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THE EVIDENTIARY VALUE OF BILLS OF LADING AND ESTOPPEL – A COMPARATIVE STUDY

by

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Dedicated with love and gratitude to my parents

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ABSTRACT

This comparative thesis addresses the evidentiary value of bills of lading and estoppel under the Hague and Hague/Visby Rules, the law in the United Kingdom and the United States. After an analysis of the *travaux prépraratoires* of the Hague and Hague/Visby Rules, and a comparison with the Hamburg Rules, the thesis focuses on the English common law and the relevant statutory provisions. The thesis advocates a new, alternative approach in order to overcome the current interpretive problems with the application of the common law doctrine of estoppel. The analysed provisions are those of the *Carriage of Goods by Sea Act, 1971* (U.K.), an enactment of the Hague/Visby Rules, the *Carriage of Goods by Sea Act, 1992* (U.K.), the U.S. *Carriage of Goods by Sea Act, 1936*, an enactment of the Hague Rules, and the U.S. *Federal Bills of Lading Act, 1994*. Further reference will be made to the relevant provisions of the *Carriage of Goods by Sea Act, 1924* (U.K.) (repealed), the *Bills of Lading Act, 1855* (U.K.) (repealed), and the U.S. *Federal Bills of Lading Act, 1916 (Pomerene Act)*, re-enacted as the U.S. *Federal Bills of Lading Act, 1994*. The thesis concludes with an outline of the evidentiary value of bills of lading in the age of electronic data interchange (EDI).

RÉSUMÉ

Cette étude comparative traite de la valeur probatoire du connaissement et de la doctrine de l'*estoppel* dans le cadre des Règles de la Haye et de la Haye/Wisby ainsi que des législations du Royaume-Uni et des États-Unis. Après une analyse des travaux préparatoires des Règles de la Haye et de la Haye/Wisby, et une comparaison de ceux-ci avec les Règles d'Hambourg, nous nous concentrerons sur une analyse de la common law anglaise et des dispositions législatives pertinentes du Royaume-Uni et des États-Unis. Ce mémoire plaide en faveur d'une nouvelle approche alternative permettant de surmonter les problèmes fréquents d'interprétation qui résultent de l'application de la doctrine de l'*estoppel*. Les dispositions analysées sont celles du *Carriage of Goods by Sea Act* de 1971 (U.K.), mettant en vigueur les Règles de la Haye/Wisby, le *Carriage of Goods by Sea Act* de 1992 (U.K.), le *Carriage of Goods by Sea Act* de 1936 (U.S), mettant en vigueur les Règles de la Haye, et le *Federal Bills of Lading Act* de 1994 (U.S). Référence additionnelle sera faite aux dispositions pertinentes du *Carriage of Goods by Sea Act* de 1924 (U.K.) (abrogé) et du *Bills of Lading Act* de 1855 (U.K.) (abrogé), ainsi qu'à celles du *Federal Bills of Lading Act* de 1916 (*Pomerene Act*), repromulgué en tant que *Federal Bills of Lading Act* de 1994. Le mémoire se conclut par un aperçu sur la valeur probatoire du connaissement à l'époque des échanges d'informations électroniques.

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INTRODUCTION

I. The Bill of Lading

Since historic times, bills of lading have been the most important commercial documents in international carriage of goods by sea. They constitute one of the oldest and most international forms of contract under both the common and the civil law, dating back to at least 1316 A.D.[1]

In recent years technological innovations, such as faster ships, containerised processing and multimodal transporters with integrated transport systems, have resulted in the introduction of documentary standardisation,[2] electronic data interchange (EDI),[3] and sea waybills.[4] In an attempt to keep pace with fast moving goods, sea waybills have avoided cargo congestion at destination terminals caused by delayed bill of lading arrivals from the consignor or one of the banks involved in the credit transaction.[5] The late arrival of waybills does not affect delivery because, as distinct from the bill of lading, the sea waybill is a non-negotiable document,[6] and to receive the goods, the consignee does not need to present the original sea waybill.[7] The sea waybill cannot, however, replace the bill of lading in many important areas of marine transport where a document of title is required. Bills of lading are still widely used in any trade that requires the sale of goods

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1 See W. Tetley, *Marine Cargo Claims*, 3rd ed. (Montréal: International Shipping Publications Blais, 1988) at 215; W.P. Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (London: Cambridge University Press, 1914) at 4, citing J.-M. Pardessus, vol. 5, *infra* note 81.

