and the carrier might then be in breach of contract when delivering to the incorrect party. Bools therefore submitted that "either the shipper’s ability to alter the bill should be abandoned altogether or the implied term in the shipment contract should be interpreted as

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258 Elder Dempster Lines v Zaki Ishag (The "Lycaon") [1983] 2 Lloyd's Rep 548 at 555


260 (1840) 11 Ad & E 888 (113 ER 651) at 903 (my emphasis). In the *Mitchell* case the defendant was the consignee (and also the carrier), but the shipper indorsed the bill of lading in favour of the plaintiff. The court held that the plaintiff was entitled to delivery. Benjamin 987-988 submitted (by stressing some rather obscure factual reasons for the decision in the *Mitchell* case — see p 988 ) that where the carrier has an interest in the delivery of the goods to the consignee named in the bill, for example where the carrier is indeed the original consignee as in the *Mitchell* case, the shipper will not be able to change the name of the consignee unilaterally. It is suggested that no such distinction should be made, and cannot be derived from the *Mitchell* case.

261 Numill Marketing CC v Sitra Wood Products Pte Ltd 1994 3 SA 460 (C) 474I, 475C-476F.

262 Bill of Lading 159-160.
requiring the carrier to deliver to the consignee or new consignee, regardless of whether the alteration was made after the shipper no longer had property in the goods." It is submitted that the shipper should rather not be allowed to change the name of the consignee, as any change always leaves the door open to fraud and uncertainty. Such a change will however probably necessitate statutory intervention. The implied term in the contract, according to which the carrier must deliver to a new consignee if the name of the consignee is changed by the shipper, must therefore be interpreted so that the carrier is allowed to deliver to the new consignee, with perhaps the added requirement that the carrier should not have notice of the fact that the shipper is not the owner of the goods when making the alteration. There is however a much easier solution. It is submitted that the carrier will be able to rely on the protection afforded to him by virtue of the *Glyn Mills* decision, and there is no need for the solutions proposed by Bools.  

In the case of bills of exchange changing the name of the payee would amount to a material alteration.

A straight or non-negotiable bill of lading cannot be negotiated. It is nevertheless not necessary that such a bill should be expressly marked as non-negotiable or non-transferable. Under the heading "Semble" Scrutton wrote, "A bill of lading which does not contain such words as 'to order', or 'to order or assigns', or which is indorsed in full but without such words, is not a negotiable instrument." This is of course quite different from the position regarding bills of exchange where a bill will be payable to order if it is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should

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263 See Chapter 7 §7.7.3.

264 Contra Bools *Bill of Lading* 159-160.

265 Malan and Pretorius *Bills of Exchange* 212; *Coley v Clemen* 1922 CPD 479 at 482 where is was held that a promissory note on which the name of the payee has been changed, cannot be negotiated other than by the indorsement of the "original" payee, and such note is also not complete and regular on the face of it. Liabilities of the parties to a bill at the date of a material alteration must be regarded as if the alteration had not been made: Bills of Exchange Act 34 of 1964 s 62(1).

266 The position seems certain though.

267 185, citing *Henderson v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253 at 260 and *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367. In the *Soproma* case the court remarked that a bill of lading not marked to order was not in negotiable or transferable form (at 373, 390). Also see *Carver 1115*, who wrote that "by analogy to bills of exchange, it would seem that the omission of the words 'or order' in a special indorsement is not material ...."
not be transferable. The fact that a bill of lading needs specific words to make it negotiable, is also the general position according to the South African common law, the common law only being changed in respect of bills of exchange, cheques and promissory notes.

Where an order bill of lading is presented to the carrier without any indorsement, the carrier should obtain an indemnity before delivering the goods, while the bill is returned to the shipper for indorsement, or another party can be authorized by the shipper to sign on his behalf.

5.4.14 “Switch Bills of Lading”

It will be seen in Chapter 7 that the duty of the carrier in general is to deliver the goods upon production of a bill of lading. A practice has however developed whereby the original bill of lading is surrendered to the carrier (before the delivery of the goods at the destination), and the carrier in turn issues a new bill of lading in which information such as the name of the shipper, the port of shipment or the date of the bills is changed. The purpose of this whole procedure might, for example, be to avoid customs duties or to conceal the name of a supplier. In The Atlas a second set of bills of lading were issued because the cargo-owners did not want the receivers to know the identity of their Russian suppliers indicated as the shippers. Longmore J said, “No doubt this provision for a second set of bills of lading to come into existence was agreed for not unreasonable commercial motives, but it is a practice fraught with danger ....” It does seem though as if the issue of the new bills of lading will often be fraudulent, or at least the change in information will be for some fraudulent purpose. The newly issued bills of lading are called “switch bills of lading” by Toh Kian Sing.

It is submitted that any party that suffers damages as a result of switch bills of lading being issued, has a claim against the carrier or the party that returned the original bills of lading to the

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268 Bills of Exchange Act 34 of 1964 s 6(3).
269 OK Bazaars (1929) Ltd v Universal Stores Ltd 1972 3 SA 175 (C) 181C; Cowen Negotiable Instruments 51.
270 Mitchellhill Bills of Lading 20.
271 Toh Kian Sing 1996 LMCLQ 416.
273 644.
carrier. If the carrier wants to be part of such a practice, they must also bear the risk of something going wrong. The carrier cannot be allowed to exchange the original bill of lading for one in which the information has been changed. His duty is to deliver upon presentation of the original bills of lading. One can even argue that switch bills of lading are not bills of lading or documents of title at all. These documents are not issued in exchange for goods, but in exchange for bills of lading. The practice will almost inevitably lead to fraud. Thus also from a policy point of view the practice should not be allowed.

Numill Marketing CC v Sitra Wood Products Pte Ltd should be understood in the following way: it was indicated in above that the shipper who still has the ius disponendi over the goods, and of course still has the bill of lading, can delete the name of the consignee and substitute the name of a new consignee. In the case this was achieved (regarding the cargo in one of the two ships) by issuing an “original replacement bill of lading”. To this there can be no objection. As long as no other information is changed other than the name of the consignee, the issue of a replacement bill of lading in these circumstances is acceptable. It is nevertheless illuminating that in the case the ship’s agent of the Akronissos was not prepared to issue amended original replacement bills of lading, but only amended copies of the bills of lading, while the ship’s agent of the Naftilos required a letter of indemnity when they issued an original replacement bill of lading. At the very least the carrier should insist on the original bills of lading being handed to him before issuing any replacement bills of lading.

274 Cf Toh Kian Sing 1996 LMCLQ 419, 420. Toh Kian Sing 420 however also wrote that “an indorsee who discovers that the original bill has more favourable terms cannot complain”, citing as authority an extended operation of Leduc v Ward (1888) 20 QBD 475 (n 24). This approach should be rejected: both the carrier and the party exchanging the bill of lading, are doing something which they are not allowed to do.

275 Contra Toh Kian Sing 1996 LMCLQ 419 (also see 421-422) who wrote that “it is fair to infer that the switch bills of lading now symbolize the cargo carried under them, are negotiable and must be presented when delivery is claimed.” Toh Kian Sing 418-419 discussed a Singaporean case in which the practice is condoned.

276 1994 3 SA 460 (C). See §5.4.11 supra.

277 §5.4.13.

278 471A.

279 See Mitchellhill Bills of Lading 62.

280 470J.

281 See Wilson Carriage of Goods 171.
5.4.15 Material Alteration of Bill of Lading

In *Kwei Tek Chao v British Traders and Shippers Ltd*\(^{282}\) the words "received for shipment and since" were inserted above the clause beginning "shipped", so that the sentence read "received for shipment and since shipped 31st October." The additional words were later deleted, so that the bill of lading indicated that the goods were in fact shipped (and not only received for shipment) on 31 October. Devlin J held,\(^{283}\)

"If somebody forges the signature to a document, that document is wholly fictitious from beginning to end, and it is of course null and void as soon as forgery is proved; but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and void.

... I think that the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument or not. If it does, and the forgery corrupts the whole of the instrument or its heart, then the instrument is destroyed; but if it corrupts merely a limb, the instrument remains alive, though no doubt defective."

The court thus held that the bills of lading were not null and void. Regarding bills of exchange, "[a] material alteration is not defined in the Act, but appears to be an alteration which would alter the liability of any of the parties to the bill."\(^{284}\) Material alterations include alterations of the date, the sum payable, the time of payment and the place of payment.\(^{285}\) A materially altered bill of exchange is also not void. Section 62(1) of the Bills of Exchange Act\(^{286}\) provides that if a bill is materially altered, the liability of the parties at the date of alteration, who did not assent to it, must be regarded as if the alteration had not been made, but subsequent indorsers are liable on the bill as altered.

5.4.16 No Transfer of Bill of Lading

If the bill of lading, contrary to a previous agreement, is not transferred, it is submitted that the person to whom the bill of lading should have been transferred, will only have a personal right for the delivery of the bill of lading against the person who should have transferred the bill of

\(^{282}\) [1954] 2 QB 459 at 462.

\(^{283}\) At 476.

\(^{284}\) Malan and Pretorius *Bills of Exchange* 212.

\(^{285}\) Bills of Exchange Act 34 of 1964 s 62(2).

\(^{286}\) 34 of 1964.
5.4.17 Intention

From the previous discussion of the bill of lading as a document of title, it is clear that the intention of the transferor and transferee is crucial in determining what the effect of the transfer of the bill of lading will be. Firstly the intention can be to transfer ownership in the goods. In South African law this will constitute a real agreement. Secondly there can be an intention to transfer ownership subject to certain conditions, such as the payment of the purchase price or the acceptance of a bill of exchange. Ownership will then pass when the price is paid or the bill of exchange accepted, and what happens in effect is that there is a reservation of ownership until the buyer pays the price or accepts the bill. Thirdly the intention of the parties can be to constitute a pledge of the goods. In the case of a pledge the goods on the ship are delivered to the pledgee by way of symbolical delivery, thus by transferring the bill of lading to the pledgee. If necessary the bill of lading must be indorsed so as to ensure that the pledgee becomes the holder of the bill of lading. Because goods are pledged (and not documents) the position is much simpler than the pledge of a bill of exchange. Lastly the transfer of the bill of lading may not transfer ownership at all, for example where the bill of lading is delivered to an agent or where the transferor is not the owner of the goods.

287 See Scrutton 187-188.
289Scrutton 197. Also see McIntosh & Co v English, Scottish and Australian Bank Ltd 1921 NPD 87; Mercantile Bank of India Ltd v Davis 1947 2 SA 723 (C). For the pledge of bills of lading in Scots law see Rodger 1971 Juridical Review 193 et seq; Gretton 1990 Juridical Review 23 et seq.
290 Generally see Sonnekus and Neels Sakereg Vonnisbundel 749-752; Van der Merwe Sakereg 650-667.
292 See Malan and Pretorius Bills of Exchange 159-163.
293 See Ivamy Carriage of Goods 111; Scrutton 198.
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5.4.18 Bulk Cargo

One of the characteristics of a thing is individuality (*selfstandigheid*). For an entity to be a thing, it must be distinct, existing independently or separately. The oxygen in the air around us, for example, cannot be a thing before being contained in a cylinder. Similarly, part of an oil cargo is not a thing. One person cannot be owner of one part of a thing and another owner of another part of the same thing. Similarly one cannot be in possession of a part of a movable thing. Both for possession and ownership the object in question must comply with the characteristics of a thing.

Cargoes such as oil or grain usually lie undivided in the ship's hold, but often many bills of lading are issued governing (parts of) such a cargo. The parties agree to this practice expressly or implicitly by usage or the way in which past transactions took place. According to Goode, "Failure to segregate the buyer's goods weakens the force of the bill of lading to an extent that is probably not generally realized." No transfer of ownership can take place, and the holder of one of the bills of lading is not in possession of a part of the cargo while the goods are at sea. In such a case the holder of a bill of lading can at most have a personal right for the

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294 For the problems relating to bulk cargo with regard to the Bills of Lading Act 1855 see Chapter 6 §6.3.

295 See Van der Merwe *Sakereg* 25-26; Sonnekus *Sakereg Vonnisbundel* 24-25. The reason for this requirement according to Van der Merwe is to avoid legal uncertainty because of the "cutting up" of ownership.

296 Van der Merwe *Sakereg* 26. This is a consequence of the "specific nature" (*beginsel van bepaaldheid*) of the law of property, which is one of the basic principles of the South African law of property: "The specific nature of the law of things entails that real rights can only exist in respect of specific things." See Van der Merwe and De Waal *Law of Things* 8-9; Van der Merwe 15-16. On the other hand it is interesting to note that the transfer of the bill of lading whereby *all* the things mentioned in it are delivered without having to deliver each thing separately, is an exception to this principle: Van der Merwe 16.

297 See Sonnekus and Neels *Sakereg Vonnisbundel* 127. Also see Sonnekus and Neels 151 for criticism of *Mills v Reck* 1988 3 SA 92 (C) where a condenser was not separated from the wreck, could therefore not have been a thing. Possession of a part of an immovable is indeed possible: Sonnekus and Neels 151; Van der Merwe *Sakereg* 99-100, 102. Even so one can still not have possession of an indeterminate part of a thing (Van der Merwe 102).

298 See Goode *Proprietary Rights* 64, 70.

299 Goode *Proprietary Rights* 70.

300 *Proprietary Rights* 70.

301 It is submitted that the transferees of different bills of lading can also not be co-owners of the bulk cargo. (It (continued...)}
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delivery of the indicated part of the bulk cargo against the carrier. A related question is what happens when the oil of two or more different shippers is mixed together in the hold of the ship. Usually there will be some agreement — expressly or tacitly — that they will become co-owners of the cargo in proportion to the value of the share they contributed. It is highly unlikely that confusio or commixtio will take place as one of the requirements for this to happen is that the mixing must happen without the permission of the owners. Even if there is no express agreement to mix the cargo, shippers must surely be aware that their oil will be mixed with the oil of other shippers in the hold of the ship. A further consequence of the shippers (sellers) being co-owners of the goods is that they will proportionally bear any loss due to wastage. It is not necessary for the carrier to apportion the loss and thus deliver a lesser amount to each holder of a bill of lading, and therefore it is possible that the last holder presenting a bill of lading will get very little. There is no certainty as to whether such a holder has a claim against the other holders who received the full amount, but it is submitted that such

301 (...continued)
is possible that the different shippers of the goods can be co-owners, as will be discussed below.) No delivery of an independent thing to any one of the transferees can take place, and therefore they cannot be in possession or become co-owners of the goods. Each transferee and each bill of lading must be considered separately. There can be no fiction that the cargo as a whole was delivered to all the transferees together. There is authority that co-ownership in such a case may be possible in some foreign legal systems (see Oelofse Letters of Credit 212 n 105) but that was never the position in England before legislative intervention.

302 Goode Proprietary Rights 64; Malan and Faul 1989 SA Merc LJ 328.

303 Generally see Ex Parte Terminus Compania Naviera SA and Grinrod Marine (Pty) Ltd: In re The Areti L 1986 2 SA 446 (C) (though dealing with fuel of the shipowner and the charterer being mixed; the court decided that the fuel was owned jointly by the shipowner and the charterer: 452G). Also see Frosso Shipping Corporation v Richmond Maritime Corporation (Ideomar SA Intervening) 1985 2 SA 476 (C). See Neels 1991 TSAR 319-320 concerning private international law aspects of these two cases. For a detailed discussion of the mixing of oil in English law see Indian Oil Corporation Ltd v Greenstone Shipping SA (The “Ypatianna”) [1987] 2 Lloyd’s Rep 286.

304 See Van der Merwe et al Contract 197-200 about tacit terms. If there is no express agreement, and the different shippers were later asked what would happen in a case where their oil was mixed, they would agree that they became co-owners (this is an application of the “innocent bystander test” derived from the English case Reigate v Union Manufacturing Co (Ramsbottom) 118 LT 479 at 483).

305 Generally see Sonnekus and Neels Sakereg Vonnisbundel 302-303; Van der Merwe Sakereg 263-265. Also see the criticism of Sonnekus and Neels 335 of Ex Parte Terminus Compania Naviera SA and Grinrod Marine (Pty) Ltd: In re The Areti L 1986 2 SA 446 (C) 4521 where there could not be confusio (at 4521) as the mixing did not take place without permission.

306 Goode Proprietary Rights 71-72; Todd Modern Bills of Lading 238. Wastage may eg be due to evaporation or adhesion of the cargo to the tanks, and is generally inevitable.

307 Grange and Co v Taylor (1904) 20 TLR 386 at 387.
claims should be allowed.\textsuperscript{308}

If the bulk cargo is not to be divided between different holders of a bill of lading, none of the problems discussed in this paragraph would occur.

In English law the Sale of Goods Act 1979\textsuperscript{309} today provides that where the buyer of goods forming part of a bulk has paid the purchase price, the property in an undivided share in the bulk is transferred to the buyer and the buyer becomes an owner in common of the bulk. If the undivided shares in the bulk exceed the whole of the bulk, the undivided share of each buyer shall be reduced proportionally.\textsuperscript{310}

5.4.19 Conclusion: Document of Title

The bill of lading is the only document of title at common law.\textsuperscript{311} It is possible that new documents of title can be created by custom.\textsuperscript{312}

In \textit{Enichem Anic S.p.A. v Ampelos Shipping Co Ltd (The “Delfini”)},\textsuperscript{313} Mustill LJ held, “First, as to the status of the bill of lading as a ‘document of title’. I put this expression in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between shipper and shipowner, the bill of lading fulfills two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable ‘key to the warehouse’. 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.”

\begin{itemize}
\item \textsuperscript{308} Goode \textit{Proprietary Rights} 72, who also wrote that in the absence of such a claim there may be unjustified enrichment. For the current English law also see Sale of Goods Act 1979 s 20B(3). Further see \textit{Grange and Co v Taylor} (1904) 20 TLR 386 at 387-388
\item \textsuperscript{309} s 20A(1)-(2).
\item \textsuperscript{310} s 20A(4). Further see Goode \textit{Commercial Law} 246-247; Burns 59 MLR 260 et seq.
\item \textsuperscript{311} Benjamin 983. The English Factors Act 1889 includes other documents under the definition of documents of title for the purposes of the Act, but such documents cannot transfer possession of the goods: see Benjamin 984.
\item \textsuperscript{312} \textit{Kum v Wah Tat Bank Ltd} [1971] 1 Lloyd’s Rep 439 at 443, 444.
\item \textsuperscript{313} [1990] 1 Lloyd’s Rep 252 at 268.
\end{itemize}
Benjamin\textsuperscript{314} wrote:

"There is no authoritative definition of a ‘document of title to goods’ at common law, but it is submitted that it means a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them."

This is a good definition, as is the exposition by Mustill LJ. Instead of attempting another definition, I will list the characteristics of a document of title. The only thing that can be added to the characteristics that appear from the definition above, is characteristic 5 below, dealing with the holder’s right to delivery of the goods. It is submitted therefore that a document of title has the following characteristics (as there are many exceptions, none of these statements are absolute):\textsuperscript{315}

1. A document of title is transferable.\textsuperscript{316}

2. The holder of the document is usually in possession of the goods.

3. The transfer of the document will usually transfer possession of the goods.

4. The transfer of the document can (but not will) transfer ownership of the goods (it is “part of the mechanism”).

5. The holder of the document normally has a right to delivery of the goods against the carrier.\textsuperscript{317}

\textsuperscript{314} 983.

\textsuperscript{315} Also see Goode \textit{Proprietary Rights} 60.


\textsuperscript{317} The definition of Debattista \textit{Sale of Goods} 29 is (his emphasis): “Transferability of the right to demand possession of goods from a person currently having physical possession of them lies at the core of the common law notion of a ‘document of title’ and an accurate definition of that phrase should include those ingredients and those alone.” This definition is too narrow: it contains nothing about the holder being in possession of the goods, and the possible transfer of possession and ownership respectively. Considering for the moment just the right to delivery of the goods, that is the central element of Debattista’s definition, it should be added that although the holder of the bill of lading will normally have a right to delivery of the goods, this cannot be an unqualified statement (and neither can elements 2 to 4 in the text). The bill of lading is not a negotiable instrument, and if the transferor for some reason does not have a right to delivery of the goods, the transferee will not have a right to delivery of the goods either merely by being the holder of the bill of lading. Because of this narrow view of a document of title Debattista 27-28 also criticized the passage quoted above (see §5.4.3) of Bowen LJ in \textit{Sanders Brothers v MacLean & Co} (1883) 11 QBD 327 at 341 where, inter alia, he referred to the bill of lading as a key to the floating warehouse. As already indicated this is an apt metaphor, and the full statement by Bowen LJ encompasses all the elements of a bill of lading listed here. A key to the warehouse indicates that the person in possession of the key can obtain the goods, just as the holder of a bill of lading has a right to demand delivery of the goods. The criticism of Debattista that the metaphor “encapsulate[s] diverse legal concepts under one convenient label” is therefore not justified: a document of title does indeed encompass more than just one element.
Of course the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992 provide for the transfer of rights and the imposition of liabilities, but this is not part of what a bill of lading is at common law.

One further caveat must be added to the exposition above of what a document of title is. Benjamin\textsuperscript{318} wrote, "The statement that a shipped bearer or order bill is a document of title assumes that the goods have indeed been shipped. A bill of lading which falsely states that goods have been shipped, when in fact none have been shipped, is not a document of title; for in such a case there are no underlying goods." Elements 2, 3 and 4 will not function in this situation, and it is probably correct that one is not dealing with a document of title in such a case.

\textsuperscript{318} 1022; \textit{Hindley & Co Ltd v East Indian Produce Co Ltd} [1973] 2 Lloyd's Rep 515 at 519.
Chapter 6
Contractual Rights and Obligations

6.1 Introduction

In this chapter the contractual rights and obligations of the carrier, shipper, and the various holders of the bill of lading will be examined. Even though the Sea Transport Documents Bill may be enacted in South Africa soon (and in England the Carriage of Goods by Sea Act 1992 was enacted a few years ago already), the Bills of Lading Act 1855 and the problems surrounding it will be examined in some detail as well. This is necessary to understand the need for the provisions of the Bill and the English Act, to evaluate the success of the Bill and the Act, and to identify areas that might still provide difficulties in future. The English Carriage of Goods by Sea Act 1992 will be discussed as well, as it will (hopefully) form the basis of any new South African legislation. Following that discussion the South African Bill in its current form will be criticized.

6.2 Reasons for Bills of Lading Act 1855

The main reason for the enactment of the Bills of Lading Act 1855 is the English doctrine of privity of contract. According to this doctrine only the parties to a contract may sue or be sued on a contract. The shipper contracts with the carrier for the carriage of the goods, and receives a bill of lading. The moment the bill of lading is transferred by the shipper, because of the application of this doctrine, the transferee of the bill of lading will not be able to sue the carrier for damage to the cargo based on the contract, and the carrier will not be able to sue the

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1 Some references will also be made to the Sea-Carriage Documents Act 1998 (South Australia).
2 Generally see Todd Bills of Lading 167-168; Girvin 1997 SA Merc LJ 98-100.
transferee of the bill of lading for freight or demurrage, or will not be able to rely on exemptions in the bill of lading when being sued in tort. In 1845, in *Thompson v Dominy* the court held that the transfer of the bill of lading does not transfer the contract. In response to this decision the Bills of Lading Act 1855 was enacted.

### 6.3 Bills of Lading Act 1855

Section 1 of the Bills of Lading Act 1855 states:

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

There are a number of potential difficulties with this section. The rights of suit and the liabilities are only transferred if property (ownership) also passes. So where there is no transfer of ownership — for whatever reason — the section will not apply. Where a bill of lading is pledged, the pledgee (often a bank) cannot sue the carrier on the contract and the carrier cannot sue the pledgee for freight. Apart from the general link with the passing of ownership, the mere passing of ownership is still not enough. Ownership must pass “upon or by reason of such consignment or indorsement”. The first possibility is that ownership passes upon or by reason of the consignment of the goods. This will happen where ownership passes on the shipment of the goods, in the case of oil often when the oil passes through the vessel’s hose connection. There must be a named consignee in the bill of lading for the section to apply when relying on

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3. (1845) 14 M & W 403 (153 ER 532) at 407.
4. Lord Blackburn in *Sewell v Burdick* (1884) 10 AppCas 74 at 91. At the time of the *Thompson* decision, and of course today, a contract could sometimes (but not always) be implied: see Todd *Modern Bills of Lading* 169-170 and the discussion in §6.6 infra.
5. For a South African case see *First National Bank of Southern Africa Ltd in re Bank of India v Kien Hung Shipping SA (Pty) Ltd* [1994] CLD 96 (W) 103-104.
6. A bank financing a transaction under a documentary credit would also not be able to rely on the section: see Todd *Modern Bills of Lading* 176. Although banks might appreciate that they will not be held liable for freight, by the same token they will not acquire any rights of suit: Todd 177.
7. *Sewell v Burdick* (1884) 10 AppCas 74. According to the decision a pledgee obtains only a “special property” in the goods and not “the property” or the “general property”.
ownership passing upon or by reason of consignment. If ownership passes before or after consignment, the section will not apply. The second possibility is that ownership passes by upon or by reason of indorsement. If ownership passed before indorsement, the section will not apply. If ownership passes only after the transfer of the bill of lading, the section will not apply. Where property passes “upon” indorsement it means “that the passing of property is simultaneous with the endorsement, and that the endorsement is the act which brings it about ....” Where property passes “by reason of” indorsement, “it means that although the endorsement of the bill is not the immediate occasion of the passing of the property, nevertheless it plays an essential causal part in it.” The word “endorsement” in the Act, similar to the law of bills of exchange, means “a written indorsement coupled with transfer of the document”.

It is therefore possible that the transferee of a bill of lading who is also the owner of the goods, does not have the rights of suit because there was no connection between becoming owner of the goods and the consignment of the goods or the indorsement of the bill of lading. It is probably arguable that when such a transferee of the bill of lading further transfers the bill of lading, and the second transferee also becomes the owner of the goods by reason of the indorsement of the bill of lading, the rights of suit are vested in the second transferee, even though the first transferee of the bill of lading never had the rights of suit. Section 1 of the Bills of Lading Act 1855 does not specify from whom the rights of suit are transferred, and it possible

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10 See eg K/S A/S Seateam & Co v Iraq National Oil Co (The “Sevonia Team”) [1983] 2 Lloyd’s Rep 640 at 643; Todd Modern Bills of Lading 171. In Hispanic de Petroleos SA and Compania Iberica Refinadera SA v Vencedora Oceanica Navegacion SA; Same v Same and The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (The “Kapetan Markos NL” (No 2)) [1987] 2 Lloyd’s Rep 321 at 329, 330, 332, 339 Petroliber was not named as consignee even though property passed on consignment. Furthermore, property also did not pass upon or by reason of indorsement, as property had already passed on shipment.

11 See The Kapetan Markos (No 2) in the previous footnote.

12 This could happen where there is a reservation of ownership (or a “reservation of the disposal of the goods”) by the seller: see eg Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] 1 AC 785 at 808, 809.


that the rights of suit may be transferred from a party higher up in the chain.\textsuperscript{16}

The Act only mentions an indorsement, and therefore a special indorsement or an indorsement in blank should be sufficient to make the Act applicable.\textsuperscript{17} The matter is, however, somewhat more complicated. If one is dealing with a bill of lading containing an indorsement in blank that is subsequently transferred by delivery\textsuperscript{18} or an original bearer bill of lading, the question arises whether in such a case the property passes upon or by reason of an indorsement. As such a bearer bill of lading normally contains no indorsement, or no further indorsement in the case of a bearer bill of lading by virtue of a previous indorsement in blank, literally interpreted the Act cannot apply in such a case.\textsuperscript{19} As the bill of lading is not indorsed for its transfer, property cannot pass upon or by reason of an indorsement.

In the case of bulk cargoes,\textsuperscript{20} where the cargo is destined for more than one buyer, ownership cannot pass before delivery of the goods from the ship, and the passing of ownership will therefore not be upon or by reason of an indorsement. Therefore section 1 will generally very seldom apply in the case of bulk cargoes.\textsuperscript{21}

Because the interpretations of section 1 discussed would seriously encroach upon the application of the Act, Carver\textsuperscript{22} suggested that because the property really passes "under a contract in pursuance of which the goods are consigned ... or in pursuance of which the bill of lading is


\textsuperscript{17} See Mitchelhill \textit{Bills of Lading} 3.

\textsuperscript{18} Therefore what is under discussion here is not the original indorsement in blank and the delivery following such indorsement, because in such a case the property may indeed pass upon or by reason of the (blank) indorsement.

\textsuperscript{19} According to Todd \textit{Modern Bills of Lading} 177 the Act will in principle apply to all bearer bills of lading. He based his opinion on the possibility of a distinction raised by Lord Selborne (83) between indorsements in blank and special indorsements that was doubted by Lord Blackburn (93), and therefore argued that since this distinction was rejected the Act will apply to all bearer bills of lading. In the \textit{Sewell} case there was indeed an indorsement, even though it was an indorsement in blank, and therefore any conclusion from the case that the Act will apply to any bearer bills of lading cannot be supported. Also see Todd \textit{Documentary Credits} 192.

\textsuperscript{20} Discussed in Chapter 5 §5.4.18.

\textsuperscript{21} See eg "\textit{The Aramis}" [1989] 1 Lloyd's Rep 213 at 218 (for a discussion of the case see Davenport 105 \textit{LQR} 174 \textit{et seq}). Cf though Reynolds 1993 \textit{LMCLQ} 438; Reynolds 106 \textit{LQR} 1.

\textsuperscript{22} 71, also n 13.
indorsed in his favour”, “[t]he actual time when the property passed would not therefore appear
to be crucial.” Some decisions support this wider view to a certain extent, 23 while this view is
rejected in other cases. 24 Even if Carver’s view is wholly accepted, it will still not apply where
ownership never passes or passes before consignment or indorsement.

A last problem with the Act is that it only applies to the traditional bill of lading and not to
documents such as waybills and ship’s delivery orders. 25

6.4 Rights and Obligations of the Transferor

The question to be examined here is whether the transferors of a bill of lading (such as a shipper
or indorser) retain their obligations after the transfer of the bill of lading, and whether they are
still able to sue on the contract of carriage after the transfer of the bill of lading. Section 2 of the
Bills of Lading Act 1855 inter alia provides that nothing in the Act will affect any right to claim
freight against the original shipper or owner. The reason for this provision is probably that the
carrier knew what the creditworthiness of the shipper was, and should not now be forced to
accept a substitute about whom he has no information, and may be a man of straw. 26 According
to Todd it is not clear whether transferors other than the shipper will also remain liable for
freight, or whether any transferor remains liable for any other obligations such as demurrage.

One can argue that section 1 only transfers rights of suit (and not liabilities), and therefore the
transferor is not freed from any liabilities. 27 In contrast it may also be possible that the wording
of the Act intended that upon the imposition of liabilities on the transferee the transferor is freed

23 See eg (though the issue was not decided) K/S A/S Seateam & Co v Iraq National Oil Co (The “Sevonia
Team”) [1983] 2 Lloyd’s Rep 640 at 643; Pacific Molasses Co and United Molasses Trading Co Ltd v Entre
Rios Compania Naviera SA (The “San Nicholas”) [1976] 1 Lloyd’s Rep 8 at 13; Karlshamns Oljefabrikar v

24 See Enichem Anic S.p.A. v Ampelos Shipping Co Ltd (The “Delfini”) [1990] 1 Lloyd’s Rep 252 at 261, 274,
275.


26 Effort Shipping Co Ltd v Linden Management SA (The “Giannis NK”) [1996] 1 Lloyd’s Rep 577 at 586; Todd
Modern Bills of Lading 183-184.

27 Modern Bills of Lading 184. He incorrectly stated that there are no decisions on the matter — see below.

28 This view is preferred by Reynolds 1993 LMCLQ 438; Bradgate and White 56 MLR 199; Effort Shipping Co
Ltd v Linden Management SA (The “Giannis NK”) [1996] 1 Lloyd’s Rep 577 at 586.
from liabilities, and that what happens is that the liabilities are in fact transferred. Regarding the original shipper, one can argue that there would have been no need for section 2 of the Bills of Lading Act 1855 preserving the right of the carrier to sue the shipper for freight, if section 1 did not indeed transfer the liabilities of all parties (including the shipper) to the transferee.29

According to *Smurthwaite v Wilkins*30 the intermediate indorser of the bill of lading is divested of his liabilities:

"Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee who receives the cargo shall have all the rights and bear all the liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it."

According to Erle CJ any other interpretation would lead to consequences that are "monstrous", "manifestly unjust"31 and that "[s]uch a construction might be very convenient for the shipowner, but it would be clearly repugnant to one's notions of justice."32 The *ratio* of the case concerned an intermediate indorser, although some passages33 can probably be interpreted as applying to the shipper of the goods as well.34 In *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")*35 Hirst LJ clearly held that the original shipper retains his liabilities. The position of the shipper retaining his liabilities was confirmed in the House of Lords by Lord Lloyd:36

"The shippers were to remain liable, but the holder of the bill of lading was to come under the same liability

29 Nicoll (1995) 26 J Mar L & Com 454; Colinvaux Carver's Carriage 95. Also see Bradgate and White 56 MLR 204 n 107. In *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")* [1996] 1 Lloyd's Rep 577 at 586 Hirst LJ stated that this argument "is readily explicable as a provision inserted ex abundanti cautela". A similar explanation is provided by Lord Lloyd in the House of Lords: *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")* [1998] 1 Lloyd's Rep 337 at 344.

30 (1862) 11 CB (NS) 842 (142 ER 1026) at 848.

31 848.

32 849.

33 See eg Williams J at 850.

34 See *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")* [1996] 1 Lloyd's Rep 577 at 586. Lord Lloyd however clearly stated that the *Smurthwaite* decision "did not deal with the position of the original shipper": *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")* [1998] 1 Lloyd's Rep 337 at 344. Hirst LJ also indicated that the *Smurthwaite* case might require re-consideration, although the point would now be unlikely to arise under the Carriage of Goods by Sea Act 1992.


36 *Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK")* [1998] 1 Lloyd's Rep 337 at 343-344.
as the shipper. His liability was to be by way of addition, not substitution."

A related question is whether a previous transferor can institute action based on the contract of carriage. Transferors cannot sue on the contract of carriage as the rights of suit are transferred by section 1. It seems that Todd is of the opinion that the original shipper in principle always has an action as a party to the original contract of carriage.\(^{37}\) It is submitted that this is not correct, as section 1 clearly states that the rights of suit are transferred to the consignee or indorsee.\(^{38}\)

### 6.5 Conditional Transfer of Ownership

In South African law a real agreement can be made subject to a condition.\(^{39}\) In the English case *Kwei Tek Chao (trading as Zung Fu Co) v British Traders and Shippers Ltd*\(^{40}\) Devlin J said the following about a cif contract:

> "I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, subject to the condition that they revest if upon examination he finds them to be not in accordance with the contract. This means that he gets only conditional property in the goods, the condition being a condition subsequent."

Where there is a suspensive condition, no transfer of ownership will take place until the condition is fulfilled, and until fulfilment of the condition section 1 will not apply. In the case of a resolutive condition (condition subsequent), ownership will indeed be transferred only to be annulled upon the fulfilment of the condition. The transferor will then regain ownership. According to Todd,\(^{41}\) "This can create havoc with section 1." The original transfer of ownership will mean (if the other requirements are met) that the transferee will now have the rights and

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\(^{37}\) See Todd *Modern Bills of Lading* 183, 185. Although such an action is theoretically possible (at least according to Todd), the action would often be of no use in practice as the shipper would usually not be the person suffering damages, as he is not the owner of the goods anymore. If ownership was not transferred from the shipper, the rights of suit will anyway not be transferred according to section 1. See *Albacruz (Cargo Owners) v Albazer (Owners) (The Albazer)* [1977] AC 774 and the discussion of the case by Todd 184-185. *The Albazer* provides no authority for Todd's point of view, as the plaintiffs in the case sued on the charterparty.

\(^{38}\) This is also the view of Reynolds 1993 *LMCLQ* 438; Bradgate and White 56 *MLR* 199, also see n 77.

\(^{39}\) Sonnekus and Neels *Sakereg Vonnisbundel* 394.

\(^{40}\) [1954] 2 QB 459 at 487.

\(^{41}\) *Modern Bills of Lading* 185.
obligations of the transferor under the contract of carriage. If the transferor then becomes the owner of the goods again by the fulfilment of a resolutive condition, the question is whether the contractual rights and obligations are vested in the transferor again. According to Todd\textsuperscript{42} that will not be possible because when the transferor becomes the owner of the goods again that will not be upon or by reason of the consignment or indorsement, and he thus concluded, “It seems that section one is inadequate to cope with conditional property.” The moment the link between the transfer of ownership and the transfer of the rights of suit is severed, as was done in the Carriage of Goods by Sea Act 1992, this problem will not arise anymore.

6.6 Ways Around the Bills of Lading Act 1855

To avoid some of the many difficulties discussed in the preceding paragraphs, a contract (often called a \textit{Brandt v Liverpool} contract\textsuperscript{43}) on the terms of the bill of lading\textsuperscript{44} can be implied when the bill of lading is presented and the goods are delivered. Such an implied contract is not dependent upon the passing of ownership at all. The doctrine in \textit{Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd}\textsuperscript{45} can therefore find application in the case of bulk cargoes,\textsuperscript{46} such a contract may be relied upon by a pledgee,\textsuperscript{47} and the doctrine may even operate where documents other than bills of lading are issued by the carrier, such as delivery orders.\textsuperscript{48}

The limitations of this doctrine mainly have to do with the requirement of consideration, which in English law will often be seen in the payment of freight (or demurrage) and the delivery of the goods in exchange upon presentation of the bill of lading.\textsuperscript{49} As there is no requirement of consideration for the validity of a contract in South African law, the matter will not be discussed

\textsuperscript{42} Modern Bills of Lading 186.

\textsuperscript{43} For a detailed discussion see Boots \textit{Bill of Lading} 107-110.

\textsuperscript{44} Terms outside the contract printed on the bill of lading, that can of course be proved between the shipper and the carrier, cannot form part of a \textit{Brandt v Liverpool} contract, as this is a new contract that is not derived from the original contract of carriage: Todd Modern Bills of Lading 190.

\textsuperscript{45} [1924] 1 KB 575.

\textsuperscript{46} See eg Cremer \textit{v General Carriers SA} [1974] 1 WLR 341 at 350.

\textsuperscript{47} As was done in \textit{Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd} [1924] 1 KB 575.

\textsuperscript{48} See eg Cremer \textit{v General Carriers SA} [1974] 1 WLR 341 at 350.

\textsuperscript{49} For a discussion see Todd Modern Bills of Lading 190-194.
here in detail. It is submitted that the payment of freight is not a prerequisite for an implied contract, but a factor, among others, from which a court can imply a *Brandt v Liverpool* contract. The presentation of the bill of lading might also not be strictly necessary to infer an implied contract, as an undertaking to deliver the documents in future might suffice. The problem with this approach is that the terms of the implied contract would not be known unless a standard bill of lading was used in previous transactions. As an implied contract is a normal contract, there must be an offer and an acceptance. According to Bingham LJ in *The Aramis*, “it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. ... I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.” So from mere presentation of the bill of lading coupled with delivery of the goods (without anything more) a court would be unlikely to imply a contract. The delivery of the goods is also necessary before a contract can be implied, as it cannot otherwise be said that the goods are delivered on the terms of the bill of lading.

Under the English Carriage of Goods by Sea Act 1992 (and the proposed South African Bill) there is no reason why an implied contract cannot still be created, but as will be seen below the need for *Brandt v Liverpool* contracts will be greatly reduced. An example where there will still be a need for an implied contract, is where the receiver of the goods never obtained the bill of lading, where delivery is therefore often made against an indemnity, or where the bill of lading

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50 Though it would be difficult to imply a contract in the absence of freight or other costs being paid: see *The Aramis* infra; Todd *Modern Bills of Lading* 193.

51 Cf Todd *Modern Bills of Lading* 192.


53 Todd *Modern Bills of Lading* 192. Also see Scrutton 42.


56 See Todd *Modern Bills of Lading* 193; Benjamin 1083.

57 Boolls *Bill of Lading* 107 n 140.
presented is not properly indorsed and the presenter is therefore not the holder.\textsuperscript{58}

6.7 Construction in South African Law by Waring and a Reply by Malan and Faul

At the outset it should be remembered that Waring wrote before the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983,\textsuperscript{59} and if she accepted that the Bills of Lading Act 1855 applied in South Africa, her approach might have been different. Therefore it is submitted that there is no real need to explain the transfer of rights, for example, in terms of the South African law of cession. It is nevertheless commendable that she attempted to place a construction on the transfer of rights and obligations that is consistent with South African law. Waring\textsuperscript{60} construed what happens in the following way:

"... it is better to consider the transfer of the bill of lading as a cession of rights only, while the liabilities under the contract are undertaken by implied agreement between the shipowner and the consignee at the time that the latter presents the bill of lading and claims delivery of the goods upon the terms expressed in the bill of lading."

According to Waring the indorsement and delivery of the bill of lading will be presumptive proof of the intention of the cedent.\textsuperscript{61} In accordance with the general principles of the law of cession,\textsuperscript{62} the carrier will also be able to raise the defences \textit{in rem} that they had against the shipper, against the transferee of the bill of lading, for example that freight must be paid before the delivery of the goods can take place. Regarding liabilities generally, Waring submitted that the undertaking of liability occurs when the bill of lading is presented and an implied contract is concluded between the carrier and the consignee.\textsuperscript{63} Waring therefore concluded that the carrier can enforce their rights in two ways, firstly, by raising defences \textit{in rem} against a claim by the

\textsuperscript{58} Benjamin 1081-1082.

\textsuperscript{59} See Dillon and Van Niekerk \textit{Maritime Law} 58 n 22 where he wrote that at the time “the theoretical basis for such transfer is dependent on general principles of Roman-Dutch law and trade usage.” The applicable law today is discussed in Chapter 3.

\textsuperscript{60} \textit{Charterparties} 287.

\textsuperscript{61} 286. A real or transfer agreement must be concluded between the cedent and the cessionary: see Van der Merwe \textit{et al} \textit{Contract} 328.

\textsuperscript{62} See Van der Merwe \textit{et al} \textit{Contract} 349-350.

cessionary (consignee), and secondly by enforcing the rights under the implied contract between the carrier and the consignee. Regarding this implied contract, it seems as if what Waring had in mind here was a Brandt v Liverpool contract. A couple of comments can be made about this construction. First, it was discussed above that there might be difficulties in implying such a contract in the absence, for example, of a clear offer and acceptance. Secondly, if there is indeed a Brandt v Liverpool contract present, not only does the carrier have rights (and the consignee therefore obligations) under such a contract, but the consignee will also have the rights under such a contract without the need of any rights having been ceded to him previously.

Waring also rejected a few other possible constructions. She rejected that the rights ceded are conditional rights, because “it is not usual to call conditional a right whose existence is contingent upon the will of the holder of the right.” She also rejected that what takes place is a delegation, the consignee undertaking the liabilities of the shipper, because it might be difficult to show the necessary consent of all three parties, and because the carrier will not have a right of recourse against the shipper. She further rejected the construction of a stipulatio alteri because it also would leave the carrier without a right of recourse against the shipper. It also seems as if Waring accepts that both rights and obligations are transferred by way of a stipulatio alteri, which is not the case. A stipulatio cannot impose a positive duty on the beneficiary, as there is no such thing as a contract to the detriment of a third party.

In response Malan and Faul wrote:

"That a cession of rights is effected by the transfer of a bill of lading is certainly true. But it does seem simpler to view the rights of the consignee or indorsee as conditional or — better — as deriving from a reciprocal agreement between the shipowner and the consignee (or indorsee), and to distinguish between the time of their acquisition and the time of their enforceability. It is suggested that any right of recourse the shipowner..."

64 Charterparties 286. Malan and Faul 1989 SA Merc LJ 330 expressed doubts about this contention.

65 A delegation is the novation of the obligation by means of a tripartite agreement, whereby a new party is substituted for an original party: Van der Merwe et al Contract 323 n 14, 374.

66 All three parties must have the animus novandi in the case of a delegation: see Van der Merwe et al Contract 375 n 102, 376. Also see Hare Shipping Law 556.

67 Waring Charterparties 286, 287.

68 Waring Charterparties 287. Also see Hare Shipping Law 555-556.

69 Van der Merwe et al Contract 189-190, also n 148.

70 See Van der Merwe et al Contract 350 n 189.
may have against the shipper is based on their contract of affreightment.”

It is conceivable that the courts might have construed what takes place in the case of the transfer of a bill of lading as cession, but it seems that because the question was never pertinently considered by the courts, the law never developed in such a way. This does not mean that a court will not decide that the requirements of cession were met in a particular case regarding bills of lading, but cession must still be proved in each particular case. It is therefore preferable that a statute simply regulates the transfer of rights and liabilities, without the need to revert to the law of cession in any particular case.

A much more difficult question, which is still perfectly relevant under the new English Carriage of Goods by Sea Act 1992, and will still be relevant under any new South African act dealing with bills of lading, is the construction to be placed on what happens where a charterer negotiates a bill of lading to a third party. It was indicated in Chapter 5 that where the goods are carried under a charterparty, the charterparty will contain the contract of carriage and in the hands of the charterer the bill of lading will only be a receipt and a document of title. If the bill of lading is in the hands of a transferee other than the charterer, the bill of lading will evidence the contract of carriage. According to Waring, “conceptual difficulties arise as to how rights, previously non-existent, are transferred to the bill-of-lading transferee.” Waring submitted that in South African law a stipulatio alteri is concluded between the charterer and the carrier with the consignee as beneficiary. Malan and Faul countered that the construction of a stipulatio alteri is “somewhat forced”, as both the charterer and the carrier are acting in their own interests, and that it could not have been their intention to conclude a stipulatio alteri, and further that the beneficiary (consignee) might be exposed to defences arising from the stipulatio

71 For example, a transfer agreement must always be proved on a balance of probabilities, which might sometimes be difficult: see Van der Merwe et al Contract 328, also n 42. A further question is whether it is necessary for the cessionary to give notice to the carrier of the cession, because the general rule is that if the debtor (carrier) performs to the cedent without being aware of the cession (or rather performs in good faith), the debtor will not be liable to the cessionary: generally see Van der Merwe et al 343-344. There is of course no requirement of notice in the Bills of Lading Act 1855. Also see Hare Shipping Law 556.

72 §5.2.3.
73 Charterparties 289.
74 Charterparties 289-290. She referred to a passage in Leduc v Ward (1888) 20 QBD 475 at 479.
75 1989 SA Merc LJ 332.
itself. Therefore Malan and Faul\(^76\) wrote:

"It seems better to compare the rights of the consignee to that of the payee of an accepted bill of exchange — no question of a stipulatio alteri arises here. It is suggested that the shipowner by issuing a bill of lading makes an offer to the consignee to transport the goods on the terms set out in the bill. This offer is conveyed by the charterer to the consignee. The former is no representative or agent; he makes no declaration or offer on his own but only conveys the offer of the shipowner without declaring himself. This means that the contract is concluded directly between the shipowner and the consignee. No question arises of ‘non-existent’ rights being transferred to the consignee. The latter derives his rights from a contract between himself and the shipowner, he is no cessionary but entitled to his rights by virtue of his acceptance of the offer made to him and contained in the bill of lading."

If an offer is indeed made in this way, there will be no problem, but the question will inevitably arise whether it was ever the intention of the charterer to make an offer to the consignee in this way. As Malan and Faul remarked with regard to a stipulatio alteri, both the carrier and the charterer are acting in their own interests, probably without any regard to the consignee. Furthermore this construction would expose the consignee to difficulties where it is found on the facts of the case that no offer was made by the charterer.

Scrutton\(^77\) wrote:

"Possibly the difficulty may be resolved by a consideration of the wording of the Carriage of Goods by Sea Act 1992 itself. Section 2(1) transfers to the lawful holder of the bill of lading all rights of suit ‘under the contract of carriage as if he had been a party to that contract’. The definition of ‘contract of carriage’ in section 5(1)(a) presupposes that the bill of lading does contain or evidence a contract: but if it is a mere receipt and the governing document is the charterparty it does not do so. As, however, the words of the statute must be given a sensible meaning, it is submitted that the true meaning is that the lawful holder has vested in him all rights of suit ‘as if there had been a contract in the terms contained in the bill of lading and he had been a party to that contract’.”

It is submitted that Scrutton’s approach of interpreting the words of the Act (and also therefore the future South African Act) in a way as if the holder receiving the bill of lading from a charterer has the rights of suit as if there had been a contract on the terms in the bill of lading, is preferable to any other approach. This means the lawful holder will always be protected

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\(^{76}\) 1989 *SA Merc LJ* 332-333. Support for the proposition can also be found in *Leduc v Ward* (1888) 20 QBD 475 at 479.

\(^{77}\) 74. Debattista *Sale of Goods* 169 n 32 called the construction by Scrutton “a valiant attempt at a technical escape from a technical problem”, but did not offer any other explanation. Benjamin 1050 wrote, “perhaps the best explanation (if it can be regarded as one) is that such a contract was a legal device, invented to avoid what would otherwise be a commercially inconvenient result.”
without facing any of the difficulties underlying the other constructions discussed above. The Sea Transport Documents Bill section 4(1)(a) provides that the holder of a sea transport document

"is subject to the same obligations and entitled to the same rights against the person by whom or on whose behalf the document was issued or who is responsible for the performance of the contract of carriage evidenced by or contained in the document as if the holder were a party to a contract with that person on the terms of the document".

The problem is that in the case of a bill of lading issued under a charterparty there is no contract of carriage evidenced by or contained in the bill of lading. The words "as if the holder were a party to a contract with that person on the terms of the document" must therefore also be interpreted as if there had been a contract, even though in fact there was no contract. Such an interpretation is made slightly easier because of the reference to "a"78 contract in the second half of section 4(1)(a) as opposed to the reference to "that" contract at the end of section 2(1) of the Carriage of Goods by Sea Act 1992.

6.8 English Carriage of Goods by Sea Act 199279

6.8.1 Introduction

The English Carriage of Goods by Sea Act will be discussed comprehensively for several reasons. The Act shows how the problems under the 1855 regime can be solved, and also indicates some difficulties which may still arise in the future. It is further the Act upon which eventual South African legislation should be based. South African legislation should be compared with the English Act, and any differences should be very well motivated — as will be seen when the Bill is discussed below, this is hardly the case at the moment.

The Act applies to bills of lading, sea waybills and a ship’s delivery order.80 A straight or non-

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78 There is, however, a previous reference to "the" contract of carriage.

79 Call for reform were made for a long time; in 1890 see eg Carver 23 LQR 289 et seq. For reform in New Zealand see Nicoll (1995) 26 J Mar L & Com 443 et seq. For the conflict of laws implications of the Act see Toh Kian Sing 1994 LMCLQ 280 et seq.

80 s 1(1).
transferable bill of lading is not a bill of lading for the purposes of the Act, but a straight bill of lading is nevertheless included in the definition of a waybill, defined as “such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and ... identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.” A bill of lading is not defined other than mentioning that it includes a received for shipment bill of lading. As one of the criticisms of the 1855 Act was that it only applies to the traditional bill of lading, the wider application of the new Act should be welcomed, and should have the positive result of waybills being used more widely where there is no need for a bill of lading.

6.8.2 Section 2 and Definitions of “Contract of Carriage” and “Holder”

Section 2(1) states that “the lawful holder of a bill of lading ... shall ... have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.” Therefore the transfer of rights is no longer dependent upon the transfer of ownership, and all the problems discussed above relating to the transfer of ownership are hereby resolved.

81 s 1(2)(a).

82 s 1(3). Tiberg (1998) 23 Tul Mar L J 25 made an interesting observation regarding the inclusion of a straight bill of lading under the definition of a waybill. He wrote that “this can hardly be the case when — as commonly in documents headed as bills of lading — delivery is conditioned upon the presentation or surrender of the document, since the Act itself states under section 2(1) that the presentation of the document is not needed for becoming entitled under a sea waybill.” So if a straight bill of lading expressly provides that delivery will be in exchange for the bill of lading, such a document will not be a waybill according to Tiberg. It is however submitted that all straight bills of lading — even if they state that delivery must be in exchange for the bill of lading — should be regarded as waybills for the purposes of the Act. Such a straight bill of lading still complies with all the requirements of s 1(3), even if delivery must in addition be made in exchange for the bill of lading. The fact that delivery is not made in exchange for the bill of lading, will anyway also not give rise to any damages as long as delivery is made to the named consignee. Also see Tiberg 32 where he wrote that “practice may be loathe to construe [clauses stipulating delivery in exchange for the bill of lading] as presentation clauses in a straight bill of lading.” In s 1(4) it is stated that a ship’s delivery order “contains an undertaking which — (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.” It is important to note that delivery orders issued by the bill of lading holder or merchants are not covered by the Act. Ship’s delivery orders are often issued where the seller of a bulk cargo wants to sell the cargo to different buyers: see Scrutton 39; S.I.A.T. di del Ferro v Tradax Overseas SA [1978] 2 Lloyd's Rep 470 at 493. Further discussion here will focus on the bill of lading and not on delivery orders or waybills.