2 Standardised bills of lading, short form and blank back bills of lading, enable major shipping lines to use standardised forms in data processing. See also, besides the generally national efforts in standardisation, international efforts under the auspices of the E.C.E. Working Party on Facilitation of International Trade Procedures, *Measures to Facilitate Maritime Transport Document Procedures: Rec. No. 12*, U.N. Doc. Trade/WP.4/INF., TD/B/FAL/INF.61 (1979).

3 See below Chapter Four.

4 See H. Kindred, "Modern Methods of Processing Overseas Trade" (1988) 22 J. World Transport 5 at 8.

5 See S.M. Williams, "Something Old, Something New: The Bill of Lading in the Days of EDI" (1991) 1 Transnat'l L. & Contemp. Probs. 555 at 565.

6 The sea waybill merely serves as a receipt and as evidence of a contract of carriage of goods. It cannot, however, transfer title. See Tetley, *supra* note 1 at 467.

during the voyage, such as commodity trades. In the case of oil tanker trade, or bulk cargoes of grain, ore, and coal, for instance, the cargo is often the subject of repeated negotiations while in transit.[8] Furthermore, as will be seen below, only bills of lading, due to their negotiability, can serve as security for loans since banks may collect waybills without any documented approval. In an environment of new technological innovations such as EDI, bills of lading will have to prove that they can continue to play an important role in the carriage of goods by sea.

Bills of lading, as a "foundation of overseas trade",[9] serve three distinct purposes:[10]

(1) they are a receipt for goods;

(2) they are best evidence of the contract of carriage; and

(3) as a negotiable document of title[11] the bill of lading replaces those goods indicated on its face, enabling the endorser to transfer the property in the goods.

By endorsing a bill of lading, the carrier states that it has received the specified goods and it promises to transport and deliver them to the designated and legitimate endorsee/consignee. In international trade, bills of lading, once passed legitimately for value out of the hands of the shipper, facilitate the documentary credit process as documents of title, where payment is made against a document upon which reliance can be placed to accurately represent the goods shipped. Ownership of the bill of lading is tantamount to ownership of the goods. Banks, through a system of documentary credit, finance a considerable proportion of international trade. Under the normal CIF contract, the seller is required to submit to the bank the bill of lading together with other documents once the goods are shipped. Upon presentation of these documents in the form

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7 See Kindred, *supra* note 4 at 7.

8 See Williams, *supra* note 5 at 566.

9 Secretariat of UNCTAD, Report by the Secretariat of UNCTAD, *Bills of Lading* (New York: United Nations, 1971) at 5, citing S.D. Cole, *The Hague Rules 1921 Explained* (London: F. Effingham Wilson, 1922) at 9.

10 See *Lickbarrow* v. *Mason* (1794), 5 T.R. 683 (*venire de novo*), (1794) 101 E.R. 380, (1794) 6 T.R. (costs), (1793) 4 Brown 57, (1793) 2 H.Bl. 211 (H.L.), (1790) 1 H.Bl. 357 (Ex. Ch.), (1787) 2 T.R. 63 (K.B) [hereinafter *Lickbarrow* v. *Mason* cited to (1790) 1 H.Bl.]. For a further description of the particular purposes, see below Preliminary Chapter

11 See *Factors Act, 1889* (U.K.), (52 & 53 Vict.), c. 45, s. 1(4), for a definition of "document of title".

required by the bank, the seller is then entitled to the payment of the contract price.[12]

Possession of the bill of lading may be considered as equivalent to possession of the goods with regard to three distinct purposes:

(1) the holder of the bill of lading is entitled to delivery of the goods at the port of discharge;

(2) the holder can transfer ownership of the goods during transit merely by endorsing it; and

(3) the bill of lading can be used as a security for a debt.[13]

By commercial usage, the bill of lading has become the "key-document" in the contract of sale. Accordingly, the seller is obliged to tender to the buyer a shipped onboard bill of lading under common shipment contracts concluded on C&F and CIF terms.

Where the International Convention for the Unification of Certain Rules Relating to Bills of Lading,[14] otherwise known as the Hague and Hague/Visby Rules, apply, Article III(3)[15] expressly acknowledges the shipper/seller's right to demand such a document according to the terms of the contract of carriage. In addition to its obligation to receive and carry the goods to their destination, the carrier also has the duty to convey the information it receives from the shipper to the consignee through the particulars inserted in the bill of lading. The carrier may only avoid inserting such statements "which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking".[16]

If, however, the particulars are inserted in the bill of lading without any qualifications, the bill of lading shall be *prima facie* evidence of the receipt of the carrier of the goods as

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[12] See *Horst* v. *Biddell Bros.* (1911), [1912] A.C. 18 (H.L.).