The contract of carriage, relating to a bill of lading, is defined as “the contract contained in or evidenced by that bill”.

Leduc v Ward still applies (when the bill of lading has been transferred to an indorsee it is the only evidence of the contract of carriage), even though the new Act uses both the words “contained” and “evidenced” when defining the contract of carriage, as opposed to the 1855 Act only using the word “contained”. It is submitted that the position is as before, the use of the word “evidenced” only referring to the relationship between the shipper and the carrier. The matter is discussed more comprehensively in Chapter 5. The holder of a bill of lading is defined comprehensively in section 5(2) as:

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of the Act as having become the lawful holder of the bill of lading wherever he has become the holder of the bill in good faith.

So instead of the transfer of the rights of suit being derived from the transfer of ownership, the rights of suit are now transferred to the lawful holder — that is a holder who has become holder in good faith. Of course at the time of the action it is unlikely that the plaintiff will still be in possession of the bill of lading (and therefore be the “lawful holder”), as the bill of lading was probably handed to the carrier in exchange for the goods. This does not matter as the rights of

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84 s 5(1)(a).
85 (1888) 20 QBD 475. The case is discussed in Chapter 5 §5.2.2.
86 Benjamin 1044; Reynolds 1993 LMCLQ 441; Wilson Carriage of Goods 134 n 68. Doubts are expressed later by Reynolds (1994) 25 J Mar L & Com 151-152; also see Todd Documentary Credits 208-209.
87 In the case of a waybill (or a straight bill of lading) there is no requirement that the transferee of the rights of suit must be a “holder” of the waybill or be in possession of the waybill: such transferee is “the person who ... is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier” (s 2(1)(b)). Such person must be identified in the waybill (s 1(3)(b)).
88 Even though lawful does not necessarily mean the exactly the same as good faith: see Bradgate and White 56 MLR 197 n 65. The definition in the Bills of Exchange Act 34 of 1964 s 94 can be applied here: “A thing is deemed to be done in good faith within the meaning of this Act, if it is in fact done honestly, whether it is done negligently or not.” For a discussion see Benjamin 1041-1043.
89 Bools Bill of Lading 92 n 60.
suit were transferred to the plaintiff earlier, and were not transferred from him later.  

Apart from the “normal” instances of being holder described in section 5(2)(a)-(b), section 5(2)(c) also includes under the concept of holder a person who has become the holder of the bill of lading after the bill of lading has ceased to be a document of title. However, section 2(2)(a) provides that where a person becomes a lawful holder of a bill of lading, but possession of the bill no longer gives a right to possession of the goods (i.e., the bill of lading is no longer a document of title), that person shall not have any rights transferred to him unless he becomes the holder of the bill by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill. The aim of the section is to prevent “champertous trafficking in documents” after bills of lading are no longer documents of title. Bills of lading often arrive only after the arrival of the goods (the mechanism of an indemnity is often used in such a case), and the purpose of the proviso is therefore to ensure that the transferee who receives the bill of lading only after the goods have been delivered, can still have the rights of suit transferred to him.  

Section 2(2)(b), similar to section 2(2)(a), provides that where a person becomes a lawful holder of a bill of lading, but the bill is no longer a document of title, that person shall not have any rights transferred to him unless he becomes holder of the bill “as a result of the rejection to that person by another person of goods or documents delivered to the other person”. The potential problem with this section, pointed out by Bools, is that where the goods are rejected after delivery (any damage will normally only be discovered after delivery), the bill of lading will already have been surrendered to the carrier, and as the person to whom rejection has been made cannot regain possession of the bill of lading, that person cannot become a lawful holder of the bill of lading again. Bools sensibly suggested that where such a person “can explain his inability to produce the bill of lading [i.e., it has been surrendered to the carrier] he can still bring the action.”

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90 See Benjamin 1040.
91 Reynolds 1993 LMCLQ 442.
92 Bradgate and White 56 MLR 197. It should be noted though that if the Hague-Visby Rules (Art III 6) govern the contract, the suit must be brought within one year of the delivery of the goods, and therefore the transferee must obtain the bill of lading within this period to be able to enforce his rights of suit. See Bradgate and White 197 n 67.
93 Bill of Lading 96.
Another question is exactly which counterclaims will a carrier be able to raise against a claim by the transferee of a bill of lading. It is submitted that only counterclaims intimately connected with the contract of carriage should be allowed. The carrier should not be allowed to raise the liability of the shipper to the carrier regarding debts in respect of other transactions. Any other view will impair the transferability of bills of lading.94

Section 2(5) provides that where rights are transferred, in the case of a bill of lading, the original party to the contract of carriage as well as any other transferors can no longer sue.96 It was submitted above that this was also the position under the 1855 Act. Section 2(5) actually reinforces what is already achieved (regarding bills of lading) by the use of the word “transfer” in section 2(1).97

Where B acquires the bill of lading in bad faith from A, B will not become a lawful holder of the bill and the rights of suit will not be transferred to him. If B then transfers the bill of lading to C, and C is bona fide, the rights of suit will be vested in C. It is therefore still possible that

94 See Benjamin 1047-1048. Benjamin wrote that the question “is not an easy one to answer.”

95 Cf Benjamin 1047. The contrary argument is that a bill of lading is not a negotiable instrument, and the transferor cannot transfer greater rights in relation to the goods to the transferee than he himself has, and therefore the transferee should also not be placed in a better position regarding contractual rights than the transferor. This is however already possible when the reasoning in Leduc v Ward is applied, where the indorsee can be in a better (or of course worse) position than the original shipper.

96 The original party to the contract of carriage in a sea waybill can still sue (s 2(5)). The reason for the difference is because a waybill is not a transferable document of title: see eg Reynolds 1993 LMCLQ 442. The fact that the original shipper can no longer sue but will still remain liable (s 3(3)) was criticized by Nicoll (1995) 26 J Mar L & Com 458-460 mainly because the position does not accord with New Zealand legislation dealing with privity of contract. Bradgate and White 56 MLR 200 also criticized this state of affairs and wrote that the real reasons why the shipper has no rights of suit after the transfer of the bill of lading are because that is the position in many other jurisdictions and that shipowners made it clear to the Law Commissions of England and Scotland that if both the shipper and the holder of the bill of lading have rights of suit that would be an objectionable change to the existing law. Neither of these “real reasons” are unsatisfactory: the English law should correspond with other jurisdictions in international trade, and the aim of the new Act is to remedy defects in the 1855 Act which has otherwise worked well, and not to make new, untried law (see Bradgate and White 189, also n 5; Beatson and Cooper 1991 LMCLQ 198-200 calling the legislation not a “code” but rather “a piece of remedial legislation”). It is submitted therefore that the approach of the Act is to be preferred. For the contrary point of view (and without doubt arguments of considerable merit) see Bradgate and White 198-200, 204, including a response to the reasons provided by the Law Commissions for their point of view. Even Bradgate and White admit though that the current position will create problems only rarely.

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rights of suit can "jump" from A to C in this example. 98

6.8.3 Section 2(4)

Section 2(4) essentially provides that where a person with any interest 99 or right in or in relation to the goods mentioned in the bill of lading sustains damage in consequence of a breach of the contract of carriage, but the rights of suit are vested in another person, that other person shall be entitled to exercise those rights for the benefit of the person who sustained the damage. 100 The reason for the section is that there can now be a separation between the person in whom the rights of suit are vested (the lawful holder of the bill of lading), and the person who suffers loss. It might, for example, be possible that a bank in possession of a bill of lading, is not the holder of the bill of lading because it was never indorsed to them, and it is also not a bearer bill of lading. Therefore the rights of suit are not vested in the bank. If the bank suffers loss for any reason, they might attempt to rely on section 2(4). There is nevertheless no duty on such other party to exercise those rights on behalf of the bank, 101 and the prudent banker would be advised to ensure that they become the holder of the bill of lading. 102 An original shipper who still has the rights of suit, but did not suffer any losses, cannot rely on section 2(4) to recover substantial damages. 103 The reason is that section 2(4)(b) requires that section 2(1) should have operated to vest the rights of suit in another person, and that will not be the case if the original shipper still has the rights of suit vested in himself.

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99 See the very narrow interpretation given to the word "interest" by Bradgate and White 56 MLR 201. Also see Benjamin 1064-1065.
100 The section is a response to Albacruz (Cargo Owners) v Albazer (Owners) (The Albazer) [1977] AC 774. For a detailed discussion see Bools Bill of Lading 100-105.
101 See eg Bradgate and White 56 MLR 201; Benjamin 1067-1068. Parties may of course provide in a contract of sale (or any other contract) for such a duty. Also see Oelofse Letters of Credit 158 n 174.
103 See Bools Bill of Lading 100-101, 105, 107, 114.
6.8.4 Section 3

Section 3 deals with liabilities\(^{104}\) under shipping documents. Under the 1855 Act, every transferee of the rights of suit was also subject to any liabilities imposed by the contract. Now, according to section 3(1), the person in whom the rights of suit are vested shall become subject to the same liabilities under the contract of carriage as if he had been a party to the contract, where he “(a) takes or demands delivery from the carrier of any of the goods to which the document relates; (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods”\(^{105}\). So a pledgee bank is still protected against claims, for example, for freight, unless they demand delivery of the goods\(^{106}\).

An implication of section 3(1)(c) is that at the time of the delivery of the goods the receiver might not know yet what will be the extent of his liability, as he had not seen the bill of lading yet.\(^ {107}\) For section 3(1)(c) to operate, the person mentioned in the section must still have the rights of suit vested in him, and that will only be possible by virtue of section 5(2)(c) and section 2(2), discussed above. It can be said that section 3(1)(c) “contains a disincentive to receive the bill of lading”,\(^ {108}\) as someone who has received the goods might now want to avoid liability under the contract of carriage, by not receiving the bill of lading, thus not becoming a lawful holder, and therefore section 2(1)(a) and section 3(1)(c) will not operate. In practice, though, the carrier will insist on the protection of an indemnity where the bill of lading is not available when delivery of the goods take place, or alternatively a contract can be implied between the carrier and the receiver when the goods are delivered and the receiver promises to deliver the bill of lading later. This situation nevertheless shows that a carrier should not deliver the goods in the

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104 Apart from the Act, the carrier also has a lien over the goods, and can thus detain the cargo, until the freight is paid. For a South African case see eg *Master and Owners of SS Hilkrag v A Beckett* (1902) 23 NLR 450 at 462-464.

105 The reason for (c) is to cover the situation where delivery is made, and the bill of lading therefore exhausted as a document of title, before the bill of lading reaches the transferee — something that happens quite often today: see Bradgate and White 56 *MLR* 203 n 101.

106 Reynolds 1993 *LMCLQ* 443; Bradgate and White 56 *MLR* 203; Humphreys and Higgs [1993] *JBL* 63.

107 See Bools *Bill of Lading* 113.

108 Bools *Bill of Lading* 113.
absence of a bill of lading and in the absence of an indemnity. Even if the carrier is unable to proceed against the receiver of the goods, he still has an action against the shipper, as will be indicated next.

Section 3(3) provides that an original party to the contract will remain liable on the contract. As indicated above, there are probably good reasons why the original party (usually the shipper) should remain liable, as the carrier has no information at the time of contracting about any subsequent transferees. Under the 1855 Act there was uncertainty about whether any transferors other than the original party retain their obligations after the transfer of the bill of lading. This question no longer arises, as the only parties that may be subject to liabilities are those listed in (a), (b) and (c) above. Liabilities are no longer imposed every time the rights of suit are transferred, but only if one of the actions mentioned in (a), (b) or (c) above is committed.

It is only necessary that the holder demands delivery of the goods to be made liable under section 3(1). As it is possible that the goods may for example be lost, and that the carrier is exempted from liability, (for example because the loss is due to an Act of God), or that the carrier delivered the goods to another party and can rely on the protection of the Glyn Mills decision, the holder of the bill of lading who is unaware of these facts may demand delivery of the goods and become liable to the carrier. In the latter case Benjamin submitted, “That person [the holder of the bill whose right acquired is of no use] might then have a claim over (against the actual recipient of the goods) in respect of the liability incurred by him under section 3(1) to the carrier; but the legal basis for such a claim is by no means clear and it might in practice be worthless.”

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109 See Bools *Bill of Lading* 114.


111 Bradgate and White 56 *MLR* 204 raised a few relevant questions about when the original shipper is being sued by the carrier: can the shipper raise a counterclaim for breach of the contract of carriage by the carrier (they say it is not clear, but it would seem that he would be unable to do so), and can the shipper rely on clauses such as choice of law or choice of forum (they say it is not clear). Regarding the counterclaim it is submitted that the shipper will not be able to raise a counterclaim since the rights of suit are vested in the lawful holder of the bill of lading. Regarding clauses such as choice of law and choice of forum, it is submitted that the shipper should be able to rely on such clauses. The carrier instituting the action on the contract of carriage must surely be bound by such clauses in the contract.

112 1070.
Benjamin concluded, “The justice of holding a person liable to the carrier when the right which he has acquired against the carrier was no more than an empty one appears to be somewhat questionable.” It is nevertheless submitted that this state of affairs is acceptable. One of the parties has to bear the loss (it will often be the freight to be paid), and in one of these (narrowly defined) circumstances it is acceptable that it should not be the carrier. The fact that the goods are lost by an Act of God or an excepted peril does not mean that the carrier is not entitled to freight anymore.

A further question regarding liabilities, that also existed under the 1855 Act, is whether the transferee of the bill of lading will be subject to liabilities arising from events before or at the shipment of the goods. An example is where the shipper ships dangerous goods. At best the answer to this question is in doubt: It is submitted that the transferee should not be liable if the shipper ships dangerous goods; in such a case the carrier must institute action against the shipper himself.

In the case of a charterer holding the bill of lading both his rights and liabilities will be governed by the charterparty, as the bill of lading is only a receipt and a document of title. A charterparty is not a “contract of carriage” as defined in section 5(1)(a) of the Act.

6.8.5 Section 4

Section 4, dealing with representations in the bill of lading, was discussed in Chapter 5. A further comment about section 4 of the Carriage of Goods by Sea Act is what will be the position

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113 See Scrutton 40.
114 See Scrutton 40.
115 The question was left open in The "Athanasia Comninos" and "Georges Chr. Lemos [1990] 1 Lloyd's Rep 277 at 281 (quoted by Effort Shipping Co Ltd v Linden Management SA (The "Giannis NK") [1996] 1 Lloyd's Rep 577 at 585) and Ministry of Food v Lamport & Holt Line Ltd [1952] 2 Lloyd's Rep 371 at 382. Carver 68 n 96 argued that the warranty by the shipper not to ship dangerous goods is “a warranty outside the terms of the bill of lading” and cannot be transferred to the consignee. Benjamin 1077 submitted that the transferee will be liable for the shipment of dangerous goods. Of course, as pointed out by Benjamin, the transferee may then have a claim against the shipper.
116 See Benjamin 1058, 1061, 1077.
117 §5.3.2.
of a *bona fide* transferee when a bill of lading is issued without any goods being shipped and without any contract of carriage being concluded previously between the shipper and the carrier. Two possibilities are suggested by Bools.\(^{118}\) The first is that the carrier might be estopped from denying the existence of the contract of carriage, and that the transferee can therefore argue that the contract was transferred to him. The second: "It is therefore arguable that, even where there is no original contract of shipment, the contract in the bill becomes ‘vested’ in the lawful holder." Either argument is acceptable, as the carrier should be held liable where bills of lading are issued (by the carrier of course) without any goods being shipped. In South African law a delictual action against the carrier will also be a possibility. This is not possible in English law as the transferee in the circumstances described above will not be the owner of the (missing or non-existent) goods and will therefore not have an action in tort.\(^{119}\) In South Africa the recovery of pure economic loss is of course allowed. One can phrase exactly the same problem a bit more generally (not necessarily dealing with the situation where no goods are shipped) and ask where there is no contract of carriage concluded between the carrier and the shipper, for example because the contract is void from the start, whether the non-existent rights can be "transferred" by virtue of section 2(1) of the Carriage of Goods by Sea Act 1992. Benjamin\(^{120}\) suggested that it will not be possible. It is nevertheless submitted that on a sympathetic interpretation of the 1992 Act a court should be able to arrive at a result similar to the second possibility raised by Bools. The policy reasons behind *Leduc v Ward* are that a transferee should be able to look at a bill of lading and know what the contract of carriage comprises without knowing about the dealings between the shipper and the carrier. By extension a transferee should not have to wonder whether a contract of carriage was concluded at all. If an acceptable result can be reached where the indorsee of a bill of lading issued under a charterparty (where it was only a receipt and a document of title) can obtain contractual rights as contained in the bill of lading, then an acceptable result should also be reached where no initial contract of carriage was concluded.

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\(^{118}\) *Bill of Lading* 145; cf Benjamin 999-1000.

\(^{119}\) Bools *Bill of Lading* 144.

\(^{120}\) 1045-1046. Probably the fact that regarding an indorsee the contract is *contained* in the bill of lading was not taken into consideration by Benjamin.
6.8.6 Section 5(4)

Section 5(4) states that the Act will still operate where the goods cease to exist after the issue of the document or where the goods cannot be identified, for example because they are mixed with other goods. As there is no link between the transfer of the rights of suit and the transfer of ownership anymore, there is probably no need for this section.

6.8.7 Multiple Original Bills of Lading

A last comment concerns the situation where more than one original bill of lading is issued. It is possible that three parts of the bill of lading may be transferred fraudulently to three different transferees all taking their part of the bill of lading in good faith, and thereby becoming a lawful holder. This was not possible under the 1855 Act as there could only be one owner of the goods. According to Bools,121 "The most likely solution is that the courts will adopt the rule preventing double recovery against the carrier ... and bar any subsequent actions for the same loss." According to him, therefore, only the first successful action instituted will be allowed. Alternatively one can perhaps also argue that only the first part of the bill of lading that is transferred also transfers the rights of suit (this will be analogous to the arguments advanced regarding the transfer of ownership and possession where there is more than one bill of lading). As another alternative one can extend the application of the Glyn Mills122 case to these situations.123 If this argument is followed, the carrier will only be liable to the holder of the part of the bill of lading to whom the goods have been delivered. None of these solutions are really satisfactory, and the time has come to prohibit the use of more than one original bill of lading, or to let the carrier bear the risk of issuing more than one original bill of lading. It is submitted that in the mean time the approach derived from Glyn Mills (although there is no direct authority for such a view in the case) should be followed. If the carrier can safely deliver to the first party providing him with a bill of lading, he should also not be sued on the contract of carriage by any other holders of parts of the bill of lading.

121 Bill of Lading 99.
122 (1882) 7 AppCas 591. See Chapter 7 §7.7.3.
123 Contra Bools Bill of Lading 99.
6.9 Sea Transport Documents Bill

A few remarks are necessary regarding the proposed South African Sea Transport Documents Bill.\textsuperscript{124} The most important comment is that there was no need to depart from the English Carriage of Goods by Sea Act 1992, with minor exceptions. All the hard work has already been done. This Bill introduces unnecessary elements that are not found in English Act,\textsuperscript{125} it leaves out many essential parts of that Act,\textsuperscript{126} and lastly it modifies the Act drastically for no apparent reason. Some of the sections of the Bill have been\textsuperscript{127} and will be\textsuperscript{128} discussed elsewhere. The Carriage of Goods by Sea Act 1992 was discussed previously, and only brief references will be made to some relevant sections.

In the Bill a sea transport document is defined as "(a) a bill of lading; (b) a through bill of lading; (c) a combined transport bill of lading;\textsuperscript{129} (d) a sea waybill; or (e) any consignment note, combined transport document or other similar document, relating to the carriage of goods either wholly or partly by sea".\textsuperscript{130} This is quite a variation from the Carriage of goods by Sea Act 1992,\textsuperscript{131} which applies simply and clearly to any bill of lading, any sea waybill and any ship’s delivery order. It is submitted that the Bill should also apply to a ship’s delivery order. A delivery order might be classified under (e), though such classification is unlikely. Whether the Bill should apply to combined transport documents is uncertain, and requires a separate study of such documents. It is submitted that the Bill should only apply to the carriage of goods by sea, so that if a combined transport document is utilised, the Bill should only apply to the part of the voyage

\textsuperscript{124} Also see www.uct.ac.za/depts/shiplaw/titosu.htm (visited 11 June 2000). According to a website note the "draft bill has been prepared as an initiative of the SA Maritime Law Association. Its main draftsmen are Messrs Douglas Shaw QC and Michael Posemann."

\textsuperscript{125} Especially section 7.


\textsuperscript{127} See Chapter 5 §5.3.2 for section 6.

\textsuperscript{128} See Chapter 7 §7.4 for section 3(3) and §7.9 for section 7; Chapter 12 §12.4 for section 9.

\textsuperscript{129} It is not clear whether a combined (or multi-modal) transport document is a document of title in South African law: for a discussion see Oelofse \textit{Letters of Credit} 156-158 where he submitted that a transferable combined transport document is a document of title if at least one part of the carriage is by sea.

\textsuperscript{130} s 1 sv "sea transport document".

\textsuperscript{131} s 1(1). Also see the Sea-Carriage Documents Act 34 of 1998 (South Australia) that defines a "sea-carriage document" as "a bill of lading, a sea waybill or a ship’s delivery order" (s 4 sv "sea-carriage document").
by sea and subsequent delivery of the goods at the port of destination. Any other interpretation
might lead to uncertain consequences. As the Bill stands, however, the Bill can easily be
interpreted to apply to the journey as a whole. As the English and Australian Acts apply only to
bills of lading, sea waybills and delivery orders, the question would not even arise in those
jurisdictions.

According to section 2(1):

This Act applies —

(a) to any sea transport document issued in the Republic, irrespective of whether it was issued before
or is issued after the commencement of this Act;

(b) to goods —
   (i) consigned to a destination in the Republic; or
   (ii) landed, delivered or discharged in the Republic; and

(c) to any proceedings instituted in the Republic in any court or before any arbitration tribunal after the
commencement of this Act in respect of any sea transport document or goods contemplated in
paragraph (a) or (b), irrespective of whether those proceedings relate to a cause of action arising
before or after the commencement of this Act.

The first question is the retroactive application of the Bill. While there is no question that
legislation is urgently needed, it is submitted that it might not be fair to subject commercial
dealings, albeit concluded under the flawed Bills of Lading Act 1855, to new legislation without
the relevant parties having any choice in the matter. The Carriage of Goods by Sea Act 1992 did
not apply to documents issued before the Act came into force.\(^{12}\) The second question is why it
is necessary in subsections (a)-(c) to state to which documents, goods and proceedings the Bill
applies. Surely whether a court can exercise admiralty jurisdiction is a separate matter, and once
it has been established that a court must exercise admiralty jurisdiction, then the law to be
applied much be determined. Only when it has been established that South African law will
apply (in the absence for example of a choice of law clause choosing a jurisdiction other than
South Africa as the governing law) the Bill will form part of the South African law to be applied
to any of these sea transport documents.\(^ {13}\) It seems as if the Bill will apply irrespective of any
choice of law clause, as long as the sea transport document is for example issued in the Republic.
This means the South African Bill might apply to some aspects of the parties’ transaction, while

\(^{12}\) s 6(3). Neither does the Sea-Carriage Documents Act 34 of 1998 (South Australia): s 3.

\(^{13}\) Thus overriding part of the current English or Roman-Dutch law mentioned in s 6(1) of the Admiralty
Jurisdiction Regulation Act 105 of 1983.
the rest of the transaction might be governed by foreign law as chosen in a choice of law clause. This will lead to chaos. The reference in subsection (b) to "goods" is also not clear. Does this mean that no bill of lading (or other document) is issued in such a case? Surely the goods must be governed by a sea transport document as well.

Sections 3 to 6 apply only to transport documents that are transferable or negotiable. Section 3(1)(a) provides that a "sea transport document may be transferred by the holder ... by delivery of the document, endorsed as may be necessary". In section 3(2) a holder is defined:

A person is the holder of a sea transport document if that person is in possession of the original sea transport document, or possession of that document is held on that person's behalf, and that person is —

(a) the person to whom the document was issued;
(b) the consignee named in the document; or
(c) a person to whom the document has been transferred in accordance with subsection (1).

There is no need to refer to the fact that the holder can be in possession of the document by virtue of somebody else holding the document on his behalf. That has always been the position. Regarding section 3(2)(a), there is no authority making a person to whom a document is simply issued (unless it is a bearer document), a holder of the document, and there is no similar provision in Carriage of Goods by Sea Act 1992.

Section 4 deals with the transfer of rights and obligations:

(1) The holder of a sea transport document —

(a) is subject to the same obligations and entitled to the same rights against the person by whom or on whose behalf the document was issued or who is responsible for the performance of the contract of carriage evidenced by or contained in the document as if the holder were a party to a contract with that person on the terms of the document; and
(b) must be regarded as the cessionary of all rights of action for loss of or damage to the goods referred to in the document, whether arising from contract or the ownership of the goods or

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134 s 2(2).
135 Cf Carriage of Goods by Sea Act 1992 s 5(2); Sea-Carriage Documents Act 34 of 1998 (South Australia) s 4 sv "lawful holder".
136 In the Bills of Exchange Act 34 of 1964 issue is defined as "the first delivery of a bill, complete in form, to a person who takes it as holder" (s 1 sv "issue"). The Act states that a holder "means the payee or indorsee of a bill who is in possession of it, or the bearer thereof" (s 1 sv "holder") and bearer is defined as "the person in possession of a bill which is payable to bearer" (s 1 sv "bearer"). S 5(1) provides that the payee must be named or otherwise indicated with reasonable certainty. In the case of an order bill, the person to whom the bill is delivered will not be the holder unless also named as payee.
otherwise.

(2) A holder who has transferred a sea transport document must be regarded as having ceded his, her or its rights and as having delegated his, her or its obligations to the new holder except in so far as those rights or obligations are such as arise from a delectus personae\textsuperscript{137} relating to the holder.

By imposing obligations on a party merely by being the holder of a document, South Africa will be out of step with other jurisdictions. Tiberg\textsuperscript{138} explained:

"The general answer for transport documents has been that no one becomes liable by merely taking possession of a document conferring rights, but that the fulfillment [sic] of liabilities may be a condition for the exercise of the rights expressed in the document. Thus, if the purchaser of the document refuses to pay for the goods due to high charges, he cannot be sued by the carrier for those charges unless he affirms the agreement by claiming performance under the contract. English law was previously different, but through the 1992 Carriage of Goods by Sea Act, it has been brought into line with other legal systems."

So section 4 is not only at odds with the system for the transfer of rights\textsuperscript{139} and imposition of liabilities\textsuperscript{140} in the Carriage of Goods by Sea Act 1992, but also with the legal position in other jurisdictions. It is therefore submitted that the whole structure and way of operation of the Bill should be improved. Apart from this, there are quite a few other problems with the section as well. It is not clear why section 4(1)(b) goes on to state that the holder of a sea transport document “must be regarded as the cessionary of all rights of action for loss of or damage to the goods referred to in the document”. In section 4(1)(a) it was already provided that the holder is entitled to the rights against the carrier as if the holder were a party to the contract of carriage.

Section 4(2) indicates that a transferor generally would have transferred both his rights and liabilities to the transferee, and that a transferor will therefore not retain any rights and liabilities. Regarding rights, this is achieved by the use of the word “transferred” in section 2(1) of the Carriage of Goods by Sea Act 1992.\textsuperscript{141} Presumably the reference to a delectus personae (choice of an irreplaceable person) is a misguided attempt to achieve what was achieved in section 3(3) of the Carriage of Goods by Sea Act 1992: an original party to the contract remains liable to the carrier. Other parties will only be liable in accordance with section 3(1). The reason for section

\textsuperscript{137} As Hare Shipping Law 523 n 217 indicated, “The use of the expression delectus personae is somewhat puzzling and not in accord with the policy of using plain language in statutes to which South African legislature should now aspire.”


\textsuperscript{139} Carriage of Goods by Sea Act 1992 s 2(1).

\textsuperscript{140} Carriage of Goods by Sea Act 1992 s 3.

\textsuperscript{141} Cf also Carriage of Goods by Sea Act 1992 s 2(5).
3(3) in the English Act is that the carrier should not be forced to accept an unknown (and possibly unreliable) party in place of the party (eg the shipper) with whom the carrier originally contracted. Section 5(2) however speaks of an irreplaceable person relating to the (new?) holder, and the holder will not be the carrier. There is no reason why the shipper would be irreplaceable for a subsequent holder — the shipper owes obligations arising from the contract of carriage to the carrier. It is only the carrier that might find the shipper irreplaceable if the final transferee for example refuses to pay the freight. The carrier is however not protected by section 5(2), not being a holder. A simple statement as in the English Act is sufficient and there is no reason to revert to a concept such as a *delectus personae*.

Furthermore, while it may be commendable to use concepts such as cession and delegation in the Bill, it is suggested that the transfer of rights and obligations is simply a statutory transfer that should rather not be linked to concepts such as cession and delegation.

Section 5 deals with “Saving of rights” and provides:

Any —

(a) right or obligation under a contract of carriage evidenced by or contained in a sea transport document; or

(b) liability of the consignee or holder by reason or in consequence of —

(i) that person being such consignee or holder;

(ii) that person’s receipt of the goods by reason or in consequence of such consignment; or

(iii) the transfer of the document to that person,

has full force and effect except to the extent to which it is affected or varied by this Act.

It is not clear what is the purpose of this section, and why any rights or obligations will not have full force and effect otherwise.

These sections are all subject to section 8 dealing with persons acting in bad faith:

(1) Nothing in sections 3, 4, 5, 6, or 7 entitles any person in possession of a sea transport document or any person making delivery of any goods to which a sea transport document relates to any right or to any defence to or discharge from any obligation if, at the time when that person acquired possession of the

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142 According to the *Memorandum on the Objects of the Sea Transport Documents Bill* §3.6: “Although there are conflicting views on the question whether a transfer should release the transferor from his, her or its obligations, it is considered reasonable to say that the transferor of rights should be released from those obligations unless his, her or its personal position was a significant factor in accepting him, her or it as an obligee (hence the reference in subclause (2) to *delectus personae*).”
document or made that delivery —

(a) in the case of a person acquiring possession, that person knew or had reasonable grounds for believing that —

(i) the goods to which the document related had not been shipped or received for shipment; or

(ii) the person from whom possession was acquired had no right to transfer the document or any right thereunder; or

(b) in the case of a person making delivery, that person knew or had reasonable grounds for believing that the person to whom delivery was made had no right to receive delivery.

(2) The onus of proving that subsection (1)(a) or (b) applies is on the person alleging its application.

The same result is reached in the Carriage of Goods by Sea Act 1992 by stating in section 5(2) that the lawful holder of the bill of lading must have become the holder of the bill in good faith. Regarding section 8(1)(a)(i)-(ii), as the bill of lading is not a negotiable instrument in the traditional sense, a transferee can anyway not acquire better title than a predecessor. Everything is section 8(1)(b) is already provided for in the Glyn Mills decision — if the master has notice or knowledge of any irregularities, the carrier will not be protected.

It cannot be emphasized enough that a South African act dealing with bills of lading and related documents is an absolute necessity. This, however, is not the way to go about it.

6.10 Tort / Delict

Although this chapter deals with contractual rights and obligations, the possibility of an action in tort or a delictual action should be briefly mentioned. In principle the owner of the goods can institute an action in tort against the carrier. In South Africa such an action will be a delictual action and it is submitted that the general principles of the South African law of delict should be applied. If the consignee or indorsee also has contractual rights by virtue of section 1 of the Bills of Lading Act 1855 or by virtue of an implied Brandt v Liverpool contract, there would not be any benefit in a tort action as opposed to a contractual action. In both cases the carrier would be able to rely on exemption clauses in the bill of lading.

At first glance an action in tort would be beneficial where the owner of the goods has no

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143 Todd Modern Bills of Lading 196.
contractual rights, especially under the Bills of Lading Act 1855. This is however also not a satisfactory solution. In this situation the carrier would not be able to rely on any exemption (or other) clauses in the bill of lading, and an action in tort might be unfair to the carrier. The problem here (ie before the Carriage of Goods by Sea Act 1992) is therefore that by not granting an action in tort the owner of the goods will be left with no action at all, while giving such owner the benefit of an action in tort might put the carrier in a position that is must worse than it would have been if there had been a contract of carriage between the parties. The plaintiff in the discussion above was referred to as the owner of the goods. The reason is that in English law to succeed in an action in tort the plaintiff must be the owner of the goods. This would not be the position in South African law where there is no objection to the recovery of pure economic loss. This is not necessarily an advantage, especially from the carrier's point of view.

Todd\(^{145}\) suggested that once the problems with the Bills of Lading Act 1855 are resolved (and they have been to some extent in England), the relationship between carrier and cargo-owner should be governed by contract only. There is nothing in the English Carriage of Goods by Sea Act 1992 regulating actions in tort, or indeed prohibiting such actions. The need to rely on such actions will however be diminished drastically by the Act.\(^{146}\)

### 6.11 Conclusion

It is submitted that South Africa urgently needs legislation to govern the transfer of rights and imposition of liabilities under bills of lading. It is further submitted that the Sea Transport Documents Bill in its current form have so many problems that a fresh start should be made rather than attempting to modify the Bill. It is submitted that any legislation in South Africa can be modelled closely on the English Carriage of Goods by Sea Act 1992. There are mainly two reasons for this. Firstly, the law governing bills of lading is based on English law anyway. Secondly, the English Act has proved to be relatively problem free since its inception more than eight years ago. By now the Act is familiar to international traders and they feel comfortable with

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\(^{144}\) Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] 1 AC 785. See Todd Modern Bills of Lading 196-197.

\(^{145}\) Modern Bills of Lading 194; Bradgate and White 56 MLR 189.

\(^{146}\) Reynolds 1993 LMCLQ 444; Todd Documentary Credits 198. Also see Bradgate and White 56 MLR 202.
the fact that their transactions are governed by the Act.
Chapter 7
Delivery of the Goods by the Carrier

7.1 Introduction

In *The Cape of Good Hope Marine Insurance Co v Berg*¹ the ship *Galatea* carrying a cargo of wood was “driven by the force of the winds and the waves upon the beach at Table Bay, and ultimately became a wreck”.² The court held that the cargo was uninjured, the contract had been fully performed and an effectual delivery could be made from the stranded ship³ (although in such a case additional expenses due to the particular mode of landing beyond that of a normal delivery in the usual anchorage place may in principle be claimed).⁴ The court therefore interpreted the delivery requirement widely.⁵ In this chapter a varied array of questions all in some way related to the delivery (or indeed non-delivery) of the goods will be considered. These matters include whether the holder of a bill of lading has a right to delivery, the carrier’s concomitant obligation to deliver the goods, to whom such delivery can be made, the position surrounding lost bills of lading, the practice of carrying an original bill of lading on board the ship to the port of destination, the use of exemption clauses and the use of letters of indemnity. Lastly it will be examined when the bill of lading ceases to be a document of title, which will generally be after the delivery of the goods by the carrier.

¹ (1865) 1 Roscoe 289.
² 290. The ship had been wrecked on the rocks at Green Point: 298.
³ 300, 294.
⁴ 295, 298.
⁵ Also see *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 1 SA 708 (A).
Chapter 7: Delivery of the Goods by the Carrier

7.2 Right to Delivery

According to Bools the transferee of a bill of lading has no right to delivery when he does not also have a "proprietary right" (i.e., ownership) or a contractual right to delivery (by virtue of a contract of carriage). There are indeed clear indications in the cases that a plaintiff will not succeed in an action for non-delivery unless he is the owner of the goods or has a contractual right to delivery. In The "Future Express" it was said that "there is no reported case where the law has provided a remedy to a party who can establish no more than that he is the lawful holder of a bill of lading."

Bools concluded that the holder of a bill of lading, merely by being holder, does not have a right to delivery of the goods, because, as mentioned above, such a holder must also be the owner of the goods or have a contractual right to delivery. He therefore rejected the notion that because the bill of lading is a document of title the holder of the bill of lading has a right to delivery of the goods, and that one of the characteristics of a document of title is that the holder of such a document has a right to delivery. According to Bools, being in possession of the bill of lading, and therefore being in possession of the goods, is on its own not enough to grant such

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6 Bill of Lading 151.

7 Many of the cases referred to by Bools Bill of Lading 152-153 decided that an agent has no action because an agent is not the owner of the goods (and often the bill of lading in these cases is indorsed to an agent to exercise a right of stoppage in transitu on behalf of a principal). In the following cases the action for non-delivery failed mainly or inter alia because the plaintiff was not the owner of the goods: see Coxe v Harden (1803) 4 East 211 (102 ER 811) at 216-217, 219; Waring v Cox (1808) 1 Camp 369 (170 ER 989) at 371: "If no property passed to the indorsee, he could have no right to complain of the non-delivery or of the conversion of the goods as an injury to himself." Also see Howard v Shepherd 9 CB 297 (137 ER 907) at 320, 322, 323, although in this case the bills of lading were never presented for delivery of the goods. For cases where the action for non-delivery succeeded after establishing that the plaintiff was the owner of the goods see Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co Ltd [1899] 1 QB 643 (discussed by Bools 152); Fraser v E A Casper, Edgar & Co and William Pearson & Co (1920) 2 L.L. Rep. 620; Bristol and West of England Bank v Midland Railway Co [1891] 2 QB 653 at 661.

8 In Chappel v Comfort (1861) 10 CB (NS) 802 (142 ER 669) at 810 (also see 812) it was stated that an assignee "is entitled to have the goods delivered to him on the terms mentioned in the bill of lading", but as Bools Bill of Lading 150 n 6 indicated, the right in question was a contractual right.


10 Bill of Lading 156, 170.

11 Bill of Lading 151.
possessor a right to delivery of the goods. His views are contrary to conventional wisdom on the subject. In *Heskell v Continental Express Ltd*¹² Devlin J said, “The reason why a bill of lading is a document of title is because it contains a statement by the master of a ship that he is in possession of cargo, and an undertaking to deliver it.” Debattista,¹³ relying on this statement, wrote, “Transferability of the right to demand possession of goods from a person currently having physical possession of them lies at the core of the common law notion of a ‘document of title’ and an accurate definition of that phrase should include those ingredients and those alone.” In *London and South African Bank v Donald Currie & Co*¹⁴ De Villiers CJ held that the indorsee of the bill of lading “should have the right of dealing with the property and demanding possession from the captain”¹⁵ and in *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola*¹⁶ Corbett JA stated that “the holder of the bill ... is entitled to the exclusion of all others, to receive the goods from the ship at the place of destination.”

One cannot fault Bools’ conclusion that for the holder to institute an action for non-delivery he must usually also be the owner of the goods or have a contractual right, but it does not follow that an embodied right to delivery is not one of the characteristics of a document of title. The normal situation is that the holder of the bill of lading will have a right to delivery of the goods. When instituting an action for non-delivery such a holder will have to prove damages, which might be difficult to do if he is not the owner of the goods or does not have a contractual right to delivery. There are of course many exceptions to this normal situation. The bill of lading is not a negotiable instrument and it does not mean that the transferee obtains good title to the bill, including a right to claim delivery of the goods, if the transferor does not have a right to delivery

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¹² [1950] 1 All ER 1033 at 1042.

¹³ *Sale of Goods* 29 (his emphasis). He also wrote, “The common law starts from the assumption that the bill of lading contains the right to demand physical delivery of the goods at the port of destination and no more ....” Todd *Modern Bills of Lading* 246 wrote, “This is the very reason why a bill of lading can be used as a document of title: transferring the document transfers also the right to demand the cargo from the ship at discharge.” He further called this the “most important single feature” of the bill of lading (1; also see 3, 4, 7 where similar statements were repeated). For the same point of view see Toh Kian Sing 1996 *LMCLQ* 417; Ivamy *Carriage of Goods* 81; Howard (1993) 24 *J Mar L & Com* 181 n 1, 182; Chorley and Giles 251; Wilson *Carriage of Goods* 136, 137.

¹⁴ (1875) 5 Buch 29 at 33-34 (my emphasis).

¹⁵ Admittedly in the case it was said (at 35): “the plaintiff had such a special property in the goods as to entitle him to bring this action.”

¹⁶ 1976 4 SA 464 (A) 492B, H; *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 1 SA 816 (W) 821A.
of the goods. One can take any of the characteristics of the bill of lading and cite examples that do not conform to the general rule. The bill of lading does not always transfer possession of the goods, but that does not mean that a document of title does not transfer possession — usually it does. The holder of a bill of lading relating to part of an undivided bulk cargo, cannot be owner of the goods. He nevertheless definitely has “a perfectly good right to demand delivery”.

A further argument against the construction of Bools, is that in the English Carriage of Goods by Sea Act 1992 both section 2(2) and 5(2)(c) refers to a “right (as against the carrier) to possession of the goods”, indicating that while the bill of lading is a document of title, the holder of the bill of lading has a right to delivery of the goods. Despite the Act referring to such a right to indicate whether a bill of lading is still a document of title or not, the right to delivery is a common law right that is not created by the Act. It will also be seen below that the carrier has an obligation to deliver the goods to the holder of the bill of lading. If the carrier has an obligation to deliver to the holder of the bill of lading, surely the holder of the bill of lading has a right to demand delivery of the goods.

For all these reasons it is therefore submitted that the bill of lading by virtue of being a document of title contains a right to delivery of the goods.

7.3 To Whom the Carrier Can Deliver

7.3.1 The Presentation Rule

The shipowner may only deliver the goods on production of a bill of lading. This is called the presentation rule. In Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd Lord Denning held:

“It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was ‘unto order or his or their assigns,’ that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping


18 Cf “The Aramis” [1989] 1 Lloyd’s Rep 213 at 229. The carrier has an obligation to deliver the goods to the holder of the bill of lading, even if one argues that it is an obligation undertaken to the shipper.

19 Also as commercial paper (Wertpapier) the bill of lading has a right to the delivery of the goods embodied in it: see Chapter 4 §4.2.


company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected." Diplock LJ, in *Barclays Bank Ltd v Commissioners of Customs and Excise*[^23], stated:

"It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading .... Until the bill of lading is produced to him, unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods."

In South Africa, in *London and South African Bank v Donald Currie & Co*[^24] the court reached a similar conclusion. The defendant delivered the goods without receiving the bill of lading. The plaintiff, who held the bill of lading, successfully claimed the value of the goods from the defendant. According to De Villiers CJ, “a delivery made to any one other than the person indicated in the bill of lading would be an improper delivery” and there is a “necessity of a delivery to the holder of the bill of lading upon production of that instrument.”[^25] The passage in the *Sze Hai Tong Bank* decision was recently approved in *Primesite Outdoor Advertising (Pty) Ltd v Salviati & Santori (Pty) Ltd*[^26].

Also in *The Sormovskiy 3068*[^27], a recent case, the master allowed stevedores to unload the cargo without presenting a bill of lading. The stevedores were employed by the Commercial Sea Port (CSP) of Vyborg, discharging the cargo as stipulated in a contract with Firma BMH (BMH). The plaintiffs bought sugar from the shippers, and before the ship's departure the plaintiffs sold the cargo of sugar to Forfar Investments, who in turn sold it to BMH. BMH's address was included in the bill of lading as the notify address. The plaintiffs were still the holders of the bill of lading, as Forfar never paid them. Clarke J once again confirmed that the goods may only be delivered

[^23]: [1963] 1 Lloyd's Rep 81 at 89. Although Diplock LJ did not expressly consider the point.
[^24]: (1875) 5 Buch 29.
[^25]: 32.
[^26]: 1999 1 SA 868 (W) 880F.
[^27]: *SA Sucre Export v Northern River Shipping Ltd (The “Sormovskiy 3068”)* [1994] 2 Lloyd's Rep 266. For the facts see 268-269.
upon production of the bill of lading.\textsuperscript{28} The defendants, who owned the vessel, raised some specific defences, but without success. They submitted that the goods were delivered according to the practice, custom and law of the port of Vyborg. If the law or custom (in its strict sense) of Vyborg did indeed require delivery to the CSP as agents of the party entitled to delivery (ie the plaintiffs) without presentation of a bill of lading, the defendants would have performed their obligations properly. If neither law nor custom prescribed such delivery without bills of lading, but the delivery is nevertheless consistent with the practice in the port, it would still not be good delivery by the defendants. The defendants, however, failed to prove such a law or custom.\textsuperscript{29} The defendants also submitted that the plaintiffs conferred ostensible authority on BMH to act as their agents (and thus the CSP as the agent of BMH) and take delivery of the cargo. According to the defendants the plaintiffs were therefore estopped from denying that the CSP was their agent, first because BMH was entered as the notify party, and second because a bill of lading and an invoice of the sale between Forfar and BMH accompanied the vessel. The court rejected the argument, saying that this does not amount to a representation that BMH may receive the cargo. Only the holder of the original bill of lading may receive the cargo. This person would often be someone other than the notify party or even the buyer of the goods.\textsuperscript{30}

In \textit{The Houda}\textsuperscript{31} exceptional circumstances prevailed. The plaintiffs chartered\textsuperscript{32} the \textit{Houda} from the defendants (shipowners). The tanker was loading oil at Mina Al Ahmadi when Iraq invaded Kuwait. After hearing of the invasion, the ship sailed with the crude oil still only partly loaded. Before departure, the master, as instructed by the charterers, signed a set of bills of lading, leaving the quantity of oil blank, to be filled in after the amount of oil was known. The bills were left in Kuwait after departure, never seen again, and probably never completed or negotiated. Eventually arriving at Ain Sukhna, the shipowners refused to discharge the cargo, because no bills of lading could be produced. Following a delay of 23 days, the discharge of the oil was

\textsuperscript{28} See the discussion on 270-274.

\textsuperscript{29} See 274-282.

\textsuperscript{30} See 282-283.

\textsuperscript{31} \textit{Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda")} [1994] 2 Lloyd's Rep 541. For the facts see 543-546. The case is an appeal from the Queen's Bench Division [1993] 1 Lloyd's Rep 333, the facts on 335-339.

\textsuperscript{32} Although a time charter is under discussion here, and in \textit{The Sormovskiy 3068 supra}, the same principles regarding the presentation rule are also applicable where bills of lading are issued without any charterparty: see Wilson 1995 \textit{LMCLQ} 289; Millett LJ in \textit{The Houda} at 557.
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effected after the conclusion of a without prejudice agreement. The issue was: “Can time charterers lawfully demand that the owners of the vessel deliver the cargo without production of the bill of lading?”

Even allowing for the unusual circumstances, the fact that the ship and the master are under the general orders and directions of the time charterers, the fact that ships often arrive before the bill of lading, as well as business efficacy, the Court of Appeal still held that, as in a normal bill of lading contract, shipowners are only obliged to deliver in exchange for the bill of lading. The time charterers cannot even order delivery to the party entitled to delivery without presentation of a bill of lading. Practical difficulties would then arise. According to Millet LJ,

“it places the master in an intolerable dilemma. He has no means of satisfying himself that it is a lawful order with which he must comply, for unless the bills of lading are produced, he cannot know for certain that the person to whom he has been ordered to deliver the cargo is entitled to it.”

The carrier is also not prevented from discharging the goods and storing them in a warehouse, and delivering the goods from the warehouse only upon presentation of the bill of lading. Obviously the necessary facilities would not always be available, especially for oil cargoes.

7.3.2 Delivery to Person Entitled to Goods

A carrier can with reasonable safety deliver the goods to the person entitled to possession (or to put it in South African terms, the person with the ius possidendi), even without the presentation of a bill of lading. Of course, as mentioned above, it might be very difficult for the carrier to be sure that a person claiming delivery is indeed entitled to the goods. Where delivery is made to...

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33 543. The facts are more complicated than stated here. Delivery without a bill of lading is only one of the issues, the rest of the case revolving around compliance with the charterers’ orders. At an earlier hearing the court order included an undertaking by the plaintiffs not to seek delivery without the consent of the defendants or an order of the court. The defendants could therefore refuse to obey an order of the plaintiffs to discharge the cargo. However, because the defendants would in any event not have discharged the oil except against presentation of bills of lading, or if they were ordered to do so by court, the question remained whether delivery had to be made without bills of lading. See Neill LJ at 550, Millett LJ at 555-556; Wilson 1995 LMCLQ 291.

34 See Neill LJ at 551, 552; Leggatt LJ at 553; Millet LJ at 556-559.

35 558. Also see Neill LJ at 552.

36 See eg London and South African Bank v Donald Currie & Co (1875) 5 Buch 29 at 32.

37 Todd Modern Bills of Lading 248.
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a person entitled to the goods, the shipowner will still be in breach of contract, but the holder of the bill of lading will be unable to prove any damages.38

7.3.3 Multiple Original Bills of Lading

Slow and unreliable communications required the use of multiple original bills of lading (it is also said that the bill of lading is drawn in parts; and one can refer to a part of the bill of lading), sent by different modes of transport, to ensure that at least one of them reaches the buyer.39 Often more (even seven) bills of lading were sent to different agents during the course of the ship's voyage. The seller will then wait as long as possible to sell the cargo at the place where the highest price is offered.40 The position of the carrier in these circumstances is certain. If the master has no knowledge or notice of the indorsement of another bill of lading, he can safely deliver to the first party providing him with a bill of lading. In such a case it is unnecessary for him to enquire about the whereabouts of the other parts of the bill of lading, or their possible indorsement — even if he is aware of their existence. If the master has notice or knowledge of the assignment of one of the other bills of lading, further enquiries by him are necessary before delivery of the goods. He may not arbitrarily choose the consignee.41

Lord Blackburn criticized the practice of using more than one bill of lading in the House of Lords as long ago as 1882:

"I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose

38 Neill LJ at 552 and Millett LJ at 556 in Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda") [1994] 2 Lloyd's Rep 541; Glyn Mills Currie & Co v The East and West India Dock Company (1882) 7 App Cas 591 at 610; SA Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068") [1994] 2 Lloyd's Rep 266 at 274.


40 Gronfors Waybills 20-21.

41 Lord Blackburn at 591 at 611, 613-614 in Glynn Mills Currie & Co v The East and West India Dock Company (1882) 7 App Cas 591. Also see Lord Selborne LC at 596-597; Earl Cairmes at 599-600; Lord Watson at 615. Even though the bill of lading provided that "the one of which bills being accomplished, the others to stand void" (592) the case also applies where there is no such clause in the bill of lading: see Lord Blackburn at 612; Bools Bill of Lading 166-167.
would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the Master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be the holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. 42

The practice of using more than one original bill of lading leaves the door open to fraud, as a specific transferee not holding all the bills of lading can never be perfectly sure that another bill of lading has not been indorsed to somebody else. 42 If such a transferee wants to ensure delivery of the goods to him, he has to give notice of his title, or be “vigilant and on the alert” and thus be present at the arrival of the ship. The financial institution or person advancing the money may require all three the bills of lading. Finally, of course, only one bill of lading may be used. 44 A bank that does not require all three bills of lading, has no effective security. 44 The buyer should, however, include a term in the contract of sale stating that he is entitled to all the bills of lading, as he would otherwise be unable to insist on more than one bill of lading even where there is a chance (as always) that there were dealings in other parts of the bill of lading. 46

More than one hundred years later, Lord Blackburn’s comments are still valid. Yet, according to Wiseman 47 who calls the practice “deplorable”, the remark “seems to have fallen on the deaf ears of generations of shipowners and traders.” Lord Blackburn is probably right when saying that merchants use three original bills of lading because they are wary of an unforeseen consequence surprising them. No such threatening consequences exist today. Financial institutions should welcome the use of a single original bill of lading. As there is no legal requirement to use more than one bill of lading, only one bill of lading should be used, with as

42 Glynn Mills Currie & Co v The East and West India Dock Company (1882) 7 App Cas 591 at 605. Also see Earl Cairnes at 598-599.