[13] See J.F. Wilson, *Carriage of Goods by Sea* (London: Pitman Publishing, 1988) at 144.

[14] Signed at Brussels, August 25, 1924, as amended by the Protocols of February 23, 1968 (Visby-Protocol) and of December 21, 1979 (S.D.R. Protocol) [hereinafter *Hague and Hague/Visby Rules*].

[15] See also *United Nations Convention for the Carriage of Goods by Sea (Hamburg Rules)*, signed at Hamburg, March 31, 1978 [hereinafter *Hamburg Rules*], which provides a stipulation to the same effect in art. 14(1).

described in the bill of lading.[17] Article III(4), as amended by the "Visby-Protocol", explicitly contains, in contrast to the original Hague Rules, the supplementary provision that the carrier is estopped from disproving the description of the goods in the bill of lading when it has been transferred to a third party acting in good faith.[18] If the bill of lading is silent as to any damage or other insufficiency of the goods, the law imposes a legal presumption that the goods were in good order and condition at the time of delivery to the carrier. Such a bill of lading without any qualifications on its face is called a "clean" bill of lading.

II. The Bill of Lading as the Evidence

Due to their function as *prima facie* evidence, bills of lading very often become the most important pieces of evidence in marine cargo disputes concerning cargo damage, short delivery or non-delivery. For the shipper the bill of lading can provide evidence of its contract. For the consignee, it will be evidence of its right to possession of the cargo.[19] In marine cargo disputes it is frequently difficult to explain the cause of mischief to cargo, a difficulty which has been exacerbated by an increase in containerised packaging. In claims to recover compensation from the maritime carrier for the loss of or damage to cargo the respective burdens of proof are the central issues. Thus, the outcome of a dispute often depends on the burden of proof and the failure of one party or the other to discharge its burden. Sometimes the description of the goods mentioned in the bill of lading may differ materially from what appears in the supplier's invoice or credit requirements. Depending on the insertions made by the shipper and carrier on its face, the

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[16] *Hague and Hague/Visby Rules, supra* note 14, art. III(3); *Hamburg Rules, ibid.*, art. 16(1).

[17] See *Hague and Hague/Visby Rules, ibid.*, art. III(4); *Hamburg Rules, ibid.*, art. 16(3).

[18] See *Hamburg Rules, ibid.*, art. 16(3)(b).

[19] See *Enichem Anic S.p.A. et. al.* v. *Ampelos Shipping Co. Ltd. (The Delfini)* (1989), [1990] 1 Ll.L.Rep. 252 (C.A. Civil Div.); *The Albazero* (1975), [1976] 2 Ll.L.Rep. 467, [1975] 2 Ll.L.Rep. 295 (C.A.), [1974] 2 Ll.L.Rep. 38 (Q.B. Div., Adm. Ct.); *Pacific Molasses & United Molasses Trading Co.* v. *Entre Rios Compania Naviera (The San Nicholas)* (1975), [1976] 1 Ll.L.Rep. 8 (C.A.); *Gardano & Giampieri* v. *Greek Petroleum George Mamidakis & Co.* (1961), [1962] 1 W.L.R. 40, 106 S.J. 67, [1961] 2 Ll.L.Rep. 259 (Q.B. Div.); *Levatino Co. Inc.* v. *M.S. Helvig Torm*, 295 F. Supp. 725, 1965 A.M.C. 2386 (S.D.N.Y. 1968); *Aunt Jemima Mills Co.* v. *Lloyd Royal Belge*, 34 F.2d 120, 1929 A.M.C. 1141 (2nd Cir. 1929).

qualifications, the bill of lading may suffer in various forms from defects impairing its negotiability or the transferability of the goods.[20] First, the buyer under a CIF contract may be entitled to reject the documents if the description of the goods in the bill of lading does not correspond with their description in the sales invoice. Second, the terms of a CIF contract might entitle the buyer or bank to insist on the production of a "clean" bill, containing an unqualified statement that the goods were shipped in good order and condition. Finally, statements of fact might affect the negotiability of the bill in the hands of a consignee, since the goods would not be readily saleable in transit if the bill disclosed that they had been shipped in a damaged condition.[21]

In a straightforward proceeding against a reasonable carrier, a *prima facie* case may usually be established[22] if the claimant can produce clean bills of lading and unqualified "bad-order" discharge receipts. If, however, the burden of proof should revert to it, the claimant would normally face great difficulty in trying to establish how, where and when the loss or damage occurred, as most of the necessary supporting information would be in the possession of the carrier or of the warehouse, or would otherwise be unavailable. Further practical difficulties frequently faced by cargo claimants in establishing their claims are pilferage or unobserved specific acts of negligence or default on the part of anyone.[23] Among the various documents that may be issued by or on behalf of the carrier and which may form evidence of the bailment itself and, depending on its contents, also of the quantity of cargo, its order, condition and loading on board, the bill of lading is the most important.

Unfortunately, the legal drafting and the interpretation of the relevant provisions of the

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[20] See Secretariat of UNCTAD, *supra* note 9 at 25.

[21] See Wilson, *supra* note 13 at 128-129.

[22] See *Attn.-Gen. of the Republic of Ghana and Ghana National Petroleum Corp.* v. *Texaco Overseas Tankships Ltd. (The Texaco Melbourne)*, [1994] 1 Ll.L.Rep. 473 (H.L.); *Emmco Ins. Co.* v. *Wallenius Carribbean Line*, 492 F.2d 508 (5th Cir. 1974); *Zajicek* v. *United Fruit Co.*, 459 F.2d 395, 1972 A.M.C. 1746 (5th Cir. 1972); *Holden (A.L.)* v. *S/S Kendall Fish*, 395 F.2d 910, 1968 A.M.C. 200 (5th Cir. 1968); *William D. Branson Ltd.* v. *Furness (Canada) Ltd.*, [1955] 2 Ll.L.Rep. 179 (P.C.); *Monarch S/S Co. Ltd.* v. A/B *Karlshamns Oljefabriker*, [1949] A.C. 196, [1949] L.J.R. 772, [1949] All E.R. 1 (H.L.); *The Arpad*, [1934] P. 189; (1934), 49 Ll.L.Rep. 313.

[23] See *Dent et. al.* v. *Glen Line, Ltd.* (1940), 67 Ll.L.R. 12, 45 Com.Cas. 244 (Com.Ct.) [hereinafter *Dent* v. *Glen* cited to Com.Cas.]; Secretariat of UNCTAD, *supra* note 9 at 9.

Hague and Hague/Visby Rules governing the evidentiary value of representations made in the bill of lading has not been as clear as the importance of the issue in practice would suggest.[24] As proof of the lack of clarity, an additional sentence was introduced into Article III(4) of the Hague Rules by the Visby-Protocol of 1968. Moreover, problems occur with regard to the permission of qualifications or exclusions by means of which the carrier tries to escape or avoid the binding force of statements on the face of the bill of lading.

The common law, too, has not been clear as regards the evidentiary value of bills of lading and the application of the doctrine of estoppel. The interpretive difficulties under English common law have resulted in problems with the interpretation of other relevant statutes in the United Kingdom and in the United States which are derived from the common law.

III. The Plan and Purpose of this Thesis

Some of the most important difficulties with the evidentiary value of bills of lading have arisen from the fact that, unlike the shipper and the carrier, the third party cargo receiver was not, according to the common law doctrine of privity, a party to the bill of lading. The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it.[25] Therefore the question arises of how the transferee/consignee can be certain of its rights

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[24] See "International Conference on Maritime Law, Meeting of the Sous-Commission, Brussels 1923, Documents and Procès-Verbaux of the Sessions held from 17 to 26 October 1922" reprinted in M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, C. Boyle, trans., vol. 1 (Littleton, Co.: Rothman, 1990) 417-518 at 419-420. At the diplomatic conferences leading to the Hague Rules the question of the evidentiary value of bills of lading was considered as one of the most difficult and it was suggested that the Rules be drafted with absolute clarity as to this issue. See also *ibid.* at 495 (Fifth Plenary Session, Monday 8 October 1923; statement of the Chairman). Due to its practical importance, it was even questioned whether the issue "justified the eventual check-mate of the convention." [hereinafter *Brussels Meeting of the Sous-Commission, 1923*].