43 Lord Blackburn at 604; Wiseman (1984) 2 JERL 139; Sanders Cognossement 310-311, 314-316.

44 Earl Cairnes at 600; Lord Selborne LC at 596.

45 Todd Modern Bills of Lading 15, 254; Wiseman (1984) 2 JERL 137, 139. All the original bills of lading (the full set) must be presented for payment under a letter of credit, even if it is not specifically required by the letter of credit: Oelofse Letters of Credit 223.

46 Sanders Brothers v MacLean & Co (1883) 11 QBD 327 at 339, 343.

Chapter 7: Delivery of the Goods by the Carrier

many copies as necessary for all the parties concerned.48

7.3.4 Further Applications of Glyn Mills

Firstly, it is possible that the carrier delivers the goods to the presenter of the bill of lading, but
that the presenter is not really the consignee or the indorsee named in the bill of lading. It is also
possible that one of the previous indorsements may be forged. If the carrier delivers to the
presenter of the bill of lading in any of these situations, the question is whether he will be
protected by the Glyn Mills decision. It is submitted that the carrier will be protected by Glyn
Mills where he delivers the goods according to the bill of lading contract and without notice or
knowledge of the fact that the presenter is not really the consignee or indorsee, or notice or
knowledge of the fact that there is a forged indorsement on the bill of lading.49 It is submitted
that if the contract is silent on checking the identity of the presenter of the bill of lading, the
construction of the contract should generally be that the carrier should check the identity of the
presenter.50 It is further submitted if the contract is silent on checking the validity of the
indorsements, it is not necessary for the carrier (in the absence of knowledge or notice of
irregularities) to check the validity of indorsements.51 To make inquiries about identity would
be relatively easy, while making inquiries about the indorsements would place an undue burden
on the carrier. It is of course possible that the contract does not require verification of the identity

48 The high number of copies (up to 100) are already causing concern: see Grönfors Waybills 16, 22. Copies are
necessary to compile the ship’s manifest, for customs authorities, port authorities, terminal operators, banks
and insurers. Administrative costs are high.

payable to order on demand is drawn on a banker, and the banker pays the bill in good faith and in the ordinary
course of business, it is not incumbent on the banker to show that the indorsement of the payee or any
subsequent indorsement was made by or under the authority of the person whose indorsement it purports to
be ....” For a discussion see Malan and Pretorius Bills of Exchange 355-358.

50 Bools Bill of Lading 168 wrote, “There seems to be no reason why, their being nothing to the contrary in the
bill, the carrier should not be required to check the identity of the presenter of the bill ....” Also see Tiberg

51 Bools Bill of Lading 168; contra Wilson Carriage of Goods 159; Tiberg (1998) 23 Tul Mar LJ 19-20, also n
60 and n 61. Tiberg 20 (writing from a Scandinavian point of view) very optimistically stated that
“endorsements should be readable and orderly, and this, in the author’s experience, is often the case with
endorsement chains.” Tiberg 18 wrote that “an endorsement of the bill to one person must be accompanied by
endorsement legibly signed or stamped by the former endorsee” and Tiberg 20 n 61 indicated that “it is
common to add a legible stamp” to an unreadable signature. It is submitted that an illegible indorsement should
not affect the position of the carrier.
of the presenter, or does require the verification of indorsements, but as it would be virtually impossible for the carrier to verify the genuineness of indorsements, it is unlikely that the carrier will knowingly become party to a contract with such a requirement.

A second question is whether Glyn Mills applies to non-negotiable bills of lading, and there is no reason why it should not. Therefore the carrier can safely deliver to the consignee in the absence of knowledge or notice that the consignee is not entitled to the goods.

7.3.5 Should Carrier Take Possession of Bill of Lading?

In the case of a non-transferable bill of lading, it is not even necessary for the carrier to see the bill of lading. The reason is that a non-transferable bill is not a document of title, possession can thus not be transferred by it, and delivery of the goods cannot be demanded by presenting the document. The person requesting the goods should only identify himself as the consignee. As the carrier issued the bill of lading, he will know who is the consignee named in the bill of lading. In the case of other bills of lading the bill of lading must be produced or the carrier will be in breach of contract. This is an implied term of the bill of lading contract, and there is no need for such a contract to provide expressly that the bill of lading should be produced upon delivery of the goods. The shipper or other transferee can waive the requirement that the bill of lading must be produced.

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52 Bools Bill of Lading 169; contra Beatson and Cooper 1991 LMCLQ 203.
53 Bools Bill of Lading 169; Toh Kian Sing 1996 LMCLQ 417; Benjamin 990, 1023. As Toh Kian Sing wrote, possession of the goods is not obtained through the non-transferable bill of lading, but by virtue of identifying the consignee. There is nevertheless no clear statement by the courts on the matter: see eg Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep 439 at 446; in Thrige v United Shipping Co Ltd (1924) 18 LI.L.Rep. 6 at 9 Scrutton LJ did not decide the matter. For the contrary view and criticism of it see Toh Kian Sing 417-418.
54 Glyn Mills Currie & Co v The East and West India Dock Company (1882) 7 App Cas 591 at 610. Also see the cases discussed in §7.3.1. If, as discussed in §7.3.2 the carrier delivers to the correct person there will be no damages.
55 Bools Bill of Lading 170, because there was no such clause in the Glyn Mills case.
56 See Beaton v Akties Ganger Rolf (1926) 24 L.I.I.Rep. 178 at 180; Galbraith Pembroke & Co Ltd v H Harrison (Shipping) Ltd (1927) 28 L.I.I.Rep. 333 at 335 (although here the plaintiffs who were not holders of the bill of lading waived the requirement that the bill of lading must be produced). For cases where no consent to deliver without production of the bills of lading was proved, see Nederlandsche Handelmaatschappij v Strathlorne Steamship Co (1931) 39 L.I.I.Rep. 171 at 173-174, 175-176; Skibsaktieselskapet Thor Thoresens Linje v H (continued...)
It is submitted that the carrier should take possession of the bill of lading, as he might otherwise later find it difficult to prove that he delivered the goods on presentation of the bill of lading, or might even be estopped from asserting that he delivered the goods when being sued by someone to whom that bill of lading was fraudulently transferred.

7.4 Lost Bills of Lading

Lost (or stolen) bills of lading do pose a problem, but in *The Houda* that fact did not help the plaintiffs. In *The Sormovskiy* Clark J remarked *obiter,*

"The simple rule to which I have referred does require some exceptions because the bill of lading might have been lost or stolen. In order to cater for that problem it is no doubt necessary to imply a term that the master must deliver cargo without production of an original bill of lading in circumstances where it is proved to his reasonable satisfaction both that the person seeking delivery of the goods is entitled to possession and what has become of the bill of lading. The precise nature of the exceptions will no doubt require further consideration in the future."  

There is no direct authority for such an implied term, but if delivery is definitely made to the party entitled to the cargo, after being offered an explanation of why the bill of lading is not available, the carrier would probably not be liable for any damages. Following the advice of Leggatt LJ in *The Houda* would nevertheless be the safest course of action:

"Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the Court that on tendering a sufficient indemnity the loss of the bill of lading is not to be set up as a defence."

What Leggatt LJ proposed, is somewhat similar to the position governing lost (or stolen, or destroyed) bills of exchange. On the one hand the owner of a lost bill should not be barred from enforcing payment merely because he lost possession of the bill (unless the bill has been acquired by a holder in due course), but on the other hand the debtor should not pay the debt

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56 (...continued)


58 Also see Tiberg (1998) 23 *Tul Mar LJ* 16.

59 274. Also see the remark by Diplock LJ in the *Barclays Bank* case quoted in §7.3.1 *supra.*

60 See *Skibsaktieselskapet Thor Thoresens Linje v H Tyrer & Co Ltd* (1929) 35 L1.1.Rep. 163 at 170. Also see §7.3.2 *supra.*

twice. According to section 67(1) of the Bills of Exchange Act 34 of 1964, if a bill of exchange is lost before it is overdue, the person who was the holder of it may request the drawer to give him another bill of the same tenor, giving adequate security to the drawer if required, to indemnify him against all persons in case the bill alleged to have been lost is found again. According to section 68, where an action is instituted on a bill of exchange (other than a proceeding for provisional sentence) the court may order that the loss or non-production of the instrument shall not be set up by way of defence, provided an indemnity is given against the claims of any other person upon the instrument in question. The court has a wide discretion in terms of section 68.

Section 3(3) of the Sea Transport Documents Bill contains an interesting provision, that is in some ways similar to the solution proposed in *The Sormovskiy 3068*:

For the purposes of subsection (2), a person must be regarded as being in possession or as holding possession of an original sea transport document if —

(a) the original document has been lost or cannot, for any reason, be produced by that person or on behalf of that person; and
(b) that person or the agent of that person would be entitled to possession of the document if the original could be produced.

The section will apply not only to lost or stolen bills of lading, but also in all other cases where the bill of lading cannot be produced “for any reason”. The section will therefore also apply when the bill of lading is not lost, but has not yet reached the final transferee in order to be presented in exchange for the goods. The following situation might now occur: the person claiming the goods from the carrier alleges that the bill of lading is delayed in the post, that he must be regarded as the holder of the bill of lading according to section 3(3) because he is entitled to the possession of the bill of lading, and that the goods must therefore be delivered to him. It is submitted that the carrier should refuse to deliver the goods to such a person. Where

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62 Malan and Pretorius *Bills of Exchange* 166-167.

63 For a brief discussion of these sections see Malan and Pretorius *Bills of Exchange* 167-168.

64 This argument will only be possible in the case of a bearer bill of lading or where the alleged holder is already named as consignee or indorsee in the bill of lading, and in both cases if the bill of lading has been posted to the alleged holder. (In the case of bills of exchange a bill will only be delivered by posting it if the addressee requested that the bill be posted, consented to it or if there is an agreement between the parties that the bill may be posted: Malan and Pretorius *Bills of Exchange* 78). If, for example, an order bill of lading is still making its way down a transaction chain, the person cannot be holder of the bill of lading, as he is not named in the document yet and would also not be entitled to possession yet if the original could be produced.
there is a long transaction chain it will be virtually impossible for the carrier to know with any
certainty whether a particular person is entitled to possession of the bill of lading. A similar
situation will not arise under the English Carriage of Goods by Sea Act 1992 section 5(2)(c). For
that subsection to be operative, the person must be in possession of the bill of lading, even
though the bill of lading will not be a document of title anymore at that stage. In the Sea
Transport Documents Bill it is not necessary that the person be in possession of the document
at all. It is submitted that the operation of the section should not extend beyond lost or stolen
documents. A section such as this should therefore not apply at all to delayed bills of lading.

As was remarked above, if the carrier delivers to the party entitled to possession, the carrier will
probably not be liable for any damages. The only place where it can really be proved
satisfactorily that a person is entitled to the possession of a lost bill of lading or a bill of lading
that cannot be produced for any other reason, is in a court. It will, however, not be of much help
to either the carrier or the alleged holder to go to the trouble and expense of approaching a court
to determine whether the alleged holder is entitled to the bill of lading. It will normally be
impossible to delay the delivery of the goods. It is therefore suggested that following the Bills
of Exchange Act 34 of 1964 and The Houda that a provision such as section 3(3) should entitle
the carrier to demand security to indemnify him against any claims when delivering the goods
where the bill of lading is lost. The loss of the bill of lading or the fact that it cannot be produced
is after all not the fault of the carrier in any way. It is the alleged holder who either lost the bill
of lading or knowingly never received a bill of lading early enough to enable him to claim
delivery of the goods.

7.5 Carrying One Original on Board

To avoid postal delays, the shipper often returns one of the original bills of lading to the master.
The master is instructed to deliver this bill of lading to the consignee at the port of destination,
thus acting as a mailing service. When the consignee once again presents this bill of lading to
the master, the master delivers the goods in exchange for it. The bill of lading is basically used
as a waybill, but the other two bills of lading may of course still be negotiated, though hardly

65 See Chapter 6 §6.8.2 for a discussion.
with any degree of security. 66

The master would probably not hesitate to deliver against the bill of lading that accompanied the ship, as the principle in the *Glyn Mills* case, on the face of it, provides adequate protection. Suppose that the other original bills of lading are negotiated to a bank and the consignee fails to pay the bank, but the goods are nonetheless delivered to the consignee. 67 Todd argued that it “is by no means clear that *Glyn Mills* extends to this situation”. According to that case the three original bills of lading are not issued for the benefit of the carrier. 68 The practice of carrying an original bill of lading on board, however, is to the advantage of the carrier, as a quicker turnaround at the port of discharge is effected. 69 Firstly, it is submitted that to carry an original bill of lading on board can just as well be regarded as being to the advantage of the shipper or an indorsee, who would not have to issue an indemnity to the carrier in the event of delivery having to take place without a bill of lading, or who would not have to wait to lay their hands on the goods until a bill of lading eventually arrived. Secondly, it is submitted that the *Glyn Mills* case should not be interpreted so narrowly. Although is was indeed considered to whose advantage the issue of more than one bill of lading was, the case did not turn on that question.

In *The Mobil Courage* 70 three bills of lading (a “triplicate bill of lading”) were carried on the ship, but the master failed to sign them. The discharge was delayed because no (signed) bill of lading was available upon arrival, and the charterers refused to indemnify the carrier because they rightly believed that there should be an original bill of lading on board. The court held that the carrier was liable for the delay, and caused their own loss because the master did not sign the bill of lading. The court did not specifically consider the legality of the practice of carrying original bills of lading on board. Nevertheless the following passages indicate that Deputy Judge Hamilton QC definitely did not frown on the practice:

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67 The hypothetical situation according to Todd *Modern Bills of Lading* 254.

68 *Glyn Mills Currie & Co v The East and West India Dock Co (1882) 7 AppCas 591: Lord Selborne LC at 596; Earl Cairnes at 599.

69 Todd *Modern Bills of Lading* 254.

"Although there are potential risks in carrying to the consignees an original bill of lading, there are obvious advantages. I am satisfied on the evidence that it is a common practice for a charterer to send to the consignees via the master an original negotiable bill of lading. This is common in the oil industry.... [I]t was common ground before me that a vessel is bound to discharge its cargo against an original bill of lading ... even though it was carried on board." 71

"Discharge at Madras ought to have been straightforward. The triplicate bill of lading ought to have been signed by the master, and should have been delivered to the consignees, IOC, who would have presented it to obtain discharge." 72

Still, as Todd remarked, "It would be unwise to regard The Mobil Courage as strong support for the legality of carrying an original on board, especially as the contrary argument does not appear to have been advanced." 73 Grönfors called the practice a "farce". 74

Maybe the most important concern about this practice is that it may encourage fraud, as an imposter may masquerade as the consignee and obtain delivery. Wiseman therefore suggested that the master should exercise due diligence to ensure the person claiming the bill of lading is indeed the consignee, otherwise the shipowner may be liable to the real consignee. 75 Despite the objections of Todd and Grönfors, it is nevertheless submitted that if Wiseman's advice is followed, there is nothing wrong with this practice.

7.6 Exemption Clauses

As the carrier must only deliver the goods on production of a bill of lading, a carrier will attempt to limit their liability by way of an exemption clause. The following is an example:

"The Carrier shall in no case be responsible for loss or damage to cargo arisen prior to loading or after discharging." 76

If the misdelivery then occurs later from a warehouse, the carrier argues that the exemption

71 657.
72 659.
73 Todd Modern Bills of Lading 255.
74 Waybills 20.
75 Wiseman (1984) 2 JERL 143-144. Of course, having taken reasonable steps, the shipowner will not be liable if the bill of lading is not delivered to the real consignee.
76 SA Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068") [1994] 2 Lloyd's Rep 266 at 268.
In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* the Rambler Cycle Company in England exported bicycle parts to the Southern Trading Company in Singapore. The goods were shipped on the *Glengarry*, belonging to Glen Line. The Rambler Cycle Company took the bill of lading and other documentation to the Bank of China in London, and they in turn sent the documents to their Singapore branch. The bank was instructed to hold the bill of lading until a bill of exchange drawn on the Southern Trading Company was paid. After the ship’s arrival, the shipowners’ agents in Singapore, Boustead and Company, stored the goods in a warehouse. The Southern Trading Company wanted to get hold of the goods, but did not want to pay for them yet. Their bank, Sze Hai Tong Bank, thus indemnified the shipowners against any loss occasioned by the release of the goods, and Boustead and Company subsequently authorised the release of the goods. In the end the Southern Trading Company did not pay for the goods. The Bank of China, of course, still had the bill of lading and would only deliver it against payment.

An exemption clause of the bill of lading provided:

“... the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.”

When the Rambler Cycle Company realised what had happened, they instituted action against the shipping company, who brought in Sze Hai Tong Bank and the Southern Trading Company as third parties. Sze Hai Tong Bank acknowledged that they had to indemnify the shipping company, but only if the shipping company was indeed liable for damages.

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77 In *The Sormovskiy 3068* protection was denied as the loss arose on discharge and not thereafter (283).

78 [1959] AC 576. For the facts see 577-579. The judgement was approved recently in *MB Pyramid Sound NV v Briese Schiffahrts GMBH and Co KG MS “Sina” and Latvian Shipping Association Ltd (The “Ines”)* [1995] 2 Lloyd’s Rep 144 at 153-154. Interestingly, Clarke J indicated that an example of where an exemption clause may protect the carrier is where the goods are stolen after discharge (152, 153). Clarke J held, “Thus the decision in the *Rambler Cycle* case supports the proposition that the requirement to deliver goods only against an original bill of lading is indeed one of the main objects of the contract. It also supports the further proposition that it is permissible (as a matter of construction) to limit the ambit of a particular clause in the light of that fact” (154).

79 586.

80 It is possible that the admission of Sze Hai Tong Bank was “arguably wrongly made”: see Todd *Modern Bills of Lading* 246-247.
In evidence the shipping company admitted that they did something they knew they should not do — and therefore they needed an indemnity. The Privy Council held that even though the exemption clause is very comprehensive, it cannot absolve the shipping company from responsibility. First, Lord Denning followed an “interpretative approach”, looking at the construction of the clause. Just as the exemption clause cannot absolve the shipping company from responsibility when giving the goods away to a passerby, burning them or throwing them into the sea, it cannot absolve them when delivering without production of a bill of lading. The extreme width of the clause is therefore limited, thus avoiding any unreasonable consequences. However, the Privy Council went even further than mere interpretation. Such a wide construction “would run counter to the main object and intent of the contract.” One of the main objects of the contract is delivery against production of the bill of lading. This object would be defeated entirely if the shipping company could at will deliver to anybody without being responsible for the consequences. The court had to limit and modify the clause to give effect to the main object of the contract. The shipping company should not, relying on a contractual exemption clause, be allowed ignore its obligations as to delivery whenever it wishes to do so: “No court can allow so fundamental a breach of contract to pass unnoticed under the cloak of a general exemption clause ....” It should be mentioned that today there is no rule of law anymore in English law providing that in cases of fundamental breach of contract parties may not rely on exemption clauses to protect them. It is a matter of construction of the clause. Nevertheless the effect in practice is much the same, as exemption clauses are constructed so restrictively as not to cover fundamental breach of contract. Any exemption clause will clearly be subjected to “particularly rigorous scrutiny.”

Lord Denning also referred to Chartered Bank of India, Australia, and China v British India Steam Navigation Company, Limited where a similar exemption clause completely protected

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81 See Wilson 1995 LMCLQ 297.
82 587.
83 587-588.
84 Generally see Todd Modern Bills of Lading 112-115, 247; Wilson 1995 LMCLQ 296.
86 Wilson 1995 LMCLQ 296.
87 [1909] AC 369. For the facts see 372-374. Also see Wilson 1995 LMCLQ 297.
the shipping company. The Privy Council in that case concluded that the clause is unambiguous, clear and should be held operative and effectual.\textsuperscript{88} A servant of the landing agents, in collusion with the consignees (who did not hold the bill of lading; the bank did) fraudulently removed the goods while in a jetty shed. Lord Denning distinguished that case from the present one because the act of the fraudulent servant could not be imputed to the shipping company. In the present case the action of the shipping agents in Singapore could be treated as the action of the shipowners.\textsuperscript{89}

In \textit{Glynn v Margetson & Co}\textsuperscript{90} the House of Lords reached a decision analogous to the \textit{Sze Hai Tong Bank} case. The bill of lading contained a clause stipulating that the steamship may call at ports covering an extensive geographical area during her voyage from Malaga to Liverpool. The ship called at the port of Burriana, not in the direction of Liverpool, in fact taking the ship farther away from her destination. Oranges were damaged because of the delay. The court held that, even though the normal meaning of the words in the clause would justify a deviation, the “main object and intent” or “main purpose” of the contract as a whole was to carry perishable goods from Malaga to Liverpool. If the shipowner could call at any port as he pleased, and arrive in Liverpool whenever he pleased, the main object of the contract would be defeated. To prevent an unreasonable construction of general words, the ship may only call at ports in the course of the voyage.\textsuperscript{91}

In \textit{The Antwerpen,}\textsuperscript{92} an Australian case, the bill of lading contained the normal exemption clause, excluding liability after the discharge of the goods. A further clause provided that:

“The exemptions limitations terms and conditions in this bill of lading shall apply whether or not loss or damage is caused by negligence or actions constituting fundamental breach of contract.”\textsuperscript{93}

According to the New South Wales Court of Appeal the normal exemption clause would not

\textsuperscript{88} 375-376.
\textsuperscript{89} 588.
\textsuperscript{90} [1893] AC 351. For the facts see 351-352.
\textsuperscript{91} Lord Herschell LC at 354, 355 and Lord Halsbury LC at 357, 358-359.
\textsuperscript{92} \textit{Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The “Antwerpen”) [1994] 1 Lloyd’s Rep 213.}
\textsuperscript{93} For the two clauses see 233.
extend to unauthorized misdelivery of the goods. The majority of the court, however, held that the normal exemption clause, in conjunction with this additional clause, protected the shipping company. Handley JA, in the minority judgement, held that even both clauses read together cannot protect the shipping company against \textit{deliberate} breaches of contract:

\begin{quote}
"On the majority's construction of cl. 8(3) [quoted above] the carrier would never be liable for breach of cl. 5.3.2.1. [delivery against production of the bill of lading] The express term would impose no effective legal obligation on the carrier and would not form part of the contract or at best would be an illusory promise."
\end{quote}

Also in South African law, if a party only has to perform if he chooses to do so, there will be no obligation because of a lack of certainty. According to the majority decision a contractual obligation may be reduced to "a mere statement of intention for which there is no warrant elsewhere in the contract". It is submitted that the approach of the majority of the court should not be followed, for all the reasons already stated eloquently by Lord Denning in the \textit{Sze Hai Tong Bank} case. The main object of the contract is defeated in \textit{The Antwerpen}.

Before \textit{Primesite Outdoor Advertising (Pty) Ltd v Salviati & Santori (Pty) Ltd}, a recent decision, a South African court has not specifically considered an exemption clause in the context of a bill of lading contract. An exemption clause contrary to public policy will be void. Therefore excluding liability for fraud is impossible. A clause exempting a party from liability for an intentional breach of contract will also be contrary to public policy and void. It is

\begin{footnotes}
94 226, 246.
95 247. Also see Wilson 1995 \textit{LMCLQ} 297-298.
96 226.
97 See Van der Merwe \textit{et al Contract} 215.
98 230.
99 1999 1 SA 868 (W).
100 On the applicable law see Chapter 3.
101 See Van der Merwe \textit{et al Contract} 215.
102 \textit{Wells v South African Alumenite Co} 1927 AD 69 72: "On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other."
103 \textit{Hughes v SA Fumigation Co (Pty) Ltd} 1961 4 SA 799 (C) 805: "If the contractor deliberately caused the fire no exclusionary clause would serve to relieve it from liability"; \textit{Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd} 1978 2 SA 794 (A) 802-803: "... it was submitted by plaintiff's counsel (continued...)
submitted that any exemption clause in the context of the carriage of goods by sea should be interpreted in a similar way as was done in the *Sze Hai Tong Bank* case. Therefore a South African court should construct an exemption clause in such a way that will not defeat the main object of the contract, which is delivery of the goods against presentation of a bill of lading. The carrier should not be allowed to deliver, at will, to anybody without being responsible for the consequences. Delivery without requiring a bill of lading, is after all an intentional breach of the contract of carriage.

In the *Primesite* case, the court quoted several passages from the *Sze Hai Tong Bank* decision approvingly. Willis AJ held,

> "It seems to me entirely reasonable to interpret the bill of lading's provisions exonerating the defendant from liability once the goods had been delivered to the consignee as meaning 'proper delivery' which must mean, in other words, delivery against production of the bill of lading by the consignee."

### 7.7 Indemnities

#### 7.7.1 Introduction

Today the bill of lading often arrives at the port of destination only after the arrival of the ship. As it is just not economically feasible for ships to wait for the bills of lading to catch up before they deliver their cargo, another solution had to be found. The carriers are therefore often willing to deliver the cargo if granted an indemnity, to expedite the discharge of the cargo and to avoid delaying the ship. In the oil trade, because of the fabulous wealth of the parties involved, the carrier will often deliver without a bill of lading and without taking an indemnity.

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104 880F-881B.

105 881D.

106 For the reasons of the late arrival of bill of lading see Chapter 8 §8.2.


108 See *A/S Hansen-Tangens Rederi III v Total Transport Corporation (The ‘‘Sagona’’) [1984] 1 Lloyd's Rep 194 (continued...)
In practice the indemnity procedure may work in the following way: Often there will be quite a lengthy chain of transactions. A, the shipper of the goods, sells the goods to B, B in turn sells to C, C to D, with consecutive sales reaching up to a 100 links in the chain (banks may of course also be involved in such a chain). The bill of lading will probably not be available at the conclusion of any of these contracts. Suppose A meanwhile wants to obtain payment from B, but B is only willing to pay A when given the bill of lading as a document of title. It is possible (and often advantageous) that the contract of sale already provides for payment against an indemnity, preferably underwritten by a bank guarantee if necessary. Whether such a contractual clause exists or not, A will offer B an indemnity in lieu of the bill of lading, and will probably obtain payment, as it is nowadays a common practice. When A acquires the bill of lading he hands it to B, and the indemnity thereby ceases to be effective. This creates a chain of indemnities as each party attempts to obtain payment without presenting the documents, every indemnity extinguished as the bill of lading passes down the chain. In oil transactions payment in exchange for the bill of lading often has to be made thirty days after the bill of lading date. It is therefore likely that most of the payments in a transaction chain would have to be made on the same day, and for the bill of lading to be handed down the chain in a single day, let alone weeks or months, is absolutely impossible. Therefore the traders use indemnities to procure payment.

There is however also a second indemnity involved. A telexes the ship's agent, requesting delivery of the cargo to B without presentation of the bill of lading. A also indemnifies the carrier against any loss or damages and agrees to provide bail if the ship is arrested. Subsequently B, C and D will also telex the ship's agent with similar requests and indemnities, again creating a chain of indemnities. The ship's agent will eventually have numerous telexes containing delivery instructions and concomitant indemnities, also showing the final buyer of the goods. When this buyer claims the goods, he will once again have to indemnify the carrier before delivery, and if he is unknown to the carrier, the indemnity will probably have to be

108 (—continued) at 201; Todd Modern Bills of Lading 248.
111 A single indemnity provided by the current holder of the bill of lading is of course also possible: see Wiseman (1984) 2 JERL 138.
countersigned by a bank. When the final buyer at last delivers the bill of lading to the carrier, his own indemnity to the carrier will cease to have effect. Because of the possibility of extensive liability (especially if a party somewhere in the chain becomes insolvent) insurance cover will often not be available and many banks will not countersign such letters of indemnity.

The contents of the indemnity may include variations on some of the following clauses: When giving an indemnity to the buyer, the seller normally guarantees his unencumbered title to the goods. As an indemnity is never a substitute for the bills of lading, the receiver of the indemnity (ie a buyer of the goods or the carrier) should be able to insist on the eventual production of the bills of lading. The receiver of the indemnity should not be responsible for legal costs because bills of lading are not available. The indemnity can contain a clause as to choice of law, which should preferably be the law normally governing the indemnifying bank rather than the law that governs the contract of sale or the contract of carriage. This simplifies enforcing the indemnity in court. The indemnity will have a financial limit that should at least make provision for the value of the cargo and other incidental costs such as legal fees. A time limit on the indemnity will also be imposed, or it will lapse upon delivery of the bill of lading.

Leggatt LJ in *The Houda* stressed the fact that the indemnity does not in some magical way do away with the serious breach of contract:

"In default of production of the bill of lading an indemnity is afforded to the shipowner not on account of the lawfulness of the order to deliver but to protect him if he does what he is not contractually obliged to do."

### 7.7.2 Examples of Obligatory and Permissive Clauses

The following clause does not impose any contractual obligation to discharge the cargo without presentation of a bill of lading. Only if the master decides to discharge the goods, the clause provides that an indemnity will come into operation. In this case the carrier cannot be forced to deliver the cargo:

"Charterers hereby indemnify Owners against all consequences or liabilities that may arise from the master,

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112 See Wiseman (1984) 2 *JERL* 140-143 for a more comprehensive discussion.

113 See Green 1988 *Florida International LJ* 227-228.

charterers or their agents signing bills of lading or other documents or from the master otherwise complying with charterers' or their agent's orders, (including delivery of cargo without presentation of Bills of Lading ...."115

Two examples of obligatory indemnity clauses are:116

"In the event that original Bill[s] of Lading are not at discharge port in time for vessel's discharge, then Owners to agree to discharge of the cargo against production of a Bank Guarantee."117

"Should Bills of Lading not arrive at discharge port in time then Owners agree to release the entire cargo without presentation of the original Bills of Lading against delivery by Charterers of Letters of Indemnity .... which Letter of Indemnity shall be limited to deal exclusively with all claims of holders of original Bill(s) of Lading in relation to discharge of cargo without presentation of original Bills of Lading and shall automatically become null and void against presentation of 1 out of 3 original Bills of Lading, or after 13 months after completion of discharge whichever occurs first ...."118

7.7.3 Enforceability

The enforceability of some indemnities may be doubtful. Obviously a reputable bank would not gain any new clients by challenging the validity of its own indemnities in court.119 So, in the Sze Hai Tong Bank case, the bank recognized that it would honour the indemnity, if the court held the carrier responsible.120 The shipowner should also keep in mind that an indemnity would not be worth anything if the party providing the indemnity is in any financial difficulty.121 Shipowners should in particular only accept a clause requiring delivery without bills of lading against an indemnity if they are sure not only about the reputability and financial standing122 of

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115 Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda") [1994] 2 Lloyd's Rep 541 at 546, 551, 556.

116 For another example where the charterers had a "right to demand" delivery against an indemnity see Mobil Shipping and Transportation Co v Shell Eastern Petroleum (PTE) Ltd (The "Mobil Courage") [1987] 2 Lloyd's Rep 655 at 657.

117 SA Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068") [1994] 2 Lloyd's Rep 266 at 268.

118 Enichem Anic S.p.A. v Ampelos Shipping Co Ltd (The "Delfini") [1990] 1 Lloyd's Rep 252 at 256. For an example of the procedure followed see 256-257.

119 Todd Modern Bills of Lading 249.

120 [1959] AC 576 at 579.

121 Wilson 1995 LMCLQ 295. The carrier will often insist that the indemnity be countersigned by a bank: see Ventris 1981 LMCLQ 479.

122 A cargo of oil may be worth more than $50,000,000: see Chapter 8 infra. Therefore an indemnity may cost (at least) hundreds of thousands of dollars for an average cargo: see Green 1988 Florida International LJ 227, (continued...)
the party providing the indemnity, but also that this party will be around for the next few years in which a claim may arise.123

In *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd*124 the plaintiffs (acting for the shipowners) issued clean bills of lading125 for a cargo of 100 barrels of orange juice at the request of the defendants (shippers). The plaintiffs were only prepared to do this because the defendants agreed to indemnify them against any losses or damages arising from the issue of clean, instead of claused bills of lading. The plaintiffs knew the barrels of orange juice were “old and frail” and some barrels were clearly leaking. From the evidence it appeared that the plaintiffs issued a clean bill of lading in exchange for an indemnity as they knew that a bank would not advance money upon a claused bill of lading. Not surprisingly, the shipowners had to pay compensation of £147 to the cargo’s insurers. The plaintiffs now claimed the same sum from the defendants under the indemnity, and the defendants resisted the claim “rather unmeritoriously”126 and “with singular ill grace” only to save their own money.127 The legal issues are nevertheless important and cannot be affected by the attitudes of the parties.128 The majority of the court held that the indemnity is unenforceable as an unlawful transaction.129 The plaintiffs knew that they made a false representation, with the intention that it should be acted upon.130 There is another important consideration:

“Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantages to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.”131

Bankers and buyers relying on bills of lading as to the condition of the cargo are not seeking law

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122 (...continued)
also 21; Ventris 1981 *LMCLQ* 480.
124 [1957] 2 QB 621. For the facts see 622-626, 631-632. For the terms of the indemnity see 624.
125 For a discussion of clean bills of lading see Oelofse *Letters of Credit* 208-212.
126 Todd *Modern Bills of Lading* 87.
127 Morris LJ at 629; Pearce LJ at 638.
128 Morris LJ at 629; Pearce LJ at 638.
129 Morris LJ at 632, 636; Pearce LJ at 640; Evershed MR dissenting.
130 Morris LJ at 629-631, 636; Pearce LJ at 638.
131 Pearce LJ at 639. Also see Staniland 1988 *SALJ* 332.
suits, even if they might eventually recover damages. The widespread practice of granting indemnities is “convenient where it is used with conscience and circumspection, but it has its perils if it is used with laxity and recklessness.” If, on the other hand, there is a bona fide dispute about the condition of the goods, and the master will therefore only issue a clean bill of lading if indemnified, he does it honestly, no fraud is present and the indemnity is enforceable. The circumstances of each case should be taken into account.

Discussing the effect of the Brown Jenkinson case, Todd wrote,

"By analogy, the practice of delivering without production of the bill of lading might reasonably be construed as a fraud on the true owner of the cargo, if he is not the person to whom delivery is made. If so, then an indemnity will not protect the shipowner. Brown Jenkinson also shows that the mere fact that a practice is common does not mean that the courts will uphold it."

It is submitted that it is not likely that the principles in the Brown Jenkinson case extend so far. In the Brown Jenkinson case the plaintiffs knew they were making a false representation. If, however, the shipowner delivers the cargo bona fide without any reason to be suspicious of the title of the party claiming delivery, and according to a common and “convenient” practice to avoid delays, the indemnity clause will be valid. In such a case an indemnity clause is used with “conscience and circumspection” and not with “laxity and recklessness”. If the carrier suspects that the presenter of the bill of lading is not entitled to delivery, the indemnity might be unenforceable. Where the indemnity clause further requests rather than requires the shipowner to discharge the goods, and the shipowner can therefore refuse to deliver the cargo, it would be less likely that the clause is unenforceable because of illegality.

132 Morris LJ at 634; Pearce LJ at 639.
133 Pearce LJ at 639.
134 According to Pearce LJ at 639, “This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short.”
135 Todd Modern Bills of Lading 88; Morris LJ at 633; Pearce LJ at 638-639. According to Scrutton 116 n 63 there will “be few cases where a master who entertains doubts about the condition of the goods could issue a clean bill of lading without his conduct being described as reckless. The practice, however usual, of employing an indemnity as a means of settling an argument between the shipper and the master is not, it is thought, one which the court would encourage.”
136 Modern Bills of Lading 249.
137 Todd Modern Bills of Lading 249.
138 Todd Modern Bills of Lading 249.
When obeying the instructions of a charterer the shipowner would normally be indemnified either expressly by the charterparty or the court will imply an indemnity.\textsuperscript{139} In \textit{The Nogar Marin}\textsuperscript{140} the ship’s agents signed clean bills of lading, as presented by the charterers, for wire rods in coils. Some coils were rusty. The shipowners had to pay damages to the receivers of the cargo, and now wanted to be reimbursed by the charterers under an implied indemnity. Mustill LJ held that the master should have conducted a proper inspection of the goods, as he would always be able to do. When the ship’s agents issued clean instead of clausled bills of lading, the chain of causation had been broken, the carrier causing their own loss.\textsuperscript{141} Similarly it may be argued that if the master obeyed the charterer’s order to deliver the goods without presentation of a bill of lading, the carrier might break the chain of causation and cannot be indemnified by the charterer.\textsuperscript{142} It is submitted, however, that the chain of causation will only be broken if the carrier is aware that they are delivering to a person not entitled to delivery. In all other cases, the carrier should be able to enforce an indemnity against the charterers. In \textit{The Sagona}\textsuperscript{143} the shipowners delivered the cargo as instructed by the charterers’ agents to a party (as it later turned out) not entitled to it. The shippers fortunately recovered their money elsewhere, and Staughton J remarked, “It is hard to see what defence the owners had to such a claim [of the shippers].”\textsuperscript{144} The shipowners nevertheless still suffered considerable losses, mainly because of the arrest of the ship, and sought to recover these losses from the charterers relying on an express or implied indemnity. The shipowners, of course, are never bound to obey an order to deliver the goods to someone who is not entitled to delivery.\textsuperscript{145} The shipowners succeeded, not specifically on an indemnity, but rather because the charterers’ order to deliver to the wrong party was not a lawful order.\textsuperscript{146} The court found that a common practice existed at the time whereby the master did not insist upon an original bill of lading before discharge, and did not require an express indemnity

\textsuperscript{139} For a discussion see Todd \textit{Modern Bills of Lading} 97-98.

\textsuperscript{140} \textit{Naviera Mogor SA v Société Métallurgique de Normandie (The “Nogar Marin”)} [1988] 1 Lloyd’s Rep 412. For the facts see 414-415.

\textsuperscript{141} 421-422.

\textsuperscript{142} Todd \textit{Modern Bills of Lading} 249-250.

\textsuperscript{143} \textit{A/S Hansen-Tangens Rederi III v Total Transport Corporation (The “Sagona”) [1984] 1 Lloyd’s Rep 194. For the facts see 195-196.}

\textsuperscript{144} 196.

\textsuperscript{145} Staughton J at 198, 205.

\textsuperscript{146} See 205-206.
either. The act required by the charterers was not “manifestly illegal in itself” nor were there any circumstances to arouse (or that ought to arouse) the master’s suspicion. Therefore Staughton J held that it was not the conduct of the master that caused the shipowner’s loss, but the charterers’ order. Todd warned that The Sagona depends on particular factual findings and that shipowners should not place too much faith in the decision. It is nevertheless submitted, as mentioned above already, that on the facts similar to that of The Sagona, the shipowners should be indemnified by the charterers: the instructions of the charterers (delivery without a bill of lading) were not “manifestly illegal”. The indemnity should only fail where the carrier is aware that delivery is not being made to the person entitled to delivery.

7.7.4 South African Law

Staniland discussed the enforceability of indemnities in a South African context. He specifically referred to the situation where the port of loading is misrepresented in the bill of lading in return for an indemnity to circumvent sanctions against South Africa. Although this may not be a topical concern anymore today, the author raised many interesting questions. Staniland concluded that if the admiralty court applies English law, this specific indemnity would be unenforceable. Looking at South African law, the indemnity in question may well be valid.

147 According to Wiseman (1984) 2 JERL 137-138 the abovementioned practice does not exist today anymore, if it did indeed ever exist before, and he “can think of no circumstance in which an owner properly advised would not protect himself by insisting on either production of the bill or by receiving an indemnity.” To be safe the carrier should procure an express indemnity before delivering the goods.

148 Todd Modern Bills of Lading 251.

149 Apparently contra Todd Modern Bills of Lading 250.

150 See Todd Modern Bills of Lading 251.

151 Todd Modern Bills of Lading 251.

152 1988 SALJ 322.

153 On the applicable law see 323-329 and Chapter 3.

154 Staniland 1988 SALJ 329.

155 Staniland 1988 SALJ 335.
In South African law a contract (or a contractual clause\textsuperscript{156}) may be void or unenforceable\textsuperscript{157} because it is contrary to statutory law, contrary to good morals or contrary to public interest or policy.\textsuperscript{158} If there is any question of fraud, the indemnity will be unenforceable.\textsuperscript{159} If there is no fraudulent collusion between the parties, the indemnity will probably only be illegal if it is contrary to public policy. This envisages a balancing of interests.\textsuperscript{160} On the one hand it is necessary, as in the \textit{Brown Jenkinson} case, that the integrity of the bill of lading as a reliable document should be protected. The interests of the holder of the bill of lading should also be taken into account, as the possibility of delivery to someone else now exists. Therefore an indemnity should be unenforceable if the shipowner knew or had reason to suspect that he is not delivering to the person entitled to delivery. On the other hand it would surely not be in the public interest to delay ships, and thereby raise the costs of many products, because the shipowner can never be protected when delivering the goods. The indemnity procedure facilitates international trade.\textsuperscript{161} According to Purchas LJ in \textit{The Delfini},\textsuperscript{162} "It is obviously commercially desirable to release the vessel to undertake further commercial enterprises." Therefore it is submitted that an indemnity for delivery without production of the bill of lading will be legal and thus enforceable if the carrier has no reason to suspect that the receiver of the goods is not entitled to delivery.

In conclusion, Wiseman\textsuperscript{163} made the following comment about the indemnity system as solving some of the difficulties facing the bill of lading:

"It will be seen that the technical objections raised against indemnities and left largely unanswered (because there are no obviously satisfactory answers) mean that the indemnity solution so commonly used in practice should be regarded as no more than patching over the cracks of an archaic system which is incapable of meeting modern commercial conditions."

\textsuperscript{156} It is possible that severance will be allowed if possible and the rest of the contract will still be valid: see Van der Merwe \textit{et al} \textit{Contract} 147.

\textsuperscript{157} See Van der Merwe \textit{et al} \textit{Contract} 145-147.

\textsuperscript{158} Van der Merwe \textit{et al} \textit{Contract} 139.

\textsuperscript{159} Staniland 1988 \textit{SALJ} 322.

\textsuperscript{160} See Van der Merwe \textit{et al} \textit{Contract} 144.

\textsuperscript{161} See Staniland 1988 \textit{SALJ} 334.

\textsuperscript{162} [1990] 1 Lloyd's Rep 252 at 257.

\textsuperscript{163} (1984) 2 \textit{JERL} 143.
Chapter 7: Delivery of the Goods by the Carrier

The buyer wants to buy the cargo and not a right to compensation.¹⁶⁴

7.8 When the Bill of Lading Ceases to be a Document of Title

If the carrier discharges the goods from the ship and stores the goods in a warehouse, the bill of lading will remain a document of title, and will be used to obtain delivery of the goods from the warehouse.¹⁶⁵ Before delivery has been made,¹⁶⁶ either from the ship or a warehouse, to the holder of the bill of lading or the person entitled to the goods¹⁶⁷ (i.e., any delivery which will protect the carrier as discussed above), the bill of lading will remain a document of title.¹⁶⁸ After such delivery the bill of lading will be exhausted. According to Diplock LJ, a contract of carriage "is not discharged by performance until the shipowner has actually surrendered possession ... to the person entitled under the terms of the contract to obtain possession of them" and "[s]o long as the contract is not discharged, the bill of lading ... remains a document of title by indorsement.

¹⁶⁴ Grönfors Waybills 20.

¹⁶⁵ Barber v Meyerstein (1870) LR 4 HL 317 at 330, 332. While the goods are in a warehouse, "the goods should be considered as if they were still at sea, in the absolute possession of the master to all intents and purposes" (330); Barclays Bank Ltd v Commissioners of Customs and Excise [1963] 1 Lloyd's Rep 81 at 89. Also see Bools Bill of Lading 192.

¹⁶⁶ The bill of lading will also cease to be a document of title in English law when the carrier attorns to the holder of the bill of lading, therefore becoming the bailee holding the goods on behalf of the holder of the bill of lading as bailor: Bools Bill of Lading 193. A further possibility apart from delivery of the goods is that a delivery order is issued, and in such a case the bill of lading will also cease to be a document of title: Barber v Meyerstein (1870) LR 4 HL 317 at 330.

¹⁶⁷ Enichem Anic S.p.A. v Ampelos Shipping Co Ltd (The "Delfinif") [1990] 1 Lloyd's Rep 252 at 269. However, in The "Future Express" [1992] 2 Lloyd's Rep 79 at 98-99 Judge Diamond, without expressing any "concluded view" on the matter, said he would be "reluctant" to hold that delivery of the goods against an indemnity to the person entitled to the goods, would exhaust the bill of lading as a document of title. His reason is that third parties acting in good faith would not be protected adequately if the bill of lading negotiated to them (fraudulently of course) is not a document of title anymore — a third party could never be sure that he is in possession of the goods. He further expressed doubts as to whether the doctrine of estoppel would provide a remedy to such an innocent third party. For the same reasons expressed in the text below, it is nevertheless submitted that delivery to a person entitled to the goods will exhaust the bill of lading's function as a document of title.

¹⁶⁸ Barber v Meyerstein (1870) LR 4 HL 317 at 329-330; Barclays Bank Ltd v Commissioners of Customs and Excise [1963] 1 Lloyd's Rep 81 at 89.
and delivery of which the rights of property in the goods can be transferred.” As Lord Westbury said, “Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument.” It seems that in the case of a wrongful delivery of the goods (eg not upon presentation of the bill of lading and not to the person entitled to the goods) the bill of lading will also remain a document of title. It is submitted that this approach is wrong. After delivery of the goods, the receiver of the goods will be in possession of the goods. The (rightful) holder of the bill of lading is not in possession of the goods anymore, and in South African law cannot transfer ownership because he cannot deliver the goods. Further, because the goods have been delivered (and ignoring for the moment any action for damages) the holder of the bill of lading will not be able to enforce his right to delivery of the goods against the carrier. This means that none of the essential elements of a document of title listed in Chapter 5 can be performed by the bill of lading anymore after the delivery of the goods — even if such delivery turns out to be wrongful.

7.9 Sea Transport Documents Bill Section 7

Section 7 of the Sea Transport Documents Bill deals with delivery and states:

(1) A carrier is discharged from the obligation to deliver if that carrier makes delivery of the goods to which a sea transport document relates to a person entitled to such delivery in terms of subsection (2).

(2) A person presenting a sea transport document is entitled to delivery of the goods to which the document relates —
   (a) only in accordance with the contract and on the terms contained in the document and subject to compliance with any obligation to which that delivery may be subject; and
   (b) subject to subsection (3) if that person is the first person presenting the document in respect of those goods.

169 Barclays Bank Ltd v Commissioners of Customs and Excise [1963] 1 Lloyd’s Rep 81 at 89.

170 In the case the goods were not delivered, inter alia as the freight still had to be paid.

171 Barber v Meyerstein (1870) LR 4 HL 317 at 335.

172 The “Future Express” [1992] 2 Lloyd’s Rep 79 at 100, though the remarks were obiter (see 96-97). According to Judge Diamond the contrary position “would completely destroy the value of bills of lading as documents of title ....” Also see Short v Simpson (1866) LR 1 CP 248 at 254-255. Further see Benjamin 1026-1027 who in contrast to The Future Express concluded that a bill of lading is not a document of title after the delivery of the goods.

173 Also see the arguments advanced by Bools Bill of Lading 194.

174 §5.4.19.
Chapter 7: Delivery of the Goods by the Carrier

(3) (a) A carrier may require any person presenting a sea transport document in respect of any goods to establish a right to delivery.

(b) Any person required to establish his or her right to delivery as contemplated in paragraph (a) may do so either by application to court or by any other means that may be acceptable to the carrier.

(c) If a right to delivery is established by means other than an application to court, the carrier bears the risk that the person has no right to delivery and the carrier may require an indemnity acceptable to the carrier in respect of the delivery.

(4) Unless the court on an application contemplated in subsection (3)(b) orders otherwise, delivery made in terms of this section does not affect any right to damages.

This is a strange and very wide-ranging provision that alters the common law and might scare away both the carrier and prospective holders of a bill of lading from choosing South African law to govern their transaction. There is nothing remotely similar in the Carriage of Goods by Sea Act 1992, and it is difficult to understand why this provision was ever included.

If section 7(1) implies that the carrier will only be discharged if he delivers to the person entitled to delivery of the goods, it places an impossible burden on the carrier. To expect the carrier to wait until such a determination has been made before delivering the goods is unacceptable. Where there is a transaction chain that can easily reach 100 links (with the added difficulty that any one of the indorsements may be forged) it will even take a court a substantial amount of time to determine who is entitled to the delivery of the goods — after all the documents have arrived at last. The carrier’s common law duty is simply to deliver to the first party providing him with a bill of lading in the absence of knowledge or notice of irregular circumstances. The Glyn Mills decision has been overruled by the Bill.

Section 7(2)(b) is in a certain sense already provided for in common law: as was indicated above the carrier may not arbitrarily choose the consignee where he is aware of the indorsement of more than one part of the bill of lading. So the carrier would never have been able to deliver the goods to the second person presenting a bill of lading without further inquiries (assuming of

175 Or in the Sea-Carriage Documents Act 34 of 1998 (South Australia).

176 Perhaps one can argue that the “person entitled to such delivery” is defined in s 7(2), with the implication that basically the only requirement to be a “person entitled to such delivery” is that such person must be the first person presenting the document. This is however an unlikely interpretation, raising the question of why the phrase “person entitled to such delivery” was used in the first place if it simply means the first person presenting a document.
course he did not already deliver the goods to the first party who presented a bill of lading). Furthermore, and more importantly, the first person presenting a bill of lading might indeed not be the person entitled to delivery of the goods. So the Bill disqualifies the person entitled to the goods from obtaining delivery if he is only the second person to present a bill of lading — according to the section 7(2)(b) such person is not entitled to the delivery of the goods. However, presumably after the process in section 7(3) has been completed and indicated that the first person presenting the document does not have a right to delivery, delivery may be made to the second person presenting a bill of lading. Section 7(2)(a) seems to attempt to achieve something similar to section 3 of the Carriage of Goods by Sea Act 1992 (dealing with liabilities), but this again is rather strange as section 4 already dealt with the transfer of obligations.

The fact that the carrier may require a person presenting a document to establish his right to delivery according to section 7(3)(a) places an impossible burden on the holder of such a document: the process has been referred to above. The carrier is in fact forced to demand that such right be established by application to court because of section 7(3)(c) and section 7(4) to avoid bearing the risk that the person has no right to delivery. This will also unnecessarily burden the courts. The courts might be approached on every delivery instead of only when there is a real dispute. Of course if the carrier decides not to ask the presenter of the document to establish his right to delivery at all, the implication is that the carrier will also bear the risk, even though the word "may" is used in section 7(3)(a). A further question regarding section 7(3)(c) is whether the words "may require an indemnity" means that the carrier now has a statutory right to demand an indemnity in those circumstances — if not it is difficult to see why the provision was included at all, as the parties may always agree on an indemnity. However, even assuming that the carrier has a right to demand an indemnity, it is submitted that this infringes upon the contractual freedom that previously existed whereby the parties can decide amongst themselves whether an indemnity is required or not. It further seems as if the words "acceptable to the carrier" indicate that the carrier can arbitrarily determine the value of the indemnity.

It is submitted that section 7 should be scrapped in toto. It changes established principles for no cogent reason and tries to regulate aspects that are already provided for clearly in common law. This is an area where statutory intervention should be avoided.
Chapter 8
Problems Facing the Traditional Bill of Lading

8.1 Introduction

For the bill of lading to survive, it would have to adapt substantially. The difficulties facing the bill of lading in its present form are probably insurmountable. There exists, as Grönfors called it, a “bill of lading crisis”. The “golden age” of the paper bill of lading stretching from the end of the previous century to the first half of this century, when bills of lading arrived before the goods, has passed. Most of the problems arise from cases where the bill of lading only arrives after the cargo at the port of destination. Examples of routes where the bill of lading arrives after the cargo are the North Atlantic routes and the USA-New Zealand routes. This is inter alia due to the increase in the speed of ships during the past three decades. Another unrelated disadvantage facing the bill of lading is the high cost of issuing, processing and verifying documents — it can be 10-15% of transportation costs.