[25] See G.H. Treitel, *The Law of Contract*, 9th ed. (London: Sweet & Maxwell, 1987) at 454. See also *ibid.* at 458, describing the two aspects of the doctrine of privity: no one except a party to a contract can acquire rights under it; and no one except a party can be subjected to liabilities under it.

against the carrier.

Since at English common law representations made in the bill of lading are not considered contractual, the transferee/consignee must show that the carrier is estopped from denying the truth of the statements made in the bill of lading. The thesis will point out the interpretive difficulties which are caused by the application of principles of the doctrine of estoppel under the relevant provisions in the United States and the United Kingdom, and at English common law. It will be shown that in some U.S. decisions representations were in fact considered contractual terms. This specific "2nd Circuit approach" in the United States will be discussed as well as another contractual approach to interpret representations made in the bill of lading. According to both "contractual approaches" advocated in this thesis, the carrier should be bound to make good any loss suffered by the transferee/consignee as a result of inaccurate statements in the bill of lading.

This thesis will analyse the evidentiary value of bills of lading under the regime of the Hague/Visby Rules, as adopted in the *Carriage of Goods by Sea Act, 1971* (*COGSA, 1971* (U.K.)),[26] and the Hague Rules, as adopted in the *Carriage of Goods by Sea Act, 1936* (U.S. *COGSA* 1936).[27] It will furthermore outline the relevant provisions of the *Carriage of Goods by Sea Act, 1992* (U.K.),[28] and the *Federal Bills of Lading Act, 1994*,[29] the re-enactment of the *Federal Bills of Lading Act, 1916 (Pomerene Act)*,[30] which

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[26] See *Carriage of Goods by Sea Act, 1971*, (U.K.) 1971, c. 19. An Act to amend the law with respect to the carriage of goods by sea [April 8, 1971]. As amended by the *Merchant Shipping Act, 1995* (U.K.), (July 19, 1995), c. 21. modified by the *Hovercraft (Civil Liability) Order, 1986*, SI 1986 No. 1305. According to s. 6, Supplemental, 3(b) of *COGSA, 1971* (U.K.), *COGSA, 1924* (U.K.) is repealed [hereinafter *COGSA, 1971*].

[27] See Act Apr. 16, 1936, ch. 229, 49 Stat. 1207, which appears generally as 46 U.S.C. Appx §§ 1300 et seq.

[28] *Carriage of Goods by Sea Act, 1992* (U.K.), 1992, c. 50. An Act to replace the *Bills of Lading Act, 1855* with new provisions with respect to bills of lading and certain other shipping documents, July 16, 1992. *COGSA, 1992* (U.K.). *COGSA, 1992* (U.K.) reads:

> 5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case of the rules (the Hague/Visby Rules) which for the time being have the force of law by virtue of s. 1 of the *Carriage of Goods by Sea Act, 1971*) [hereinafter *COGSA, 1992*].

[29] See Act Oct. 31, 1994, P.L. 103-429, § 6(79), 108 Stat. 4388, (effective July 5, 1994, as provided by § 9 of such Act, which appears as 49 U.S.C.S. § 321 note) [hereinafter *Federal Bills of Lading Act, 1994*].

[30] *Federal Bills of Lading Act, 1916 (Pomerene Act)*, ch. 415, 39 Stat. 538-45, 49 U.S. Code Appendix;

governs the majority of interstate and export bills of lading and applies to bills signed in the United States. The statutory provisions will be compared with the English common law, from which most of the provisions are derived. Reference will be made to the predecessor of the *Carriage of Goods by Sea Act, 1992* (U.K.), the *Bills of Lading Act, 1855* (U.K.).[31]

The thesis will begin with an analysis of the *travaux préparatoires* of the Hague and Hague/Visby Rules. Article III(3) and (4) will then be briefly compared with the relevant provisions of the Hamburg Rules. Beginning with a description of the legal nature of representations made in the bill of lading, the thesis will then focus on the law in the United States and the United Kingdom. The two "contractual approaches" will be described. Afterwards, the evidentiary value of bills of lading in the relationship between the shipper and the carrier, the transferor and the transferee, as well as between the transferee and the carrier will be outlined and criticised. The results according to the "general" approach based on the doctrine of estoppel will be compared with the results according to the "contractual, alternative approaches". Moreover, an analysis of the authority of the carrier's agents to make representations in the bill of lading will be included. The thesis will outline the deficiency of the common law doctrine of estoppel in particular with respect to the requirement of detrimental reliance, "clarity and unambiguity". The thesis will furthermore advocate, on the basis of the contractual approaches, a doctrinally straightforward interpretation of the authority of the carrier's agents to make representations in the bill of lading. The final chapter will point out the prospects for the evidentiary value of bills of lading in the age of electronic data interchange (EDI). By describing and analysing the differences in the law, this thesis attempts to achieve a uniform interpretation of the evidentiary value of bills of lading under the Hague and Hague/Visby Rules, the other relevant statutes in the United States and the United Kingdom, and at English common law.