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1 Generally see Todd Modern Bills of Lading 243-246; Wiseman (1984) 2 JERL 144-145.
2 Cargo Key Receipt 10; Electronic Documents 19.
3 Grönfors Electronic Documents 19.
4 See Yiannopoulos (ed) Ocean Bills of Lading 18.
5 Myburgh [1993] NZLR 324.
6 Goode Proprietary Rights 73; Todd Modern Bills of Lading 244; Todd Documentary Credits 2, 86. Also see Enichem Anic S.p.A. v Amelos Shipping Co Ltd (The “Delfini”) [1990] 1 Lloyd’s Rep 252 at 257. Ships are better designed, and navigation and operation are more advanced: see Myburgh [1993] NZLR 324.
7 Yiannopoulos (ed) Ocean Bills of Lading 18.
However, even in *Sanders Brothers v Maclean & Co*[^8], a case reported in 1883, a ship from Sebastopol in the Black Sea bound for Philadelphia would have arrived before any bills of lading coming from London where payment had to be made. The facts of the case were somewhat unusual, because of a delay due to the fact that the defendants (purchasers) wrongfully refused to pay the plaintiffs (sellers) for a shipment of old iron rails because the plaintiffs offered only two of the three original bills of lading in exchange for payment. Subsequently the plaintiffs obtained the third bill of lading from the shipper in St Petersburg and offered the complete set of three to the defendants. Only then was it under consideration to send all three originals from London to Philadelphia, but at that stage the ship had already travelled too far and the bills of lading would not have been able to arrive before the ship anymore. Because the defendants could not ensure the timely arrival of the bills of lading in Philadelphia, and would therefore have incurred warehousing charges, they again wrongly declined to pay the plaintiffs.

Although the case was decided on the basis of the first wrongful refusal, Brett MR did not want to leave the validity of the argument advanced by the defendants, that they could refuse to pay the plaintiffs because the bills of lading would arrive after the ship, in doubt.[^9] According to Brett MR, although the shipper or seller (or any other party in the transaction chain by implication) may not keep a bill of lading as long as they wished, “it is obvious the reasonable thing is that he [ie the shipper or seller] should make every reasonable exertion to send forward the bill of lading as soon as possible after he has destined the cargo to the particular vendee or consignee.”[^10]

This is the only obligation on the shipper or seller. There is no implied condition that they should deliver the bill of lading in time to the purchaser for him to ensure that the bill of lading is at the port when the ship arrives, or even before any expenses are incurred. What “reasonable exertion” is, will depend on the facts of each case.^[11]

Especially in modern commerce the chances of the bill of lading arriving before the cargo are slim, even if every reasonable exertion is made to send forward the bill of lading. In *The

[^8]: (1883) 11 QBD 327.
[^9]: 335-336.
[^10]: 337.
Chapter 8: Problems Facing the Traditional Bill of Lading

Sagona\textsuperscript{12}, the master of the ship, Captain Elvehoy, had been in command of tankers since 1970. He was asked how often an original bill of lading had been presented to him before discharge, and answered, "I have never seen it". Another captain testified that he "could not recall having been presented with a bill of lading, except in rare circumstances."\textsuperscript{13} As was discussed in the previous chapter, the carrier delivering the cargo without receiving a bill of lading, exposes itself to grave consequences.

8.2 Reasons for the Arrival of Ships before Bills of Lading

The decrease in transit times of ships has already been mentioned above. Containerization, shorter stopover periods and speedy cargo-handling procedures also contribute towards a quicker voyage.\textsuperscript{14} Sometimes it is possible that the delay may be due to the loss of documentation.\textsuperscript{15} The bill of lading also "is the last document in the export transaction but the first in the import transaction."\textsuperscript{16} This leaves the bill of lading only a small window in which it would probably have to pass hands between many consecutive holders, and for the final holder to make sure the bill of lading is at the port when the ship arrives in order to be able to claim the goods. If the transaction involves the use of letters of credit, this will lead to further delays, as the bill of lading has to be presented to banks, each taking time to examine the bill of lading.\textsuperscript{17} Postal delays and busy executives will not speed up the process either.\textsuperscript{18} There may be so many bills of lading governing the cargo contained in a single ship that there will be serious administrative delays.\textsuperscript{19} According to Goode the number can be as high as 2000 bills of lading for a single ship.

\textsuperscript{12} A/S Hansen-Tangens Rederi III v Total Transport Corporation (The "Sagona") [1984] 1 Lloyd's Rep 194.

\textsuperscript{13} 201. For further evidence see 201-202.

\textsuperscript{14} Grönfors Electronic Documents 19.

\textsuperscript{15} Wilson 1995 LMCLQ 291.

\textsuperscript{16} Goode Proprietary Rights 73; De May (1984) 2 JERL 197-198.


\textsuperscript{18} Goode Proprietary Rights 73.

\textsuperscript{19} Goode Proprietary Rights 73.
A further problem is that in the past the oil companies were known to each other and to a large extent trusted each other. Today a much more open market is flooded with traders who are not so familiar with each other. Inevitably this leads to delays: “Before exchanging $40 million for a piece of paper, most people want to be very sure that it was the right piece of paper and that it would ultimately give them rights to receive the cargo!”

Finally, the resale of the cargo leads to lengthy transaction chains, also called “daisy chains.” Different authors mention chains consisting of 30, 40, 60, 100 and 120 links. Sometimes the bill of lading arrives months or years after the cargo. Parties that reappear at various stages in the transaction chain and cargoes that are split and later recombined again all add to the bill of lading making an even slower journey down the chain. Just unravelling the transaction thread may take employees weeks. Oil is often sold while it is still in tanks and pipelines before it has been loaded, or even produced at all, although the bill of lading will not play any role in these very early transactions. These successive resales may be motivated by “changes in the need...

20 Urbach [1983/84] 12 OGLTR 267 wrote, “Once oil was shipped around among a few majors where trust was more important than documents. This has changed.”
21 De May (1984) 2 JERL 197 called this the “disintegration of the international oil industry.”
22 An oil cargo can easily be worth this much.
24 Goode Proprietary Rights 73; Todd Modern Bills of Lading 244.
29 Todd Documentary Credits 2.
30 Green (1988) 3 Florida International LJ 225, also n 14. Green 237 n 60 wrote, “Oil sold on a futures market is called ‘electric barrels.’ Oil sold on a spot market is called ‘paper barrels.’ Oil actually existing is called ‘wet barrels.’”
31 Todd Documentary Credits 2; Todd Modern Bills of Lading 245. A case of two years is documented by Green (1988) 3 Florida International LJ 228 n 25.
32 A party can for example buy back a cargo that he has previously sold.
for a particular type of oil, changes in the price of the oil or the cost of the transportation, relative location of the ship, and even the terms of financing available. The price of an oil cargo may fluctuate widely in the transaction chain due to turmoil in the markets. Notwithstanding these delays, the need not only to determine the eventual consignee, but also the rightful party at any given moment before delivery, is growing more acute.

8.3 Consequences of the Delayed Bill of Lading

If the bill of lading arrives before the ship, most problems referred to in this chapter and the previous chapter would never even arise. If the bill of lading is delayed however, the consignee cannot collect his goods. The shipper may be liable for demurrage and the storage of the goods. Delayed ships would in turn lead to port congestion — quite apart from the fact that the ships will not be earning freight. The facilities to store a bulk oil cargo for a short time to allow the tanker to leave would generally not be available. In the oil trade a quick turnaround of the vessel in the port is expected.

Because the bill of lading is not available when the goods are discharged, the goods are often discharged only when the carrier is provided with a letter of indemnity. This aspect, as well as the extent to which exemption clauses might protect the carrier that delivers without a bill of lading, has already been discussed in the previous chapter.

8.4 Fraud

Documentary maritime fraud involving the bill of lading and the letter of credit make up the bulk

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36 Urbach [1983/84] 12 OGLTR 268. Tax benefits can also lead to long transaction chains: see Green (1988) 3 Florida International LJ 237-238 n 63. Green indicated that buying and selling the cargo for tax and other benefits is called “spinning the bill of lading”.


40 Goode Proprietary Rights 73; Todd Documentary Credits 2 n 1.

41 See A/S Hansen-Tangens Rederi III v Total Transport Corporation (The “Sagona”) [1984] 1 Lloyd’s Rep 194 at 201; Todd Modern Bills of Lading 244; Todd Documentary Credits 86.
of annual international trade losses due to maritime fraud. The purpose of this section is to show how the bill of lading is used to commit maritime fraud — the bill of lading being the document that plays the primary role in this regard. One of the main criticisms (or rather fears) of electronic data interchange systems is that they are not secure enough. It is important therefore to keep in mind that paper-based systems also lead to fraud, and are even less secure than their electronic counterparts.

Negotiability simplifies fraud, and many measures to guard against fraud, would be at the expense of negotiability. The likelihood of fraud rises as transaction chains lengthen. Buyers can run checks on sellers, carriers and the cargo with relative ease if there is only one sale of the cargo. Proper enquiries and checks for a buyer stuck somewhere down a transaction chain would probably be an impossible task, and such a buyer would normally only have reliable information about the party selling to him. Measures to guard against fraud will also increase costs and lead to even more delays.

In the next two paragraphs the most common forms of fraud will be examined, together with an indication of whether an electronic bill of lading will lead to a reduction in fraud. Bills of lading may be issued (or forged) where no shipment of goods took place at all, and probably neither the goods nor the vessel ever existed. In such a case the buyer cannot even attempt to sue the nonexistent carrier. It is submitted that the use of an electronic bill of lading will not eliminate this type of fraud completely. A carrier can still issue an electronic bill of lading where no goods have been shipped. There is however still an advantage in the use of an electronic bill of lading. At the very least a buyer of the goods will definitely know that a particular carrier issued an electronic bill of lading, and might then decide whether or not to accept the electronic

42 Walsh 6 Ariz J Int'l & Comp L 224, 225.
44 Further see Chapter 9.
45 Todd Modern Bills of Lading 19, 261, 262, 264-266; last pages also on further measures to combat fraud.
46 The specific types of possible electronic bills of lading will be discussed in Chapters 11-12.
47 See eg Hindley & Co Ltd v East Indian Produce Co Ltd [1973] 2 Lloyd's Rep 515; Schultsz and Thomas 1983 CMI Colloquium 44-46, 55.
48 This is done by the use of asymmetric cryptography: the electronic bill of lading will contain a digital signature that can only originate from a specific party, in this case the carrier. Further see Chapter 9 §9.8.5 on digital (continued...)
bill of lading based on the reputability of the carrier. If a fraudulent third party that is not even a carrier issued an electronic bill of lading, the prospective transferee will most likely be aware of it. Another possibility is that the goods are loaded, bills of lading issued, and the goods subsequently unloaded again. This might require collusion between the shipper and the carrier, master or someone involved in cargo-handling. As just mentioned, a buyer will know who the carrier is, but not whether the goods are on the ship, even when an electronic bill of lading is used. It is also possible that some of the goods may be stolen during shipment. An electronic bill of lading will not make any difference in such a situation. Because of containerization the seller can ship basically anything (or nothing) without anybody noticing. An electronic bill of lading will not make any difference to this. The quantity or quality of the goods may be misrepresented when the bill of lading is issued.\(^{49}\) Again an electronic bill of lading will not change the situation. The original information in an electronic bill of lading may not be correct. In all these cases it is the buyer or cargo owner who would end up in a difficult position.\(^{50}\) It can therefore be seen that where an electronic bill of lading is used, there can still be fraud, but the carrier will probably have to be involved. The advantage for a buyer of the goods (when using an electronic bill of lading) is that such a buyer can be sure of the identity of the carrier, and that the carrier at least exists.

The fraudulent use of more than one original (paper) bill of lading may also lead to more than one transaction chain.\(^{51}\) This is impossible to happen when an electronic bill of lading is used, as there is no such thing as more than one original electronic bill of lading. Of course a second electronic bill of lading covering the same goods can theoretically be issued by the carrier after the first one has been transferred to the shipper,\(^{52}\) but this is unlikely to be possible in a closed

\(^{48}\) (...continued)

\(^{49}\) See Schultsz and Thomas 1983 *CMI Colloquium* 46-49.

\(^{50}\) On these possibilities of fraud using a paper bill of lading see Todd *Modern Bills of Lading* 262-263; Walsh 6 *Ariz J Int’l & Comp L* 251-259.

\(^{51}\) Green (1988) 3 *Florida International LJ* 229. Lloyd 1983 *CMI Colloquium* 80 quoted a participant as saying that “the only people who would regret the passing away of the bill of lading in triplicate after three hundred and fifty years would be those who are themselves hellbent on fraud.”

\(^{52}\) See Yiannopoulos (ed) *Ocean Bills of Lading* 18.
system such as the one that will be described in Chapter 12.\footnote{See the description of bolero.net in Chapter 12 §12.7.} If this does happen when using an electronic bill of lading, the shipper and the carrier will have to be involved in the fraud — the shipper must obviously be aware of the fact that he received a second electronic bill of lading. A bill of lading can also be altered later (as opposed to when originally issued) by the holder of the bill of lading.\footnote{See Yiannopoulus (ed) Ocean Bills of Lading 19.} In this case an electronic bill of lading will be a definite advantage, as it is unlikely that it can be altered without trace, and there can definitely be no change without the involvement of the carrier. From a practical point of view, paper bills of lading are also easily forged. Blank standard documents are readily available, as provided in bulk by the carrier to the shipper enabling the shipper to complete the documents beforehand.\footnote{Walsh 6 Ariz J Int'l & Comp L 251-252, 252 n 192 and n 194; Green (1988) 3 Florida International LJ 229.} Of course there will not be anything similar to a standard blank document freely available when using electronic bills of lading. An imposter would not be able to create the digital signature of the carrier.

In the notorious case of \textit{Shell International Petroleum Co Ltd v Gibbs}\footnote{[1983] 2 AC 375. For the facts see 375-376, 386-387. Also see Basedow \textit{Dokumentelose Wertbewegungen} 71.} — a case with a South African twist — the nearly impossible happened in that a cargo of 195000 tons of crude oil, worth more than $56,000,000, was stolen. In a contract with the South African Strategic Fuel Fund Association (SFF) the conspirators undertook to deliver a cargo of Saudi Arabian crude oil to Durban. On the basis of the contract they obtained an advance payment from Mercabank Ltd, and purchased a tanker called the \textit{Salem}. The master and principal officers were all co-conspirators, and the rest of the crew were willing to follow their instructions. They chartered the \textit{Salem} to Pontoil SA, an innocent party, and 195000 tons of oil were loaded in Kuwait, to be carried to Italy. Neither Pontoil, nor the shipper (Kuwait Oil Co) knew about the conspirators' true intention, otherwise the loading and departure of the vessel would never have been permitted. After departure, Pontoil innocently sold the cargo to Shell, the plaintiffs. The SFF agreed to accept Kuwaiti oil instead of Saudi Arabian oil. Instead of continuing to Italy, the \textit{Salem} turned off to Durban, discharged 180000 tons of the oil, and obtained payment from the SFF. They scuttled the ship with the remaining oil off Senegal in the Atlantic. The staggering amount received by the conspirators from the SFF was $45,000,000. The case only turned on insurance issues; the plaintiffs eventually only recovering the value of the 15000 tons lost when
the ship sank.

It can therefore be seen that electronic bills of lading may prevent fraud to a certain extent — but of course not in all cases. In a case such as Shell International Petroleum the use of electronic data interchange would do little good. Electronic bills of lading will nevertheless definitely be more secure than paper bills of lading, and it is not realistic to expect them to eliminate all fraud. It is submitted that the primary use of electronic bills of lading will not be to combat fraud, but mainly to combat the disadvantages of the delayed bill of lading. In Sanders Brothers v Maclean & Co Bowen LJ held,

"But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery."

8.5 "The Bill of Lading: Do We Really Need It?"

Lloyd remarked:

"The bill of lading has had a long and distinguished history. It has served the community well. Indeed, it might be regarded as one of the most remarkable products of mercantile genius. For it enabled the goods to be bought and sold while at sea, so passing not only property in the goods, but also the right to possession on arrival. So wonderfully convenient did this prove to be, especially in the days of long sea voyages, that the bill of lading became endowed (or seemed to become endowed) with an almost supernatural or magical quality. I suspect that, to some little extent, this is still so. In certain parts of the world the bill of lading is still regarded, not just as the key to the warehouse, but as the key to commerce in general."

The bill of lading may have a distinguished history, but today the magic has worn off and in many ways the bill of lading is becoming outdated:

"But what [ie trading the goods en route] was a great convenience in the days gone by is now, with sea

57 (1883) 11 QBD 327 at 343.
58 Also see Lloyd 1983 CMI Colloquium 10, 82.
59 This is the title of an article by Lloyd 1989 LMCLQ 47.
60 Lloyd 1989 LMCLQ 48-49.
The sea waybill provides a solution where a document of title is not required. When used, the master only has to deliver the cargo to the consignee named in the waybill. There are many other advantages. The waybill is not a document of title and therefore presentation of it is not necessary before delivery can take place. Furthermore no indemnities would be required to protect the carrier when delivery is made. Using waybills will make committing fraud more difficult. It will probably lead to less litigation. The waybill can accompany the goods. Intricate documentary procedures will be avoided. A waybill would probably suffice in the majority of cases where goods are carried by sea. The Comité Maritime International (CMI) recommended using waybills when a negotiable document is not required, and the use of bills of lading in these instances should indeed be discouraged. Already it is widely used, especially in connection with containerization and shorter voyages. Manufactured goods, for example, will usually not be resold during the voyage. On the North Atlantic routes sea waybills are used for 70% of liner goods. According to Hare sea waybills are the norm in much of the trade between South Africa and the United States and Europe respectively. Nevertheless waybills are not used as widely as they should be. This may be because "old habits die hard" and a bill of lading provides a (supposed) level of certainty and comfort.

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61 Lloyd 1989 *LMCLQ* 49.
63 Lloyd 1989 *LMCLQ* 49.
64 Lloyd 1989 *LMCLQ* 57.
65 Lloyd 1989 *LMCLQ* 50.
66 Todd *Modern Bills of Lading* 252.
67 Lloyd 1989 *LMCLQ* 48; Todd *Modern Bills of Lading* 252.
68 Lloyd 1989 *LMCLQ* 49.
69 *Shipping Law* 446 n 23.
70 Lloyd 1989 *LMCLQ* 50.
8.6 Conclusion

Lloyd hoped that the reader will not find the title of his paper “altogether too sensational.”\textsuperscript{71} The bill of lading, even in its present form, still fulfils important and unique functions. For bulk oil or dry-cargo shipments that are normally traded during the voyage, a bill of lading is necessary. If there is any doubt about payment by the buyer, or even the ability of the seller to deliver the goods, only a bill of lading will provide adequate security.\textsuperscript{72} Although the advantages of the sea waybill may be numerous, only the bill of lading can perform these essential functions. It is however submitted that the paper bill of lading presents too many disadvantages to be used in its present form much longer.

Therefore it is submitted that there is a need for an electronic bill of lading in those cases that the cargo must be resold while at sea. An electronic bill of lading will provide all the functions of the paper bill of lading, but due to its virtual instantaneous transmission will not lead to the problems discussed in this chapter. It is further submitted that an electronic bill of lading will be more secure than a paper bill of lading, and will lead to a decrease in fraudulent practices, even though this advantage should not be seen as the primary reason for the use of an electronic bill of lading. In the following chapters electronic data interchange will firstly be discussed generally, and thereafter various proposals for the replacement of the bill of lading will be analysed.

\textsuperscript{71} Lloyd 1989 \textit{LMCLQ} 48.

Chapter 9

Electronic Data Interchange

9.1 Introduction

Today we are undoubtedly living "in the shadow of the print era", even though paper will exist and be used for a very long time still. The aim of this chapter is to provide an introduction to the concept of electronic data interchange (EDI) for the purposes of examining possible alternatives to the traditional bill of lading in the following chapters. The chapter is therefore not intended to be a comprehensive treatise on the law relating to electronic data interchange. The chapter will also not deal with the law of electronic commerce in general, or related fields like Internet law. Aspects of electronic data interchange will be examined that may be relevant to devising an electronic bill of lading. Apart from what exactly electronic data interchange is, these aspects include a discussion on what the relevance of paper is in our law (and society) today, what the meaning of concepts like writing, document, original and signature is, as well as the formation of contracts in an EDI environment. In South African law there is no general requirement demanding formalities for the validity of a contract. In Goldblatt v Fremantle Innes CJ held, "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity."

9.2 Paper

Paper has long been the medium of choice for the exchange of information and "[i]n

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1 Title of an article by Jones 1994 EDI LR 55.
2 Electronic commerce is a much wider concept than EDI: see Boss and Winn (1997) 52 Business Lawyer 1472.
3 1920 AD 123 at 128; Menelaou v Gerber 1988 3 SA 342 (T) 346B.
4 For a brief history of paper see Faerber (1999) 17 JCIL 803-805.
consequence, habits and attitudes have had time to develop and to become generally accepted.\textsuperscript{5}

Notwithstanding many beneficial characteristics over many centuries, the disadvantages of paper are many and mounting.\textsuperscript{6} Paper will not be cheap and available in abundance forever, due mainly to increased environmental pressures in future. Records use valuable storage space. The costs of transportation, security and handling are high.\textsuperscript{7} The use of paper leads to delays, and in the case of the bill of lading the cargo may nowadays arrive before the bill of lading at the port of destination.\textsuperscript{8} The rekeying of information also leads to more mistakes and rising costs.

Although the use of paper itself is escalating,\textsuperscript{9} ironically even in an electronic environment, paper is increasingly used as a "transitory medium" rather than as the primary information carrier or storage medium.\textsuperscript{10} Paper may for example be used to check the contents of a computer file, but is often discarded thereafter.\textsuperscript{11} Apart from being a transitory medium, "paper rescues

\textsuperscript{5} Seipel \textit{Paper Laws} 116; Kuner and Miedbrodt 1999 \textit{EDI LR} 145. See Leith \textit{Oral Nature of Law} 225-226 for an amusing (legal and academic) observation about the psychological hold of paper: "... I need think only of my own law school when it is visited by television cameras to interview colleagues on some new legal development, etc. The interviews always take place (at the camera crew's insistence) in our library, in front of rows of law reports and legislation: despite the fact that the interview is being mediated through speech, the background setting is always text — as though the interviewee is a conduit (a priest?) between the books in the background to the viewer in his or her home." Or as Sonnekus 1990 \textit{TSAR} 114 wrote, "Die reg begelei die mens van voor die wieg tot na die graf. Hierdie begeleiding word in 'n tipiese skrifgeorienteerde samelewing hoofsaaklik skriftelik bewys. Die geboortesertifikaat dien as bewys van die geregistreerde geboorte, 'n huweliksbertifikaat as bewys van die huwelikstand van die betrokkene en die doodsertifikaat as bewys van die geregistreerde afsterwe." For a similar comment see Faerber (1999) 17 \textit{JCIL} 805.

\textsuperscript{6} Toh See Kiat \textit{Paperless International Trade} 5-6; Van Esch and Prins \textit{Recht en EDI} 1; Seipel \textit{Paper Laws} 111-112; Bergsten and Goode \textit{Legal Questions} 127; Faerber (1999) 17 \textit{JCIL} 807-808.

\textsuperscript{7} It is rather ironic that the advantages of using paper money rather than coins long ago were precisely the same: lesser costs of storage, transportation and production: cf Brown (1980) 2 \textit{Computer/Law Journal} 155. Brown 157 also wrote, "The truly unique aspect of EFT systems lies in the elimination of even the tangible symbol of value. Use of such systems becomes the ultimate act of payment faith ...." One should hope this is not true anymore twenty years later.

\textsuperscript{8} Grönfors \textit{Cargo Key Receipt} 11 (in 1982) pointed out that apart from the fact that a bill of lading is issued in two to six originals, there may be from 15 to 60 copies of the bill of lading as well. Grönfors further wrote that notwithstanding "the very thin paper quality used, the documentation for all consignments on board a modern containership weighs well over 40 kgs. — no one has had the time to count the copies, only to weigh them ...." Also see Henriksen \textit{Trade and Transport} 85; Grönfors 1975 \textit{European Transport Law} 638; Grönfors 1976 \textit{LMCLQ} 250; Basedow \textit{Dokumentelose Wertbewegungen} 82-83.

\textsuperscript{9} Faerber (1999) 17 \textit{JCIL} 805.

\textsuperscript{10} Seipel \textit{Paper Laws} 99; Toh See Kiat \textit{Paperless International Trade} 6.

\textsuperscript{11} Faerber (1999) 17 \textit{JCIL} 805 wrote, "Unpredictably, computer word processors that have removed much of the (continued...)"
the computer by providing a replacement backup for digital data lost in a ‘crash.’ Much of the valued content of the world’s computer memory is duplicated on paper.”¹² So even though we may be living in the shadow of the print era, paper still provides assurances that computerized information does not. Of course computerization also has the effect that an increasing number of transactions take place without any paper record being kept at all.

### 9.3 Replacing Paper

A rather dramatic choice of words would say that today we are “freeing [ourselves] from the tyranny of paper”.¹³ As a result, “[i]t is now possible to talk about ‘pure’ information, divorced from the medium that carries it ....”¹⁴ This much exaggerated “tyranny of paper” has however provided us with numerous advantages, and some of the many beneficial attributes of paper will be discussed below. In many walks of life we are probably very far from discarding paper for good. As will be indicated at the end of this paragraph, paper has displayed exceptional durability and accessibility by later generations.

The functions of paper may be divided into the following five categories: Paper is a carrier of information, a carrier of authentication (by for example showing a signature), a carrier of evidence, a carrier of symbols (a symbol of the goods in the case of a bill of lading) and it performs formal legal functions (certain contracts must be in writing).¹⁵ Regarding the first function, information can of course be exchanged in many paperless ways: talking, television

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¹¹ (...continued)
tedium from the act of writing by simplifying textual changes have also encouraged countless printouts of text that eat up paper like never before.”


¹³ Reed Electronic Finance Law 2.

¹⁴ Reed Electronic Finance Law 1.

¹⁵ Toh See Kiat Paperless International Trade 1-4. To make a list of a number of functions of paper is of course rather arbitrary, and different people will probably highlight different functions of paper. It is nevertheless submitted that this division into five functions makes sense. For another exposition of the (in this case ten) functions of paper, see Seipel Paper Laws 117-119. Also see Henriksen Trade and Transport 29; Eisesen 1992 THRHR 211-212; Galtung Paperless Systems 13; Thomsen Background 33; Walden EDI 240-241; Walden and Savage [1989] JBL 103.
and e-mail are but a few. There is also no general legal rule that the exchange of information must take place on paper, and therefore no reason why information cannot be exchanged electronically. Authenticating symbols such as a signature can be easily and cheaply affixed to paper — without any special equipment. Authentication and the signature in an electronic environment will be discussed below. Paper as a carrier of evidence can be easily examined by handling and looking at it, and it can be stored to resolve later disputes. The evidential function of paper will fall largely outside the scope of this study. This study is however mainly concerned with paper as a carrier of symbols, or the bill of lading as a symbol of the goods, also embodying personal rights. The traditional bill of lading was discussed in the preceding chapters, and replacing the bill of lading by electronic means will be considered in the following chapters. Lastly paper performs formal legal functions. Some of these formal legal functions will be discussed in the paragraph on writing below.

One can also identify some characteristics or attributes of paper. These attributes will of course overlap to some extent with the functions of paper. The attributes of paper include the fact that it is durable and exists in a stable state, it is inexpensive, tangible, portable, it can be used easily (only a pen is required), additions (for example an indorsement) can be made without  

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16 Toh See Kiat, *Paperless International Trade* 1 wrote that paper is “only the most familiar and most trusted” way of communicating. That is probably still true in the year 2000, but for how long?  
17 Toh See Kiat, *Paperless International Trade* 45 n 2 wrote, “Note that at various times in history, pigeons, drums, smoke and semaphore flags — and in more recent years, radio and telegraph — have been used for communications. Thus communication does not need to be by way of tangible media ....” Also see Henriksen, *Trade and Transport* 52; Sonnekus 1990 *TSAR* 114.  
18 §§9.8.4-9.8.5.  
20 §9.6.  
21 For a refreshing look (because the trend today is to brand all paper transactions as counterproductive and harmful) at the “surprising durability” of paper even in a digital age see Faerber (1999) 17 *JCIL* 803-807. Also see Richards (1999) 17 *JCIL* 873-874 n 4.  
22 In the case of computer media, one deals with “[information] more and more often on the run”: Seipel, *Paper Laws* 100. This is especially true today regarding information found on the Internet. Seipel 117 further wrote, “Paper is a passive information carrier. It does not act on its own or react to its environment.”  
23 According to Seipel, *Paper Laws* 116, “paper is everyman’s medium.” The computer is probably, even today, not everyone’s medium to the same extent that paper is.
effort, any specific piece of paper can be found at a specific location at any given time,\textsuperscript{24} and finally because the writing on it is clearly visible, alterations and errors may easily be traced.\textsuperscript{25}

Paper thus has certain legal functions and certain attributes.\textsuperscript{26} The legal functions of paper are strictly speaking not a direct consequence of the characteristics of paper. The legal order rather has a “need for information handling procedures and information media which can perform certain functions.” Because paper has been available for a very long time, these legal functions are now identified with paper itself.\textsuperscript{27} For example, there is often a legal need for the authentication of information. For a very long period of time authentication was accomplished by applying a signature to paper. Therefore one can easily make the mistake of assuming that paper and only paper is a carrier of authentication. Even though paper has been a carrier of authentication for millennia, electronic media can also be a carrier of authentication. The question to be determined is therefore to what extent electronic media can perform some or all of the legal functions traditionally associated with paper — this study deals specifically with the functions of the bill of lading.

Objections to electronic media include lack of durability, lack of easy access and lack of easy legibility,\textsuperscript{28} lack of uniqueness, it can be altered easily and it does not exist independently from the hardware and software used to recall it.\textsuperscript{29} Regarding durability, Faerber\textsuperscript{30} wrote that paper “is durable and survives considerable abuse. In moving office equipment, for example, a cardboard box of books and manila files may be dropped, tossed, and otherwise manhandled with no ill effect, while similar treatment of computer gear might result in thousands of dollars in damage and irreparable loss of precious data.” The lack of easy access to electronic media may present even more of a problem due to the fact that the information was stored by

\textsuperscript{24} Contrast this with determining the location of an electronic message.

\textsuperscript{25} Toh See Kiat \textit{Paperless International Trade} 5; Seipel \textit{Paper Laws} 115-117; Bergsten and Goode \textit{Legal Questions} 127; Henriksen \textit{Trade and Transport} 30.

\textsuperscript{26} For the characteristics and functions of paper in comparison with electronic media, generally see Seipel \textit{Paper Laws} 119-127.

\textsuperscript{27} Seipel \textit{Paper Laws} 117.

\textsuperscript{28} Toh See Kiat \textit{Paperless International Trade} 65.

\textsuperscript{29} Eiselen 1992 \textit{THRHR} 211, 212; Eiselen 1995 \textit{ABLU} 4; Henriksen \textit{Trade and Transport} 31.

\textsuperscript{30} (1999) 17 \textit{JCIL} 808.
equipment (including operating systems and applications) that are obsolete and unavailable today — for this reason it might be difficult or impossible to access digital records that are only 5 to 10 years old. Faerber concluded that “paper printouts of stored digital data, in the eyes of many experts, comprise the only present guarantee of readability by future generations.” This is true, and a book in paper form will probably outlast a book in electronic form. An electronic bill of lading, however, does not need to be preserved for future generations. It only has to exist until there is no chance of any further claims being instituted upon it, and with the state of current technology that is not a problem.

9.4 Approaches to Replacing Paper

When searching for alternatives to paper, three approaches may be followed. The “managerial approach” retains paper to a large extent because it is argued that it is not possible to replace the paper document soon. Such an approach would attempt to function by making use of existing legal rules, while reducing the use of paper somewhat or speeding up the transfer of the paper documents. The “technical approach” replaces paper by electronic means. The same procedures are used though, because it is maintained that it is either not possible or not advantageous to change the old system radically. The paper documents are “imitated” by electronic means. The “functional approach” breaks the link with paper-based procedures, replicating only the legal functions of the old system. The challenge is to develop functional

31 Faerber (1999) 17 JCIL 812-813. See Faerber 813 for a list of “once-honored but now out of date personal computer names”.


33 Toh See Kiat Paperless International Trade 161-163. Most authors only distinguish between two approaches, thus not including the “managerial approach”. Other authors call the “functional approach” the “legal approach”: see Toh See Kiat 194 n 2; Henriksen Trade and Transport 33. Also see Baum Electronic Contracting 162; Eiselen 1992 THRHR 212-213; Henriksen 32-33.

34 Though a change in legislation would often be imperative: Toh See Kiat Paperless International Trade 162.


36 Henriksen Trade and Transport 32.

37 Also see UNICTRAL Guide to Enactment §§15-18 where a “functional equivalent approach” is followed in parts of the Model Law on Electronic Commerce 1996.
equivalents in electronic media for the existing functions of paper. In an ideal world the goal would undoubtedly simply be functional equivalence. How realistic the attainment of functional equivalence will be at this time, will be examined in the following chapters. It is the approach that will face most resistance.

9.5 EDI Defined

The time when the disadvantages of paper outweigh the advantages, has arrived. Electronic Data Interchange (EDI) is part of the move towards a paperless world, and provides solutions for many of the disadvantages of paper.

EDI may be defined as:

The electronic exchange of machine processable, structured data, formatted to agreed standards and transmitted across telecommunications interfaces directly between different applications running on separate computers. Because the data is machine processable and structured, computers may communicate with one another without any human intervention at all. E-mail, for example, is not regarded as EDI.

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38 See Seipel *Paperless Laws* 122-128.
39 Toh See Kiat *Paperless International Trade* 161.
40 Toh See Kiat *Paperless International Trade* 6-7 uses the term *telematic data interchange* (TDI) to denote electronic data interchange (EDI), but all other authors use the term EDI. For an example of how EDI would work in practice, see Eiselen 1992 *THRHR* 206-207; Grayton (1993) 27 *UBC L Rev* 258-259.
41 For the advantages of EDI see Walden *EDI* 239, 242; Eiselen 1992 *THRHR* 209; Van Esch and Prins *Recht en EDI* 3; Toh See Kiat *Paperless International Trade* 7-8; Seipel *Paper Laws* 113; Robertson (1998) 49 *South Carolina Law Review* 793-794; Mitaraks *Open EDI* 24-25; McKeon (1994) 12 *J CIL* 512-514. For the problems facing a paperless world see Toh See Kiat 10-13.
42 Eiselen 1995 *ABLU* 2; Eiselen 1992 *THRHR* 208. Also see Van Esch and Prins *Recht en EDI* 2. Toh See Kiat *Paperless International Trade* 7 defined EDI as “the direct transfer of structured business data between computers by means of telecommunications”. Also see Toh See Kiat 7 for his “more sophisticated definition”. In the UNCITRAL Model Law on Electronic Commerce 1996 Article 2(b) EDI is defined as “the electronic transfer from computer to computer of information using an agreed standard to structure the information”. Chandler (1998) 22 *Tul Mar LJ* 464 n 1 stated that “edi” (in lowercase) is often used (though I have not come across it) to refer to all electronic ways to do business. Chandler correctly concluded that the term to be used in such a case should rather be “electronic commerce” with EDI as a specialized part thereof. The same article by Chandler was published in (1997) 32 *European Transport Law*, but further reference will only be made to (1998) 22 *Tul Mar LJ*.
43 Two of the public standards are ANSI X12 (developed by the American National Standards Institute, Accredited Standards Committee X12) and EDIFACT (EDI for Administration, Commerce, and Transport developed by the UN): see Wright and Winn *Electronic Commerce* §2.05; Jones and Marsh *EDI Law* 10-12.
because the data is not structured and the receiving computer cannot process the contents of the message.  

9.6 Writing and Documents

9.6.1 Introduction

Writing and signature are required for the validity of some documents in South African law. A bill of exchange is an order in writing that must be signed by the drawer. No executory contract of donation is valid unless the terms thereof are embodied in a written document signed by the donor. No contract of suretyship is valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety. The Credit Agreements Act provides that a credit agreement shall be reduced to writing and signed by or on behalf of every party.


45 For the use of concepts like writing, document and signature in the Hague-Visby Rules and the Hamburg Rules see Jones 1994 (4) EDI LR 277-278, 280; Van Boom (1997) 32 European Transport Law 13-15. According to Article 14.3 of the Hamburg Rules a signature can be in “handwriting, printed in facsimile, perforated, stamped, in symbols or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.” So Article 14.3 still provides that the signature must be consistent with the national law of the country of issue. See Gliniecki and Ogada (1992) 13 NJILB 139-141; Economic Commission for Europe 1998 EDI LR 7-8, 41-43; Grönfors Cargo Key Receipt 16-17 and Faber 1996 LMCLQ 239 for areas in these conventions in need of reform. According to Van Boom 14, because of Art 14.3 of the Hamburg Rules, “it can therefore be concluded that the Hamburg Rules allow the use of intangible bills of lading, as long as the national law does not (explicitly or impliedly?) bar the use.” It is submitted that it cannot be concluded that just because of relatively wide definitions of writing and signature an electronic bill of lading will be recognized: the essential problems of uniqueness and negotiability still remain.

46 Although signature is discussed separately below, to avoid undue fragmentation both writing and signature requirements in South African law are examined here.

47 Bills of Exchange Act 34 of 1964 s 2(1).

48 General Law Amendment Act 50 of 1956 s 5. The document can also be signed by a person acting on the written authority of the donor granted by the donor to that person in the presence of two witnesses.

49 General Law Amendment Act 50 of 1956 s 6. The proviso is that “nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.”

50 75 of 1980 s 5(1)(a). Section 5(2) however states that “a credit agreement which does not comply with any such requirement shall not merely for that reason be invalid.”
thereto. According to the Alienation of Land Act\textsuperscript{51} no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents on their written authority. In the Wills Act\textsuperscript{52} a will "includes a codicil and any other testamentary writing."\textsuperscript{53} There is no explicit requirement that a will must be in writing,\textsuperscript{54} but this can probably be derived from the words "other testamentary writing" just quoted,\textsuperscript{55} from the fact that section 2(1)(a)(iv) refers to a "page"\textsuperscript{56} and from the fact that signature is a requirement. The Interpretation Act\textsuperscript{57} defines writing by stating that "[i]n every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form." The phrase "all other modes of representing or reproducing words in visible form" is very wide. The definition does, however, not state that the words must merely be \textit{capable} of being represented in visible form; the information as it is must already be in visible form.\textsuperscript{58} Therefore information in electronic form is probably excluded by the definition. It is

\begin{footnotesize}
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\textsuperscript{51} 68 of 1981 s 2(1). In s 1 a "deed of alienation" is defined as "a document or documents under which land is alienated." S 28(2) provides that any alienation which does not comply with s 2(1) shall in all respects be valid \textit{ab initio} if the alienee had performed in full and the land in question has been transferred to the alienee.

\textsuperscript{52} 7 of 1953.

\textsuperscript{53} s 1 sv "will". In s 2D, dealing specifically with the interpretation of wills, a will is defined for the application of that section as "any writing by a person whereby he disposes of his property or any part thereof after his death" (s 2D(2)).

\textsuperscript{54} Sonnekus 1990 \textit{TSAR} 120 wrote, "Dit is nog geen uitgemaakte saak dat die Suid-Afrikaanse wetgewer in 1953 bewustelik skrif as minimum vereiste vir die geldigheid van 'n testament gestel het nie en of daar nie bloot by gebrek aan ander moontlikhede aanvaar is dat skrif die enigste medium is aan die hand waarvan die laaste wilsuiting anders dan mondeling later objektief bewysbaar sou wees nie."

\textsuperscript{55} \textit{Cf Tshabalala v Tshabalala} 1980 1 SA 134 (O) 138A.

\textsuperscript{56} It is difficult to see how there can be pages other than in the context of paper and traditional writing. \textit{Cf Tshabalala v Tshabalala} 1980 1 SA 134 (O) 138B. According to Sonnekus 1990 \textit{TSAR} 120 directions such as those dealing with multiple pages only indicate the requirements that must be complied with if the will is indeed in written form, but there is no requirement to begin with that a will must be in writing.

\textsuperscript{57} 33 of 1957 s 3.

\textsuperscript{58} In the UK virtually the same words are used in the Interpretation Act 1978 s 5: writing "includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly". Toh See Kiat \textit{Paperless International Trade} 67 concluded that the "definition should be wide enough to cover words displayed on monitor screens and printouts. Whether it covers the impulses stored in tapes, disks and RAM or ROM is a moot point. It is submitted that the impulses, after all, are capable of being ‘reproduced’ in a ‘visible’ form.” Also see Bradgate \textit{Evidential Issues} 32. However, according to Reed \textit{Electronic Documents} 94, 97, 289-291 the great majority of the definitions of “writing” do not include digital information. Even the Interpretation Act 1978 “makes it

(continued...)
\end{footnotesize}
submitted that what is meant by writing, should always depend on the specific statutory provisions, and that a generalized answer cannot be given.

The category of documents is much wider than the category that includes writing. In *Grant v Southwestern and County Properties Ltd* the court held, “I think it is fair to say that all these cases, in different ways, stress that the essential feature of a document is the information thereby conveyed: they all hark back to the Latin origin of the word.”

9.6.2 Reasons for Writing and Signature Requirements

Reasons for writing and signature requirements in different statutes are very similar. The reason for the requirements in the Wills Act is generally to combat fraud. The primary aim of the formalities is to make the will of the testator as certain as possible after his death. The purpose of the requirements of the Alienation of Land Act is to recognize that because transactions relating to the alienation of land are “of considerable value and importance, and that the conditions attached were often intricate”, these contracts must be reduced to writing “to prevent

58 (...)continued
impossible for digital information *per se* to amount to writing, as it requires the reproduction of words in visible form.” As Jones and Marsh *EDI Law* 34 (also see Millard *Contractual Issues* 47) wrote, “This definition suggests that the reproduction itself must be visible, and not simply capable of being made visible. So this definition is not really broad enough to include EDI messages.” Faber 1996 *LMCLQ* 235 wrote that the definition “would not appear to include an electronic message which is not, of itself, visible.” For a comprehensive review of the statutory use of the word “writing” in English law, see Reed 83-132, 289-292.

59 Toh See Kiat *Paperless International Trade* 67-68. For Italian views on the meaning of document see EDIFORUM (Italy) 1994 *EDI LR* 129-131. “The term ‘document’ derives from the Latin word ‘documentum’ which means ‘that which is teaching or informing’, deriving in turn from the verb ‘doceo’ which means ‘to make known’, ‘to teach’” (149 n 13). Also see *Grant v Southwestern and County Properties Ltd* [1975] 1 Ch 185 at 190E-F. For an exhaustive review of the statutory use of the word “document” in English law see Reed *Electronic Documents* 9-82, 285-289.

60 [1975] 1 Ch 185 at 193G, also 190G.

61 For a comparative historical survey see Rabel 63 *LQR* 174 *et seq.*

62 7 of 1953.

63 See *Tshabalala v Tshabalala* 1980 1 SA (O 136H-137A; *Radley v Stopforth* 1976 1 SA 378 (T) 385D-E.

64 Sonnekus 1990 *TSAR* 120.

65 68 of 1981.
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litigation and to remove a temptation to perjury and fraud".\textsuperscript{66} The Credit Agreements Act\textsuperscript{67} guards against people "being enticed into shops and being sold goods of more or less value at prices which they can ill-afford to pay and on terms which are harsh and unconscionable."\textsuperscript{68} The provisions regarding contracts of suretyship are to achieve certainty as to the contractual terms, avoid perjury, fraud and litigation, and the "Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another".\textsuperscript{69} So one of the main objectives of writing can be said to avoid later doubts and disputes — an evidentiary function.\textsuperscript{70} It is also often said that writing emphasises the solemnity and formality of the proceedings.\textsuperscript{71} Writing is a ritual that denotes seriousness and deliberation on the part of the writer (and reader) and it cautions the writer about the results that may flow from his actions.\textsuperscript{72} In this case the legal formality of writing can be said to perform a cautionary function.\textsuperscript{73}

9.6.3 Link Between Writing and Paper

There is no definite link between writing and paper,\textsuperscript{74} though for historical reasons writing is

\textsuperscript{66} Wilken v Kohler 1913 AD 135 at 142; Neethling v Klopper 1967 4 SA 459 (A) 464E-F; Magwaza v Heenan 1978 2 SA 1019 (A) 1025B, 1030F; Johnston v Leal 1980 3 SA 927 (A) 939B-D; Clements v Simpson 1971 3 SA 1 (A) 7A; Van Wyk v Roucher's Saw Mills (Pty) Ltd 1948 1 SA 983 (A) 988; Hirschowitz v Moolman 1985 3 SA 739 (A) 7571-758A.

\textsuperscript{67} 75 of 1980.

\textsuperscript{68} Smit and Venter v Fourie 1946 WLD 9 at 13 dealing with the Hire-Purchase Act 36 of 1942.

\textsuperscript{69} Fourлемel (Pty) Ltd v Maddison 1977 1 SA 333 (A) 343B-C.

\textsuperscript{70} See Morton v Copeland 16 CB 517 (139 ER 861) at 535; Fuller (1941) 41 Columbia LR 800.

\textsuperscript{71} See Sonnekus 1990 TSAR 125. Sonnekus 118 made the following interesting observations (when writing about the possibility of video wills): many people will be able to express themselves better (and with more clarity and accuracy) orally than in writing. Regarding the structuring influence of writing on ideas, Sonnekus indicated, having regard to the many difficulties in the interpretation of both statutes and contracts, that if the legislator finds it difficult to put its intention into writing, it should be even more difficult for normal people.

\textsuperscript{72} Wright and Winn Electronic Commerce §1.03[C], §14.04[A].

\textsuperscript{73} See Fuller (1941) 41 Columbia LR 800.

\textsuperscript{74} See Toh See Kiat Paperless International Trade 85 n 1.
usually associated with paper. According to Darling J in *R v Daye*,

> "I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble or clay, and it might be, and often was, on metal."

Writing can therefore be done on walls, on a ring, in the sand and on Hebert’s “large white cow of malevolent aspect.” According to the Bills of Exchange Act a bill of exchange is an order in writing, although writing is not defined in the act. Malan and Pretorius wrote, “Without prescribing specific categories, it is submitted that the material on or manner in which words are reproduced should conform to the function of a bill or note as a negotiable instrument. Bills and notes are intended to circulate: they must be delivered, presented, accepted and paid, and the material used or the manner applied should be reconcilable with these functions.”

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75 [1908] 2 KB 333 at 340. Also see Usher *Deposit Banking* 33-34.

76 In *Ruscoe v Grounsell* (1903) 20 TLR 5 the court assumed that a tablet set in a wall was an agreement in writing.

77 See *R v Farr* (1864) 4 F & F 336 (176 ER 589). The ring in question had an inscription made in occasion of the loss of a sister, and in memory of her.

78 Herbert *Uncommon Law* 201.

79 34 of 1964 s 2(1). A note is defined in s 87(1) as a promise in writing.

80 Malan and Pretorius *Bills of Exchange* 49.

81 *Bills of Exchange* 49. Contrast this with the very simplistic approach of Gamertsfelder (1998) 21 *UNSWLJ* 566 *et seq* who suggested that as long as an electronic bill of exchange (called an e-bill) is recognized by the law as being in writing and signed, that is the end of the matter and all necessary requirements are met. Gamertsfelder submitted that in Australia an electronic bill of exchange would be regarded as being in writing (568) and signed (570): “The aim of this paper is to demonstrate that it is probably unnecessary for the law to be changed to refer specifically to e-bills in order to validate them” (575). He suggested however that legislation based on the UNCITRAL Model Law on Electronic Commerce 1996 would provide more certainty (567, 568, 571). Gamertsfelder also exaggerated the importance of the bill of exchange today, writing inter alia that “the legal recognition of e-bills is crucial to the development of international trade” (571, 566). On this further see Chapter 10 §10.3. Gamertsfelder 573 also wrote, “The introduction or use of e-bills would not derogate from the concept of negotiability. Indeed, the use of e-bills would enhance negotiability because the act of indorsing bills and transferring them would be facilitated by the use of e-bills.” Apart from this very optimistic statement he did not indicate how exactly negotiability will work, and as will be discussed especially in Chapter 10, this is probably the most difficult aspect of finding electronic equivalents for bills of exchange or bills of lading. Effross 38 *Jurimetrics J* 389 (1998) initially seemed to indicate that writing and signature are the only hurdles for an electronic message to be regarded as a negotiable instrument, but at least later (394-395) concluded that such an electronic message can still not be viewed as an original and may be cloned. Further see Chapter 10 §10.4.1.

82 As Grönfors *Paperless Transfer* 20 wrote, “it is most inconvenient to have one's promissory notes feeding on (continued...)
even though one can write on Herbert's negotiable cow, other aspects such as delivery,83
"[paying] the cow into the bank" and negotiation cause difficulties — the cow in fact resented
the attempt at being indorsed on the abdomen and adopted a menacing posture.84

There is no explicit requirement that a bill of lading must be written on paper.85 Realistically,
though, the same approach should be followed as in the case of the bill of exchange. For the bill
of lading to be used in its traditional way, there must be writing on a material that can be
indorsed, delivered and presented at the port of destination in exchange for the goods. So even
though there is no explicit legal link between writing and paper, it is submitted that an approach
similar to that used in the case of bills of exchange should be followed. The material should
enable the bill of lading to perform its functions. The fact that there is no definite link between
writing and paper, does enable the writing on a potential electronic bill of lading to appear on
electronic media, as long as all the functions of the bill of lading can still be performed.

9.6.4 The Characteristics and Objectives of Writing in an Electronic
Environment

One should not expect the impossible of writing in an electronic environment — as will be
indicated the concept has also been liberally interpreted in a paper environment. There is no
general requirement that writing must be legible.86 There is further no requirement that writing

82 (...continued)
green pastures."

83 Being arrested for causing an obstruction in Trafalgar Square, Mr Haddock, the owner of the cow, "said it was
a nice thing if in the heart of the commercial capital of the world a man could not convey a negotiable
instrument down the street without being arrested" (Herbert Uncommon Law 15).

84 Herbert Uncommon Law 202. A further (inevitable) question is: "Was the cow crossed?" (Herbert 201).

85 See Chapter 12 §12.3.5 on the question of whether a bill of lading should be in writing to begin with.

86 De Wet and Van Wyk Kontraktereg en Handelsreg 746 n 16; Malan and Pretorius Bills of Exchange 49.
Contra R Barkhan Corporation v Dabros (Pty) Ltd 1986 2 SA 686 (A) 691A: "As one of the main functions
of writing is the recording and communication of ideas, the importance of its legibility is obvious." The
question to be decided was whether the word "only" appeared after the name of the payee, and whether four
promissory notes were therefore negotiable or not. Holmes JA held that the court was "unable to hold with any
certainty that the letters in question constitute that word [only]" (692B). The court also stated with reference
to s 6(5) of the Bills of Exchange Act 34 of 1964 that "in my view such words should be sufficiently legible
and clear to indicate the intention with certainty on a perusal of the document with ordinary care. Anything less
(continued...)
and signature should be in Roman letters — it can for example be in Hebrew, Chinese or Arabic. There is also no need that writing must be visible to the naked eye. Some sort of equipment might be necessary to enable humans to read the writing. Documents kept in microdot form can be read by instruments such as powerful microscopes, and microfilm with the aid of a projector. This does not mean that information stored in these forms cannot be regarded as writing. Therefore one should not summarily dismiss the data in the memory of a computer or files stored on disk as not being in writing — the information can still read with the help of the computer and can thus be regarded as writing. Using the same argument, there is no reason why an e-mail message cannot be regarded as written: it should not matter that a

86 (...continued)
would facilitate shifts of deceptive concealment and require of holders an unreasonable degree of scrutinious care. ... Turning to the promissory notes in question, the tenor of all the writing thereon manifests a reckless disregard of legibility, in negation of the basic requirement of writing" (691C-E). It is submitted that the decision of the court is correct, because the court could simply not find that the letters (or rather "squiggle") formed the word "only". There was no need for the court to make any pronouncements as to whether legibility is a requirement for writing to arrive at this decision. In Western Bank Ltd v Sparta Construction Co 1975 1 SA 839 (W) 840E-F Coetzee J remarked, "What should also be investigated (in respect of all printed contracts) is whether there should not be some absolute minimum permissible standard of printing, specifically in regard to the size, to establish valid contractual relationships. There should be some limit below which the traditional fine print in contracts may be held pro non scripto." Even so, such a contract must still be regarded as in writing if necessary. In Skandinaviska Kreditaktiebolaget v Barclays Bank (1925) 22 Ll.L.Rep. 523 at 525 the court held that a bill of lading with an unrecognisable indorsement and in which the shipper was also not named could be rejected for the purposes of a letter of credit because it is not a blank indorsed bill of lading: "from the document itself, no one could ascertain who was the person entitled to endorse the document". The court did not decide that the indorsement as such was invalid.

87 See eg In re Berger [1989] 2 WLR 147 at 160B.

88 In Arab Bank v Ross [1952] 2 QB 216 an indorsement was both in Arabic and English.

89 See Grant v Southwestern and County Properties Ltd [1975] 1 Ch 185 at 197: "It is, I think, quite clear that the mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle." Also see Derby & Co Ltd v Weldon (No 9) [1991] 1 WLR 652 at 657H-658C; Toh See Kiat Paperless International Trade 66.

90 Grant v Southwestern and County Properties Ltd [1975] 1 Ch 185 at 197. Infrared photography may be used to see what is underneath paper slips pasted over a document: see In the Goods of Itter; Dedman v Godfrey [1950] P 130 at 132-133. In Kell v Charmer (1856) 23 Beav 195 (53 ER 76) an amount was written as "i. x. x." — an amount not readable by most people. Evidence was admissible to show how the testator, a jeweller, used these private marks or symbols to signify certain amounts of money.

91 See however the interesting observation by Reed Electronic Documents 95: "as users of this method of communication [e-mail] are aware, many of the messages are merely brief responses to received messages, composed without detailed thought or consideration for their wording. Such email messages are more similar to speech than 'writing' in its traditional sense." On the other hand, Sonnekus 1990 TS.4R 126-127 submitted that a tape recording of a will is more similar to a written will than an oral will, because it can later replicate (continued...)
machine, such as a computer monitor or printer, must be used before a human can read the writing, as long as it is capable of being reproduced in visible form either by showing the message on a computer screen or by printing the message. Courts are further generally not too formalistic when determining whether formalities such as writing and signature were complied with, but admittedly under current legislation an e-mail message will most likely not be regarded as written for the purposes of for example a contract of suretyship. But apart from any statutory requirements, it is submitted that there is no reason why the objectives of writing cannot be achieved by electronic means.

Even if one interprets writing widely enough to encompass electronic messages, this does not mean that a bill of exchange can be sent by electronic means. There is a huge difference between a mere message (or even a normal written contract) and an instrument such as a bill of exchange. In the case of a bill of exchange the medium is of cardinal importance for the bill of exchange to perform its functions. Regarding negotiable instruments and other transferable instruments such as the bill of lading, the approach of Malan should be followed: writing alone is not sufficient without an acceptable medium on which the writing appears, that can ensure the fulfilment of all the functions of the instrument.

91 (...continued)
the words of the testator exactly, just like a written will.

92 See eg Craib v Crisp 1984 3 SA 594 (T) (an acceptance by telegram complied with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981); R v Riley [1896] 1 QB 309 at 312-313 (also regarding a telegram); Hugo v Cross 1989 1 SA 154 (C) (a phonogram that was delivered in written form constituted written authority for the purposes of the Alienation of Land Act 68 of 1981 s 2(1)); Van der Merwe v DSSM Boerdery BK 1991 2 SA 320 (T) 329C.

93 Toh See Kiat Paperless International Trade 64-65 stated (once again rather arbitrarily) that there are five objectives of writing. 1. Writing chronicles events, and thus preserves such events for the future. There is no reason why events cannot be chronicled by electronic means. 2. Writing controls, in the sense that writing verifies events and fraud and forgery are reduced. Again there is no reason why electronic communications cannot be verified. 3. Writing communicates because it can be preserved and therefore transmitted beyond time and space — as can electronic communications. 4. Writing cautions, meaning that writing something down “forces the writer to reflect on the seriousness of his commitment.” It is firstly doubtful whether writing really still has this effect today (see Toh See Kiat 85 n 3), and people will furthermore just have to learn to display the same caution with regard to electronic communications. 5. Writing confers rights and duties, for example in a contract or a will. There is no reason why electronic communications cannot confer rights and duties as well. Also see Erber-Faller 1996 EDI LR 26-27 for the functions of written form (including signatures); UNCITRAL 1997 EDI LR 126; Johnson (1992) 6 IYLCT 8; Kelly (1992) 16 Tul Mar LJ 355-356; Sonnekus 1990 TSAR 114, 126; UNCITRAL Guide to Enactment §48.
9.6.5 UNCITRAL Model Law on Electronic Commerce 1996

Wright and Winn⁴ wrote, "A belief is building among legal authorities that electronic records are (for many purposes) writings. It is becoming generally understood that the law recognizes electronic commerce as beneficial and will not allow meaningless legal technicalities to impede its use." This is true, but most courts will probably be reluctant to extend the meaning of writing too far. This is remedied in the UNCITRAL Model Law on Electronic Commerce 1996. The concept of non-discrimination is stated in Article 5 of the Model Law:⁵ "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message."⁶ The UNCITRAL Model Law on Electronic Commerce deals with writing in the following way:⁷

Where the law requires information to be in writing, that requirement is met by a data message⁸ if the information contained therein is accessible so as to be usable for subsequent reference. So the information should simply be readable in some way. A further implication is that the hardware and software necessary to access the information should be retained otherwise subsequent reference will be impossible.⁹ Later reference also indicates a certain level of durability of the information. Article 6(3) makes provision for the fact that the article might be implemented so as not to apply to, for example, warnings placed on certain products or to the fact that a cheque must be in writing.¹⁰ Further approaches to law reform will be discussed in

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⁴ Electronic Commerce §14.01.
⁵ Singapore implemented parts of the Model Law in their Electronic Transactions Act 1998: see Nicoll 1999 EDI LR 123 et seq. For an interesting article on how the Model Law influenced United States legal developments, and conversely how US legal developments influenced the model law, see Boss 72 Tul L Rev 1931 et seq (1998).
⁶ A similar provision is found in section 6 of the Singaporean Electronic Transactions Act 1998: see Nicoll 1999 EDI LR 125. Also see the Australian Electronic Transactions Act 1999 s 8(1).
⁷ Article 6(1). See the Australian Electronic Transactions Act 1999 s 9(1)(a) and s 9(2)(a) for similarly worded articles.
⁸ A data message is defined in Article 2(a) as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy".
⁹ UNCITRAL Guide to Enactment §50; UNCITRAL 1997 EDI LR 127.
¹⁰ UNCITRAL Guide to Enactment §51.
9.6.6 Conclusion: Writing

It was stated at the beginning of this chapter that South African law imposes few formalities. It is submitted that the instances where South African law currently imposes a statutory requirement for writing and signature will not inhibit electronic commerce or even trade in general. There is no need for a will to be in electronic form (apart perhaps from a video testament), and there is good reason why legislation for consumer protection stipulates that credit agreements should be on traditional paper. Similarly the fact that a contract of suretyship must be in writing and that contracts for the alienation of land must be in writing, will probably not impede electronic commerce either. It is further submitted that electronic information should not be regarded as written where there are statutory requirements for writing, in the absence of investigations into the desirability of such requirements and subsequent legislation allowing a deviation from the traditional writing requirement. As indicated, there is probably no such need at present. Regarding electronic commerce in general, therefore, the aim of legislation in South Africa dealing with writing should be to ensure that an electronic document enjoys the same status as a paper document. In this way electronic commerce will be encouraged, and perhaps more importantly, it will ensure that there is no discrimination against a document merely on the basis that it exists in electronic form rather than in paper form. There is however no pressing need merely to avoid statutory formalities.

This brings us to the bill of lading, where there is of course no statutory requirement of writing. If one assumes for the moment that writing is a requirement for a bill of lading (a conclusion on

101 §9.8.6.1.

102 The provision in s 7 of the Singaporean Electronic Transactions Act 1998 (similar to Article 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996) does not apply to wills, negotiable instruments, trusts and powers of attorney, contracts for the disposition of immovable property or documents of title: see Nicoll 1999 EDI LR 126. The reasoning is that “there are a number of special contracts or instruments that are so familiar to the public, such as a will, or have become such well established figures of mercantile custom, such as a bill of lading, that their manifestation in paper form has become an integral part of their character.” Wright and Winn Electronic Commerce §14.08[D] gave a possible general definition that states that the requirement of writing is satisfied if the information is embodied in a Record. Record “means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form” but sensibly excludes negotiable instruments, documents of title and wills.
this will only be reached later),\textsuperscript{103} it may be beneficial for the development of an electronic bill of lading to have legislation similar to Article 6(1) of the Model Law in order for a court to recognize the electronic bill of lading as a bill of lading. However, it should be remembered that an instrument such as a bill of lading (and a bill of exchange) requires a much more comprehensive legal (and technical) framework before an electronic bill of lading can be recognized as the functional equivalent of a traditional bill of lading — regarding the bill of lading it will be shown in Chapter 12 that such a framework is indeed possible.\textsuperscript{104} There are also additional provisions in the Model Law\textsuperscript{105} that deal specifically with the carriage of goods and these provisions will be examined later. It should therefore be kept in mind that for legislation to provide solely that a bill of exchange or a bill of lading does not need to be in writing (which will be the effect of Article 6(1) of the Model Law) and allowing it to be electronically signed, might lead to uncertainty, although such an article might be beneficial in conjunction with further clauses.\textsuperscript{106} Apart from any prospective legislative intervention and leaving aside the aspect of negotiability for the moment, it is submitted that all the functions of writing in a paper bill of lading — which is essentially providing information — can be fulfilled easily by an electronic bill of lading.

9.7 Originality and Uniqueness\textsuperscript{107}

On paper a unique representation of information may be found.\textsuperscript{108} The original bill of exchange

\textsuperscript{103} The matter will be discussed in Chapter 12 §12.3.5.

\textsuperscript{104} See §§12.3 and 12.7.

\textsuperscript{105} Articles 16 and 17. For a discussion see Chapter 12 §12.6.

\textsuperscript{106} For a conclusion on this question see Chapter 12 §§12.6 and 12.9.

\textsuperscript{107} The UNCITRAL Model Law on Electronic Commerce 1996 Article 8(1) states (regarding an original): “Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.” Interestingly Article 8(3)(a) provides for the possibility of an indorsement without affecting originality (see Howland (1997) 32 European Transport Law 704). Further see UNCITRAL Guide to Enactment §§62-69 or UNCITRAL 1997 EDI LR 130-132.

\textsuperscript{108} Seipel Paper Laws 116.
(and not any copies) may be presented for payment. The original bill of lading can be presented in exchange for the delivery of the goods. The fact that one is dealing with an original bill of exchange or bill of lading, makes the document unique. There is an assurance that nobody else will obtain payment or the goods, because nobody else can be in possession of that unique document. Conversely, the drawee or the carrier want to be sure that they perform to the holder of the instrument, and there can be only one holder of the instrument because the instrument is unique.

It is submitted that to think in terms of originality and uniqueness will not help much in an electronic environment, even though an original can in a certain sense be created by way of cryptography usually in conjunction with a registry. One should rather think of what is accomplished by a bill of exchange or a bill of lading being unique, and that is that only one person can be holder of the instrument and only one person can obtain payment or delivery of the goods. Similarly in an electronic environment, the goal should be that only one party can obtain payment or delivery of the goods. The fact that an electronic message cannot be regarded as an original is one of the central problems facing the creation of an electronic bill of lading and will again be discussed more comprehensively later.

9.8 Signature

9.8.1 Introduction

A signature today seems to be an often repeated ritual imbued with many magical qualities. As in many other jurisdictions, South African law also require a signature before some

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109 Leaving aside for the moment the fact that the bill of lading is often issued in a set of three originals.

110 See Chapter 10 §10.4.

111 See Chapter 10 §10.4.1.

112 "The cases indicate that the original meaning of the term 'sign' is a 'mark' from the Latin signum": Ex Parte Goldman and Kalmer 1965 1 SA 464 (W) 468B; In re Trollip (1895) 12 SC 243 at 246; Putter v Provincial Insurance Co Ltd 1963 3 SA 145 (W) 148B.

113 See Vandenberghe Signature 59. In France the signature was first legally recognized in 1566. Wright and Winn Electronic Commerce §1.03[C] called the signature "a legal and ritualistic symbol of finality, assent, and authenticity."
instruments or legal acts will be recognized as valid. A signature is both more and less than authentication. On the one hand it is one way (among others) to authenticate a document, but on the other hand a signature is also more than mere authentication. A signature can for example be an expression of the will to be bound by a contract. There is no general definition of a signature in South African law. For the constitution of a valid bill of exchange, it needs to be signed by the drawer. Apart from this constitutive function, a signature on a bill can also guarantee its payment and effect its transfer by indorsement. The functions of the signature on a bill or a note are thus much wider than mere authentication. No definition of a signature is given in the Bills of Exchange Act. Regarding bills and notes, signature “means any mark — whether it be a person’s full name and surname, or his initials and surname, or only his initials, or a mere mark — placed on the instrument with the intention of identifying the signatory.” Therefore a cross, stamp, signature by facsimile and other marks will also qualify as signatures. When devising a digital signature, the same liberal approach should be of much help.

In the Wills Act “sign” is defined as including “the making of initials and, only in the case of a testator, the making of a mark and ‘signature’ has a corresponding meaning”. A will must be signed at the end by the testator in order for it to be valid. Such signature must be made or acknowledged by the testator in the presence of two witnesses who must also sign the will. If the will consists of more than one page, every page other than the last page must in addition also be signed by the testator anywhere on the page. A court is also granted the power to condone a document that does not comply with the formalities in section 2(1) as long as the

114 Bills of Exchange Act 34 of 1964 s 2(1). A promissory note must also be signed by the maker (s 87(1)).
115 Although only in a very general sense: Malan and Pretorius Bills of Exchange 97.
116 34 of 1964; Malan and Pretorius Bills of Exchange 97-98.
117 Malan and Pretorius Bills of Exchange 99.
118 Malan and Pretorius Bills of Exchange 99.
119 Malan and Pretorius Bills of Exchange 99-100.
120 7 of 1953 s 1 sv “sign”. Previously there was a great deal of debate as to whether initials constitute a signature.
121 Wills Act 7 of 1953 s 2(1)(a)(i). A will can also be signed by the making of a mark or by another person in the presence of the testator and under his direction: for more details see s 2(1). Regarding amendments see s 2(b).
122 s2(1)(a)(ii)-(iii).
123 s2(1)(a)(iv).
court is satisfied that the document was intended by a person to be his will or an amendment of his will.\textsuperscript{124}

It appears that what constitutes a signature in a specific case, must be interpreted with regard to the relevant legislation and considerations about the purpose of the signature in the particular legal concept. A signature is generally given a wide interpretation:

"Signature does not necessarily mean writing a person's Christian and surname but any mark which identifies it as the act 'of the party' .... To sign, as distinguished from writing one's name in full is to make such a mark as will represent the name of the person signing. ... Pencil signatures, signature by initials or by means of a stamp, or by mark, or by a party's writing below a printed heading are all sufficient under the Statute of Frauds".\textsuperscript{125}

In \textit{Bennett v Brumfitt}\textsuperscript{126} Bovill CJ held,

"The ordinary mode of affixing a signature to a document is not by hand alone, but by the hand coupled with some instrument, such as a pen or pencil. I see no distinction between using a pen or pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him."

Today one can perhaps argue that a signature can be made by a computer as the instrument instead of a pen. There is no need that a signature must be the accustomed mode of signature of a signatory.\textsuperscript{127} It is also not necessary that a signature must be written in ink. As long ago as 1826 it was held that an indorsement on a promissory note or a bill of exchange can be written

\textsuperscript{124} s2(3).

\textsuperscript{125} \textit{Van Niekerk v Smit} 1952 3 SA 17 (T) 25D-E; \textit{Chisnall and Chisnall v Sturgeon and Sturgeon} 1993 2 SA 642 (W) 645D-E; \textit{In re Trollip} (1895) 12 SC 243 at 246; \textit{Navidas (Pty) Ltd v Essop; Metha v Essop} 1994 4 SA 141 (A) 156E; \textit{Putter v Provincial Insurance CO Ltd} 1963 3 SA 145 (W) 148; \textit{Goodman v J Eban Ltd} [1954] 1 QB 550 (CA) 557. Regarding signatures in the context of testate succession in South Africa, see \textit{Jhajbhai v Master} 1971 2 SA 370 (D) 372C-D; \textit{Ex Parte Jackson: In re Estate Miller} 1991 2 SA 586 (W) 589H; Bell J in \textit{Van Vuuren v Van Vuuren} 2 Searle 116. In the \textit{Jhajbhai} case the court held that the writing of a name in capital letters is a signature for the purposes of the Wills Act. See further \textit{Ex Parte Goldman and Kalmer} 1965 1 SA 464 (W) 469C-D. On the other hand, as mentioned, there was a dispute for a long time as to whether initials should be regarded as a signature with reference to the Wills Act before being amended and the answer was no in many cases: see \textit{Melvill v The Master} 1984 3 SA 387 (C); \textit{Dempers v The Master} 1977 4 SA 44 (SWA); \textit{Harpur v Govindamall} 1993 4 SA 751 (A).

\textsuperscript{126} (1867) LR 3 CP 28 at 31.

\textsuperscript{127} \textit{Jhajbhai v Master} 1971 2 SA 370 (D) 372A, F. A reporter's footnote (a)\textsuperscript{1} in \textit{Morton v Copeland} 16 CB 516 (139 ER 861) at 535 stated that a signature must "be the accustomed mode of signature of a party." Muller J in the \textit{Jhajbhai} case (372E) indicated that the remark "is merely a Reporter's footnote, and is not borne out by the judgement."
Where a signature is demanded by statute, there is a further requirement that a signature may only be added to a document once the document is otherwise completed in full. There is no need that a bill of exchange (or a bill of lading) must only be signed after the bill of exchange has otherwise been completed in full. Where there is a statutory requirement for a signature, such signature must also be placed correctly on the document, or to put it somewhat differently, "[i]n order to comply with the statute it must appear from the document itself that the parties thereto appended their signatures in such a way and at such a place as to indicate that they did

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128 Geary v Physic (1826) 5 B & C 234 (108 ER 87) at 237-238; Importers Co Ltd v Westminster Bank Ltd [1927] 1 KB 869 at 874. Also see Bateman v Pennington (1840) III Moore 223 (13 ER 95); Lucas v James (1849) 7 Hare 410 (68 ER 170).

129 In cases where there is no legal requirement of writing, a document signed before it has been completed would be binding in the absence of fraud and error after signing: Fourlamel (Pty) Ltd v Maddison 1977 1 SA 333 (A) 342A.

130 In Van Rooyen v Hume Melville Motors (Edms) Bpk 1964 2 SA 68 (C) a preprinted hire-purchase agreement (in terms of the old Hire Purchase Act 36 of 1942 which provided in s4(1) that an agreement must be in writing and signed personally by the buyer) containing the usual terms of a hire-purchase contract was signed in blank by the defendant — ie without the names of the parties, the article being sold, the cash price, finance charges etc. The plaintiff later completed the document and signed it. The court held that the agreement is of no force and effect, as the document did not contain all the essential terms of a hire-purchase agreement at the time of signing: "What defendant signed was not an agreement but a piece of paper. ... I have no doubt that the object that the Legislature sought to serve by sec. 4 was that when the buyer signed he should have before him in black and white the terms of the agreement he was letting himself in for ..." (71D-F). To decide otherwise may lead to the fraudulent insertion of terms, uncertainty and thus possibly unnecessary litigation. In Fourlamel (Pty) Ltd v Maddison 1977 1 SA 333 (A) the court held that a contract of suretyship signed before containing all the terms of the contract (the names of the co-surety, creditor and principal debtor did not appear on the document at that stage) was invalid in terms of s 6 of Act 50 of 1956: "What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement" (341H). Cf Jurgens v Volkskas Bank Ltd 1993 1 SA 214 (A). In Raven Estates v Miller 1984 1 SA 251 (W) a similar conclusion as in the above cases was reached regarding the alienation of land.

131 Cf also Bills of Exchange Act 34 of 1964 s 18.
so as a token of execution.”  

D’Arcy v Blackburn, Jeffereys & Thorp Estate Agency\textsuperscript{133} Eksteen AJP held, “On the face of it the document in the present case has designated the space in which the contracting parties are required to signify the execution of their offer and acceptance. In such a case any signature in the body of the writing — or for that matter at the end of the additionally inserted clause 11\textsuperscript{134} — cannot be regarded as binding.” There is no need that a bill of exchange or a bill of lading must be signed in any particular place.

The effect of a signature was stated by Innes CJ in Burger v Central South African Railways:\textsuperscript{135}

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”

9.8.2 Traditional Signatures

Before discussing electronic signatures, it is necessary to examine the traditional signature. It is especially important to point out characteristics that people assume that signatures have, when in fact they do not have these characteristics at all.

The functions of a particular signature will differ according to the context in which the signature

\textsuperscript{132} D’Arcy v Blackburn, Jeffereys & Thorp Estate Agency 1985 2 SA 178 (E) 181D-E; Brack v Citystate Townhouses (Pty) Ltd 1982 3 SA 364 (W) 368H. In the Brack case the seller signed below the typed words “As witnesses” and not above the word “Seller” — ie in the wrong column. The space above the word “Seller” is therefore blank. The court held that the contract was null and void as it did not comply with the (now repealed and replaced) Contracts of Sale of Land Act 71 of 1969 s 1(1), not showing that it was signed by the seller. There can be no rectification of the contract, because no contract exists (367F-H, 369H). Also see Caton v Caton (1867) LR 2 HL 127 at 139, 142-143; Firstpost Homes Ltd v Johnson [1995] 1 WLR 1567 (CA) 1573F-G.

\textsuperscript{133} 1982 2 SA 178 (E) 182D-E.

\textsuperscript{134} Two additional clauses were inserted after the printed contract (actually on the reverse of the second page), and all the parties signed after the last inserted clause, but one of the purchasers did not also sign before the additional clauses in one of the spaces specifically demarcated for signatures. The space for the second purchaser’s signature is therefore blank.

\textsuperscript{135} 1903 TS 571 at 578. Approved in Bhikagee v Southern Aviation (Pty) Ltd 1949 4 SA 105 (E) 110 (“[b]y his signature he elected to take the risk, and he is bound”); George v Fairmead (Pty) Ltd 1958 2 SA 465 (A) 470C; Glenburn Hotels (Pty) Ltd v England 1972 2 SA 660 (RA) 663; Industrial and Mercantile Corporation v Anastassiou Brothers 1973 2 SA 601 (W) 605A-B; Keens Group Co (Pty) Ltd v Lotter 1989 1 SA 585 (C) 589C-D; Branco t/a Mr Cool v Gale 1996 1 SA 163 (E) 171F-I.
is used. In a very general sense, three functions of a signature can be identified: Firstly, a signature identifies the signatory, and thus also the source of the document. In Morton v Copeland the court held that a signature is “any mark which identifies it as the act of the party”. Secondly a signature authenticates the information in the document. According to Evershed MR in Goodman v J Eban Ld “the essential requirement of signing is the affixing in
some way, whether by writing with a pen or pencil or by otherwise impressing upon the
document, one’s name or ‘signature’ so as personally to authenticate the document.” 140 Thirdly
a signature constitutes an expression of the will of the signatory to be bound by the contents of
the document (ie an acceptance of liability).141 According to Maasdorp J in Richmond v
Crofton,142 “in case there is to be a written contract it cannot, it seems to me, be said to have
been fully executed until the consent of the parties has been expressed by their signature upon
the document or documents constituting the written contract.” In George v Fairmead (Pty) Lt143
Fagan CJ held, “When a man is asked to put his signature to a document he cannot fail to realize
that he is called upon to signify, by doing so, his assent to whatever words appear above his
signature.” Hoexter JA held in Jurgens v Volkskas Bank Ltd,144

“The function of a signature is to signify that the writing to which it pertains accords with the intention of the
signatory. It conveys an attestation by the person signing of his approval and authority for what is contained
in the document; and that it emanates from him.”

It will be shown below that the first two functions can be accomplished with relative ease by
way of cryptography: the signatory will be identified and the information will be authenticated.
The third function might seem to constitute some difficulty in a situation where signatures are
generated automatically by a computer. The solution is however that the expression of the will
to be bound should be sought in the will of the party that implemented the (automated) system.

140 [1954] 1 QB 550 (CA) 557 (my emphasis); R v Cowper (1890) 24 QBD 533 at 536; Fox v Bearblock (1881)
17 ChD 429 at 432.

141 In Fourlamel (Pty) Ltd v Maddison 1977 1 SA 333 (A) 342H Miller JA stated, “the party concerned is required
to manifest his assent to the agreement as recorded in a written document, by appending his signature to such
document.” Further see Nelson v Hodgetts Timbers (East London) (Pty) Ltd 1973 3 SA 37 (A) 44E; Guardhouse v Blackburn
(1866) LR 1 PD 109 at 116. Also see Lefebvre [1998] JBL 315; Wright and Winn
Electronic Commerce §14.01: “The law generally recognizes that a signature is any symbol a person adopts
to show that she approves a writing or a transaction. What is important is not what the symbol is, or the
technical reliability of the symbol, but rather the intent behind the symbol.” The intent to be bound to the
contract is of course not the only intent that may be indicated by a signature. “A signature may, for example,
signify an intent to be bound to the terms of the contract, the approval of a subordinate’s request for funding
of a project, confirmation that a signer has read and reviewed the contents of a memo, an indication that the
signer was the author of a document, or merely that the contents of a document have been shown to the signer
and that her or she has had an opportunity to review them”: Smedinghoff and Bro (1999) 17 JCIL 731.

142 (1898) 15 SC 183 at 189.

143 1958 2 SA 465 (A) 472A.

144 1993 1 SA 214 (A) 220E. Further see Roomer v Wedge Steel (Pty) Ltd 1998 1 SA 538 (N) 5411, 543B-C;
Chisnall and Chisnall v Sturgeon and Sturgeon 1993 2 SA 642 (W) 645E-F.
According to Reed\textsuperscript{145} “that intention is prima facie evidenced by the application of the encryption process.” It can further for example be proved that the alleged signatory controlled the computer that encrypted the document, or that the alleged signatory was the party that had access to the encryption key.\textsuperscript{146}

More important than showing what the functions of a signature are, is perhaps to highlight some of the misconceptions regarding the traditional signature. One should not have unrealistic expectations of an electronic signature where these expectations do not also materialise in the case of the traditional signature. People prefer the traditional signature because they think that it is signer-dependent\textsuperscript{147} (ie the signature is unique to the originator — only the signatory can sign in this way), message-dependent\textsuperscript{148} (the signature is attached permanently to the message) and inter-dependent\textsuperscript{149} (the signer deliberately signed the document to confer authenticity and to accept liability).\textsuperscript{150} Toh See Kiat argued that in reality the traditional signature is not one of those three things. There is no signer-dependency because a traditional signature can be forged so adeptly that it cannot be distinguished from the real signature by the average person.\textsuperscript{151} Apart from that a businessman will often simply not know whether a signature that appears on a contract is genuine or not — he will not know what the signature of the signatory looks like. There is no inter-dependency because a document can be signed involuntarily or in error.\textsuperscript{152} There is also no message-dependency as there is no requirement in English law that there must be a direct physical link between the signature and the particular document.\textsuperscript{153} Therefore the traditional signature does not require any of these three qualities for validity. Perhaps the conclusions of Toh See Kiat are somewhat harsh. In the normal case there will be signer-dependency, message-dependency and inter-dependency in the case of the traditional signature.

\textsuperscript{145} Reed \textit{Electronic Documents} 257.
\textsuperscript{146} Reed \textit{Electronic Documents} 258.
\textsuperscript{147} Cf Henriksen \textit{Trade and Transport} 45, 78 n 8.
\textsuperscript{148} Cf Henriksen \textit{Trade and Transport} 46 calling this requirement “data-dependent”, meaning that because the signature and the data belong together, no alterations have been made to the data.
\textsuperscript{149} Cf Henriksen \textit{Trade and Transport} 46.
\textsuperscript{150} Toh See Kiat \textit{Paperless International Trade} 39.
\textsuperscript{151} Toh See Kiat \textit{Paperless International Trade} 79.
\textsuperscript{152} Toh See Kiat \textit{Paperless International Trade} 79-80.
\textsuperscript{153} Toh See Kiat \textit{Paperless International Trade} 80.
There are however many exceptions to this normal situation: sometimes there may be forgeries and errors. Toh’s argument nevertheless indicates that, for example, one should not always expect inter-dependency in the case of an electronic signature if it does not always exist in the case of the traditional signature.

Toh See Kiat also examined whether English law requires that certain characteristics must appear from the signature itself to constitute a valid signature. Toh See Kiat inter alia found that the following characteristics are not necessary: the identity of the person claiming to be bound by the signature (someone can for example sign in a purely representative capacity), the full name of the signer (marks and initials are acceptable), handwriting (printed signatures and stamps are acceptable), legibility, uniqueness (crosses are not unique but are acceptable as signatures) and paper as a medium. He concluded that “[o]nly the mark needs to be visible on the document itself.” All the other characteristics may be proved by extraneous evidence. They are not required to constitute a valid signature as such.

Therefore people might expect security and guarantees from electronic signatures which they never previously expected from traditional signatures. The same standard being applied to conventional signatures should be applied to electronic signatures.

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154 Toh See Kiat Paperless International Trade 80-83.
155 Toh See Kiat Paperless International Trade 83.
156 Baum Electronic Contracting 127-128; Gregory 1999 EDI LR 53-54.
9.8.3 Intention

It seems that intention plays an important part in determining whether a signature is constituted. In *Jhajbhai v Master* Muller J held, “The intention of the witness in writing or signing his name is the criterion. If he intends his mode of writing or signing his name to represent his signature, it is effective as such.” Similarly in *Ex Parte Goldman and Kalmer* Galgut J stated, “if a sign was made by a person, and it was intended by the author that the sign was to be a signature, it would be regarded as a signature.” However, in *Melvill v The Master* Friedman J stated with reference to the *Jhajbhai* case:

“With great respect to the learned Judge, intention cannot be the criterion. Obviously the person signing must have the intention of signing his name, but whether he has, in the result, given effect to that intention, and produced what can be classified as a signature, requires to be determined objectively. Were it not so, the door would be opened to abuse as it could be contended that any writing or printing which is not a mark, was intended to be the author’s signature, even if, objectively considered, what was written was not his signature at all.”

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157 After examining the intention with which a signature is made, Reed *Electronic Documents* stated that a “mark” must probably also be made before a signature can be constituted. A signature must therefore also be a mark on a document. It is submitted that the three cases he cited in support of this contention firstly do not indicate a general trend by any stretch of the imagination, and secondly none of the cases pertinently addresses the issue. Reed’s argument is that an electronic document can therefore never be signed because there is no visible and physical alteration made to the thing that is marked. According to Reed a digital signature is not visible and it does not alter the storage medium except at a microscopic level. It is submitted that this is not correct (apart from the fact that to begin with there is no requirement that a signature must also constitute a mark). An instrument (such as a computer) can be used to read or decrypt the digital signature, and both the information content of the document and the carrier of the information (contra Reed) are altered — at what level is irrelevant.

158 *Ex Parte Jackson: In re Estate Miller* 1991 2 SA 586 (W) 590B; *Ex Parte Singh* 1981 1 SA 793 (W) 798E-F. Further see the minority judgement of Lord Esher MR in *R v Cowper* 24 QBD 533 at 535: “I know of no case with the exception of a will in which, if a man’s name is put down by him with the intent that it shall be treated as his signature, that is insufficient, because it is not in his handwriting.” There is also sometimes a requirement that personal attention must be paid to a signature in English law: see the *Cowper* decision at 536; *Goodman v J Eban Ld* [1954] 1 QB 550 at 557, 561. Toh See Kiat *Paperless International Trade* wrote that apart from statutory requirements for personal attention “the common law does not call for personal attention”. It is therefore not a general requirement, and a signature produced by a computer or other mechanical device will be valid.

159 *Harpur v Govindamall* 1993 4 SA 751 (A) 767D-F.

160 Regarding the *Goldman* case see 397F-I. At 396F Friedman J held, “Intention cannot make a signature of something which is not a signature.” A further problem (which will usually occur only within the ambit of testate succession) is that the testator cannot testify as to what his intention was (396G-H). Also see *Van Heerden JA in Harpur v Govindamall* 1993 4 SA 751 (A) 767D-F.
Admittedly intention cannot make any and every act a signature, but it is submitted that where the functions of a signature are satisfied, intention should be the overriding criterion. Mere identification is also not sufficient. In Selby v Selby\(^{161}\) a letter beginning “My dear Robert” and ending “Do me the justice to believe me the most affectionate of mothers” was held not to be signed for the purposes of the Statute of Frauds. The court held,\(^{162}\)

“It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name — such as a person unable to write making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word ‘I’ or ‘me’ would be enough, provided you can prove the hand-writing.”

It is submitted that when dealing with the effect of an electronic signature, a court should place a lot of emphasis on the intention of the signatory so as to ensure the validity of the electronic signature. Lastly it should be kept in mind that the use of intention to determine whether a signature is constituted, should not be confused with the third function of a signature discussed above.

### 9.8.4 Electronic Signatures

Lefebre wrote,\(^{163}\)

“It should be pointed out, however, that an electronic signature is not and may never be, no matter how much the technology advances, a signature as it is generally understood in the classic meaning of the word. ... The electronic signature should therefore be taken for what it is: it represents a metaphor to designate the mechanisms by which the parties to a transaction that has been performed by electronic means of communication will identify themselves and manifest their intention to appropriate the content of an instrument or transaction.”

It is certainly true that an electronic signature is not the same thing as what has been characterized under the concept signature earlier this century, however widely interpreted. The

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\(^{161}\) (1817) 3 Mer 2 (36 ER 1).

\(^{162}\) 6.

\(^{163}\) [1998] JBL 312-313.
functions of an electronic signature will nevertheless be very similar. According to Winn, "Digital signatures may play a role in the information revolution similar to the role played by negotiable instruments in the industrial revolution." Whether digital signatures will have such a far-reaching effect, remains to be seen, but various forms of electronic signatures will definitely form one of the cornerstones of electronic commerce.

EDI and electronic commerce in general create new challenges for the traditional signature. Possible electronic signatures include personal identification numbers, sometimes used in conjunction with cards, as well as the unique qualities of a person (collectively referred to as biometrics) such as fingerprints, retinal scans, signature dynamics and voice analysis. Certain electronic signatures are equal to or superior to traditional signatures. It remains to be seen to what extent South African law and other jurisdictions accept electronic signatures within the confines of existing legislation. Much depends of course on the question whether electronic and traditional signatures fulfill the same or similar functions.

There are however quite a few differences between some electronic signatures and the traditional signature. Most of the electronic signatures listed in the previous paragraph grant access to a system; it is a part of a procedure to gain access. Many of these signatures, including

165 See Wright and Winn Electronic Commerce §3.06[A] regarding smart cards.
166 For a comprehensive discussion see Jueneman and Robertson 38 Jurimetrics J 447-455 (1998).
167 See Wright (1996) 12 CLSR 247 regarding PenOp signatures: signing takes place by way of a pen or stylus on a digitizer pad attached to a computer. Not only is an image of the signature formed but "the unique behaviour that any individual exhibits when signing an autograph, such as the speed, angle, and grace with which the various loops, lines, and crosses of the autograph are imparted" is recorded. These statistical measurements are called biometric measurements. According to the developer, "a qualified handwriting expert can be just as effective judging the authenticity of a signature captured with PenOp as he would be judging the same signature inscribed in ink on paper."
168 See Jueneman and Robertson 38 Jurimetrics J 428 (1998); Vandenberghe Signature 62-63; Wright and Winn Electronic Commerce §3.06[B]; Bradgate Evidential Issues 34-36; Kelly (1992) 16 Tul Mar LJ 357.
170 Vandenberghe Signature 63-65.
those based on biometric identification, it may therefore be called access controls. It is not an expression of the person's will to be bound. What happens after access has been gained, cannot be determined at this stage. There is no indication of the will of the person gaining access.

Regarding personal identification numbers specifically, the traditional signature is a personal creation of the signer, whereas this is not the case with a personal identification number or code. A person can have only one traditional signature, but the same person may have many identification numbers. A personal identification number may also be imitated purely by chance, while it is virtually impossible for that to happen with a classical signature. Therefore these electronic signatures (personal identification numbers) neither authenticate the presence of the signer, nor express a will to be bound. The sole purpose is to gain access. The functions of the traditional signature and these particular electronic signatures, are therefore different.

There are also other possible electronic signatures, that are not necessarily access controls. A simple form is the “From” line at the top of an e-mail message. The facts might indicate that the sender intended this to be a signature and that his intention is to be bound to the message by signing in this way. A somewhat more sophisticated system that will provide more assurances to the receiver, is to end the e-mail message by “Signed: X” or “My name at the close of this message is my signature and shows my assent to this agreement. — X.” This shows the intention of the signatory clearly. On the Internet a signature could consist of clicking a button next to a message requesting one to click the button if one agrees to the displayed terms. Wright and Winn called this a clickwrap agreement. Finally, although biometrics were regarded as access

172 See Kiat Paperless International Trade 40-41 and Baum Electronic Transaction Records 154-156 for examples of access controls.
173 But also see Toh See Kiat Paperless Internation Trade 41 who pointed out that even traditional signatures may be attacked because no consent is present.
174 Even where a person can choose his own PIN, he is limited to a certain number of numerals.
175 Vandenberghe Signature 65.
176 For a discussion see Wright and Winn Electronic Commerce §14.02.
177 Also see Gregory 1999 EDI LR 55.
controls above, it is possible (again a factual question) that a voice print might for example indicate an intention to be bound. It is submitted that many of these electronic signatures can fulfil all the functions of a traditional signature.

9.8.5 Digital Signatures

There is also another kind of electronic signature, more properly called a digital signature.179 The public-key system of cryptography works in the following way:180 A wants to send a message to B. B's public key is distributed or published. A encrypts the message using B's public key. Only B can decrypt the message with his private key — a key he alone possesses. It is practically impossible to work out B's private key from his published public key.181 This is called an asymmetric encryption system,182 because two separate keys are necessary to encrypt and decrypt the message.183 The great advantage of asymmetric encryption is that it is not necessary for

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179 According to Wright and Winn Electronic Commerce §3.06[D] the term "digital signature" is a term of art preferably referring specifically to a signature created through public-key cryptography. The term "electronic signature" is a wider concept including such digital signatures as well as all the other types of electronic signatures referred to above: see Effross 38 Jurimetrics J 390 n 26 (1998); Information Security Committee 38 Jurimetrics J 244 (1998); Winn (1998) 49 South Carolina Law Review 740; Jueneman and Robertson 38 Jurimetrics J 437 (1998); Smedinghoff and Bro (1999) 17 JCLL 730-731; Richards (1999) 17 JCLL 876-877; Winn 72 Tul L Rev 1198 (1998). In practice the terms are sometimes used interchangeably though.

180 Henriksen Trade and Transport 53-58; Toh See Kiat Paperless International Trade 39-40. The example given is similar to the example of Henriksen and Toh See Kiat. Further see Wright and Winn Electronic Commerce §3.06[C]-[D]; Merrill 1995 EDI LR 109-111; Reed 52 MLR 658-659; Reed Electronic Documents 254-256; Bradgate Evidential Issues 36; Gripman (1999) 17 JCLL 776-779; Baker (1998) 32 International Lawyer 965-966; Chong (1998) 14 CLSR 326 (for a good graphical representation).

181 Merrill 1995 EDI LR 110; Reed Electronic Documents 254; Information Security Committee 38 Jurimetrics J 249 n 23 (1998). The term used is that it is "computationally infeasible" to calculate the private key from the public key. According to Reed 252 n 83, "[c]omputational infeasibility means that although the message can in theory be decoded, the amount of time this would take is so large that for practical purposes the encryption can be regarded as secure."

182 Regarding symmetric encryption (also called single key encryption or private key encryption), where the same key is used to encrypt and decrypt the information, see Reed Electronic Documents 251-253; Szafran (1998) 3 Communications Law 38-39; Gripman (1999) 17 JCLL 774-776; Richards (1999) 17 JCLL 879-880 n 35; Mack (1999) 17 JCLL 986. As the two parties each have the same key, either one of them can alter the information and thereafter encrypt the information again.

183 Anderson 1994 EDI LR 45. The keys work both ways, and the words encryption and decryption are used merely for linguistic purposes and ease of reading. For example, a message can be encrypted with the secret key and then decrypted with the public key, but the same message can also be encrypted with the public key and decrypted with the secret key: see Henriksen Trade and Transport 54-55.
parties to physically exchange any keys (the public keys are published).\footnote{Anderson 1994 \textit{EDI LR} 45; Merrill 1995 \textit{EDI LR} 110; Szafran (1998) 3 \textit{Communications Law} 39; Chong (1998) 14 \textit{CLSR} 322-323; Winn (1998) 49 \textit{South Carolina Law Review} 762-763; Saunders (1999) 17 \textit{JCIL} 948; Winn 72 \textit{Tul L Rev} 1199 (1998).} Of course private keys should be kept secure. There is further a need for the general administration of the system including the reliable distribution of public keys as well as the revocation of public keys. This is done by a certification authority (CA).\footnote{For a discussion see Wright and Winn \textit{Electronic Commerce} §3.06[D]; Merrill 1995 \textit{EDI LR} 111; Szafran (1998) 3 \textit{Communications Law} 40; Information Security Committee 38 \textit{Jurimetrics J} 252-259 (1998); Chong (1998) 14 \textit{CLSR} 325, 327; Winn (1998) 49 \textit{South Carolina Law Review} 765 et seq; Gripman (1999) 17 \textit{JCIL} 779-782; Anderson and Closen (1999) 17 \textit{JCIL} 852 et seq; Richards (1999) 17 \textit{JCIL} 881-885; Osty and Pulcanio (1999) 17 \textit{JCIL} 964-968; Smith and Kiefer (1999) 116 \textit{Banking Law Journal} 341 et seq; Winn 72 \textit{Tul L Rev} 1202-1204 (1998).} When a CA is sure that a party will be using a digital signature in accordance with its policies a “certificate” digitally signed by the CA is issued identifying the party\footnote{As indicated by the Information Security Committee 38 \textit{Jurimetrics J} 252-253 (1998) “a public and private key pair has no intrinsic association with any person; it is simply a pair of numbers.”} (called the subscriber), the CA and containing the subscriber’s public key. Someone relying on the certificate knows there is a definite link between a public key and a specific party, and therefore that party will be bound by the message.

There is, however, still the possibility that B may create messages and encrypt them with his own public key, and thereafter allege that A sent them, or B can simply not be sure that the message in fact originated from A. To prevent this, a double encryption system is used. By using this system a unique digital signature is created (by A in this example). B, the receiver of the message, is now certain of A’s identity, secrecy and the contents of the message. The system works in the following way:\footnote{Toh See Kiat \textit{Paperless International Trade} 40 illustrated the process in notational form.} A wants to send a message to B. A encrypts the message using his private key.\footnote{Usually the whole message is not encrypted. The message is run through a “hash function” to produce a “hash result”: “Technically speaking, a ‘hash function or message digest algorithm’ is an algorithm that processes the message ... and generates a short and unique ‘distillate’ from it. This distillate is called the ‘hash result’ or ‘message digest’” (Chong (1998) 14 \textit{CLSR} 325). Only the hash result is encrypted. Normally the digital signature is then attached to the message. The receiver also runs the message through the same hash function, and compares that hash result to the (decrypted) hash result received. If the message has been changed, the hash results will differ. The reason for using hash functions is that less data is needed to create digital signatures. It is furthermore virtually impossible to construct the message from the message digest when a one-way hash function is used. For more information see Information Security Committee 38 \textit{Jurimetrics J} 249-251 (1998); (continued...)} The result of this is A’s digital signature. A then re-encrypts the above result...
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(ie the digital signature) using B's public key, and sends the result to B. B then decrypts what he received with his private key, and that results in A's digital signature. To extract the message, B uses the public key of A.

B receives both a signature and a message. B knows (and can prove) that only A could have created the signature, and B can further not alter the message as he cannot generate a new signature without A's private key. A digital signature is "by definition unforgeable since the sender maintains and protects his private key, both keys work only one way and a secure and reliable public key storage and maintenance infrastructure is in place." Because the signature can be obtained only from that specific message, message-dependency is present. Because the signature can only originate from one specific sender (no one else knows A's secret encryption key), there is signer-dependency: "an intelligible message is extracted from the otherwise unintelligible 'signature' by the sender's [public] key". It is also possible to ensure inter-dependency contractually, although it is probably correct to say the digital signature is the result of a specific act thus showing the necessary intent. The differences between these digital signatures and handwritten signatures are basically twofold: Firstly, the digital signature can in principle not be imitated (except if someone gets hold of the private key), while a traditional signature may always eventually be duplicated. Secondly the traditional handwritten signature remains essentially the same on different documents, but digital signatures are different for each

188 (...continued)

189 Henriksen Trade and Transport 58

190 Brown (1994) 32 IEEE Communications Magazine 78.

191 Henriksen Trade and Transport 59 wrote, "Instead of linking the paper and the signature physically by signing the document, the signature and the contents of the message are linked mathematically by using this cryptograph system. In essence the result will be the same." Also see Henriksen 65.

192 Toh See Kiat Paperless International Trade 40; Henriksen Trade and Transport 65.

193 Toh See Kiat Paperless International Trade 40.

194 For ways in which to secure the private key see Information Security Committee 38 Jurimetrics J 248 n 20 (1998); Jueneman and Robertson 38 Jurimetrics J 428, 442-445 (1998); Anderson and Closen (1999) 17 JCIL 853-854 n 132.
message, as the signature is essentially the specific encrypted message. The digital signature therefore fulfills — in an even better and more secure way — all three the general functions of the traditional signature discussed above: it identifies the signatory, it authenticates the information and it constitutes an expression of the will of the signatory to be bound.

9.8.6 Legal Reform

9.8.6.1 Introduction

It is often thought that legislation will clear up all uncertainty regarding writing and signature in an electronic environment. This is simply not true, even in the case of traditional writing and signature requirements. Legislation cannot provide for all permutations, and might be especially inflexible in a rapidly changing digital world. Wright and Winn wrote, “Ambiguity is not always bad. One could regard it as a strip of flexibility in the fabric of the law. ... In fact, law often works best when it speaks in broad, flexible terms that can be adapted to suit different circumstances.”

There are different ways in which to effect a revision of the current law. Before examining these different methods, it is of course possible to maintain the status quo. For example, there may be no desire to make a will in electronic form, or to do away with consumer protection laws requiring writing and signature. This approach will further leave it up to the courts interpret requirements such as writing and signatures, leading perhaps to legal uncertainty. Regarding a revision of the law, it is firstly possible to eliminate formal requirements such as writing and

197 Henriksen Trade and Transport 55; Szafran (1998) 3 Communications Law 40.
198 See Wright and Winn Electronic Commerce §14.03 figure 14-1 for a list of different interpretations of writing and signature in the traditional sense in American law.
199 Electronic Commerce §14.03.
201 Apart from a video will discussed by Sonnekus 1990 TSAR 114 et seq.
202 Wright and Winn Electronic Commerce §14.08 [A].
203 See Wright and Winn Electronic Commerce §14.08 [F]; Reed Electronic Documents 301-303.
signature. This will require careful consideration of each individual instance where writing and signature is required. It might however still be necessary to place electronically signed documents on equal footing with their paper counterparts. Secondly one can recognize electronic methods explicitly by way of legislation. A drawback might be that the legislation rapidly becomes obsolete, especially when dealing with changing technology. These options will be discussed below. Of course a simple general legislative recognition of writing and signature will not suddenly make an electronic bill of lading possible, as none of the essential questions about how it should function are answered. Thirdly definitions in existing statutes may be amended.

9.8.6.2 Some American Solutions and the UNCITRAL Model Law

Utah famously enacted the world’s first “ambitious and complex” Digital Signature Act in

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204 See Wright and Winn Electronic Commerce §14.08 [B] for arguments for and against retaining these formal requirements.
205 See Wright and Winn Electronic Commerce §14.08 [C].
207 See Wright and Winn Electronic Commerce §14.08 [C].
208 See Wright and Winn Electronic Commerce §14.08 [D]; Reed Electronic Documents 304-305.
209 See Nicoll 1999 EDI LR 127-131 regarding the Singaporean Electronic Transactions Act 1998 which distinguishes between electronic signatures (which has exactly the same effect as a traditional signature) and secure signatures (in which case there is a rebuttable presumption that the secure signature is that of the person to whom it correlates and that it was affixed with the intention of signing or approving the record). Secure signatures are divided into secure digital signatures (based on asymmetric cryptography and trustworthy certificates) and an open category of other secure electronic signatures. The latter category “has the advantage of permitting a method of security different to a digital signature including technologies yet to be invented” (Nicoll 130). Regarding the Digital Signatures Act 1997 of Malaysia that is based substantially on the Utah Digital Signature Act (and thus limited to asymmetric cryptography) see Chong (1998) 14 CLSR 327-331. Regarding the German Signaturgesetz see Kuner and Miedbrodt 1999 EDI LR 148-149. Further see Julià-Barceló and Vinje (1998) 14 CLSR 303 et seq; Baker (1997) 31 International Lawyer 729 et seq.
210 The Utah model was followed in Minnesota and Washington: Robertson (1998) 49 South Carolina Law Review 819; Osty and Pulcanio (1999) 17 JCIL 971, 972. Other states such as Wyoming provided for signing electronic documents, but only within the context of filing documents with the government electronically: see Wright and Winn Electronic Commerce §14.08 [C][1]. In California §16.5 of the California Government Code only applies to transactions involving written communications with a public entity: Wright and Winn §14.08 [C][3]. For a discussion of the different types of transactions covered by different electronic signature statutes (continued...)
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1995. The Act applies to digital signatures by way of public-key cryptography appended to all types of electronic messages, and involving a certification authority (CA) licensed in Utah. The results of a signed message complying with the requirements of the Act, are that the message is deemed signed for legal purposes, it is presumed that the signature belongs to the subscriber who owns the private key, and the message is as valid, enforceable and effective as if it had been written on paper.

One point of criticism against the Utah Act is that it is limited only to digital signatures making use of public-key cryptography. The reason for this limitation is that public-key cryptography is a proven and reliable system. Wright and Winn pointed out that people might want to use the technology differently or use completely different technologies, and as such the Act will hinder competition and innovation. In California §16.5 of the California Government Code provides (although limited to transactions involving the state government) that a digital signature embodies the following attributes: it is unique to the person using it, it is capable of verification, it is under the sole control of the person using it, it is linked to data in such a manner that if the data are changed, the digital signature is invalidated and it conforms to regulations adopted by the Secretary of State. “Digital signature” is defined as “an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual


211 Wims 1995 EDI LR 155; Livermore and Euarjai (1997) 28 J Mar L & Com 58. There are now electronic signature statutes enacted or under consideration in 49 US states (Smedinghoff and Bro (1999) 17 JCIL 726; Osty and Pulcanio (1999) 17 JCIL 961 n 1). See Smedinghoff and Bro 738-742 for a discussion of these statutes divided into the following three categories: “(1) all electronic signatures satisfy legal signature requirements; (2) electronic signatures satisfy legal requirements only when they possess certain security attributes; or (3) digital signatures satisfy legal requirements.”

212 The Act was amended extensively in 1996: Wright and Winn Electronic Commerce §14.08 [C][2].


214 A broad approach was also followed in Florida: see Robertson (1998) 49 South Carolina Law Review 822-823, 826.

215 Used here in the sense of an electronic signature.

216 For a critical discussion of these first four requirements see Smedinghoff and Bro (1999) 17 JCIL 740-741 n 64. Much of their criticism is directed at the fact that these are not requirements for the traditional signature.
signature.” According to Wright and Winn because of the objective criteria set, “[i]t supports all
effective technologies, now known or to be invented” and the “approach is flexible and
encourages innovation.” A further point of criticism against the Utah Act is the over-regulation
of certification authorities, discouraging the emergence of unlicensed certification authorities.

Many commentators suggested that the widely diverging electronic signature legislation in the
US hinders electronic commerce more than it helps, in effect creating a barrier to electronic
commerce.\(^{217}\) According to one commentator, “the variety of state laws and the inconsistency
in their provisions create an atmosphere of confusion and untrustworthiness that may ultimately
impede the overall expansion of e-commerce.”\(^ {218}\) Winn formulated one reason for the diverging
approaches in different US states as follows: “an element of competition to be the center of high-
technology commerce inspired a race for leadership rather than cooperation”.