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replaced by *The Law Revision Bill Title 49, 1993*. All reference to what was the *Federal Bills of Lading Act* is now 49 U.S.C. § 801–. Pursuant to The Law Revision Title 49 Act, 1993, §§ 1 (a) and 6 (a) the Bill was not intended to alter the law substantively. Thus, all the cases decided under the old act are still good law [hereinafter *Federal Bills of Lading Act, 1916*].

[31] *Bills of Lading Act, 1855* (U.K.), (18 & 19 Vic.), c. 111 (repealed).

PRELIMINARY CHAPTER

Although this thesis focuses on the evidentiary value of the bill of lading, and thus its function as a receipt for goods, its other functions shall be briefly described as well. Furthermore, the various kinds of bills of lading will be mentioned.

I. Definition of the Bill of Lading

There is no legal definition of a bill of lading in the Hague and Hague/Visby Rules,[32] but the Hamburg Rules did attempt to define a bill of lading:[33]

> Bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

Another definition can be found in the INCOTERMS 1990:[34]

> 10. As used in these rules the term "bill of lading" is a shipped bill of lading, issued by or on behalf of the carrier, and is evidence of a contract of carriage as well as proof of delivery of the goods on board the vessel.
> 11. A bill of lading may be either freight prepaid or freight payable at destination. In the former case the document is usually not obtainable until freight has been paid.

The latest English statutory definition can be found in *COGSA, 1992* (U.K.)[35] and, in the United States, in § 80103(a) of the *Federal Bills of Lading Act, 1994*.[36] It has always

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[32] Some authors have even described the lack of a definition of a bill of lading as "the first problem faced by the drafters of the Hamburg Rules concerning the carrier's responsibilities for the contents and issuance of a bill of lading under the Hague Rules". See Dalhousie Ocean Studies Programme, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University, 1982) at 115.

[33] *Hamburg Rules, supra* note 15, art. 1(7).

[34] *INCOTERMS 1990*, I.C.C. Publication No. 450 (New York: I.C.C. Publishing Corp., 1990).

[35] S. 1(2): "References in this Act to a bill of lading – (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but (b) subject to that, do include references to a received for shipment bill of lading."

[36] See *Federal Bills of Lading Act, 1994, supra* note 29, § 80103(a)(1): "Negotiable bills.–A bill of lading

been disputed whether a combined transport bill of lading is a bill of lading within the meaning of the Hague and Hague/Visby Rules. Nevertheless, some authors believe that this has now been conclusively established by custom and usage.[37] A "negotiable" bill of lading is distinct from a "non-negotiable" receipt such as the waybill or straight bill.[38]

II. Evidence of the Contract of Carriage

"[A] bill of lading is not in itself the contract between the shipowner and the shipper of the goods, though it has been said to be excellent evidence of its terms."[39] According to some U.S. courts, the bill of lading may even be construed as *containing* the contract of carriage.[40] Under most national laws the contract of carriage may be concluded without formalities and is usually formed when the cargo is booked with the shipping line. The contract furthermore comprises the offer, the arrangements for shipment, the advertisements of the carrier, the booking note, the acceptance of the shipper, the statements of the agents, etc.[41] The *terms of the contract* are often specified in printed

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is negotiable if the bill–(A) states that the goods are to be delivered to the order of a consignee; and (B) does not contain on its face an agreement with the shipper that the bill is not negotiable.".

37 See *Guide to the Hague and Hague-Visby Rules*, *infra* note 47 at 15.

38 Title to the goods covered by a waybill is transferred independently from the transfer of the waybill document itself. In order to transfer title to the goods there must be an assignment. Rights under the contract evidenced by the waybill may be transferred by the deed of assignment as well. See Tetley, *supra* note 1 at 221.