Digital signature legislation can therefore be technology specific as in Utah or technology neutral
as in California. It is submitted that neither method is better than the other. To regulate digital
signatures based on public-key cryptography and certification authorities properly, the legislation
should of course be technology specific. But there must also be room for other types of electronic
signatures with technology neutral enabling legislation.\(^ {219}\) It is therefore submitted that there is
a place both for technology specific and technology neutral legislation, and the one should not
be seen as excluding the other. At this stage South Africa should not go beyond technology
neutral legislation, therefore waiting for more international certainty on technology specific
legislation to avoid adding to the diverging American approaches. The Australian Electronic
Transactions Act 1999 also followed a technology neutral approach.\(^ {220}\)

The UNCITRAL Model Law on Electronic Commerce 1996 is an excellent example of possible
technology neutral legislation and deals with signature in the following way:\(^ {221}\)

Where the law requires a signature of a person, that requirement is met in relation to a data message if:

\(^{217}\) See eg Smedinghoff and Bro (1999) 17 *JCIL* 744; Baker (1998) 32 *International Lawyer* 963, 970; Lui-Kwan

\(^{218}\) Mack (1999) 17 *JCIL* 996.


\(^{220}\) See s 10.

\(^{221}\) Article 7(1). Also see the Australian Electronic Transactions Act 1999 s 10(1)(a)-(b).
a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement. 222

The two basic requirements are therefore identification of the signatory and approval of the message. In the Guide to Enactment of the Model Law it is further correctly stated, "the mere signing of a data message by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the data message. Whether a data message that fulfilled the requirement of a signature has legal validity is to be settled under the law applicable outside the Model Law." 223 This conforms with the position regarding traditional signatures.

9.8.7 Conclusion: Signature

The remarks made in the paragraph that concluded the discussion on writing are also valid here. 224 Regarding those few instances where there is a statutory requirement for a signature, it is submitted that as in the case of writing requirements, a court should be loathe to recognize an electronic signature as satisfying such requirement. Regarding electronic commerce in general, it will be emphasized again that it has been stated that the problem is not so much that provision must be made for the recognition of electronic signatures where there are formal statutory signature requirements, but that any legislation should ensure that electronic signatures are placed on the same footing and treated in the same way as traditional signatures. If it is accepted that a bill of lading must be signed as matter of law, 225 then legislation dealing with electronic

222 For the factors to be taken into account in this regard, see UNCITRAL Guide to Enactment §58 or UNCITRAL 1997 EDI LR 129. These factors include (apart from any other relevant factor and some further factors not listed here) the sophistication of the equipment used by the parties, the nature of the parties' trade activity, the frequency of their commercial transactions, the kind and size of the transaction, the importance and value of the information contained in the data message and the degree of acceptance of the method of identification in the relevant industry. According to Nicoll 1999 EDI LR 130 "[t]he wisdom of prescribing "commercial reasonableness" [the term used in the Singaporean Electronic Transactions Act 1998] is that it recognizes the expense involved in providing for a very secure system and that such expense may not be justified in light of the particular application."

223 UNCITRAL Guide to Enactment §61.

224 See §9.6.6.

225 This aspect will be discussed in Chapter 12 §12.3.5.
signatures will be beneficial for the recognition of an electronic bill of lading.

It is further submitted that many electronic signatures are able to fulfil the same functions as the traditional signature, and that a digital signature based on asymmetric cryptography will fulfil those functions without any doubt and even better than a traditional signature. It is further submitted that even without any new legislation dealing with electronic commerce in South Africa, a court having regard to the functions of a signature and the intention of the signatory, must be able to find that an electronic bill of lading is signed by way of a digital signature.

9.9 Formation of Contracts

With the advent of EDI a computer can decide whether to place an order and then places that order without any human involvement. The computer itself, however, cannot form the human will to be bound which is required for the formation of a contract. With the ongoing development of artificial intelligence, it might become even more difficult to ascribe a human will to somebody. Although it is generally agreed that a party should be bound to contracts concluded by an intelligent computer, it is not yet absolutely clear what the basis of such a contract should be.

It is submitted, as already referred to above, that the will to be bound should be sought in the will of the party on whose behalf the computer is functioning. That party knew beforehand that his will is going to be expressed by a computer often generating automated

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226 There is of course no reason why offer and acceptance and thus consensus cannot be achieved by way of EDI. For a discussion see Van der Klaauw-Koops Totstandkoming van Overeenkomst 38-45; Nimmer (1996) 14 JCIL 215-217. Regarding liability in an EDI environment (both contractual and delictual) see Katus Aansprakelijkheidsposities 53 et seq; Galtung Paperless Systems 94-116. Article 11 of the UNCITRAL Model Law on Electronic Commerce 1996 provides that “an offer and the acceptance of an offer may be expressed by data messages.” There is no real need for such a provision, but it might “promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means” (UNCITRAL Guide to Enactment §76).

227 See Van der Klaauw-Koops Totstandkoming van Overeenkomst 35, 40; Nicoll [1998] JBL 35-36, 43-44; Nimmer (1996) 14 JCIL 212: it can even be said that “human choices may be actively discouraged in seeking the optimal business communication environment.”

228 For a discussion see Van der Klaauw-Koops Totstandkoming van Overeenkomst 40-42. Also see Article 13(2) of the UNCITRAL Model Law on Electronic Commerce 1996: “a data message is deemed to be that of the originator if it was sent ... by an information system programmed by, or on behalf of, the originator to operate automatically.”
messages, and thus agreed to be bound by the actions of the computer. Just as one can express one's will by writing on a piece of paper, now a party's will is expressed by a computer running a specific program in accordance with the wishes of that party. To regard the computer as an agent is complicating a relatively uncomplicated issue.

There are a few differences between contracting with EDI and making contracts over the Internet, although it is submitted that none are really fundamental. In the case of EDI the messages are structured, while the messages used in Internet contracting will often be in free-form. EDI contracting will normally take place on the basis of an interchange agreement, while in the case of Internet contracting there might be no prior contract. EDI contracting may take place without direct human intervention, while this is usually not so with Internet contracting. In an EDI relationship the parties would normally be huge commercial companies, while Internet contracting will take place between such a commercial company and an individual.

The time and place of contracting are normally determined at the time and at the place where the offeror is notified that his offer has been accepted. A departure from the information theory is made in the case of postal contracts. Such contracts are concluded at the time and place the acceptance is posted. Most authors agree that the expedition theory should generally not be

229 See Julià-Barcelò 1999 EDI LR 158.

230 Smith (ed) Internet Law 94; Street and Grant Law of the Internet 3. Of course none of these differences can be regarded as absolutes. Smith further felt that these differences between EDI and the Internet will often mean that solutions to problems will be different.

231 Van der Merwe et al Contract 43. This is called the information theory.

232 Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd 1921 CPD 244 at 266: "where in the ordinary course the Post Office is used as the channel of communication, and a written offer is made, the offer becomes a contract on the posting of the letter of acceptance." Further see Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 332-334 (dealing with a contract concluded by telex); Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH [1982] 1 All ER 293 at 295-296, 297 (also dealing with acceptance by telex); Van der Merwe et al Contract 51-56; Visser and Pistorius 2000 ABLU 39; Pistorius 1999 SA Merc LJ 287-288. A problem might arise when the communications are not instantaneous for some reason. In the Brinkibon case at 296 the court held, "[n]o universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie". It is submitted that these considerations will very seldom dictate a departure from the information theory — which is the theory that is generally applicable — in the case of EDI contracts. If the offeror does not check his electronic mailbox and therefore is unaware of the acceptance, the message should still be treated as delivered: see the Brinkibon case at 297 and the Entores case at 333. According to Kerr Contract 110, dealing with a telephone answering (continued...
applied in the case of EDI contracts. Even though EDI communications are not necessarily instantaneous, an acknowledgement can be returned reasonably promptly, and there will be no reason for a departure from the information theory.

### 9.10 Interchange Agreements

Interchange agreements are concluded to deal with those areas of the law that are not clear at the moment, or that the parties want to handle in a way different to the current positive law that does not really cater for electronic commerce. Examples of clauses in interchange agreements include the obligation to use EDI, standards for communication, the avoidance of traditional legal formalities like writing and signature, evidential questions, liability, choice of law, security and authentication.

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(...continued)

machine, "it is suggested that, in the absence of special circumstances the contract is entered into when the offeror plays back the recording and hears the message, or, if there is no matter of higher priority requiring his attention, when he could and should have played it back."

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232 Malan 1990 *Stell LR* 167, 169; Myburgh [1993] *NZLJ* 326-327; Millard *Contractual Issues* 46; Kelly (1992) 16 *Tul Mar L* 360; Boss and Winn (1997) 52 *Business Lawyer* 1482; Kerr *Contract* 110. Also see Wright and Winn *Electronic Commerce* §13.06; Nimmer (1996) 14 *JCIL* 223-224; Bagrain (1998) 6 *Juta's Business Law* 51; Mitrakas *Open EDI* 48-53. Noeding (1998) 3 *Communications Law* 86 suggested that because e-mails differ from instantaneous communications such as the telephone or fax (because "they are not sent directly from the offeree to the offeror" as network service providers are involved, e-mail "is converted into digital form and broken into digital chunks" when sent, and the sender finds it difficult to "know whether and when the e-mail was received and whether it was complete and garbled"), the postal rule should apply in such cases. It is submitted, however, that generally the circumstances surrounding the use of e-mail should not indicate a departure from the information theory which is the default theory to be applied. Also see Turner and Brennan [1997] 11 *ICCLR* 383; Bagrain 51. For comprehensive provisions on the time and place of the dispatch and receipt of data messages see UNCITRAL Model Law on Electronic Commerce 1996 Article 15 and UNCITRAL *Guide to Enactment* §§100-107. Much simplified, receipt (for dispatch see Article 15(1)) of a data message occurs when the data message enters the information system of the addressee (see Article 15(2) for more permutations). Even more importantly, Article 15(4) provides that "a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received where the addressee has its place of business." The effect of this provision, very sensibly, is that the location of the information systems (that might be anywhere in the world), is irrelevant. For similar provisions see the Australian Electronic Transactions Act 1999 s 14(5)-(6).


An interchange agreement cannot solve all legal issues. An interchange agreement cannot alter the legal framework within which it must operate. Legal barriers will still remain in place where contractual clauses cannot override statutory law, and where third parties are involved who are not part of the agreement. Furthermore there might still be a void with regard to issues on which the parties did not come to an agreement. Drafting an agreement will also lead to transaction costs.

As states pass laws dealing with electronic commerce, the importance of interchange agreements will diminish to some extent. Although not called an interchange agreement, it will be indicated in Chapter 12 that because of the legal vacuum surrounding electronic bills of lading, the operation of such bills of lading is governed by comprehensive contractual provisions.

9.11 Conclusion

The conclusions regarding writing and signature requirements will not be repeated again. All that can be emphasized again, is that after examining the functions and characteristics of writing on paper, and the nature of a signature, neither electronic messages nor electronic signatures will stand in the way of an electronic bill of lading. The matter is however more complicated than mere writing and signature requirements, and in the next chapter the possibility of providing negotiability or transferability in an electronic environment will be examined.

236 Boss and Ritter *Interchange Agreements* 122.
237 Boss and Ritter *Interchange Agreements* 123.
238 §12.7.
239 See §§9.6.6 and 9.8.7.
Chapter 10
Dematerialisation and Negotiability

10.1 Introduction

The bill of lading, even though it is not a “negotiable instrument” in the traditional sense, is nevertheless transferable or negotiable. Negotiability or transferability is probably the most challenging aspect of devising an electronic bill of lading, and the question is whether it is in fact possible to be “[n]egotiating bit by bits”. This problem is of course not limited specifically to the bill of lading, as providing negotiability for any negotiable or transferable instrument in an electronic environment will be very challenging. According to Reed, “To replace such an instrument successfully, a dematerialised instrument must exhibit the same (or better) ease of transfer.” So an electronic bill of lading should be as easily transferable as the traditional bill of lading. When looking at this aspect, a further and equally important question is whether one should attempt to provide negotiability in an electronic environment at all. This chapter deals with these questions.

240 See Toh See Kiat Paperless International Trade 115. Also see the list of characteristics of the bill of lading by Goode Proprietary Rights 78-79 and the special attributes of financial instruments by Reed Electronic Finance Law 114-115.


242 Electronic Finance Law 114. Also see Smeele Passieve Legitimatie 7-8.
10.2 Dematerialisation

According to Reed\textsuperscript{243} a ""dematerialised" financial instrument is one that exists not in the traditional paper form, but as a digital file on some machine-readable storage". The term is only used where the dematerialised instrument (or the rights embodied in the instrument) is still transferable after dematerialisation. Therefore an electronic transfer of funds would generally not be regarded as dematerialised. Reed further indicated that simply entering information on paper into a computer does not amount to dematerialisation: "In addition to their role as information carriers, financial instruments also create, evidence or effect legal relationships. The goal of dematerialisation is thus the creation of new forms of financial instrument that can perform the same functions as their paper equivalents without needing to be 'materialised' on paper." One can also distinguish between a "fully dematerialised instrument" and a "partly dematerialised instrument".\textsuperscript{244} In the case of a fully dematerialised instrument a paper form of the instrument does not exist anymore. In the case of a partly dematerialised instrument the instrument was created in paper form, but is now traded electronically.\textsuperscript{245} The instrument can still be rematerialised by for example withdrawing it from a registry.\textsuperscript{246}

10.3 Electronic Negotiable Instrument?

The idea to embody personal rights in a piece of paper was revolutionary.\textsuperscript{247}

"The ingenuity of the bill of exchange lies in its tangibility. ... The achievement of the medieval merchants was to incorporate their intangible rights of action against their trading partners in the corporeal paper and to make transfer of these rights dependent on the fate of the instrument. They flouted existing and traditional legal norms

\textsuperscript{243} Electronic Finance Law 111.

\textsuperscript{244} Reed Electronic Finance Law 112.

\textsuperscript{245} Also see Vermaas 1997 \textit{SA Merc LJ} 171-172.

\textsuperscript{246} In the Companies Act 61 of 1973 s 7(b) there is also the possibility that a share certificate can be "rematerialised" even though the envisaged system can be classified as one of full (and not partial) dematerialisation. Of course the share certificate is not withdrawn from a registry, but a new certificate is issued.

\textsuperscript{247} Malan 1990 \textit{Steil LR} 153, 154. Holden \textit{History} 297 wrote, "It is indeed one of the most striking illustrations of mercantile genius that a single type of instrument [the bill of exchange] could serve such diverse purposes: it was, at once, a means of settling a debt, a form of currency, a method of providing short-term finance and a means of guaranteeing another person's obligations. No other legal instrument has ever attained such a degree of versatility."
and subjected them to the requirements of the marketplace. They made law and lawyers have never ceased to
wonder at their audacity."

There is today no need to replace the bill of exchange electronically. Novel solutions\(^\text{248}\) will in
future provide (and already provide) alternatives to the bill of exchange. An example is
electronic funds transfers (EFT).\(^\text{249}\) Therefore there is no need to replicate the bill of exchange
electronically, as new solutions have already been found.

In the past there have been discussions as to whether the bill of exchange can be simulated
electronically. Most authors concluded that it is doubtful.\(^\text{250}\) Ellinger\(^\text{251}\) pointed out four
difficulties, or characteristics of the bill of exchange, that will make replacing the bill of
exchange problematic. Firstly, a bill of exchange constitutes a string of contracts. Secondly a bill
of exchange is transferable by way of indorsement (if necessary) and delivery. Thirdly a bill of
exchange (in South African terms) is a thing. Somebody is the owner of the bill. The holder must
be in possession of the bill. Fourthly there are procedural difficulties — a bill must for example

\(^{248}\) The widespread use of credit cards and rising use of debit cards are the most obvious examples. See Muller
(1998) 54 Business Lawyer 406-413 for a discussion of credit cards, electronic checks (see www.echeck.org
(visited 23 May 2000)), smart cards ("stored-value card systems"), online account payments and
micropayments (used for "low-value transactions, particularly transactions below five dollars"). Of course only
some of these payment projects will survive into the future or will even be fully implemented.

\(^{249}\) Johnson (1992) 6 IYLCT 15. Of course, the bill of exchange is not only an instrument of payment, but also an
instrument of credit and investment: see Malan and Pretorius Bills of Exchange 1-4. Bills of exchange can be
post-dated, negotiated (and thus discounted for immediate payment) and accepted by the drawee: see Reed
Electronic Finance Law 142. Electronic funds transfers also have many advantages, such as fast transmittal:
see Toh See Kiat Paperless International Trade 145 n 96.

\(^{250}\) According to Smart Electronic Banking 2, "... the bill of exchange has peculiar properties that make it an
unlikely candidate for electronic handling. It represents a succession of contracts; with every party acquiring
rights and liabilities; it is a document requiring presentation, and it is itself an item of property. The difficulties
of translating all this in electronic terms make any such translation unlikely in the foreseeable future."

\(^{251}\) Ellinger Electronic Funds Transfer 41-43. Ellinger 29 et seq discussed the possible replacement of bills of
exchange and promissory notes specifically with making deferred payment by means of EFT. Cheques are not
discussed by him because they are issued for the immediate payment of debts. Also see Reed Electronic
Finance Law 142-144. Reed indicated that it might be possible to provide in the rules of an EFT system for
irrevocable post-dated payments. The paying bank transmits an EDI message to the payee stating that the buyer
has issued an irrevocable post-dated payment instruction, and this message amounts to an offer by the paying
bank to the payee (seller). The payee would then have an action against the paying bank (providing for
"acceptance"). According to Reed, "Assuming that recipient banks would be prepared to extend credit
facilities against the payment message, the irrevocable post-dated payment message would effectively be
discountable in the same way as a bill."
be presented for acceptance and payment. Apart from any questions of practical plausibility, there is no need to devise an electronic bill of exchange, as already indicated above. That, rather than any of the difficulties in the way of an electronic bill of exchange, in the end precluded the further evolution of the bill of exchange. Although the attempts to create an electronic negotiable instrument are not of much practical significance regarding the bill of exchange today, they will nevertheless be discussed as a way to shed light on the possibility of replicating a transferable bill of lading electronically.

10.4 Henriksen

10.4.1 Background

Henriksen devised a special technical method to provide for negotiability. The system was developed in response to Grönfors’ Cargo Key Receipt and Reinskou’s Notification-Confirmation System. As Henriksen emphatically stated, he was not criticising the juristic work of Grönfors or Reinskou, but the functional approach adopted for these two projects whereby the technique of possession and surrender of a physical paper document is replaced by another technique with the same legal consequences. Henriksen preferred a technical approach because then a completely new legal technique does not need to be developed and a new

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252 See Toh See Kiat *Paperless International Trade* 202 n 53. According to Toh See Kiat, “It does seem wiser and more fruitful to find a legally valid way of performing the functions of the negotiable instrument rather than to struggle through the obstacle course of the BEA 1882.” Also see Johnson (1992) 6 *IYLCT* 12-15. Gamertsfelder (1998) 21 *UNSWLJ* 566 et seq did not even consider any of these obstacles before assuming that an electronic bill of exchange is possible.

253 See Ellinger *Electronic Funds Transfer* 43-44; Toh See Kiat *Paperless International Trade* 202 n 53.

254 Ellinger *Electronic Funds Transfer* 43 also noted that “the possibility of the replacement of traditional negotiable instruments by electronically produced and recorded data cannot be ruled out.” Even so, Ellinger 42 also wrote that “the creation of a multi-party contract, which can be readily transferred, which confers property rights on its ‘owner’, and which is recorded by electronic means, remains a revolutionary concept.” This is probably true even today, and even more so in the case of bills of lading.

255 Chapter 11 §11.5.

256 Chapter 12 §12.2.

257 Regarding the different approaches see Chapter 9 §9.4.

258 Henriksen *Trade and Transport* 119.
technique with many different legal consequences in different countries is avoided.\footnote{This stems from the fact that even the legal consequences of traditional paper routines differ from country to country: see Henriksen \textit{Trade and Transport} 120.} Probably the most important consideration for Henriksen is that a technical approach will not lead to such widespread legal uncertainty. The rules relating to the traditional paper system were clarified over a long period through use and interpretation by the courts, and therefore parties bound by these rules do not generally run into unforeseen complications. The clear rules relating to the existing paper system can be applied to a large extent when researching a technical approach.\footnote{Henriksen \textit{Trade and Transport} 120.}

Taking the technical approach as a starting point, Henriksen described his angle of approach in the following way:\footnote{Henriksen \textit{Trade and Transport} 121.}

"A document consists of a piece of paper (or something similar) to which various forms of data are committed. We wish to eliminate the paper, not the necessary data. Today legal consequences attach to possession and surrender of the actual paper document. The first thing that suggests itself is to attach these legal effects to what remains after the paper is eliminated — i.e. the data. Thus the idea is that the present-day document shall be replaced by ‘original data contents’ — something tangible — and that possession and surrender of these original data contents, such as the data contents of a B/L, shall be endowed with exactly the same legal effects in all respects as possession and surrender of the original paper document (e.g. B/L) has today.

... In the event this idea is realized, the symbolic function of the document will be linked with possession of the original data contents, not with the original document as in today’s system."

The wording of a document indicates whether it is a bill of exchange, promissory note or bill of lading. Similarly the particular formulation of the data contents will identify the type of document.

When dealing with concepts such as original and uniqueness that are essential for a paper document such as a bill of exchange, the drawback of public-key cryptography (the double encryption system) as described in the previous chapter, is that the transferor of a message can transmit the same message to different parties, as he always retains a copy of the message.\footnote{Apart from the fact that there will not be a single original, public-key cryptography can of course be used to transfer a message between more than two parties successively, adding additional information such as an indorsement where necessary: see Henriksen \textit{Trade and Transport} 63-64 and Effross 38 \textit{Jurimetrics J} 390-391 (1998) for a description. According to Henriksen he was the first person to describe this use of public-key cryptography.}
Henriksen wrote, “The recipient will therefore be in the same position as if the data sender holds an unlimited (indefinite) number of original documents and transmits one of them to the recipient.”263 Effross264 concluded, “Although PKI [public key infrastructure] would practically resolve many issues associated with negotiability, until the threat of cloned ‘couriers without luggage’ can be technologically eliminated the electronic negotiable instrument may well remain only a digital dream.” Henriksen attempted to provide a solution to circumvent this problem.

10.4.2 Description of Henriksen’s Special Technical Method

The system makes use of public-key cryptography (the double encryption system) to confirm the identity of the sender of the message and ensure that only the transferee can read the message. In the description that follows, public-key cryptography will not be referred to extensively again.265 As a point of departure the computers used in the system are programmed to have three specific characteristics.266 Firstly, the computer of the transferor erases the message when receipt of the message is confirmed by the transferee. Secondly, when X uses his secret key to encrypt a message entered into the computer by himself (ie not a message received from another party) the computer will add the phrase “generated by X” to the message. Of course the computer must be programmed in such a way that X cannot prevent this from happening. The original message plus the additional phrase will then be encrypted to provide the digital signature of X. Thirdly, if X adds to a message that he received from another party (ie not a message entered by himself) the computer adds the phrase “added by X” when X uses his secret key to encrypt the message. The message will then contain the original message that X received, the phrase added by the computer and the additional information (such as an indorsement) added by X. All of this will be encrypted to provide the digital signature of X.

262 (...continued)
cryptography whereby the transferee further transfers the message to a third party. The system is similar to the one described here, but without the three special characteristics of the computer (see below).

263 Henriksen *Trade and Transport* 122. Also see Perritt *Contract* 365-366.


265 See the discussion in Chapter 9 §9.8.5.

266 Henriksen *Trade and Transport* 123-124.
The system then works in the following way: A sends a message to B (message A). Message A contains “generated by A” (inserted by the computer just before encryption took place when A signed the message using his secret key) and the original message. B “indorses” the message to C (message B). Message B contains “generated by A”, the original message of A, “added by B” (inserted by the computer just before encryption took place when B signed the message using his secret key) and B’s indorsement. When C is satisfied, C acknowledges receipt of the message to B and B’s computer automatically erases the messages and signatures stored on it. B sent the digital signature of A and the digital signature of B to C. C therefore has the digital signature of A, message A (arrived at by using the public key of A on the digital signature of A), the digital signature of B and message B (arrived at by using the public key of B on the digital signature of B).

By comparing message A and message B, C can see they were generated by A and an indorsement was added by B. Suppose that B wanted to commit fraud. B made a printout of A’s digital signature before the message on his computer was erased by C confirming receipt of the message. B enters the digital signature from the printout into his computer, and arrives at message A by using A’s public key. B also adds an indorsement to D. When B signs the message, the phrase added will be “generated by B” because this message was not received from another party. The phrase “added by B” will not be included in the message because B did not add anything to a message that he received from another party. When D receives the messages, he will see that message A correctly states “generated by A” but message B states “generated by B” instead of the correct “generated by A”. Presentment of the messages to A will similarly warn A of the irregularity.

267 Henriksen *Trade and Transport* 124-127.

268 What is actually sent is the digital signature of A, ie message A encrypted with A’s secret key. A can for example be a “drawer” creating a payment order: see Toh See Kiat *Paperless International Trade* 170.

269 The acknowledgement of receipt should happen virtually instantaneous as B must not have time to transmit a second copy of the message before the acknowledgement destroys the message on his computer: cf Toh See Kiat *Paperless International Trade* 203 n 64. Alternatively it is submitted that B’s computer should prevent sending the same message before a specified period of time lapses. The problem is not addressed by Henriksen.

270 Without going into details here, as the double encryption system was described in the previous chapter, before C could have access to any of the signatures listed here, he had to decrypt all the information he received with his secret key as B encrypted all the information he sent to C by using C’s public key.
According to Henriksen, "[o]n the face of it" the system is compatible with concepts such as "good faith" and "holder in due course". Printouts of messages or information have no similar legal effect in the system as originals.\textsuperscript{271}

### 10.4.3 Evaluation

It is submitted that the greatest weakness in the system is the fact that each party controls his own computer and may manipulate the computer program. This is admitted by Henriksen,\textsuperscript{272} but he submitted that near perfect forgery of paper documents can also occur, although only a small number of documents are in fact falsified. It is submitted that one possible solution can be for the parties to log onto a computer system maintained by a trusted independent third party, and that the parties therefore do not have access to the programs running on the system.\textsuperscript{273} Apart from this flaw, the greatest advantage of the system is (ironically) probably the high level of security: only the specific transferor can create the message using his secret key and only the transferee can read the message using his secret key. The messages can be relied on with confidence — except if a party reprograms his computer.

Toh See Kiat\textsuperscript{274} identified a further problem. When the final holder transfers the message to the "drawee", the message on that holder's computer is destroyed. If the holder is not paid, how does he prove the fact that the instrument is "dishonoured"? Toh See Kiat submitted that "a presentment for payment in such a system should best be made through a third party, such as a clearing house, which would keep records of the message and corresponding payment credit, if any." Toh See Kiat\textsuperscript{275} also criticized the system because it is closed, as a central body would have to supply the computer programs and issue the public keys. This is somewhat harsh: no electronic system would ever be completely open, especially if public-key cryptography is used. It is nevertheless admitted that without the necessary computer programs, a party would be unable to participate. Toh See Kiat then strangely (as he is usually very positive about the

\textsuperscript{271} Henriksen \textit{Trade and Transport} 128.

\textsuperscript{272} \textit{Trade and Transport} 128.

\textsuperscript{273} The problem with this approach however is that one is then basically dealing with a registry.

\textsuperscript{274} \textit{Paperless International Trade} 172.

\textsuperscript{275} \textit{Paperless International Trade} 180.
recognition of electronic routines) went on to criticize the system because “a relay of electrons or photons will never be viewed by judges and lawyers as equivalent to the far more permanent structure of ink and celluloid molecules that constitutes paper.” Of course there must be a legal framework in which to implement and recognize the system, but thereafter a delivery is achieved by transferring the message and the whole point of the system is to ensure that there is only one original. Toh See Kiat concluded, “It is difficult to expect conservative, cautious lawyers to adopt concepts associated with paper in a totally alien environment. Old dogs definitely do not learn new tricks, especially the mental gymnastics required for such technical devices. Far better to start with a clean slate, or at least a slate with very few leftovers from the old.”

There is no doubt that a functional approach will often be better, but this system by Henriksen deserves considerable recognition, even though it would probably never be used extensively in practice. Many other so-called functional approaches relating to the bill of lading, are merely electronic variations on registries. Henriksen’s system created an electronic negotiable instrument that (to a large extent) lives an independent life similar to its paper sibling. That said, the approaches described Chapter 12, even though they are essentially registries, would probably be a more effective way of designing an alternative to the bill of lading.

10.5 Reed

10.5.1 Description

Reed also described what he called a standalone dematerialised instrument. Such a dematerialised instrument must exhibit the same characteristics as a paper instrument: “1. Uniqueness. 2. It evidences the obligation represented by the instrument, e.g., the debt in the case of a bond. 3. It evidences the chain of transfers to the current holder.” Reed wrote that the first and third requirements are linked, because as “it is possible to make an infinite number of copies

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276 Toh See Kiat *Paperless International Trade* 214 n 126 asked: “Where is the document ‘issued’? How would you ‘deliver’ it? Can the message received at the destination be an ‘original’ since in reality it is a totally different set of electrons from those that began the journey?” Toh See Kiat 180 also questioned whether a bill of lading can be regarded as “clean” in the system. The answer is simply that one looks at the wording of the message, just as one looks at the wording of the traditional bill of lading to determine if it is clean.

277 *Paperless International Trade* 180.

278 Reed *Electronic Finance Law* 118.
of an electronic record, each indistinguishable from the original, it is only the chain of transfers which is capable of distinguishing the original from a copy.” This is not correct. As should be apparent from the discussion above, without any further special methods as described by Henriksen, once the same message is sent to two different transferees, both chains will look as if they contain a valid chain of transfers. Public-key cryptography is used to ensure characteristics 2 and 3.

The system will work in the following way: A wants to send a message to B. A encrypts the message with his private key and transmits the encrypted message to B. If B wants to transfer the message to C, he adds an indorsement to the encrypted message that he received, encrypts the result with his private key and transmits it to C. C decrypts what he received with B’s public key, thus showing him the indorsement, and then uses A’s public key to show the text of the original message. Up to here the system is basically the same as that of Henriksen without the three special characteristics. Reed however deals with the possibility of C transmitting the same message to more than one party (ie uniqueness) in a different way. Reed submitted that A “will presumably be liable to repay only the first recipient of the message, subsequent recipients being limited to an action against [C] for breach of contract or deceit.” This however showed that one is not dealing here with a standalone instrument yet. Reed therefore proposed that a third party needs to authenticate the transfer, and the appropriate third party is simply A. If A authenticates more than one transfer from one specific party, he will be liable to more than one party for payment. So if C in this example transfers the message to D, C will request authentication from A and A will send authentication of C’s ownership directly to D. Reed wrote,

“This procedure obviously requires [A] to maintain detailed records, if only for his own protection. Although it might be argued that [A] is for all practical purposes maintaining a register of ownership, this is not in fact so. [A’s] records are for his own use only, i.e., so as to avoid authenticating multiple transfers of the same bond; the evidence that the bond is unique and has been validly transferred is contained in the dematerialised instrument itself, and can be checked by successfully decrypting the various messages contained in it.”

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279 Reed Electronic Finance Law 118-119.

280 The example used by Reed Electronic Finance Law 118 is that A issues a bond to B.

281 Reed Electronic Finance Law 120. See the figure on p 121.
10.5.2 Evaluation

Reed\textsuperscript{282} concluded, "The advantages of a stand-alone instrument are that there is no need to invest in the substantial infrastructure of a registry and dedicated telecommunications network. ... If stand-alone instruments are created, they are likely to be used for low-volume, high-value applications where the trading partners are unlikely to be members of a common electronic trading community." It is indeed unlikely that such a system will ever be used in practice. It is further submitted that whatever Reed might say, the system is perilously close to being a registry.

10.6 Using a Token

Richardson\textsuperscript{283} described the use of a "chip bill of lading"\textsuperscript{284} using a smart card:

"On this card the carrier would put all the necessary bill of lading information, together with the appropriate authentication. He would give this to the shipper, who would take it along to his bank. The banker would place the chip bill in a machine linked to his computer, so that the details on the bill could be checked against the details of the letter of credit on the computer. If the details were acceptable, then the machine would deprogram the chip bill, while programming another chip bill in the office of the instructing bank at the consignee's end. Thus a document of title would be preserved in tangible form, from which print-outs could be obtained to provide readable detail of the information on the chip bills, but without the need to send paper or other tangible media long distances from the place of receipt to the place of delivery."

Such a solution can probably not be described as dematerialisation as the card is still a physical object. A further observation is that the same system can be used to handle a piece of paper: a bank can also take possession of one document, destroy it (Richardson's chip bill is deprogrammed), and the document can again be issued (as another chip bill is programmed) at another bank. Although this will speed up the process considerably, the bottom line is that a physical object must still be moved around. Toh See Kiat indicated that the bank creating the new chip bill of lading should be acting on behalf of the carrier, as it might otherwise be contended that this new chip bill is not the original bill of lading that can be used to claim

\textsuperscript{282} Electronic Finance Law 121.

\textsuperscript{283} Transport Documentation 180. Cf Brace (1976) 14 Osgoode Hall LJ 794.

\textsuperscript{284} Of course this system is in theory not limited to bills of lading.

\textsuperscript{285} This quotation comprises all the information that Richardson provided about the chip bill of lading.
delivery of the goods.\textsuperscript{286} The chip bill will nevertheless be very secure, and can contain a log of all the transactions.\textsuperscript{287}

\section*{10.7 Dematerialisation of Share Certificates}

The STRATE (Share TRA.nsactions Totally Electronic) project of the Johannesburg Stock Exchange (JSE) will allow the dematerialisation of share certificates, and dematerialisation will be a requirement for the trading of shares on the JSE.\textsuperscript{288} The project necessitated the insertion of section 91A into the Companies Act 61 of 1973 dealing with uncertificated securities. Section 91A(4), for example, provides:

(a) Transfer of ownership in an uncertificated security shall be effected upon the debiting and crediting, respectively, of both the account in the subregister from which the transfer is effected and the account in the subregister to which transfer is to be made, in accordance with the rules of a central securities depository.

(b) A transferee shall, upon the entry of his, her or its name in a subregister, become a member of and be recognized as a member by the company in respect of the uncertificated securities registered in his, her or its name.

A detailed analysis of the dematerialisation of share certificates falls outside the scope of this

\textsuperscript{286} Toh See Kiat \textit{Paperless International Trade} 183. Even where a bank has Toh's power of attorney this will be a contention that might be upheld in a court. Toh See Kiat then wrote that "[a]lternatively, the token may travel with the goods, or through the hands of the parties dealing with it", but this will, it seems, defeat the whole purpose which is faster transmission of the chip bill. If the token must travel the whole route there will be no time benefit as compared to a paper bill of lading.

\textsuperscript{287} Related to the basic token system, and still relying on a token as a physical object, is a solution proposed by Davies and Price \textit{Security for Computer Networks} 335-339. Davies and Price 337 indicated that they want "to establish electronic negotiable documents in which the evidential and symbolic properties are managed without registries of ownership." They proposed a negotiable document consisting of two parts: information is provided by an information document (ie an electronic document) and the symbolic part of the document is provided by a token. The two parts are securely linked to each other (the method is described by Davies and Price), and no person holding only the information document or only the token can make use of the negotiable document. As the token must still travel the route that a paper bill of lading must travel, and because all the relevant information can be contained on the token itself, there is no real advantage to the use of this two-part system. The only advantage this author can think of, is that because the token alone is of no value, there might be a disincentive to steal it, but this can be achieved just as well by limiting access to the token by for example a pin number. The system is described in more detail by Davies and Price.

\textsuperscript{288} For a discussion of the STRATE system see Vermaas 1999 \textit{SA Merc LJ} 119-123; Vermaas 1998 \textit{SA Merc LJ} 337-338.
thesis, and has already been undertaken elsewhere. As a general observation it should be said that the dematerialisation of shares in a closed and relatively small environment such as the Johannesburg Stock Exchange, is of course considerably easier to achieve in comparison with a system dealing with electronic bills of lading that much satisfy all the parties involved in the carriage of goods by sea all over the world. There are of course also huge differences between bills of lading and share certificates. Vermaas wrote, "Die aandelesertifikaat is slegs bewys van die aandele met sekere regte. Die dokument self vervat nie die regte soos 'n titelakte of verhandelbare dokument nie. Dit beteken dat die houer van 'n aandelesertifikaat nie alleen deur die besit daarvan regte op die aandeel kan verkry nie."

10.8 Conclusion: Is Negotiability Essential?

The question whether we really need the bill of lading has already been raised earlier. Toh See Kiat argued that most of the arguments raised in favour of negotiability are merely psychological. The truth is probably that although there are undoubtedly psychological

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290 1997 SA Merc LJ 46; Vermaas Dematerialisasie van Genoteerde Aandele 47.

291 Vermaas Dematerialisasie van Genoteerde Aandele 69; Vermaas 1997 SA Merc LJ 52 n 70 also does not regard the share certificate as commercial paper. Malan and Pretorius Bills of Exchange submit that the share certificate is commercial paper "because it plays an important role in the transfer and pledge of shares".

292 Chapter 8 §§8.5-8.6.

293 The discussion here is about negotiability in the sense of transferability. For a critique of negotiability (but in the sense of a holder in due course taking free of claims and defences) see Rosenthal (1971) 71 Columbia LR 375 et seq. Further see Rogers (1987) 65 Texas Law Review 929 et seq; Mann 44 UCLA L Rev 951 et seq (1997). Mann 956 n 12 indicated that he did not cover bills of lading or other documents of title.

294 Toh See Kiat Paperless International Trade 117-118. The main arguments for the retention of negotiable documents ("negotiable documents" thus including bills of lading) according to Toh See Kiat (though he rejected these arguments) are firstly that financiers insist on using these documents, as they know the law governing such documents to be well-established and clear. Secondly it is argued that nothing can replace the negotiable document in all its roles, leading to fragmentation and thus again legal uncertainties. Thirdly international traders insist on using negotiable documents for similar reasons as the financiers. Fourthly it is argued that there are immense barriers to overcome as well as high costs before replacing negotiable documents. Therefore the question is why changing a functioning system of negotiable documents. According to one estimate it will take 40 years or two generations for checks to vanish, due more to emotional than legal reasons: see Faerber (1999) 17 JCIL 829-830 n 203.
barriers, doing away with negotiability altogether will have wide-ranging legal repercussions. It is true that negotiability is often superfluous. A negotiable airway bill is possible, “[b]ut commercially, such a document does not make sense”.[295] It is nevertheless equally true that negotiability can in some instances still play a crucial role. It is submitted that the problems facing a transferable document such as the bill of lading should not be solved (in all cases) by doing away with the document altogether by replacing it with a non-negotiable alternative, but that electronic alternatives to the bill of lading should be developed.

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295 Wheble International Trade 125. The reason is the speed of air transport: “no-one would be willing to pay — and at a higher freight rate — for his goods to travel quickly, and then sit at destination waiting for the arrival of the negotiable document to set them free again.” The same argument would apply in most cases regarding multi-modal transport: Toh See Kiat Paperless International Trade 149 n 122.
11.1 Introduction

Goode told about a question from a delegate at a seminar on electronic funds transfer, the delegate asking "whether EFT was conceptually different from the physical carriage of money from one bank to another." According to Goode, "The question deserves to be taken seriously, for there is a tendency to ascribe to new technology some magical quality taking it altogether beyond the plane of established legal principle." This is an important point to keep in mind. Whether one views the electronic bill of lading as a completely novel concept, or just as a variation on an established theme, this does not mean that all basic legal principles should be discarded. At the very least the underlying purpose of such a new bill of lading will be much the same as that of the paper bill of lading. In this chapter proposals for replacing the bill of lading will be discussed, and the process will be continued in the next chapter where truly negotiable electronic bills of lading will be examined. Apart from looking at the characteristics of the bill of lading and some comments about reducing reliance on paper, a form of an electronic waybill will be discussed, followed by a failed registry for paper bills of lading.

11.2 Characteristics of the Bill of Lading

Goode wrote,

"The traditional bill of lading possesses the following features the disappearance of which may be expected to cause legal problems:

1. It is a document, that is, a paper writing constituting a record in permanent form of the carrier's..."
receipt of the goods and the terms of the contract of carriage.

(2) The document carries a signature identifying the issuer of the document and authenticating its contents.

(3) The document is issued at the port of shipment.

(4) It is then physically transmitted to the consignee of the named goods at the port of destination.

(5) Production of the document to the carrier at the port of destination is required in order to secure release of the goods.

(6) Accordingly, control of the goods can be transferred by negotiation of the document.”

The functions of a bill of lading as a receipt and evidence of the contract of carriage (Goode’s characteristic 1) can easily be reproduced in electronic form.3 As already discussed in the context of EDI, a “document” or “paper writing” is not necessary to convey information. There is also no reason why an electronic message cannot be as permanent as a paper document. As discussed in Chapter 94 a digital signature can identify the issuer and authenticate the information (Goode’s characteristic 2), and therefore poses no obstacle either.5 Regarding characteristics 3 and 4, an electronic bill of lading can be issued anywhere (depending of course on the availability of communications and computer equipment) and transferred anywhere. Technically there will probably be a central registry physically situated at one or more locations, but all the parties will be able to log onto the registry from anywhere in the world.6 Characteristics 4, 5 and 6 refer to the function of a bill of lading as a document of title. Can one use an electronic bill of lading to “[get] a grip on the cargo”?7 The answer is yes, and this particular aspect will be examined in the next chapter.

11.3 Waybills8

The waybill was referred to previously and as indicated it solves many of the problems relating

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3 Cf Grönfors Cargo Key Receipt 21.

4 §9.8.5.

5 The master will seldom (if ever) sign a bill of lading personally today. This will usually be done by the agent of the shipowner by way of a stamp or printing rather than traditional handwriting: see Grönfors Cargo Key Receipt 24.

6 See the Bolero concept discussed in Chapter 12 §12.7.

7 Terminology of Grönfors Cargo Key Receipt 26.

8 Regarding waybills generally see Chapter 8 §8.5.
to bills of lading where the use of a bill of lading is not vital. It will be seen in this chapter that it is also easier to create an electronic waybill than it is to create an electronic bill of lading.

11.4 Simple Procedures to Reduce Paper

Before moving on to replacing the bill of lading altogether, it is necessary to take a look at a few ways mentioned by Grönfors in which reliance on paper and the endless need for copies can be reduced. Firstly the layout and the form of the document can be standardised. Secondly documents that are physically smaller can be used, thus leaving less space for long contractual clauses. Thirdly the document can contain an incorporation clause, with the complete contractual clauses available separately. This can in turn lead to the use of blank back documents (the contract of carriage is usually printed on the back of the bill of lading) as the standard conditions of carriage are available separately, and therefore only the front of the document needs to be copied. A further possibility is so-called “destination bills of lading”. The document can be issued at the port of destination with the help of information transmitted (by telex) from the port of shipment, or the completed bill of lading can be transmitted (by way of fax) from the port of shipment to the port of destination. Another step forward is the use of computers, but only to facilitate the use of paper documentation, or to automate paper handling. Information can for example be entered into a computer that then produces a (paper) bill of lading and other documentation. Of course none of these ideas eliminate paper, and therefore it is necessary to continue by examining paperless alternatives.

9 See Grönfors Cargo Key Receipt 13.


11 See Grönfors Electronic Documents 51-52; Basedow Dokumentelose Wertbewegungen 87-89.

12 Grönfors Cargo Key Receipt 14: “Thus, delay in the carriage of documents can be avoided, but the technically out-moded basis of the procedures remain unchanged.” A faxed bill of lading can however not be regarded as an original. Also see Basedow Dokumentelose Wertbewegungen 89-90.

13 Grönfors Cargo Key Receipt 14-15: “This is a half-way solution, which seems to combine the disadvantages of old paper routines with those of new computerized systems. But often it constitutes a necessary step on the way when designing new computerized handling procedures.”
Chapter 11: Replacing the Bill of Lading

11.5 Cargo Key Receipt\textsuperscript{14}

11.5.1 Description

The Cargo Key Receipt (CKR), developed by Grönfors, was based on the Datafreight Receipt System of the Atlantic Container Line (ACL) that has been in operation since 1971. The Datafreight Receipt System was introduced because of the congestion caused by the late arrival of bills of lading. The system was built around the concept of the waybill and not the bill of lading. When writing in 1982, Grönfors felt that customers were not prepared to accept more sophisticated methods that make provision for the negotiation of a bill of lading as well.\textsuperscript{15} Therefore there is no negotiability or transferability, but the method is nevertheless instructive in illustrating how a paper document such as a waybill can be replaced. The Datafreight Receipt System operates in the following way: the necessary information is entered into a computer at the port of shipment, the shipper gets a receipt for the cargo and the information is transmitted to the port of destination. Before the ship arrives on the other side of the Atlantic, the computer issues a notice of arrival informing the receiver of the date and time that he can collect his goods, also including the other information originally entered into the computer, and the notice is mailed to the receiver.\textsuperscript{16} Although this system was a huge step forward, it did not make provision for parties other than the shipper, carrier and receiver to be involved, particularly a bank financing the transaction and demanding security.\textsuperscript{17} To remedy this shortcoming, Grönfors defined Project NODISP. This system requires some amplification before returning to the role of a bank.

While the shipper is in possession of the duplicate waybill (first copy of the waybill), he can

\textsuperscript{14} For an account of the history of the project see Henriksen \textit{Trade and Transport} 97-99.

\textsuperscript{15} \textit{Cargo Key Receipt} 43.

\textsuperscript{16} Grönfors \textit{Cargo Key Receipt} 15-16, 35.

\textsuperscript{17} A consignee also does not know that the shipper will not “resell or reroute the goods in transit”: Kozolchyk (1992) 23 \textit{J Mar L & Com} 220; Kozolchyk (1992) 55 \textit{Law and Contemporary Problems} 86.
change his instructions to the carrier by for example changing the port of destination. After handing this duplicate waybill to the consignee or to a bank, the shipper cannot intervene anymore. To regulate this situation in a paperless environment, Grönfors proposed project NODISP. The shipper makes the following declaration: “The shipper has irrevocably declared that he has assigned his right to control the goods during transport to the receiver of the goods.”

This declaration is entered into the computer, shown on the receipt given to the shipper and also reproduced in the documentation at the port of destination. Rather than using the full declaration, the declaration is shortened to the word NODISP that is reproduced on all relevant documentation. Therefore there is no need for the shipper to physically transfer a duplicate waybill to the consignee, and for the consignee to be in possession of a duplicate waybill to ensure nobody interferes with the delivery of the goods. The only unavoidable printout is the receipt given to the shipper in exchange for the goods so that he can check whether the information is correct.

Holding a waybill does not give the holder any right to delivery of the goods as the goods are simply delivered to the receiver indicated on the waybill — the waybill is not presented in exchange of the goods. Therefore, even though a financing bank is in possession of the waybill,

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18 See Grönfors Electronic Documents 27-28. Today, however, “the duplicate is only used as an easy way to prove who has the right to control but not as a necessary condition for having such right” (Grönfors 51). A further advancement is that a duplicate sea waybill is seldom issued, and thus an express declaration similar to NODISP discussed below is used to facilitate transfer of the right of control to the consignee. The idea was taken from the Cargo Key Receipt pattern: Grönfors 55-56. Rule 6 of the CMI Uniform Rules for Sea Waybills dealing with the right of control provides: “(i) Unless the shipper has exercised his option under subrule (ii) below, he shall be the only party entitled to give the carrier instructions in relation to the contract of carriage. Unless prohibited by the applicable law, he shall be entitled to change the name of the consignee at any time up to the consignee claiming delivery of the goods after their arrival at destination, provided he gives the carrier reasonable notice in writing, or by some other means acceptable to the carrier, thereby undertaking to indemnify the carrier against any additional expense caused thereby. (ii) The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above and the shipper shall cease to have such rights.”

19 Also see Grönfors Cargo Key Receipt 77-79.

20 Grönfors Cargo Key Receipt 27-28,

21 According to Grönfors Cargo Key Receipt 36, “the basic idea was to ‘translate’ the function of the duplicate waybill by the express NODISP declaration by the carrier, thus using the computer as bearer of the same function.”

22 Grönfors Cargo Key Receipt 33. For more detail see Grönfors 37-38.
they are usually indicated as the receiver on the waybill as well, and the real receiver of the
goods is indicated by way of a notify address only: "By this legal ‘trick’ the non-negotiable
character of the document is, so to speak circumvented and the bank’s grip on the goods when
they have arrived at the place of final destination remains firm."23 Under the computerized
system, a bank will be satisfied when they see the receipt with a NODISP clause indicating them
as the receiver of the goods.24 The bank now knows that nobody can interfere with the delivery
of the goods to them (if necessary). They are in the same position as being in possession of the
duplicate (paper) waybill indicating that they are the receiver of the goods. A bank will further
not accept a claued waybill (for example showing that the goods are defective in some way) as
security, and therefore the codeword CLEAN must be added together with NODISP to satisfy
a bank.25 The Cargo Key Receipt system as adopted by ACL briefly works in the following way
when used in conjunction with a letter of credit.26 A letter of credit is opened in favour of the
seller, payable against presentation of a Cargo Key Receipt. After the shipment of the goods the
shipper (seller) gets the first printout of the Cargo Key Receipt marked NODISP, CLEAN and
SECURITY, and naming the buyer’s bank (who opened the letter of credit) as consignee. The
information is transmitted to the port of destination. The seller is paid by his bank against
surrender of the Cargo Key Receipt. The seller’s bank transmits the necessary information to the
buyer’s bank, informing them that they have debited the account of the buyer’s bank. The
buyer’s bank in turn debits the buyer’s account. Before the ship’s arrival, the buyer’s bank gets
the notice of arrival, that includes a Cargo Key Receipt attached to it, stating: "The goods will
be delivered against the enclosed Cargo Key Receipt duly assigned by the bank as consignee."
The buyer is also notified as the notify addressee. As the buyer’s bank did obtain payment from
the buyer, they assign the Cargo Key Receipt to the buyer, and he thus demands delivery of the
goods from the carrier.

23 Grönfors Cargo Key Receipt 27, 43-44.
24 Grönfors Cargo Key Receipt 31-32. Grönfors 38 wrote (italics omitted): "The delivery of this receipt to the
bank means, that the bank can rely upon the fact that these data were in fact stored into the record of the
carrier’s computer and that their correctness at that very moment was checked by the carrier against the real
goods taken in charge."
25 Grönfors Cargo Key Receipt 39, 77-79. A further codeword SECURITY was later added because of objections
by banks wanting more security, meaning that the carrier undertakes to hold the goods as specified in the
receipt as security and collateral for the bank named as consignee: Grönfors Electronic Documents 76;
Grönfors Cargo Key Receipt 86-87.
26 For a full description see Grönfors Cargo Key Receipt 96-98, 101, 36-37.
The system can be further refined by issuing the receipt to the shipper and the notice of arrival at the port of destination also electronically, and transmitting the information to the bank electronically, but this will not change the basic functions of the system.\(^\text{27}\)

### 11.5.2 Evaluation\(^\text{28}\)

The system "has been successfully tried out in full scale but is not yet regularly used."\(^\text{29}\) The main disadvantage is that the system is an initiative of one carrier, and thus limited to ports that carrier visits.\(^\text{30}\) Traders who are not regular customers of the carrier might view the system with suspicion, and financing banks (especially the exporter's bank) might not be interested in the system.\(^\text{31}\) An odd feature of the system when a bank is involved is the delivery of the goods against presentation of the Cargo Key Receipt, usually assigned (i.e., indorsed) by the bank to the buyer. As Toh See Kiat\(^\text{32}\) wrote, "Perhaps this physicality was permitted to raise the enthusiasm of the financiers in the project." This does not really cause a problem, as the Cargo Key Receipt is not posted from the port of shipment to the port of discharge, and both the buyer and the buyer's bank are physically situated at or near the port of discharge. There is nevertheless no need to deliver against a Cargo Key Receipt; the carrier knows that the bank is the consignee, and they will deliver the goods to the bank unless the bank instructs them otherwise in whatever way. There is no need for the carrier to see the Cargo Key Receipt.

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27 Grönfors *Cargo Key Receipt* 40.

28 See Grönfors *Cargo Key Receipt* 80-95 for objections raised by Swedish and American banks to the system, and his response to such objections.

29 Grönfors *Electronic Documents* 76; Grönfors *Cargo Key Receipt* 95, 96. Actually it seems the system was "mothballed": see Kozolchyk (1992) 23 *J Mar L & Corn* 222-223.

30 Toh See Kiat *Paperless International Trade* 184; Urbach *Electronic Presentation* 115.

31 Toh See Kiat *Paperless International Trade* 217 n 168 wrote that the exporter's financier "has no means of protecting himself should his principal (the importer's financier) fail to reimburse the payment or become insolvent. All he has is a worthless CKR — he cannot sell it, he cannot claim the goods on it, he cannot eat it. This is perhaps another reason for the unpopularity of the CKR idea — the financiers likely to be involved are financiers with such close, established relationships that there cannot be many of them in world-wide context." Toh See Kiat 185, 216-217 n 166 correctly rejected the argument of Grönfors *Cargo Key Receipt* 58, 91 that the consignor (seller) can resume the right of disposal if the buyer for example refuses to pay or to receive the goods.

32 *Paperless International Trade* 184. Also see Goode *Proprietary Rights* 81.
Toh See Kiat\textsuperscript{33} wrote that the Cargo Key Receipt system "is nothing more than a sea waybill with a 'NODISP' handicap" and it can therefore not be attractive to an exporter. It is nevertheless submitted that this system is a sound way to replace the waybill. The electronic transmission of information is an improvement over a paper waybill. The limitation of this system — and this is not a criticism as the system was never designed to replace the bill of lading — is that the goods cannot be traded \textit{en route}.\textsuperscript{34} The Cargo Key Receipt system can be described as a functional approach.

11.6 SeaDocs

11.6.1 Background: Registries

Two functions of a central registry can be identified.\textsuperscript{35} Firstly, the registry is the custodian of the instrument. A partly dematerialised instrument is physically deposited with the registry. Secondly, the registry maintains a record of all the transactions relating to the instrument. In the case of a negotiable or transferable instrument the registry can indorse the instrument on behalf of the holder. Rematerialisation of an order instrument takes place by withdrawal from the registry and indorsement and delivery to the final transferee. A bearer instrument can be rematerialised by delivery to the transferee. Setting up and maintaining a registry is a costly exercise, and therefore registries will only be cost-effective where the volume of the instruments traded is high.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{33} Paperless International Trade 185.
\item \textsuperscript{34} See however Grönfors Cargo Key Receipt 67 and the criticism of Toh See Kiat Paperless International Trade 184-185. Grönfors Electronic Documents 59-60 proposed that the waybill pattern can be elaborated to get closer to the bill of lading pattern, by allowing the consignee to assign his right to control and right to obtain delivery to another party (apart from the bank assigning its right to claim delivery to the real buyer). The consignee must also expressly notify the carrier of the assignment. It is submitted however that if a bill of lading is needed, a bill of lading or an electronic equivalent of the bill of lading should be used. The bill of lading developed precisely because of the uncertainty and chaos that might develop in a long chain of assignments without embodying the right that is assigned in a paper document, which also tells the carrier to whom delivery must be made. Toh See Kiat 185 indicated why such an assignment is not possible in English law. Even if it were, it should be avoided at all costs.
\item \textsuperscript{35} Reed Electronic Finance Law 117. Also see Chandler (1998) 22 Tul Mar LJ 472-474.
\item \textsuperscript{36} Reed Electronic Finance Law 117.
\end{itemize}
11.6.2 Description

SeaDocs (Seaborne Trade Documentation System) was conceived in 1983 by Chase Manhattan Bank on the initiative of INTERTANKO.37 Under the system documents such as the bill of lading are prepared and issued in their traditional form. Thereafter the bill of lading is deposited with the Registry. The subsequent negotiation of the bill of lading is undertaken by the Registry on behalf of its members: the Registry transfers the bill of lading as the agent of the seller and receives it as the agent of the buyer.38 The bill of lading in the vault of the Registry is also physically indorsed.39 Near the port of destination the master can inquire from the Registry to whom delivery must be made.40 The Registry receives information and then provides information in response or performs acts relating to the documents.41 The last holder of the bill of lading according to the Registry can demand the original paper documents to use in the event of a dispute.42 Regarding letters of credit, the Registry can either provide an electronic copy of the bill of lading to a bank or certify to a bank that the bill of lading and other documents conform to the letter of credit.43 SeaDocs undertook the duty to scrutinize the bill of lading "somewhat grudgingly", and in addition a very wide exclusion of liability clause now formed part of the governing contract.44 Parties therefore felt their own control systems already in place were more reliable.

37 Love [1992] 2 OGLTR 54. Intertanko is an international association of tank owners. The system was proposed by Mr Per Gram (see Gram 1983 CMI Colloquium 69-72), a Norwegian maritime lawyer involved with Intertanko, and developed at Chase Manhattan Bank by Urbach: see Urbach Electronic Documents 117; Kozolchyk (1992) 55 Law and Contemporary Problems 89 n 199; Albert (1986) 14 Int Bus Lawyer 430.


41 The messages must meet three tests: "(i) each party's message must be confirmed by at least one or more other messages, (ii) messages are re-filed to the presumed sender and must be re-acknowledged, and (iii) each message has a header code which is unique to sender and message as it must contain an element from the prior sender and from the computer acknowledgement message": Urbach Electronic Presentation 121. For a more detailed description of the process see Kozolchyk (1992) 55 Law and Contemporary Problems 89; Kozolchyk (1992) 23 J Mar L & Com 228; Green (1988) 3 Florida Int LJ 235-236; Yiannopoulos (ed) Ocean Bills of Lading 23.

42 Urbach Electronic Presentation 120; Yiannopoulos (ed) Ocean Bills of Lading 23.

43 Urbach Electronic Presentation 120.

The system is relatively open, as any party with a secure way of communication can access the system — but all users must conclude a contract authorising the Registry to act on their behalf, and the contract also included a multitude of further conditions. The Registry is protected against mistakes. A bill of lading can only be registered if all the interested parties were participants to the system. Again SeaDocs were indemnified should a nonparticipant appear in the transaction chain.

11.6.3 Evaluation

The advantage of the system is that the paper bill of lading survives together with the legal rules governing the bill of lading: “By retaining the physical documents SeaDocs solves the critical problems faced by any electronic transfer system, that is uncertainty in law and questions as to the authenticity of the purported message. ... The useful features of a bill of lading are preserved, the document is only made to function better.” This is however not how things worked out in practice: “Although it was a stated goal of the Registry that the legal relationships of the various parties would remain unaffected, ‘fix it but don’t change it’ did not prove to be a workable maxim where bills of lading were concerned. It proved necessary at almost every point to encumber the original simplicity with a whole series of special provisions in order to deal realistically with the interests of the various parties involved.” This is perhaps a warning to all systems that theoretically look sound on paper.

The first obvious point of criticism is that the system retains the bill of lading, but that was excusable at the time when the system was designed. The promised benefits were to eliminate

45 Urbach *Electronic Presentation* 120.
47 Urbach *Electronic Presentation* 121-122.
49 The system can be compared with cheque truncation, although admittedly the cheques are not negotiated anymore after being immobilised: see Malan and Pretorius *Bills of Exchange* 291-296.
delays in the arrival of the bill of lading both at the port of discharge and at intermediate buyers of the cargo, and thus eliminate letters of indemnity.\textsuperscript{52} The carrier will also know to whom the cargo must be delivered by relying on the Registry, and would thus in theory never be liable for delivery to the wrong party.\textsuperscript{53} A pilot project was launched by Chase Manhattan Bank in which 60 companies participated and “shadow documents” were used to test the Registry.\textsuperscript{54} In spite of all this, SeaDocs still failed. When requesting prospective shareholders to join SeaDocs in 1986, the project did not attract support, and Chase Manhattan Bank withdrew from SeaDocs in 1987.\textsuperscript{55}

There are several specific reasons for the failure of SeaDocs. None of the parties involved were convinced they were going to derive benefits from the system that would make up for the perceived disadvantages that would follow. Shipowners worried about the lack of support from insurers and the high cost of insurance.\textsuperscript{56} Buyers saw many new expenses, while they were not certain that the documents would have a higher degree of validity and accuracy than before. Banks did not like the fact that they were not able to inspect the documents, while still having to comply with the strict demands imposed by letters of credit.\textsuperscript{57} Banks also felt uncomfortable because the Registry was controlled by a competitor.\textsuperscript{58}

A very important further disadvantage was that SeaDocs protected themselves against just about any eventuality, as already described above. SeaDocs could further also expel a bill of lading or a participant without notice or explanation. They limited the monetary value of their liability. SeaDocs could also unilaterally change the rules and the operating procedures.\textsuperscript{59} Another problem was the fact that traders did not want their transactions recorded in a Registry that can be inspected by the Registry itself, competitors and tax authorities.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{52} See Basedow \textit{Dokumentelose Wertbewegungen} 91.
\item \textsuperscript{53} Love [1992] 2 \textit{OGLTR} 54; Green (1988) 3 \textit{Florida Int LJ} 238-239.
\item \textsuperscript{54} Love [1992] 2 \textit{OGLTR} 56.
\item \textsuperscript{55} Love [1992] 2 \textit{OGLTR} 56.
\item \textsuperscript{57} Love [1992] 2 \textit{OGLTR} 56.
\item \textsuperscript{58} Kozolchyk (1992) 23 \textit{J Mar L & Com} 228; Yiannopoulos (ed) \textit{Ocean Bills of Lading} 23.
\item \textsuperscript{59} Love [1992] 2 \textit{OGLTR} 55.
\item \textsuperscript{60} Kozolchyk (1992) 23 \textit{J Mar L & Com} 228; Green (1988) 3 \textit{Florida Int LJ} 241; Yiannopoulos (ed) \textit{Ocean Bills of Lading} 23.
\end{itemize}
even in international business in which confidentiality and privacy are a greater obsession. Traders worry about the competition and in some cases the taxman. Cargoes may follow devious routes and lengthy transaction chains to bust regional boycotts and international sanctions.\textsuperscript{61} Love concluded,\textsuperscript{62}

"Finally, all difficulties at the end of the day came back to the central problem: the legal complexity of the bill itself. Because it performed so many functions for so many people it was impossible to devise a simple system which could satisfy all interested parties and at the same time escape from the potential conflicts of interest which were inherent in the nature of the bill itself. The effort to do so was sincere, protracted and well funded, but ultimately it failed."

\section*{11.7 Conclusion}

The two systems described here — Cargo Key Receipt and SeaDocs — can be seen as important precursors to a truly electronic bill of lading. The Cargo Key Receipt system showed that waybills can be replicated electronically. This is of course even easier when there is no need to make provision for a bank providing security. Nevertheless, as discussed in Chapter 8, there is still a need for a bill of lading allowing the parties to trade in the goods during the voyage. It seems as if SeaDocs failed more because of the way in which it was practically implemented, than because the idea as such was flawed. The SeaDocs system, even though it failed, was a sound concept in the early eighties. This is not the case anymore today. Today there is a need for a paperless electronic bill of lading, and these possibilities will be scrutinized in the next chapter.

\textsuperscript{61} Reed \textit{Electronic Trade Payments} 111. All records would be destroyed after six months.

\textsuperscript{62} [1992] 2 \textit{OGLTR} 56.
Chapter 12

Negotiable Electronic
Bills of Lading

12.1 Introduction

Hare\(^1\) wrote, “the very dignity which the law has ascribed to a bill of lading as an essential
document of international trade, and its integrity as the surrogate for the goods it describes,
militates against its replacement by anything as intangible as a sequence of computer codes
drifting in the amorphous nowhere of cyberspace.” As it has previously often been mentioned,
it will indeed be difficult to recreate a document of title that can be negotiated electronically. It
is nevertheless possible, and it is submitted that the dignity of the paper bill of lading can be
retained in an electronic environment. This chapter examines electronic surrogates for the paper
bill of lading that provide all the functions of the traditional bill of lading, especially that of the
bill of lading as a document of title. The first is the pioneering work of Reinskou who proposed
a theoretical system based on notification and confirmation of messages. The second is the CMI
Rules for Electronic Bills of Lading. These Rules will be examined extensively for a few
reasons. Firstly, the Rules are international in nature and not linked to a specific country or legal
system. Secondly, the Rules are very comprehensive. This allows more detailed commentary.
Thirdly, the Rules might form the basis\(^2\) of many systems that will be adopted in the future, even
though such systems will not follow the exact route proposed by the Rules. Then follows a
discussion of the way in which regulations can ensure that the Carriage of Goods by Sea Act
1992 is applicable to electronic bill of lading, the application of the Sea-Carriage Documents Act
1998 of South Australia to electronic bills of lading and some relevant articles in the
UNCITRAL Model Law on Electronic Commerce 1996. After discussing the Model Law, the
Bolero system (“bolero.net”) will be examined as a system for electronic bills of lading that is

\(^1\) Shipping Law 567.

\(^2\) Or put less emphatically, they will provide the inspiration for many future systems.
used in practice. This undoubtedly shows that electronic bills of lading are not only possible in theory but are being used in international trade today.

12.2 Reinskou's Notification-Confirmation System

12.2.1 Description

The system proposed by Reinskou seems clear and simple at first glance. This might of course largely be because of the fact that it contains none of the details of the CMI Rules for Electronic Bills of Lading or the even more comprehensive rules of Bolero. Reinskou followed a functional approach, leaving him free from the shackles of the traditional bill of lading: "the problem is not how to construct a system to which the law on negotiability is applicable. The problem is how to make a system that will lead to the same legal consequences as those which today follow from the law on negotiability." 3 The system works in the following way: 4

"The fundamental idea is the conception of a notification-confirmation system. Whenever a right in the goods is created or assigned, the transferor notifies the carrier of the transaction. The carrier registers the change and sends the transferee [the "lawful receiver"] a confirmation of his acquired right. If e.g. the goods are sold while at sea, the seller who is registered as the owner, will notify the carrier of the sale. The carrier registers the buyer as the new owner and confirms to him that he is now the owner of the goods." 5

The first confirmation is issued by the carrier 6 to the shipper after the shipment of the goods, unless the carrier is already notified of a sale of the goods, in which case the confirmation will be sent to the buyer, and a "duplicate" to the shipper as a receipt. 7 The confirmation sent by the carrier will include the contract of carriage as well as a description of the goods as in a regular bill of lading. 8 Reinskou stressed that "the legally significant events for the creation of legal

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3 Reinskou (1981) 2 J Media L & P 161. Reinskou 160 wrote, "The conclusion to draw from the article is that there is no serious legal or technical obstacles to computerization, or to put it into Latin: Navigare necesse est, Documenta non sunt necessaria."


5 There is of course no need that the computer equipment must be physically located on the ship: see Reinskou (1981) 2 J Media L & P 179.

6 Reinskou (1981) 2 J Media L & P 172-173. Of course the original information (such as a description of the goods) may be transmitted directly from the shipper to the carrier, the carrier checks the information and adds to it if necessary, and then issues the confirmation.

rights and obligations are the messages themselves. The carrier’s registration of the notifications and the information stored in his computer are of no legal consequence in this process.” The electronic process is used for speed and efficiency in the delivery of the messages. Negotiability and other essential characteristics of the traditional bill of lading are created by contractual means. The original contract of carriage will state that the carrier will issue confirmations to transferees after being notified by a transferor, and every confirmation will contain the same clause binding the carrier to take part in the system. According to Reinskou, the confirmation “is formulated as an independent [unilateral] promise” that “will govern the contractual relationship between the carrier and the buyer.” The promise irrevocably binds the promisor. In South African terms it would perhaps be clearer to state that an offer is made by the carrier to carry the goods on the terms set out in the confirmation, which is of course the same as the original contract of carriage. The contract of carriage and confirmations will further stipulate that the carrier is discharged if he delivers the goods in good faith to the party to whom he transmitted the last confirmation (normally the carrier is discharged when delivering to the holder of a bill of lading without any notice or knowledge of irregularities). When a letter of credit is used, the seller notifies the carrier of a transfer to the advising bank and the carrier confirms to the advising bank. The advising bank pays the seller if there are no irregularities. The advising bank in turn notifies the carrier of a transfer to the issuing bank and the carrier confirms to the issuing bank. The transfer from the issuing bank to the buyer will take place in the same way, usually when the buyer pays the bank. Security will be achieved by way of public-key cryptography.

12.2.2 Evaluation

The most obvious deterrent of the system is that it imposes a burden on the carrier that it did not
have to bear previously. This is admitted by Reinskou, but of course the carrier will recoup their expenses by way of higher freight. The further problem with such a system is that it will be available only to participants. Reinskou indicated that when goods are sold to an outsider, the carrier can issue a normal bill of lading after the notification and request from the seller. Further negotiation within the system is then suspended. In the extract on how the system works that was quoted above, Reinskou indicated that a party will be registered as the owner of the goods. This approach should not be followed: a party should be registered as the holder of the bill of lading, and questions of ownership should be left to the law that governs the transaction. There is no definite link between being the holder of a bill of lading, and being the owner of the goods. Another difficulty is getting all the parties to agree on the very detailed contract that is required. It should also not be forgotten that the system is of course essentially a registry kept by the carrier.

Toh See Kiat wrote that Reinskou’s system at first glance looks very similar to the CMI Rules that he classified as a technical approach. Toh See Kiat nevertheless stated that the fundamental difference between the systems is that “Reinskou aims to reproduce the effects of the bill of lading by means of a contractual arrangement (a legal technique) [while the CMI Rules] uses a technical technique (supported by a contract) to do the same.” It is not clear why this should

14 See Basedow Dokumentelose Wertbewegungen 96-97.
16 Traders might not be so willing to pay for the additional costs of communications: see Toh See Kiat Paperless International Trade 186.
18 Toh See Kiat Paperless International Trade 186. The liability of the carrier in the case of miscommunication or system failure should be extensively governed in the contract. Toh See Kiat also indicated that there are privity of contract issues and problems regarding consideration in English law if the carrier does not send a confirmation to a transferee, as such a transferee is then not a party to the contract. The contract of carriage between the shipper and the carrier in which the carrier undertakes to send confirmations to subsequent transferees can be regarded as a stipulatio alteri in South African terms. A delictual claim might also provide some degree of relief to such a transferee. The problem of consideration does not arise in South African law. On the other hand Toh See Kiat indicated that while the carrier might be exonerated by the contract of carriage against wrongful delivery, the carrier is still not protected from a suit in tort instituted by a non-participant. In South African terms, it will at least be necessary to prove that the carrier was negligent before a delictual claim will succeed — and as in the case of the traditional bill of lading the carrier is unlikely to be negligent when he delivered to the last confirmed transferee without notice of any irregularities.
19 Paperless International Trade 186.
make any difference, and whether there even is such a fundamental difference between the two
systems to warrant the one being classified as a functional approach and the other as a technical
approach. It is submitted that both these systems are based on the functional approach. It will be
seen in the discussion of the CMI Rules that follow, that a multitude of aspects have not been
considered in Reinskou's system. This is not so much a criticism of Reinskou's theoretical
system, as an indication that in practice the statutory or contractual framework will need to be
extremely comprehensive.

12.3 CMI\textsuperscript{20} Rules for Electronic Bills of Lading\textsuperscript{21}

12.3.1 Introduction

Because an extensive commentary on the Rules will be provided in this section, many of the
articles will be quoted in full rather than paraphrasing them. A more general evaluation of the
Rules will subsequently be provided. As a general observation at this stage it can be said that
some of the rules are not drafted very elegantly.

Before delving into the more obscure details of the rules, it might be helpful to give a general
outline of the system envisaged.\textsuperscript{22} After the carrier has received the goods, the carrier transmits
an electronic receipt message to the shipper containing all the information normally found in a
bill of lading. In addition the message contains a "Private Key" (i.e., a secret code or perhaps a
digital signature).\textsuperscript{23} After the shipper confirms the message to the carrier, the shipper becomes

\textsuperscript{20} The Comité Maritime International is an international federation of national maritime law associations.

\textsuperscript{21} See Chandler (1989) 20 J Mar L & Com 573-575 for the history of the effort. Professor Jan Ramberg of the
University of Stockholm was the Chairman of the International CMI Subcommittee. For a similar scheme
see Reed Electronic Finance Law 136-139.

the process.

\textsuperscript{23} The use of the term "Private Key" is to be regretted, as it might cause confusion with the "private key" in the
case of asymmetric cryptography. The "Private Key" should also not be confused with the means of securing
the message. The use of asymmetric cryptography or any other means of providing security is a separate matter:
the "Holder". Suppose the holder wants to transfer the electronic bill of lading. The holder notifies the carrier of its intention to transfer the electronic bill of lading using the Private Key, the carrier confirms the message to the holder, the carrier transmits the receipt message (excluding any Private Key) to the proposed new holder, the proposed new holder advises the carrier of its acceptance and the carrier then cancels the current Private Key and issues a new Private Key to the new holder. The carrier later notifies the holder of the date and place of the intended delivery of the goods, and delivers the goods upon production of proper identification. This is a brief description of the system, and what follows is a more detailed analysis.

12.3.2 Rules 1 to 6

Rule 1 states the rules will apply whenever the parties so agree. The rules will therefore not apply automatically. The agreement wherein the parties agree that the CMI Rules will govern their relationship, can be concluded by EDI when the parties first make contact (thus effectively forming part of the contract of carriage), or it can be a master agreement concluded beforehand.

Rule 2 provides definitions of "Contract of carriage", "EDI", "UN/EDIFACT", "Transmission", "Confirmation", "Private Key", "Holder", "Electronic Monitoring System" and "Electronic Storage". The concepts of "Holder" and "Private Key" will be discussed in more detail below, but the definitions will be given in the meantime. "Private Key" is defined 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." "Holder" is "the party who is entitled to the rights described in Rule 7(a) by virtue of its possession of a valid Private Key." The following definitions may require some further elucidation. "Confirmation" is defined as "a Transmission which advises that the content of a Transmission appears to be complete and

24 The Rules state that what is transferred is the "Right of Control and Transfer" and not an electronic bill of lading as such.

25 For a graphical representation of a transaction where a letter of credit is used, see Chandler (1998) 22 Tul Mar LJ 479-480.


27 Defined in Rule 2(a) as "any agreement to carry goods wholly or partly by sea."

28 Defined in Rule 2(d) as "one or more messages electronically sent together as one unit of dispatch which includes heading and terminating data."
correct, without prejudice to any subsequent consideration or action that the content may warrant." This should be read with Rule 3(d): "Unless otherwise agreed, a recipient of a Transmission is not authorised to act on a Transmission unless he has sent a Confirmation." Therefore all transmissions must be confirmed. This avoids misunderstandings and reduces the risk of unauthorized transmissions. "Electronic Monitoring System" is defined as "the device by which a computer system can be examined for the transactions that it recorded, such as a Trade Data Log or an Audit Trail." In Rule 3(e) it is stated that in the event of a dispute the Electronic Monitoring System may be used to verify the data received. The Electronic Monitoring System can therefore be said simply to be the controls in place that provide proof of a particular transaction by tracing and monitoring the information sent and received by the computer. Finally "Electronic Storage" is defined as "any temporary, intermediate or permanent storage of electronic data including the primary and the back-up storage of such data."

Parts of Rule 3 have been referred to above already. In Rule 3(a) it is determined that the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID) governs the conduct between the parties when not in conflict with the Rules, and Rule 3(b) states that the standards to be applied is UN/EDIFACT unless the parties agree otherwise. Rule 3(c) states that unless otherwise agreed, the document format for the contract of carriage must conform to the UN Layout Key or compatible national standard for bills of lading. Rule 3(e) provides that the data relating to transactions are considered as trade secrets not available for inspection, unless the data is revealed in an examination of the Electronic Monitoring System.

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29 This can be changed by agreement between the parties.
30 Both an Audit Trail and a Trade Data Log are used "to verify when and what data was received in a computer system": Chandler (1989) 20 J Mar L & Com 572.
32 This is in effect an interchange agreement.
33 The exact words are: "However, the parties may use any other method of trade data interchange acceptable to all of the users." Toh See Kiat Paperless International Trade 182 asked, "Does this mean all the participants and potential participants in the system?" It is submitted that the users cannot sensibly be interpreted to include potential participants, as one could not reasonably envisage a change in the standards used in the middle of the voyage. So the users must be the original users or all the parties in a closed system. It is admitted that the section does not make this clear.
34 Toh See Kiat Paperless International Trade 182 wrote, "It is not clear how a telematic document can comply with the format designed for a paper document. It is submitted that the format — when viewed or printed — can be the same as for a paper bill of lading."
in which case the data must still be treated as confidential and may not be released to an outside party. Rule 3(f) provides that a “transfer of rights to the goods shall be considered to be private information, and shall not be released to any outside party not connected to the transport or clearance of the goods.” These provisions dealing with confidentiality are understandable in the light of the SeaDocs experience.\textsuperscript{35} Rule 10 (also discussed below) provides that the holder can at any time before the delivery of the goods demand a paper bill of lading from the carrier. Such a bill of lading will not include a full list of indorsements (thus showing the transfers that have taken place), but will be made out to bearer or to the order of the holder. This situation may be regarded as somewhat strange, as it is a departure from the paper bill of lading that will indicate the full chain of transfers, but as said perhaps this can be understood in the light of SeaDocs. Apparently the reason behind this procedure is that just as the first bill of lading given to the shipper will not contain a string of indorsements, when a paper bill of lading is demanded it will not contain indorsements either.

Rule 4 deals with the form and content of the receipt message:

a. The carrier, upon receiving the goods from the shipper, shall give notice of the receipt of the goods to the shipper by a message at the electronic address specified by the shipper.

b. This receipt shall include:

(i) the name of the shipper;
(ii) the description of the goods, with any representations and reservations, in the same tenor as would be required if a paper bill of lading were issued;
(iii) the date and place of the receipt of the goods;
(iv) a reference to the carrier's terms and conditions of carriage; and
(v) the Private Key to be used in subsequent Transmissions.

The shipper must confirm this receipt message to the carrier, upon which Confirmation the shipper shall be the Holder.

c. Upon demand of the Holder, the receipt message shall be updated with the date and place of shipment as soon as the goods have been loaded on board.\textsuperscript{36}

d. The information contained in (ii), (iii) and (iv) of paragraph (b) above including the date and place of shipment if updated in accordance with paragraph (c) of this Rule, shall have the same force and effect as if the receipt message were contained in a paper bill of lading.

\textsuperscript{35} It was felt that “truly sensitive trades could be masked by the use of agents, forwarders or little known subsidiaries”: Chandler (1989) 20 J Mar L & Com 574.

\textsuperscript{36} A received for shipment bill of lading can also be changed into an onboard bill of lading. These are not “periodic updates” as indicated by Kelly (1992) 16 Tul Mar LJ 364, but a one-off occurrence.
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In this Rule provision is made for the receipt function of the bill of lading as well as the fact that a bill of lading evidences the contract of carriage. Rule 4(b) shows that the message will contain the same information as the traditional bill of lading. Before the shipper confirms the message, he can check the accuracy of the information. Rule 4(d) makes it clear that the same legal rules will apply as in the case of a traditional bill of lading. It is submitted that between the contracting parties\textsuperscript{37} at least the provision will be fully effective.\textsuperscript{38} Therefore the receipt function of the electronic bill of lading will be similar to the receipt function of the traditional bill of lading among the parties that are bound by the CMI Rules.

As in the case of a paper bill of lading it might be impractical to include the whole contract of carriage in the message, and therefore Rule 5(a) provides that it “is agreed and understood that whenever the carrier makes a reference to its terms and conditions of carriage, these terms and conditions shall form part of the Contract of Carriage.” According to Rule 5(b) these “terms and conditions must be readily available to the parties to the Contract of Carriage.” Even when using a paper bill of lading there will usually be an incorporation clause referring to the full contract of carriage available elsewhere. Rule 5(c) states that where there is “any conflict or inconsistency between such terms and conditions [in the contract of carriage] and these Rules, these Rules shall prevail.” Rule 6 deals with applicable law and determines that the contract of carriage “shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued.” Thus if the Hague-Visby Rules would have applied if a paper bill of lading had been issued, the Hague-Visby Rules will apply when using the CMI Rules as well. The reason why an express incorporation is necessary is because the Hague-Visby Rules “applies only to contracts of carriage covered by a bill of lading or any similar document of title.”\textsuperscript{39} However, even so it is not certain that the Hague-Visby Rules will be incorporated in such a case, due to the express declaration that they apply only to bills of lading and similar documents of title.\textsuperscript{40} At the very least the incorporation clause must be very

\textsuperscript{37} The parties that agree to be bound by the CMI Rules.

\textsuperscript{38} Cf Kindred \textit{7 BFLR} 273-274; Myburgh \textit{Current Developments — New Zealand} 258; Roberts \textit{Electronic Bills of Lading} 96; Van Boom (1997) \textit{32 European Transport Law} 16.

\textsuperscript{39} Art I(b). Incorporated into South African law by the Carriage of Goods by Sea Act 1 of 1986 s 1.

\textsuperscript{40} Faber 1996 \textit{LMCLQ} 239: “Therefore, if a court were to hold the electronic message not to be a bill of lading or document of title, the Rules would not apply.”
carefully worded. The Hague-Visby Rules can be amended to apply to electronic bills of lading to avoid any uncertainty, but it is submitted that this is strictly speaking not necessary.

12.3.3 Rule 7, Contractual Rights and Obligations and Possession

Rule 7 deals with the right of control and transfer, and states:

a. The Holder is the only party who may, as against the carrier:
   (1) claim delivery of the goods;
   (2) nominate the consignee or substitute a nominated consignee for any other party, including itself;
   (3) transfer the Right of Control and Transfer to another party;
   (4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.

b. A transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and (ii) confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in article 4 (except for the Private Key) to the proposed new Holder, whereafter (iv) the proposed new Holder shall advise the carrier of its acceptance of the Right to Control and Transfer whereupon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.

c. If the proposed new Holder advises the carrier that it does not accept the Right to Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effects as the transfer of such rights under a paper bill of lading.

Rule 7 can therefore generally be said to deal with the bill of lading as a document of title, and possibly also with the transfer of contractual rights and obligations. The system can be compared with the indorsement and delivery of a paper bill of lading. The transferee under the Rules, similar to the indorsee of a traditional bill of lading, now has access to all the information contained in a traditional bill of lading, especially regarding the quantity and condition of the goods, and the contract of carriage. The transferee, by virtue of being the holder of the Private Key, also effectively controls the goods. Whether it can be said that a transfer of the rights of suit and liabilities takes place in some way, and whether the transferee is actually in possession of

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41 Faber 1996 LMCLQ 239. See the Bolero Rulebook Art 3.2(4) (§12.7.2 infra) for an example of such a clause.

42 See Kindred 7 BFLR 278-279; Roberts Electronic Bills of Lading 97.
the goods, will be discussed below.

Rule 7(d) states that a transfer under the Rules will have the same effect as the transfer of a paper bill of lading.\textsuperscript{43} This is of course a sensible provision but it may not be fully effective.\textsuperscript{44} Whether the provisions (in South Africa) will lead to the application of the Bills of Lading Act 1855 is not sure at all, and probably unlikely.\textsuperscript{45} The Bills of Lading Act 1855, for example, specifically provides for transfer upon or by reason of indorsement.\textsuperscript{46} The transfer procedure followed in the Rules would not be regarded as indorsement in the traditional sense. It is further unlikely that the holder of the Private Key will be regarded as a consignee or an indorsee. It is therefore submitted that the Bills of Lading Act 1855 will not apply in South Africa to an electronic bill of lading created by the CMI rules. The English Carriage of Goods by Sea Act 1992 specifically provides for the possibility of regulations dealing with electronic bills of lading,\textsuperscript{47} and will be discussed below. It would be possible to let the provisions of that Act apply in the case of these Rules.

There is however another possibility. A contract with the same terms as the original contract of carriage is concluded between the carrier and the transferee: there is an offer by the carrier and acceptance by the transferee.\textsuperscript{48} This approach perhaps makes it less crucial for a transfer of the rights of suit to take place and for liabilities to be imposed.\textsuperscript{49} The problem with this approach and the Rules as they currently stand, is that the rights and liabilities of the transferor are not

\textsuperscript{43} Therefore the holder of the electronic bill of lading is not necessarily the owner of the goods and a transfer of the electronic bill of lading will not necessarily lead to a transfer of ownership as implied by Kelly (1992) 16 \textit{Tul Mar LJ} 363, 364. For the same mistake see Yiannopoulus (ed) \textit{Ocean Bills of Lading} 28.

\textsuperscript{44} Cf Yiannopoulus \textit{Ocean Bills of Lading} 37-38; Kozolchyk (1992) 23 \textit{J Mar L & Com} 240.

\textsuperscript{45} Van Boom (1997) 32 \textit{European Transport Law} 16-17, 21-22. Kindred 7 \textit{BFLR} 280 wrote that in Canada the relevant legislation dealing with the transfer of contractual rights and obligations will not apply, because it refers only to bills of lading and not to electronic transactions. Kindred wrote, though, that “it can be strongly argued at common law that Article 7 demonstrates clear agreement that one party, to the knowledge of the other, intends to transfer all its interest in the transaction, which is enough, at the very least, to effect an assignment in equity.” For a similar conclusion in New Zealand see Myburgh \textit{Current Developments — New Zealand} 258.

\textsuperscript{46} For a more comprehensive discussion see Roberts \textit{Electronic Bills of Lading} 98-105.

\textsuperscript{47} s 1(5) and s 1(6). Also see the Sea Transport Documents Bill s 9.

\textsuperscript{48} Cf Reed \textit{Electronic Finance Law} 140.

\textsuperscript{49} Cf Todd \textit{Documentary Credits} 122.
extinguished, and there remains a contract in existence between the carrier and each transferee. Apart from the liabilities of the original shipper, this is not the approach of the Carriage of Goods by Sea Act 1992 where the rights of suit are transferred and liabilities only imposed under certain circumstances. A solution where many of these problems were remedied, will be discussed below.

A further and even more intriguing problem is the fact that the transfer of a paper bill of lading equals transfer of possession of the goods. It is submitted that one cannot by mere agreement “transfer” possession, therefore it will not help the parties to agree contractually to say that the transfer under the Rules will now also amount to symbolical delivery of the goods, which is the implication of Rule 7(d). Possession is a factual question; it cannot be created by means of an agreement. There might be another solution though. The carrier plays an active role in the transfer mechanism — something it did not do when using a traditional bill of lading. Therefore, instead of symbolical delivery, one can make use of attornment as a form of

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50 Carriage of Goods by Sea Act 1992 s 3(3).
51 s 2(1).
52 s 3(1).
53 See the discussion of the Bolero Rulebook Art 3.5.1 in §12.7.2.
54 Kozolchyk (1992) 23 J Mar L & Com 243 wrote, “Throughout the history of documents of title, possession provided reliable public notice of legitimacy of acquisition. ... Possession of an electronic bill would be symbolic at best and, thus, would not be apparent to third parties ....” Therefore Kozolchyk proposed a public registry of bills of lading, but this seems unrealistic. It is interesting to note, nevertheless, that it looks unlikely that public notice of possession will be given by any system of electronic bills of lading in future. It is submitted however that third parties will not be in a position worse than they were in when a paper bill of lading was used. It will be equally difficult for a third party to know who is in possession of a paper bill of lading, and therefore in possession of the goods.
55 Cf Van Boom (1997) 32 European Transport Law 13 (referring to a previous version of the Bolero Rulebook though — see §12.7.1 infra): “Another provision states that the holder of the electronic bill has all the same rights and privileges under and in relation to the contract of carriage evidenced by the electronic bill, and in respect of the goods to which the electronic bill of lading relates, as he would have enjoyed had he been the holder of a tangible bill. This provision aims at emulating the proprietary effect the conventional bill has. It can however be doubted whether this provision has any binding force vis-à-vis third parties.” Van Boom 16-17 wrote, “it is in itself highly questionable whether the electronic bill of lading can be used for the transfer of title to the goods. ... Most authors hold the view that in the present state of legislation, the electronic bill of lading is not a document that can be used to transfer ownership and assign rights and duties under the contract of carriage.” It will be indicated below (§12.7) when the Bolero project is discussed that all these functions can indeed be performed by the current embodiment of the Bolero Bill of Lading.
56 See Van Huizen Vervoer en EDI 136-137.
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It was submitted in a previous chapter that under a traditional bill of lading the transfer of the bill of lading does not amount to attornment, either in English or in South African law, but here one is dealing with a novel situation. Attornment as a form of delivery can be used without any difficulty. Van Huizen wrote,

"De 'Private Key' is niet anders dan een erkenning door de vervoerder dat hij voor de rechtsverkrijger gaat houden.

Hier presenteert zich de figuur van de traditio longa manu.

Met het verstrekken van de Private Key erkent de vervoerder de overdracht van het bezit. Daarmee wordt de levering geëffectueerd."

The carrier is aware that he is now holding on behalf of the transferee instead of the transferor because the carrier administers the system. Even if an independent central registry is used, the carrier will be aware of the transfer through the central registry acting as the agent of the carrier. It is submitted that to avoid any uncertainty, on receiving the goods the carrier should explicitly acknowledge that he is holding the goods on behalf of the shipper in the receipt message and with each transfer that he is now holding the goods on behalf of the transferee. This is especially important because attornment is not the form of delivery that was previously used when using a paper bill of lading. The transferor and transferee should also make appropriate statements in their messages. It should be clear from the statements of the three parties that the parties agree that the carrier will now hold the goods on behalf of the transferee and not the transferor. While the goods are at sea the carrier will of course exercise factual control over the goods at the time of attornment.


58 Chapter 5 §5.4.12.

59 Vervoer en EDI 137.

60 This is attornment in South African law and not the same as traditio longa manu in South African law. See Sonnekus and Neels Sakereg Vonnisbundel 401.


62 As Sonnekus and Neels Sakereg Vonnisbundel 401 stated, courts will not take any of the requirements of attornment for granted.

63 See Van der Merwe and De Waal Law of Things 162; Van der Merwe Sakereg 327.
12.3.4 Rules 8 to 10

Rule 8 deals supplies more information regarding the Private Key:

a. The Private Key is unique to each successive Holder. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key.

b. The carrier shall only be obliged to send a Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when such Holder secures the Transmission containing such electronic message by the use of the Private Key.

c. The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security password or identification used to access the computer network.

Rule 9 deals with the delivery of the goods:

a. The carrier shall notify the Holder of the place and date of intended delivery of the goods. Upon such notification the Holder has a duty to nominate a consignee and give adequate delivery instructions to the carrier with verification by the Private Key. In the absence of such nomination, the Holder will be deemed to be the consignee.

b. The carrier shall deliver the goods to the consignee upon production of proper identification in accordance with the delivery instructions specified in paragraph (a) above; such delivery shall automatically cancel the Private Key.

c. The carrier shall be under no liability for misdelivery if it can prove that it exercised reasonable care to ascertain that the party who claimed to be the consignee was in fact that party.

The notification corresponds to normal bill of lading practice where there is usually a party named under the notify address. Just as the bill of lading ceases to be a document of title after the delivery of the goods, delivery of the goods will automatically cancel the Private Key. The

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64 Here one can ask whether the “last” holder means the previous holder, or the current holder: see Toh See Kiat *Paperless International Trade* 216 n 154. Of course it means the current holder.

65 Toh See Kiat *Paperless International Trade* 181 wrote, “The flaw here is the inter-relation of rule 7a and rule 9a. Is a delivery to a new consignee, upon instructions of the holder, a transfer of the right of control and transfer under rule 7? If it is not, then there is no need for the carrier to transmit the information of rule 4 to the new consignee under rule 7b.” It seems that delivery to a new consignee under Rule 9(a) is not a transfer of the right of control under the Rules. Therefore such a new consignee will not be treated as if the consignee were in possession of a paper bill of lading. It is submitted that the choice of the word consignee in Rule 9(a) is somewhat unhappy. The consequences outlined above are indeed what the Rules intended: the holder of the Private Key perhaps wants another party to take delivery of the goods on its behalf — for example another company that will carry the goods by road to the party who is currently the holder of the electronic bill of lading. That other company is now merely identified to the carrier. If the current holder of the Private Key wanted to transfer the electronic bill of lading to that party, it could have been accomplished in the usual manner. Therefore it is submitted that there is no flaw in the Rules, but that the person who takes delivery on behalf of the holder, should rather not be called a “consignee”. A consignee implies somebody who will be a holder of the bill of lading.
carrier is further protected as long it exercised reasonable care to ascertain the identity of the consignee. Again it can be asked whether this provision will protect the carrier against third parties (who did not agree to be bound by the CMI rules) suing for misdelivery of the goods. It is submitted that if the carrier had no notice or knowledge of irregularities, it exercised reasonable care in identifying the consignee and it operated in accordance with the CMI Rules, the carrier should be protected as in the *Glyn Mills* decision. Apart from this though, it is unlikely that there will be another party who can sue for the misdelivery of the goods. If a party is not bound by the CMI Rules, such a party should not be part of the system and will not be the holder of an electronic bill of lading. Only if the carrier fraudulently issued both a paper bill of lading and an electronic bill of lading, can there be a holder of a paper bill of lading in addition to an electronic bill of lading, and then the carrier must of course suffer the consequences.

Rule 10 deals with the option to receive a paper document, and has already been referred to above. According to Rule 10(a)-(d) the holder can demand a paper bill of lading from the carrier at any time prior to delivery of the goods. The carrier will not be responsible for delays in delivering the goods resulting from the holder exercising this option. The carrier also has the option prior to delivery to issue a paper bill of lading to the holder unless the exercise of such option could result in undue delay or disrupts the delivery of the goods. Such a paper bill of lading will include the information referred to in Rule 4 barring the Private Key, and a statement to the effect that the bill of lading has been issued upon termination of the procedures for EDI under the CMI Rules for Electronic Bills of Lading. As already stated, the bill of lading can at the option of the holder be issued either to the order of the holder or to bearer. Issuing a paper bill of lading cancels the Private Key and terminates the procedures for EDI under the Rules. Termination of these procedures will not relieve any of the parties of their rights, obligations or liabilities under the Rules or under the contract of carriage. A reason why it may be necessary to revert to a traditional bill of lading is that a party does not have the hardware to deal with EDI. It is nevertheless submitted that it should not be this easy to demand a paper bill of lading, or for the carrier to issue a paper bill of lading — the parties should be compelled to remain in the system unless, for example, there is system failure on such a scale that the continued use of electronic bills of lading is impossible. It is also possible of course that the requisite technology

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66 See Chapter 7 §7.3.3 *supra.*

might not be available at a specific port or part of the world.  

Rule 10(e) provides that the holder can at any time demand a print-out of the receipt message referred to in Rule 4 that must be marked as a non-negotiable copy. Of course such a copy does not cancel the Private Key or terminate the procedures for EDI.

### 12.3.5 Rule 11 and Writing and Signature Requirements of a Traditional Bill of Lading

Rule 11 states:

The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the Contract of Carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayed in human language on a video screen or as printed out by a computer. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.

It is of course unlikely that the parties can agree to this where there is a statutory (or even common law) requirement for writing and signature. In fact Rule 6 expressly states that the contract of carriage is subject to any international convention or national law that would have been applicable if a paper bill of lading had been issued. There is no express statutory requirement in English or South African law that a bill of lading must be in writing and must be signed, but realistically writing (on paper) in the traditional sense is probably mandatory for

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68 See Faber 1996 LMCLQ 234.

69 Cova Arria (1997) 32 European Transport Law 712; Reed Electronic Finance Law 140; Kindred 7 BFLR 281; Myburgh Current Developments — New Zealand 257; Myburgh [1993] NZLR 328; Roberts Electronic Bills of Lading 93.

70 Myburgh [1993] NZLR 328.

71 Carr Current Developments — Great Britain 166-167; Roberts Electronic Bills of Lading 91. Faber (1993) 2 Law, Computers and Artificial Intelligence 27-28 wrote, “No statute or decided case expressly requires a bill to be signed but references to the signing of bills appear in all the leading textbooks and in many judgements.” In Germany a bill of lading must be in writing and contain the personal signature of the carrier or his agent. Without a signature neither the carrier or the consignee can rely on the validity of the bill of lading: Herber Current Developments — Germany 161. In Greece a bill of lading must be in writing and contain a handwritten signature, and without a signature the bill of lading is void: Kiantou-Pampouki Current Developments — Greece 200, 201. Writing and/or signature can generally (sometimes by legislation, sometimes implicitly) also be said to be a requirement in Argentina (Ray Current Developments — Argentina 58), Australia (Livermore Current Developments — Australia 76-77), Belgium (Bemauw Current Developments — Belgium 90-91),
the traditional bill of lading to fulfil its functions and a signature is customary. In The "Maurice Desgagnes" the court held that an unsigned document is not a bill of lading after examining various textbooks, statutes and precedents that assume a bill of lading must be signed. The Hague-Visby Rules contain no express requirement of writing and signature, although there are references to a "document of title" and "document" and the carrier must "issue" a bill of lading on demand of the shipper.

The fact that there is no express requirement for a bill of lading to be in writing and to be

71 (...continued)
Canada (Yiannopoulus (ed) Ocean Bills of Lading 13), Japan (Sakurai and Yoshida Current Developments -- Japan 219), the Netherlands (Japikse Current Developments -- The Netherlands 229) and New Zealand (Myburgh Current Developments -- New Zealand 241). Bernauw 115 wrote, "Indeed the legal regime for negotiable instruments ... is in essence based on the technique of a tangible original paper document, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original document. ... A negotiable document of title (like the bill of lading) consists by its very nature of writing: the writing is the vehicle of the right incorporated in the title." A further perspective is provided in the "Bolero Legal Feasibility Study" (downloaded at www.bolero.net decision/legal/legal.php3 (visited 23 May 2000)) §4.3 under the heading "Bolero Bills of Lading as traditional paper bills of lading": "However, under English law there is a more serious problem [than mere writing and signature requirements]. A bill of lading exists in law by the legal recognition of a custom of merchants. Under English law, it is not possible to invent a custom of the trade overnight. A private agreement between two parties and the bearer to create a negotiable instrument does not in law create one in the absence of a wider custom. That being so, we do not believe that Bolero could reproduce the definitional requirements of a bill of lading under English law irrespective of whether dematerialising the document and signature requirements can be overcome." On Bolero further see §12.7.

72 See Chapter 9 §9.6.3 supra.

73 A bill of lading must be "signed or otherwise authenticated" for letter of credit purposes: Oelofse Letters of Credit 216 (see the example of the correct signature by an agent on p 217 n 124).


75 See eg Purchase Documents of Title 22, 25, 28; Scrutton 66.


77 This was a Canadian decision, and the question before the court was whether the document was a bill of lading within the meaning of the Canadian Carriage of Goods by Water Act, RSC 1970 c. C-15.


79 Art I(b).

80 Articles III(3), V, VI, X(a).
signed leaves some room for South African courts to interpret the concept of a bill of lading widely. It is submitted that at least in England and South Africa, a court will not decline to recognise an electronic bill of lading merely because it is not written on paper and does not contain a traditional signature, provided that it fulfills the same functions. A court should, however, not regard an electronic “bill of lading” as a bill of lading if it is not unique, but that will not be because the bill of lading is not written on paper and signed. When writing about a bill of exchange, it was said that a bill must for example be capable of being delivered, presented and accepted, and that the material used should make all these actions possible. The same approach should be followed for the traditional paper bill of lading. Similarly, an electronic bill of lading should also be able to fulfill these functions and must in addition be regarded as the equivalent of an original (unique) paper bill of lading. When all these conditions have been satisfied, as will be the case under the CMI Rules, it is submitted that a court will recognize such an electronic bill of lading, and a court should not reject an electronic bill of lading then because it is not written on paper and does not contain a traditional signature. In other jurisdictions this may be more of a problem.

12.3.6 Further Security

The CMI Rules do not prescribe any specific method such as the use of digital signatures to secure the system. The value of such a technology neutral approach is, as remarked by Chandler, that the CMI Rules “are still relevant, notwithstanding the quantum changes in technology since 1990.”

The security of the system described by the CMI Rules can be further enhanced by the use of public-key cryptography. When the carrier sends the receipt message containing the Private Key to the shipper, the message is encrypted using the private key of the carrier (thus creating

81 Admittedly one can probably argue that this requirement can be derived as was done in The Maurice Desgagnes.

82 Chapter 9 §9.6.1.

83 The system described here should allay the concerns mentioned by Kozolchyk (1992) 23 J Mar L & Com 239-239.


85 See Todd Documentary Credits 125-126; Todd Dematerialisation 114-115.
a digital signature) and the public key of the shipper. When the shipper sends a message to the carrier, the message (including the new Private Key) is encrypted using the secret key of the shipper and the public key of the carrier. The same system is used in messages between the carrier and transferees.

12.3.7 Evaluation

As in Reinskou’s system the obvious objection is that the carrier would not want the burden of acting as a registry and handling the distribution of keys. One can say that these are “new and additional obligations and liabilities for the carrier that have very little relation to the performance of its business of carrying cargoes.” Another consequence of the system is that the carrier is now aware of each transfer, whereas under the traditional bill of lading system they would only see who the final holder of the bill of lading was upon presentation of the bill of lading in exchange for the goods. Therefore the prospective transferors and transferees of the electronic bill of lading might feel that the carrier is not disinterested and impartial (and perhaps reliable) enough to look after their interests. The carrier is after all a party that must perform under the contract of carriage by transporting and delivering the goods. One can of course let an independent third party perform all the functions that the carrier has to perform under the Rules, so long as that party contracts on behalf of the carrier with prospective transferees. A

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86 Kozolchyk (1992) 23 J Mar L & Com 239-240 wrote (his emphasis): “From a strictly legal viewpoint 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 transmitted 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 been non-existing rights relying upon fraudulent information in a receipt message transmitted to it by someone pretending to be the carrier.” It is firstly submitted that the use of public-key cryptography as described above will mean that the transferee will know whether a message originated from the carrier or not. Secondly, a traditional bill of lading is not a negotiable instrument and the holder of the bill may have received the bill from a party without title to it. Also when using an electronic bill of lading, there will be no guarantee that the transferor is for example the owner of the goods.

87 Kindred 7 BFLR 279.


89 See Baughen Shipping Law 25.

further difficulty would be to convince banks to participate in the system.\textsuperscript{91}

The Rules does not regulate what happens in the case of a system failure.\textsuperscript{92} Message corruption on the other hand should be avoided by way of the confirmation procedure signifying that a transmission is complete and correct.\textsuperscript{93} The system is relatively open, as there is no requirement that the parties must belong to a specific group.\textsuperscript{94} It is nevertheless submitted that in practice the system would never be implemented is such an open way.

Toh See Kiat is highly critical of the Rules. It seems however that what bothers him most is the fact that words (especially “holder”) are used, that are too reminiscent of the paper bill of lading.\textsuperscript{95} It is submitted, however, that the use of such terminology is not misleading, and the mere use of terminology cannot by itself determine the nature of the electronic bill of lading.\textsuperscript{96} That some of Rules are drafted inelegantly, is true,\textsuperscript{97} but that can be rectified and the whole

\textsuperscript{91} See Chandler (1998) 22 Tul Mar LJ 477. One of the concerns is security which might be compromised when SWIFT must make provision for interacting with a system based on the CMI Rules. Today, however, SWIFT is a 50% shareholder in Bolero: see §12.7.1 infra.


\textsuperscript{94} Todd Documentary Credits 122.

\textsuperscript{95} See Toh See Kiat Paperless International Trade 181. It is submitted that it is simply not true that “[t]he participants in this system act telematically but think paper bill of lading.” All systems to some extent must replicate the functions of the traditional bill of lading and thus keep the paper bill of lading in mind. There is no need (even when following a functional approach) to devise a completely new set of underlying legal rules. As already discussed above, Toh See Kiat regarded the CMI Rules as a technical approach and Reinskou’s approach as a functional approach for no convincing reason. Toh See Kiat 215 n 145 became very inventive in finding fault with the Rules. Here he criticized the constant reference to EDI because not all communications between the carrier and other parties would amount to an \textit{interchange} of data, some being a one way transmission of instructions. This is absurd: EDI is a term of art to describe a wide variety of electronic communications and there was never an intention that \textit{every} single message must be in response to a previous message or lead to a subsequent message.

\textsuperscript{96} Admittedly it can influence the way in which a concept is viewed. See Chapter 1 §1.3.

\textsuperscript{97} Toh See Kiat Paperless International Trade 215 n 149 (also see Toh See Kiat 214 n 132) correctly pointed out a problem when applying the definition of “confirmation” (Rule 2(e)) to Rule 7(b)(ii). A confirmation advises that the content of a transmission appears complete and correct. In Rule 7(b)(ii) the carrier must confirm the notification message, but the carrier cannot know if the transferee indicated is really the correct transferee. Toh See Kiat wrote, “How is the carrier to know who the holder’s intended transferee is such that he can commit himself to saying that transferee is the one intended (ie ‘correct’)? Surely the ‘confirmation’ of the carrier is meant to indicate the completeness and integrity of the message rather than its accuracy or veracity? Obviously (continued...)
system should not be judged on that fact alone. For example, in Rule 2(i) "electronic storage" is defined, but the term is not used again in the Rules except for "computer data storage" in Rule 11. Another example is the words "human language" in Rule 11. Toh See Kiat\(^9\) indicated that this phrase might not include trade data displayed in codes (such as EDIFACT codes) and numbers "because no human speaks that way". This is indeed not clear drafting.

The advantage of the system is of course that most of the rules relating to paper bills of lading, such as those governing the delivery of the goods, are still able to function without modification.\(^9\) It will be unlikely that the carrier will deliver the goods to the wrong party. It is submitted that the Rules are a valiant, if somewhat flawed attempt to make provision for electronic bills of lading on unchartered waters. One should also give Reinskou some credit for the original idea. Finally it must be stated that the electronic bill of lading cannot be regarded as

\(^9\) (...continued)

it is expected that the carrier would confirm the form rather than the substance of the message, but the definition does not make this clear.\(^*\) It is submitted that the definition can indeed be drafted better, but one can also emphasize the word "appears": the message must only appear correct. Another criticism of Toh See Kiat is the (alleged) use of the word "holder" in differing ways. Toh See Kiat 216 n 150 referred specifically to the use of the phrase "proposed new Holder" in Rule s7(b)(i) and 7(c). It is submitted however that the word "proposed" clearly indicates what is meant and distinguishes the term from just a "Holder" as in Rule 7(a).

Other problems related to imprecise drafting have been discussed above already.

\(^8\) *Paperless International Trade* 182.

\(^9\) See Chandler (1998) 22 *Tul Mar LJ* 476, 477; Ramberg (1997) 32 *European Transport Law* 699-700. Van der Ziel (1997) 32 *European Transport Law* 717-718 criticized this approach whereby the electronic bill of lading is treated "as if" (the words are used in Ruled 4(d), 7(a)(4), also see Rule 7(d)) it were a paper bill of lading. According to him the system "needs legal rules of its own." He furthermore criticized the Rules because they did not deal with the proprietary function of the bill of lading. It is submitted that Van der Ziel's point of view should be strongly rejected. The objective is to provide an electronic equivalent of the bill of lading, and not to create a totally new instrument. The world will simply not agree on new, untested rules for the bill of lading, that not only governs bills of lading but also the (possibly differing) proprietary effects the negotiation of a bill of lading has throughout the world. This was true in 1990 and will be true for a very long time to come. Van der Ziel 717 wrote, "It may be clear that these references to bill of lading principles on an 'as if' basis can only survive for a transitional period during which the paper B/L still exists. ... Then, B/L law will fade away as well, all the more so because, historically, B/L law is based on merchants' customs and practices. " This is simply not true: even if the paper bill of lading is completely abandoned in future, it does not mean that the legal rules relating to the paper bill of lading will simply vanish into thin air. Over time such rules will naturally start to be regarded as applicable to electronic bills of lading. It is of course not hereby implied that by mercantile custom and perhaps by statutory intervention legal rules and practices specifically suited to the electronic bill of lading will not eventually be adopted, and that such rules might be different from the rules governing paper bills of lading. The point is that at the present time there is no need to revise the substantive law surrounding bill of lading to provide for an electronic bill of lading.
a form of commercial paper (Wertpapier) anymore: Van Huizen\textsuperscript{100} described what takes place under the Rules by analogy to paper documents:

"In termen van geschriften gesproken, geeft de vervoerder aan de rechtsverkrijger een geschrift af op grond waarvan de vervoerder zich verplicht de zaken voor hem te gaan houden, tegen inlevering van het door hem aan de rechtsvoorganger afgegeven geschrift. Een dergelijk geschrift en dus evenmin een 'Private Key' in de zin van de CMI Rules voldoet daarmee aan de eisen van waardepapier die aan het cognossement worden gesteld. Dit betekent dat de 'Private Key' niet met een cognossement kan worden gelijkgesteld. Goederrechtelijk fungeert de 'Private Key' zoals een cognossement, niet als drager van zaken. Anders gezegd, de 'Private Key' belichaamt niet de zaken die de vervoerder onder zich heeft."

Regarding the future, Chandler\textsuperscript{101} wrote that "no real usage has occurred to enable a review of the CMI Rules. Given the slow pace that EDI ... is developing, it could be well into the twenty-first century before the CMI will be able to examine a developed practice." Two years after Chandler's article this is not true anymore and Bolero will be discussed below as a "developed practice".

\section*{12.4 Carriage of Goods by Sea Act 1992}

The English Carriage of Goods by Sea Act 1992 section 1 provides:

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to —

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

(6) Regulations under subsection (5) above may—

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

According to section 5(1) "'information technology’ includes any computer or other technology

\textsuperscript{100} Recht en EDI 136-137.

\textsuperscript{101} (1998) 22 Tul Mar LJ 496.
by means of which information or other matter may be recorded or communicated without being reduced to documentary form".102

It must therefore be considered exactly how the Carriage of Goods by Sea Act 1992 can be made to apply to electronic bills of lading by way of regulations.103 Todd104 wrote, “no guidelines are laid down in section 1(5), for example as to the type of electronic documentation that ought in principle to be covered. It would be sensible to allow only electronic documentation which performs a similar function to the other documentation covered by the Act ...” This is of course true, but any guidelines might be restrictive and might become obsolete in future. One would assume that any regulations considered would indeed be only for similar documentation. Regardless of what method is adopted, one is looking at a minefield of unforeseen difficulties.

Faber indicated that the first possibility is to simply state that the Act applies to electronic bills of lading as it applies to paper bills of lading.105 This however is very vague, and leaves too much to do for the lawyers and the courts. The second possibility indicated by Faber is the redefinition of certain words in the Act. The CMI Rules can be scheduled to the Act or regulations and “a bill of lading could be defined as: ‘a receipt message as described in Rule 4’” and the lawful holder of a bill of lading as “the person referred to in the Rules as the ‘Holder’”.106 The problem with such an approach is obvious: the regulations are now inextricably bound to the CMI Rules and will allow little or no variation thereof. Electronic bills of lading are rapidly evolving, and this approach might not cover related systems (even those that do not differ much from the CMI Rules) or possible future developments. An immediate problem pointed out by

102 Todd Documentary Credits 203 pointed out that this definition “assumes that information recorded on a computer system is not itself documentary in form” and that [t]here are good arguments that this is legally incorrect.” Todd 203 n 65 then wrote that “section 1(5) assumes the existence of a paper document” whereas information on a computer is not in documentary form according to the definition. This is not correct. Section 1(5) does not assume the existence of a paper document. The words “corresponding to” are used, for example: “information technology is used for effecting transactions corresponding to ... the issue of a document” (my emphasis). It does not mean that a document must be issued.

103 See Faber (1993) 2 Law, Computers and Artificial Intelligence 31-32; Faber Shipping Documents 92-93; Faber (1992) 6 IYLCPT 81-82. Todd Documentary Credits 119 wrote, “it would probably be a mistake to assume that appropriate regulations will necessarily be forthcoming. Ideally, therefore, any electronic replacement for the bill of lading should provide its own means for the transfer of contractual rights and liabilities along with the documentation itself.”

104 Documentary Credits 203.


Chapter 12: Negotiable Electronic Bills of Lading

Faber is where the notification is not given to the carrier but to another party such as a bank — in such a case the regulations will be ineffective. A more general redefinition of the terms in the Act also provides a new set of problems. To define a bill of lading as “including an electronic message sent by or on behalf of the carrier containing such information as is provided by a documentary bill of lading” is inadequate. The reason is that under the CMI Rules the carrier can send a message to a party who does not want to become the holder and therefore the carrier does not provide that party with a Private Key. Therefore a definition must deal with the Private Key. This will result in a rather long and clumsy definition, and the same criticism referred to above about the exclusivity of the CMI Rules still applies.

Section 1(2)(a) of the Act provides that references to a bill of lading “do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement”. It has been indicated above that the notification system described above used by the CMI Rules cannot be seen as the indorsement (if necessary) and delivery of a bill of lading, and therefore an electronic bill of lading will be excluded from the definition. In section 1(2) a bill of lading should rather be defined as “any negotiable bill of lading including received for shipment bills of lading”. This seems straightforward enough, but section 1(6)(a) quoted above refers to “the following provisions of this Act” and therefore section 1(2) cannot be modified by regulation.

A last remark is that if one looks at section 1(5)(a) and (b) it looks like any future regulations will make provision for the transfer of an electronic document from one holder to the next, while the CMI model is in essence a registry. Section 1(5)(c) is nevertheless wide enough to encompass a system such as that postulated by the CMI Rules. Having said all this, it is clear that

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108 Faber (1992) 6 IYLCPT thus defined a bill of lading as “including an electronic message sent by or on behalf of the carrier containing: (1) name of the shipper; (2) description of the goods; (3) data and place of receipt of the goods; (4) the carrier’s terms and conditions or a reference thereto; (5) a private cypher known only to the carrier and to the person in receipt of the said electronic message who is obliged to use the cypher when giving instruction to the carrier who is not obliged to follow any instruction unless it is accompanied by the said cypher.” The lawful holder of the bill of lading is defined as “the person to whom the carrier has intentionally provided the private cypher.”

109 Faber (1992) 6 IYLCPT 82 (my emphasis).

110 See Todd Documentary Credits 203, also n 65.
it will require careful consideration and draftsmanship to let the Carriage of Goods by Sea Act 1992 apply sensibly to electronic bills of lading. Provisions such as those in s 1(5) and s 1(6) will admittedly have to be framed in very wide terms, which will undoubtedly open the door to some confusion.

The South African Sea Transport Documents Bill does not provide more answers than the English Act. Section 9 deals with regulations and provides:

1. Subject to subsections (2) and (3), the Minister may make regulations —
   a. prescribing the circumstances in which and the conditions subject to which a record or a document produced by a telecommunication system or electronic or other information technology system, and effecting transactions such as those effected by any sea transport document, is to be regarded as a sea transport document;
   b. regarding generally any matters that are reasonably necessary or expedient to be prescribed in order to achieve the objectives of this Act.

2. The Minister must publish all regulations proposed to be made under subsection (1) in the Gazette for comment at least three months before the date contemplated for their commencement.

3. Before the final promulgation of any regulation, the Minister must take into account any comment received on proposed regulations.

Section 3(1) provides:

A sea transport document may be transferred by the holder, either —

a. by the delivery of the document, endorsed as may be necessary; or
b. subject to section 9(1)(a), through the use of a telecommunication system or an electronic or other information technology system.

The inference in section 3(1)(b) is even stronger than in the Carriage of Goods by Sea Act 1992 that an electronic document will be transferred from one holder to the next. A further problem is that "a record or a document" (neither defined) must be produced by the system according to section 9(1)(a). Words such as "record" or "document" should rather not be used in the context of an EDI system, and can be easily avoided as was done in the English Act. The implication might just be that one is referring to a printout made by the system.

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111 The only reference there is to transactions corresponding to the issue of a document and the indorsement and delivery of a document: Carriage of Goods by Sea Act 1992 s 1(5).
12.5 UNCITRAL Model Law on Electronic Commerce 1996

12.5.1 Articles 16 and 17

According to Chandler,\textsuperscript{112} “The UNCITRAL Model Law on Electronic Commerce would provide a legal foundation for the CMI Rules for Electronic Bills of Lading, if enacted in those countries that have legal impediments to such transactions.” Express provisions in the Model Law regarding writing and signatures (although of course not applicable only to maritime commerce) are probably more desirable than the solution in Rule 11. It was nevertheless previously submitted that a court should not withhold recognition of an electronic bill of lading merely because it is not written on paper and does not contain a traditional signature. Apart from the writing and signature articles in the Model Law — both were discussed in Chapter 9 — there are further articles in the Model Law specifically relevant to bills of lading.

Articles 16 and 17\textsuperscript{113} of the Model Law deal with the carriage of goods. It should be noted that these articles are not limited to the carriage of goods by sea, but apply also for example to road, rail or air transport, or the multimodal carriage of goods.\textsuperscript{114} The articles further apply to both non-negotiable and negotiable transport documents.\textsuperscript{115} Article 16 lists a host of actions related to contracts of carriage of goods, for example furnishing the quantity or weight of the goods, issuing a receipt for the goods, confirming that the goods have been loaded, notifying a person of the terms and conditions of the contract and claiming delivery of the goods.\textsuperscript{116} Article 16(f) refers to “granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods” and article 16(g) refers to “acquiring or transferring rights and obligations under the contract”. Article 17(1) then goes on to state that “[s]ubject to paragraph 3, where the law

\textsuperscript{112} (1998) 22 Tul Mar LJ 495.

\textsuperscript{113} For the history of these articles see Chandler (1998) 22 Tul Mar LJ 488-490.

\textsuperscript{114} UNCITRAL Guide to Enactment §§110, 112.

\textsuperscript{115} UNCITRAL Guide to Enactment §110.

\textsuperscript{116} According to Chandler (1998) 22 Tul Mar LJ 494 the reason for the comprehensive list is “to be sure that all of the data messages applicable are treated in the same manner, rather than having acceptance for just the critical messages or having to revert to paper for the incidental transactions.”
requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.” Regarding bills of lading, Article 17(3) is particularly relevant:

If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that reliable method is used to render such data message or messages unique. So if a system such as the CMI Rules is used, there will indeed be an assurance that the data messages that replace the bill of lading, are unique. In the UNCITRAL Guide to Enactment of the Model Law this requirement is referred to as the “guarantee of singularity”. It is submitted that the advantage of this article is that there is now no need to exclude a bill of lading from the working of Article 6(1).

According to Article 17(5):

Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.

Logically a paper bill of lading cannot be used in conjunction and at the same time as an

117 This would for example include the indorsement and delivery of a bill of lading: see UNCITRAL Guide to Enactment §113; Howland (1997) 32 European Transport Law 705.

118 The CMI Rules on Electronic Bills of Lading, for example, envisages the use of more than one message to effect “negotiation” of the electronic bill of lading. See UNCITRAL Guide to Enactment §114.

119 Chandler (1998) 22 Tul Mar LJ 495 wrote, “Enactment of a Model Law containing such a provision would serve to validate voluntary rules for the transfer of rights in goods, such as the CMI Rules, and is an important development for such usages.” This is true, but in the previous sentence he wrote, “Without such a provision, the CMI Rules or any other scheme to transfer rights, could not function.” The concept of uniqueness is of course inherent in the way the CMI Rules will function, and is therefore provided for in the CMI Rules.

120 Article 17(4) provides that “the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.” No particular technical method is specified, ensuring that the Model Law will always be applicable: see Howland (1997) 32 European Transport Law 705-706.

121 §115. According to the Guide to Enactment, “Paragraph (3), in combination with paragraph (4), is intended to ensure that a right can be conveyed to one person only, and that it would not be possible for more than one person at any point in time to lay claim to it.”
electronic bill of lading, as neither one can then be regarded as unique. The article nevertheless envisages that it might be necessary to revert to paper bills of lading for some reason, although the converse is not excluded — there might be a switch from paper documentation to electronic documentation. The UNCITRAL Guide to Enactment indicates that the “reference to ‘terminating’ the use of data messages is open to interpretation.” The circumstances under which termination will be allowed is not provided for in the Model Law, although a state enacting the Model Law might choose to include such provisions.

Article 17(6) provides:

If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

Therefore if the Hague-Visby Rules would have applied to a paper bill of lading, these Rules will also apply to an electronic bill of lading. It was submitted when discussing Rule 6 of the CMI Rules for Electronic Bills of Lading that the Hague-Visby can be incorporated by contract to apply to electronic bills of lading, but is submitted that if Article 17(6) appears in a statute it will dispel any possible uncertainty about the applicability of the Hague-Visby Rules.

12.5.2 Contractual Rights and Obligations and Possession

There is no doubt that on the wording of Articles 16(g), 17(1) and 17(3), the Bills of Lading Act 1855 in South Africa or the Carriage of Goods by Sea Act 1992 in the UK should be applied to unique electronic bills of lading according to the Model Law. While this is definitely a commendable state of affairs, it is submitted that such a wide provision — in effect simply stating that the Act applies to electronic bills of lading — will lead to endless uncertainty. A court will have to interpret an act dealing with the transfer or imposition of rights and liabilities by way of analogy. For example, where there are references to a holder, indorsement, possession

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122 See UNCITRAL Guide to Enactment §118.
123 UNCITRAL Guide to Enactment §120.
124 §119.
125 See UNCITRAL Guide to Enactment §121.
126 Or the proposed Sea Transport Documents Bill.
(of the document) or transfer, a court will now have to embark upon a quest to find similar or analogous concepts regarding an electronic bill of lading. It is submitted that a court should be able to do this in a reasonably sensible manner, but there are still reasons why this is not an approach that should be followed. It submitted that traders will be unlikely to subject the running of their affairs to results that might turn out to be very surprising, and will in any event conclude governing contracts that deal with all eventualities — the Bolero Rulebook and Operating Procedures\textsuperscript{127} indicate the extent of the legal framework that is necessary to enable an electronic bill of lading to have any chance to survive in practice. Secondly, however open-minded a court may be, it is still difficult to predict whether a court will find that a specific procedure used in a system for electronic bills of lading, is for example analogous to negotiating a paper bill of lading or possessing a paper bill of lading. For these reasons it is submitted these articles should not form part of South African or English law without also suitably amending (by regulations) the Carriage of Goods by Sea Act 1992. There is however no reason to amend the Carriage of Goods by Sea Act 1992 in the near future.\textsuperscript{128}

A further question (though of mere academic interest because of the conclusion just reached) about Article 17(6) is whether that specific article will lead to the application of the Bills of Lading Act 1855 in South Africa or the Carriage of Goods by Sea Act 1992 in the UK to electronic bills of lading.\textsuperscript{129} It is submitted that it does not. Article 17(6) deals with a rule of law that applies to a contract of carriage, and not with the transfer of rights and obligations emanating from that contract to another party.

A final comment about the Model Law is that none of the provisions will provide for possession: it does not provide legal recognition for the fact that the transfer of an electronic bill of lading should also effect the transfer of possession of the goods. Article 16(f) refers to “rights in goods” and Article 17(3) also refers to a right. Possession is not a right, and therefore these articles will not affect the question of who is in possession of the goods on the ship. In the absence of delivery of the goods in South Africa, there cannot be a transfer of ownership.

\textsuperscript{127} Generally see §12.7 \textit{infra}.

\textsuperscript{128} See §12.9 \textit{infra}.

\textsuperscript{129} The same question can of course be asked about Rule 6 of the CMI Rules for Electronic Bills of Lading although there one is not dealing with legislation (the idea is that the Model Law will be implemented as legislation in a country).
12.5.3 Assessment: UNCITRAL Model Law and Bills of Lading

Chandler\textsuperscript{130} indicated that the work of UNCITRAL (regarding the Model Law on Electronic Commerce) "in the maritime arena is complete" and "there is no substantive work for the CMI to undertake at this time on EDI or electronic commerce".\textsuperscript{131}

The question still remains how implementing the Model Law as it currently stands would affect electronic bills of lading specifically — it should be remembered that the Model Law is not a contractual framework, but is intended as legislation. It is submitted that when the Model Law is implemented, a court will firstly not be able to deny effect to an electronic bill of lading that is unique because it is not written on paper and it is not traditionally signed. It was submitted previously that a court should even today not deny effect to a unique bill of lading because it is not on paper and signed, but admittedly this is a gray area. Secondly there will be no doubt that the Hague-Visby Rules will apply to electronic bills of lading, although it was also submitted that the same result can be arrived at contractually. Thirdly the Model Law will lead to the application of the Bills of Lading Act 1855 in South Africa, with uncertain consequences. It was submitted that without amending the Bills of Lading Act 1855 (or rather the proposed new South African legislation) or the Carriage of Goods by Sea Act 1992, this result should rather be avoided. Lastly it is submitted that the Model Law will not affect the question of who is in possession of the goods. The conclusion is that — regarding bills of lading specifically — Articles 16 and 17 should not currently form part of South African law.

12.6 Sea-Carriage Documents Act 1998 (South Australia)\textsuperscript{132}

The Australian Act does not only contain a general provision enabling regulations to apply to electronic bills of lading in future. Section 5 deals specifically with electronic and computerised

\textsuperscript{130} (1998) 22 \textit{Tul Mar LJ} 495, 496.

\textsuperscript{131} Of course clarification might always be necessary: see Chandler (1998) 22 \textit{Tul Mar LJ} 496.

\textsuperscript{132} Available at scaleplus.law.gov.au (visited 21 August 2000). The text of the Sea-Carriage Documents Act 34 of 1998 (South Australia) will be used here, although the same legislation has been enacted elsewhere in Australia.
sea-carriage documents:

(1) Subject to this section, this Act applies —

(a) in relation to a sea-carriage document in the form of a data message — in the same way as it applies in relation to a written sea-carriage document; and

(b) in relation to the communication of a sea-carriage document by means of a data message — in the same way as it applies in relation to the communication of a sea-carriage document by other means.

(2) This Act applies under subsection (1) with necessary changes and in accordance with procedures agreed between the parties to the contract of carriage.

The term "communication" used in section 5(1)(b) may lead to some uncertainty. It seems that the term must be interpreted to mean "negotiation" or the equivalent of negotiation in an electronic environment. The "other means" referred to in section 5(1)(b) must mean indorsement (if necessary) and delivery in the case of a paper bill of lading — the transfer or negotiation of a paper bill of lading. A traditional bill of lading is not communicated. The use of the word "communication" might also indicate that the sea-carriage document in the form of a data message must only be communicated to another party, in the sense that the other party must be only be informed of the content of the sea-carriage document, without an action with the same effect as an indorsement and delivery really taking place. The problem already discussed above, is of course that in systems such as Bolero, there is not really any transfer of the electronic bill of lading, as entries are merely made in a register. The advantage of the term "communicate" is therefore that the use of the term "transfer" is avoided and that it is also not implied that an electronic bill of lading can be "transferred". Perhaps it might have been beneficial to define the communication of a sea-carriage document by means of a data message as an action that fulfills the same functions and has the same effect as the negotiation of a sea-carriage document on paper.

133 A sea-carriage document includes a bill of lading, a sea waybill or a ship's delivery order: s 4 sv "sea-carriage document".

134 A "data message" is defined as "information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange, electronic mail, telegram, telex and telecopy" (s 4 sv "data message").

135 If one argues, as was done in this thesis (see Chapter 9 §9.6.3), that there is no definite link between writing and paper, an electronic bill of lading can also be regarded as written. Of course it is unlikely that a court will find it difficult to interpret a written sea-carriage document correctly as a sea-carriage document on paper within the context of the section.

136 See §12.4 supra.
In section 5(2) it is recognised that there will probably be a comprehensive agreement between the parties governing the use of an electronic bill of lading. It is also clear that such agreement is not necessarily contained in the contract of carriage itself, as the section only refers to an agreement between the parties to the contract of carriage. Section 5(2) indicates that the Act will apply in accordance with the procedures agreed upon. This makes it clear that the contract governing the use of electronic bills of lading might enjoy preference above the Act if there is a clash. It remains a question of interpretation, however, of how much the procedures agreed between the parties may deviate from the Act.\textsuperscript{137} Sections 5(1) and 5(2) are obviously very general, and may lead to the uncertainty discussed above, when using terms such as “in the same way” and “with necessary changes”.\textsuperscript{138}

The section nevertheless continues with some specific descriptions of how traditional concepts should be interpreted in an electronic environment:

\begin{itemize}
  \item Without limiting the generality of subsection (2), in this Act, in the application of the following terms to a sea-carriage document in the form of a data message, or to the communication of a sea-carriage document by means of a data message —
    \begin{itemize}
      \item \textit{delivery} includes any form of communication which constitutes delivery under the terms of the contract of carriage;\textsuperscript{139}
      \item \textit{endorsement} includes any form of authorisation which constitutes endorsement under the terms of the contract of carriage;
      \item \textit{possession}, in relation to the document, includes being in receipt of the document in any manner which constitutes possession under the terms of the contract of carriage;
      \item \textit{signed} includes authenticated in any manner which constitutes signing under the terms of the contract of carriage.
    \end{itemize}
\end{itemize}

The difficulty here is the use of the words “under the terms of the contract of carriage” in each of the four definitions. The terms of the contract of carriage — in the case of a bill of lading this is the contract contained in or evidenced by the bill of lading\textsuperscript{140} — will usually not state what is meant by delivery, indorsement, possession and signed. The contract of carriage will further usually not include the procedures to be used in the case of an electronic bill of lading, as that

\textsuperscript{137} See the example of an electronic bill of lading that is not unique at the end of this paragraph.
\textsuperscript{138} See §12.4 \textit{supra}.
\textsuperscript{139} The “delivery” referred to here should of course mean delivery of the bill of lading and not the delivery of the goods.
\textsuperscript{140} s 4 sv “contract of carriage” (a).
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will constitute a separate agreement. What exactly delivery, indorsement, possession or signed means should be determined by the common law applicable to bills of lading. So when the statement is made that delivery includes any form of communication which constitutes delivery under the terms of the contract of carriage, it means that one will effectively have to revert to the common law when determining whether a bill of lading is delivered (or indorsed, possessed or signed) because the contract of carriage will be silent on the matter. So "delivery" of an electronic bill of lading will not be delivery under the terms of the contract of carriage. That in turn leads one to the conclusion that only the general sections 5(1) and 5(2) will be of any real effect.

One last potential difficulty should be noted. Suppose the procedures agreed upon between the parties make provision for the electronic communication of a document, but that it is in no way ensured that the document can be regarded as the equivalent of an original. One of the parties might thus fraudulently transfer the document to two different transferees. The question is whether the Act will apply in such a case, and the question is essentially whether the document in question is a sea-carriage document (or bill of lading to be more specific) in the form of a data message. It is submitted that such a document cannot be a bill of lading in the form of a data message, as such a document much still exhibit the characteristic of uniqueness even in an electronic environment.

12.7 Bolero

12.7.1 Introduction

Trials on Project Bolero (Bills of Lading for Europe) began in 1995, and the project was operated by a consortium of carriers, banks and telecommunications firms. There were initially participants in Hong Kong, the Netherlands, Sweden, the UK and the USA. The system is basically a centralized registry that is used to send and receive authenticated messages and contains details of shipping documents. There is also the ability to provide an electronic

equivalent of the bill of lading. The messages used are based only partially\textsuperscript{142} on the CMI Rules for Electronic Bills of Lading. By 1997 the project suffered from concerns over funding and was under its third management.\textsuperscript{143} As a central registry, problems such as confidentiality that plagued SeaDocs were also not addressed.\textsuperscript{144}

It seems as if Bolero shrugged off many (if indeed not most) of its initial problems. The company Bolero International Ltd was created in April 1998, and trades under the name of “bolero.net”. Bolero launched commercially on 27 September 1999. SWIFT (Society for Worldwide Interbank Financial Telecommunication)\textsuperscript{145} and the TT (Through Transport) Club (an insurer of parties involved in transport)\textsuperscript{146} each owns 50\% of the company.\textsuperscript{147} According to information on their website, “The cross industry ownership of bolero.net provides the company with a unique neutral positioning which sets it apart from previous proprietary initiatives which have favoured the interests of a specific company, market or country.” This should allay some of the fears of a repeat of SeaDocs. SWIFT operates the Core Messaging Platform and the Title Registry Application.\textsuperscript{148} According to bolero.net’s website, there are many participants in the system and the outlook is very positive.\textsuperscript{149}

\textsuperscript{142} Van Boom (1997) 32\textit{European Transport Law} 12. One feels however that somewhere on the website of bolero.net there should at least be a reference to the pioneering work of the CMI.


\textsuperscript{144} Chandler (1998) 22\textit{Tul Mar LJ} 486. Chandler further cautioned that it would be “too much at this stage of maritime commerce” (487 n 52) for any system to attempt to provide a service to all parties involved in the carriage of goods — the previous scope of BOLERO was too ambitious (486). From information on the website of bolero.net it seems as if the project today — rightly so — aims to offer services to as many parties involved as possible: banks, importers, exporters, freight forwarders, shipping agents and of course carriers. See www.bolero.net/news/inthenews/inthenews1999/bank_law.php3 (visited 23 May 2000).

\textsuperscript{145} See www.swift.com (visited 1 June 2000); www.bolero.net/aboutus/corporate/swift.php3 (visited 23 May 2000).


\textsuperscript{147} www.bolero.net/aboutus/corporate/index.php3 (visited 23 May 2000).

\textsuperscript{148} www.bolero.net/aboutus/corporate/swift.php3 (visited 23 May 2000). The Title Registry will be discussed below.

\textsuperscript{149} See the information at www.bolero.net/news/inthenews/ and www.bolero.net/news/pressrel/ (visited 23 May 2000). Apart from the few early articles in previous footnotes, I have relied on the very extensive information provided on the website of Bolero (www.bolero.net (visited 23 May 2000)). A good judgement of the legal (continued...)
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The Bolero Rulebook\textsuperscript{150} "constitutes an agreement between Users, and between each User and the Bolero Association".\textsuperscript{151} Apart from issues such as the validity of electronic communications, the binding effect of digital signatures, operating procedures and other technical issues, the Rulebook also "provides the legal rules which underpin the system for the ability to transact electronic bills of lading (Bolero Bills of Lading)".\textsuperscript{152} The Rulebook itself is governed by and interpreted in accordance with English law,\textsuperscript{153} and English courts have exclusive jurisdiction where the sole matter at issue is a claim for non-compliance with or breach of the Rulebook.\textsuperscript{154} Other matters are subject to the non-exclusive jurisdiction of English courts, and may be brought before other competent courts.\textsuperscript{155} The implication is that the applicable law to bills of lading remains as it were under traditional bills of lading and is not necessarily English law. In the

\textsuperscript{150} It can be downloaded at www.boleroassociation.org/dow_docs.htm (visited 23 May 2000). The Rulebook is marked “First Edition September 1999”. All further references to articles are to the Bolero Rulebook.

\textsuperscript{151} Rulebook Art 2.1.1(1), Art 1.1(46). There are also “Operating Procedures” that are appended to the Rulebook (Art 1.1(38)) and incorporated into the Rulebook (Art 2.1.2(2)). The Operating Procedures marked “First Edition September 1999” can be downloaded at www.boleroassociation.org/dow_docs.htm (visited 23 May 2000). In these Operating Procedures there are “Operational Rules” that are mandatory and binding (Art 1.1(39), Art 2.1.2(3)). There is further an “Operational Service Contract” that is “the standard form contract between each User and Bolero International, as amended from time to time” (Art 1.1(40)). The “BAL Service Contract” is “[t]he contract between Bolero Association Limited and each User, as amended from time to time” (Art 1.1(5)). These contracts are available at www.bolero.net/enrol/dow_docs.php3 (visited 23 May 2000) and www.boleroassociation.org/dow_docs.htm (visited 23 May 2000). For a description of and the interaction between the Bolero Association and Bolero International see Art 1.1(10); Art 1.1(14); www.bolero.net/decision/legal/contract.php3 (visited 23 May 2000); www.bolero.net/decision/legal/bas_cont.php3 (visited 23 May 2000); www.bolero.net/decision/legal/oper_cont.php3 (visited 23 May 2000); www.bolero.net/decision/legal/bol_int.php3 (visited 23 May 2000); www.boleroassociation.org (visited 23 May 2000); www.bolero.net/aboutus/corporate/association.php3 (visited 23 May 2000).

\textsuperscript{152} www.bolero.net/decision/legal/rule.php3 (visited 23 May 2000).

\textsuperscript{153} Art 2.5(2).

\textsuperscript{154} Art 2.5(3).

\textsuperscript{155} Art 2.5(4).
Chapter 12: Negotiable Electronic Bills of Lading

Bolero Rulebook a “Bolero Bill of Lading” is defined as “A BBL Text together with its related Title Registry Record.” BBL Text is defined as “A Document which: (a) is sent into the Core Messaging Platform and recorded in the Title Registry as the documentary component of the Bolero Bill of Lading; and (b) acknowledges receipt of goods by a Carrier for carriage by sea.” The BBL Text must further contain or evidence the terms of the contract of carriage, unless the Bolero Bill of Lading is issued under a charterparty. The BBL Text will look a lot like a traditional bill of lading, and will provide similar information. The Title Registry is defined as “An application operated by Bolero International and providing: (a) the means to execute the functions relating to Holdership and transfer of Bolero Bill of Lading; (b) a record of the status of current Bolero Bills of Lading; and (c) an audit trail of dealings with such Bolero Bills of Lading.” So the Title Registry records and carries out transactions such as the transfer of the Bolero Bill of Lading. The purpose of the remainder of this section is not to provide a detailed analysis of bolero.net (the Rulebook together with the Operating Procedures are lengthy and detailed documents), but to point out a few interesting provisions in the Rulebook that are related to similar provisions in the CMI Rules for Electronic Bills of Lading 1990 and to comment on their applicability in South Africa.

The point of departure is sensibly not to change the law relating to bills of lading: “[bolero.net]”

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156 The system can also be used for sea waybills and ship’s delivery orders: see Articles 1.1(47), 1.1(49), 1.1(56), 3.9.
157 Art 1.1(11).
158 According to Art 1.1(23) this is the “messaging system of the Bolero System as described in the Operating Procedures.”
159 Art 1.1(6).
160 Art 3.1(1)(b).
161 For more information see Art 3.1(2).
163 The “Bolero Legal Feasibility Study” §3 (downloaded at www.bolero.net/decision/legal/legal.php3 (visited 23 May 2000)) indicated that “[t]he use of the word ‘title’ in this context is only colloquial as the Title Registry is a register of the holder of rights under the BBL [Bolero Bill of Lading], not of legal title to the cargo.”
164 Art 1.1(53).
166 The Rulebook consists of 25 pages and the Operating Procedures of 157 pages.
makes no significant change in the basic business processes and concepts of a bill of lading.”

Article 3.1(3) for example, deals with statements relating to goods received, and provides that “any statement a Carrier makes as to the leading marks, number, quantity, weight, or apparent order and condition of the goods in the BBL Text will be binding on the carrier to the same extent and in the same circumstances as if the statement had been contained in the paper bill of lading.” The provision can be compared to Rule 4(d) of the CMI Rules. The advantage of the Bolero system is that because it is a closed system all potential parties to any future transactions have already agreed to be bound by the Rulebook, and therefore there will be no doubt that the Bolero Bill of Lading will function as a receipt among those parties.

12.7.2 Some Specific Provisions in the Rulebook

Article 2.2.2 deals with validity and enforceability:

1. **Writing Requirements.** Any applicable requirement of law, contract, custom or practice that any transaction, document or communication shall be made or evidenced in writing, signed or sealed shall be satisfied by a Signed Message.

2. **Signature Requirements.** The contents of a Message Signed by a User, or a portion drawn from a Signed Message, are binding upon that User to the same extent, and shall have the same effect at law, as if the Message or portion thereof had existed in a manually signed form.

3. **Undertaking not to Challenge Validity.** No User shall contest the validity of any transaction, statement or communication made by means of a Signed Message, or a portion drawn from a Signed Message, on the grounds that it was made in electronic form instead of by paper and/or signed or sealed.

The comparable provision in the CMI Rules is Rule 11, and Article 2.2.2 of the Bolero Rulebook can be seen as an expanded (but similar) version thereof. The legal position remains essentially the same. Parties can probably not agree to waive writing and signature requirements where such requirements are imposed by statute or common law. It was however submitted that due to the fact that there is no express requirement that a bill of lading must be in writing and signed (although admittedly it can be derived), a court in South Africa will not refuse to give effect to an electronic bill of lading provided that it performs all the functions of a paper bill of lading, and its operation and effect (including the fact that it can be regarded as original) is governed by rules such as the CMI Rules or the Bolero Rulebook. The contract will of course be binding.

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168 This is by way of a digital signature: see Art 1.1(50).
between the parties.

Article 3.2(4) deals with international conventions:

A contract of carriage in respect of which the Carrier has created a Bolero Bill of Lading shall be subject to any international convention, or national law giving effect to such international convention, which would have been compulsorily applicable if a paper bill of lading in the same terms had been issued in respect of that contract. Such international convention or national law shall be deemed incorporated into the Bolero Bill of Lading. In the event of a conflict between the provisions of any international convention or national law giving effect to such international convention and the provisions of the contract of carriage as contained in the BBL Text, the provisions of that national law or that international convention shall prevail.

A similar clause can be found in Rule 6 of the CMI Rules and the same comments also apply here. It is submitted that a South African court should regard this clause as fully effective in applying the Hague-Visby Rules to an electronic bill of lading.

Article 3.4 deals with the transfer of possession:

3.4.1 Procedure for Transfer of Possession

1. **By designation.** The transfer of constructive possession of the goods, after the creation of a transferable Bolero Bill of Lading, shall be effected by the Designation of:

   a) a new Holder-to-order,\(^{169}\)

   b) a new Pledgee Holder\(^{170}\)

   c) a new Bearer Holder,\(^{171}\) or

   d) a Consignee Holder."\(^{172}\)

2. **Effect of Designations.** The carrier shall, upon Designation of such Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder, acknowledge that from that time on it holds the goods described in the Bolero Bill of Lading to the order of the new Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder, as the case may be.\(^ {173}\)

\(^{169}\) Indorsee in possession of the bill of lading. See Art 1.1(32).

\(^{170}\) This is "a party ... having a financing or checking interest in the bill of lading": "Legal Aspects of a Bolero Bill of Lading" document downloaded at www.bolero.net/decision/legal/index.php3 (visited 23 May 2000). Also see Art 1.1(42).

\(^{171}\) This is the party in possession of a bearer instrument: "Legal Aspects of a Bolero Bill of Lading" document downloaded at www.bolero.net/decision/legal/index.php3 (visited 23 May 2000). Also see Art 1.1(7).

\(^{172}\) The Consignee is the "consignee of a non-negotiable (straight) bill": "Legal Aspects of a Bolero Bill of Lading" document downloaded at www.bolero.net/decision/legal/index.php3 (visited 23 May 2000). See Art 1.1(21) and Art 1.1(22).

\(^{173}\) Art 3.4.1(5) deals with a refusal by the transferee, and states that in such a case the carrier will still hold the goods on behalf of the transferor.
3.4.2 Bolero International as Carrier's Agent

Each carrier hereby irrevocably appoints Bolero International as its agent for the following purposes:

(a) To acknowledge that the Carrier holds the goods to the order of any Designated Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder or Shipper ...

Article 3.4.1(2) therefore includes an express declaration by the carrier that he will henceforth hold the goods on behalf of the transferee and not the transferor. It was submitted when discussing the CMI Rules that such a declaration is advisable, because attornment was not previously recognised as the way in which delivery took place when using a paper bill of lading. It was further submitted that similar statements by the transferor and transferee (not included in the Rulebook) will also be advisable to avoid any uncertainty, although there is of course not any requirements that the intention of the transferor and the transferee should be expressly manifested by such statements. Article 3.4.2(a) is also very important because it allows the registry (Bolero International) to act on behalf of the carrier. Under the CMI Rules where the registry was operated by the carrier, such a clause was not necessary.

Article 3.5 deals with the novation of the contract of carriage:

3.5.1 Occurrence and Effect

The designation of a new Holder-to-order or a new Consignee Holder after the creation of the Bolero Bill of Lading ... shall mean that the Carrier, the Shipper, the immediately preceding Holder-to-order, if any, and the new Holder-to-order or Consignee Holder agree to all the following terms in this section 3.5.1:

(1) New parties to Contract of Carriage. Upon the acceptance by the new Holder-to-order or Consignee Holder of its Designation as such ... a contract of carriage shall arise between the Carrier and the new Holder-to-order or Consignee Holder either:

(a) on the terms of the contract of carriage as contained in or evidenced by the BBL Text; or
(b) when the Shipper is a [charterer], on the terms set out or incorporated in the BBL Text, as if this had contained or evidenced the original contract of carriage.

(2) Accession to Rights and Liabilities. The new Holder-to-order or Consignee Holder shall be entitled to all the rights and accepts all the liabilities of the contract of carriage as contained in or evidenced by, or deemed to be so contained in or evidenced by, the Bolero Bill of Lading.

(3) Prior Designee's Rights and Liabilities Extinguished. The immediately preceding Holder-to-order's rights and liabilities under its contract of carriage with the Carrier shall immediately cease and be extinguished, unless:

(a) such immediately preceding Holder-to-order is also the Shipper, in which case its rights but not

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174 Article 3.5.2(1) deals with the situation where the transferee refuses the transfer of the Bolero Bill of Lading to him.
The reason why provision was made for the novation of the contract of carriage rather than the assignment (cession) thereof, is because some civil law systems require assignment or notice thereof to be in writing. The Rulebook does not rely on the Carriage of Goods by Sea Act 1992 to transfer rights of suit and impose liabilities, or wait for unlikely regulations to be enacted under the Act. This of course sensible, as the many pitfalls were already indicated when the Act was discussed above. The solution is an express provision for a new contract of carriage between the carrier and each transferee in Article 3.5.1(1)-(2). The fact that such a contract of carriage is “on the terms of the contract of carriage as contained in or evidenced by the BBL Text” is in accordance with the common law, whereby when the bill of lading is transferred to an indorsee, it will be the only evidence of the contract of carriage. Article 3.5.1(1)(b) deals with the situation where a bill of lading issued under a charterparty is transferred to an indorsee other than the charterer. The bill of lading in such a case will evidence the contract of carriage, even though the position between the charterer and the carrier was governed by the charterparty. The same result is achieved by Article 3.5.2(1)(b) and the article is therefore consistent with the common law. Article 3.5.2(3) clearly indicates that a transferor’s rights and liabilities will be extinguished with the exception of the liabilities of the original shipper. This is largely in accordance with the Carriage of Goods by Sea Act 1992. One point of criticism is that every intermediate holder of the Bolero Bill of Lading will also be subject to liabilities. This state of affairs was criticized in the discussion of the South African Sea Transport Documents Bill and the criticism will not be repeated here. A so-called Pledgee Holder (which will normally be a bank) is protected to some extent by Article 3.5.3(1) stating that there will be “no novation of the contract of carriage between the Carrier and a Pledgee Holder”. So merely being a Pledgee Holder will not make a bank liable unless the bank for example takes ...
Article 3.10 deals with ownership and contracts of sale:

1. **Transfer of Ownership.** If as a result of either the intention of the parties to the transaction or the effect of any applicable law, the transfer of constructive possession of the goods and/or the novation of the contract of carriage as provided for in this Rulebook have the effect of transferring ownership or any other proprietary interest in the goods (in addition to constructive possession thereof), then nothing in this Rulebook shall prevent such transfer of ownership or other proprietary interest from taking place.

2. **Rulebook Does not Effect Transfer.** Nothing in this Rulebook shall be construed as effecting transfer by the owner of property in the goods which are subject to a contract of carriage contained in or evidenced by a Bolero Bill of Lading or other Transport Document.

Article 3.10(1)-(2) states that the transfer of ownership will not be prevented by the Rulebook, but it is also clear that transfer of ownership will not take place merely because of the provisions in the Rulebook. If for example there is delivery of the goods by attornment as contemplated by the Rulebook, the delivery requirement for the transfer of ownership in South African law will be met, but all other requirements for the transfer of ownership must still be complied with. Article 3.10(1) also makes allowance for the fact that in some legal systems (such as South Africa) ownership will not be transferred merely by the intention of the parties.

### 12.7.3 Conclusion: Bolero

It is submitted that bolero.net shows that an electronic bill of lading is practically feasible. It is further submitted that — even though this was not a detailed analysis of the Bolero system — the system can easily be implemented under South African law without any major changes. It should also be noted that it is submitted that Bolero is viable in South Africa even in the absence of any legislative intervention.

### 12.8 Conflict Between a Paper Bill of Lading and an Electronic Bill of Lading

The question to be examined here is what the situation is when a carrier fraudulently issued both delivery of the goods.\(^{182}\)

\(^{182}\) See Art 3.5.3(3). The system is easily applicable to documentary credits: see Art 3.11.
Chapter 12: Negotiable Electronic Bills of Lading

a traditional and an electronic bill of lading. Looking at Article 17(5) of the Model Law, one can conclude that if a paper bill of lading is issued only after an electronic bill of lading, the paper bill of lading will be of no effect at all. It will seem that a literal interpretation of Article 17(5) will arrive at the same result even when the paper bill of lading is issued first. This is hardly fair towards the holder of the paper bill of lading.

The problem when dealing with a system such as Bolero is that the rules of the system cannot influence the position of a third party who is the holder of a paper bill of lading — accepting for the moment that what such third party holds is indeed a bill of lading. The following can happen in the absence of the enactment of the Model Law: an electronic bill of lading is issued in the Bolero system and the carrier fraudulently also issues a paper bill of lading — before or after issuing an electronic bill of lading. Both the bills of lading are negotiated to innocent third parties. One can argue that effect will be given to the first bill of lading issued. This was in essence also the solution proposed when dealing with multiple bills of lading in Chapter 5.183 If, for example, the paper bill of lading was issued before the electronic bill of lading, the paper bill of lading will be “the” bill of lading governing the goods. The second bill of lading can actually not be a bill of lading. Of course if the carrier issues both a paper bill of lading and an electronic bill of lading to the shipper, the shipper will have to be involved in the fraud as well.

Suppose as a first possibility that a paper bill of lading is issued before an electronic bill of lading. The electronic bill of lading will be ineffective — just as a paper bill of lading an electronic bill of lading is not a negotiable instrument that can grant a bona fide holder for value any rights if there are none in the first place. Two problems will be examined here: the transfer of rights and liabilities and possession of the goods. First the transfer of rights and liabilities. According to the Bolero Rulebook there is a new contract between the carrier and each transferee. Therefore both the transferee according to Bolero and the indorsee of the paper bill of lading will have rights of suit against the carrier (assuming that an act such as the Carriage of Goods by Sea Act 1992 applies to the paper bill of lading). From the point of view of the carrier this is exactly what the carrier deserves, but the two innocent transferees will probably not agree that two parties should have rights of suit against the carrier, especially if the carrier is in any financial difficulty — which is always most likely if the carrier resorts to fraud. The result will

183 §5.4.9.
nevertheless be two parties having rights against the carrier. The second problem relates to possession. The holder of the effective paper bill of lading is in possession of the goods. This is the normal position, but the carrier in Bolero expressly agrees to hold the goods on behalf of the holder of the electronic bill of lading. It can therefore be argued that such holder of the electronic bill of lading is in a closer factual position in relation to the goods, and that the party actually in possession of the goods is therefore the holder of the electronic bill of lading, even though the electronic bill of lading itself is ineffective. It is submitted that precisely because of this — the fact that the electronic bill of lading is ineffective — a court should hold that any statements that the carrier made in pursuance of the electronic bill of lading, are of no effect, and that the holder of the paper bill of lading is therefore the party in possession of the goods.

Suppose now as a second possibility that the electronic bill of lading is regarded as the effective bill of lading because it was issued first. The problem now is whether a court will be so brave as to recognize an electronic bill of lading in preference to a traditional paper bill of lading. It has often been stated in this chapter that a court should recognize an electronic bill of lading, but when faced with a choice between a paper bill of lading and an electronic bill of lading one must think it unlikely that the electronic bill of lading will be preferred. It is nevertheless submitted that a court should in such a case give preference to the electronic bill of lading.

Lastly one can ask what will happen if the paper bill of lading and the electronic bill of lading is issued at exactly the same time (though this will be highly unlikely in practice). The same question can of course be asked when two paper bills of lading covering the same goods are issued at exactly the same time to two different parties — not as part of a set but as two different and separate bills of lading. It is submitted that again time is the only yardstick that can be used. The first bill of lading (paper or electronic) that is negotiated to a third party will be the operative bill of lading.

12.9 Conclusion: Is Specific Legislation Necessary to Provide for an Electronic Bill of Lading?

It is submitted that at this stage of the evolution of the electronic bill of lading there is no need for legislative intervention. It is submitted that any use of an electronic bill of lading for the
foreseeable future will be by way of a comprehensive governing contract. Even such questions as discussed in the previous paragraph concerning a conflict between paper bills of lading and electronic bill of lading, do not necessitate legislative intervention. These are problems that will not normally arise and that will in addition be accompanied by the fraud of the carrier. As stated, these problems are also not unique to an electronic bill of lading — they can also arise when two different paper bills of lading are issued that do not form part of a set.

Regarding regulations to the Carriage of Goods by Sea Act 1992 (and thus also regulations to a bitterly needed South African act), it is submitted that it might be beneficial to provide in the Act for the possibility of regulations dealing with electronic bills of lading. It is submitted that at this stage there is no need for such regulations, and that it will furthermore be difficult to ensure that such regulations are applicable to all possible variations of an electronic bill of lading.

Regarding the UNCITRAL Model Law, it is submitted that it will probably be beneficial to state that a unique electronic bill of lading does not need to be in writing and signed in a traditional way, but it was also submitted that a court should not refuse to give effect to an electronic bill of lading for the sole reason that it is not written on paper and traditionally signed. It will also be beneficial to ensure by legislation that the Hague-Visby Rules will apply to electronic bills of lading, but again this is not an absolute necessity. Regarding Articles 16 and 17 of the Model Law in general, it is submitted that the articles will lead to confusion when dealing with contractual rights and obligations, that the application of these articles is anyway limited because the articles do not influence who is in the possession of the goods, and that where the application of these articles can be regarded as beneficial, a statutory solution is not essential. Therefore questions of electronic commerce in general aside — it is submitted that there is no need for the Model Law to enable electronic bills of lading to become a reality.

By this conclusion stating that there is currently no need for legislation to provide for electronic bills of lading, it is not meant that there should never in future be such legislation. Problem areas might arise that necessitate legislative intervention. On the other hand, is also likely that the increased use of electronic bills of lading will lead to practices and legal rules that will become part of the common law.
12.10 Conclusion

Having come to the end of the voyage, one feels slightly disappointed that all the electronic alternatives to the bill of lading are essentially registries. It seems that the only way in which the uniqueness of a paper document can be replicated is by way of a registry. There is no unique electronic document that can live a life of its own. Even when electronic communications are taking the world by storm, it is still important to realize that the uniqueness of paper is a magical quality. The fact that uniqueness in a digital world is achieved by a registry is not due to any legal shortcoming, but today at least is a characteristic of the available technology. Just as asymmetric cryptography created the possibility of a useful and legally valid digital signature, so there might be some new technology in future that will come closer to the current uniqueness of paper.

So can the "tradition-laden paper bill of lading" be replaced with a "more ethereal bill of lading"? It seems that it is indeed possible, and it is not even true anymore to say that "[t]he precise electronic garb worn by these future negotiable ocean bills of lading is unclear". Bolero provided us with a clear indication of how such an electronic bill of lading would function. However, as Yiannopoulus wrote, the electronic bill of lading is not merely an evolution of the paper bill of lading, "it is the creation of a new species of bills of lading." By no stretch of the imagination can an electronic bill of lading be regarded as commercial paper. The question asked in Chapter 1 was whether an electronic bill of lading is still a bill of lading, or whether we are just calling it a bill of lading due to the lack of any other suitable terminology. It is submitted that the answer is slightly ambiguous. On the one hand the negotiation of an electronic bill of lading (including paper-based concepts such as delivery, indorsement and possession) will be handled in a totally different manner: entering information into a registry is not the same as indorsing and delivering commercial paper. The result of entering the information into a registry is, however, the same as negotiating the paper bill of lading, and perhaps the differences can therefore be said to be more of form than of substance. The results of using an electronic bill of lading are the same as using a paper bill of lading. The functions of an electronic bill of lading

are the same as the functions of a traditional bill of lading. Therefore it is submitted that an electronic bill of lading can still be regarded as a bill of lading, even though it has a slightly different name and employs a slightly different procedure to achieve the desired results. It is simply the culmination of a long evolutionary process.

It is probably fair to say that no system of electronic bills of lading will be as open as the paper bill of lading. Any carrier can use pen and paper to draft a traditional bill of lading. This will not be the case anymore. It is submitted that in the near future there will only be closed systems with comprehensive legal rules within which electronic bills of lading will be used. So some things will indeed be lost in lost using an electronic bill of lading, but even more will be gained. The bill of lading can continue its long and distinguished legal history in an electronic world.

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187 Cf Todd Documentary Credits 120, 122.
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