39 *The Ardennes* (1950), [1951] 1 K.B. 55 at 59, (1950) 84 Ll.L.Rep. 340 at 344, *per* Lord Goddard [hereinafter *The Ardennes* cited to K.B.], citing *Sewell* v. *Burdick* (1884), 10 App.Cas. 74 at 105, *per* Lord Bramwell (H.L.) [hereinafter *Sewell* v. *Burdick*]; *Crooks* v. *Allan* (1879), 5 Q.B.D. 38, 49 L.J.Q.B. 201, 41 L.T. 800, 28 W.R. 304, 4 Asp.M.C. 216. See also *Cho Yang Shipping Co. Ltd.* v. *Coral (U.K.) Ltd.* (15 May 1997), LEXIS/NEXIS Doc., Transcript: Smith Bernal (C.A.); *The Heidberg* (1993), [1994] 2 Ll.L.Rep. 287 at 312-313.

40 See *Western Lumber Manufacturing Co.* v. *U.S.A. (The Brush)*, 1926 A.M.C. 91 at 93 (N.D. Ca. 1925) [hereinafter *The Brush*]; *The Sarnia*, 278 F. 459 (2nd Cir. 1921). See also *Bank of Delaware* v. *Oregon Iron Co. (The Delaware)*, 81 U.S. 579 at 583, 20 L.Ed. 779 at 783, *per* Clifford J. (1871) [hereinafter *The Delaware* cited to L.Ed.], dealing with the construction of the bill of lading in the absence of a provable written agreement.

41 See *Union Industrielle et Maritime* v. *Petrosul Int'l Ltd. (The Roseline)*, 1985 A.M.C. 551 at 556-558 (Fed. Ct. of Can., Trial Div. 1984); *Falconbridge Nickel Mines Ltd.* v. *Chimo Shipping Ltd. (The P.M. Crosbie)*, [1974] S.C.R. 933, [1974] E.T.L. 45, [1973] D.L.R. (3d) 545, [1973] 2 Ll.L.Rep. 469 (Sup. Ct. of Can. 1973); *Grace Plastics Ltd.* v. *The Bernd Wesch II*, [1971] F.C. 273 (Fed. Ct. of Can. 1971). See also *Fleet Express Lines Ltd.* v. *Continental Can Co. of Canada Ltd.*, [1969] 2 O.R. 97 at 101 *et seq.* (High Ct. of Justice 1969); *West India Industries* v. *Tradex*, 664 F.2d 946, 1983 A.M.C. 1992 at 1996 (5th Cir. 1981); *Hellenic Lines* v. *U.S.A.*, 512 F.2d 1196, 1975 A.M.C. 697 (2nd Cir. 1975).

general conditions to which the bill of lading may make reference (*e.g.*, "all other conditions as per charterparty", "the contract evidenced by this bill of lading is subject to the conditions set out in the carrier's standard conditions of carriage"). The *terms of the bill of lading* may be incorporated by means of reference in a previously issued document, such as a dock receipt or a received for shipment bill of lading which was previously issued and where a shipped bill was not subsequently issued.[42]

Despite Lord Goddard's dictum in *The Ardennes*,[43] bills of lading may best be characterised as standard form contracts.[44] This interpretation takes custom and trade practices into consideration according to which merchants or forwarding agents usually represent various carriers and neither alter their pre-printed bills of lading, nor formulate individual terms. Instead, they rather restrict their service to inserting into the bill the description of the goods

III. Receipt for Goods

The bill of lading constitutes the carrier's receipt for the goods and acknowledges that the carrier has taken possession of the goods. The bill of lading serves as a receipt from the moment it is transferred to a third party consignee for value.[45] If a bill of lading is issued under a charterparty it is a receipt only, whereas the evidence of the *contract of transportation*[46] is the charterparty itself. If, however, the charterer transfers or assigns

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[42] See *Buenos Aires Maru*, [1986] 1 S.C.R. 752 at 798-799, 1986 A.M.C. 2580 at 2618-2619 (Sup. Ct. of Can. 1986), according to which the carrier is a bailee before loading and after discharge. For a distinction before loading, see *Raymond Burke Motors Ltd.* v. *The Mersey Docks and Harbour Co.* (1985), [1986] 1 Ll.L.Rep. 155 at 161, *per* Leggatt, J. (Q.B., Com. Div.); *Aerolyn Fabrics Inc.* v. *Fireman's Ins. Co.*, 1960 A.M.C. 2435 (N.Y. Sup. Ct. All. Div. 1960); *J. Deere & Co.* v. *Mississippi Shipping Co.*, 170 F. Supp. 479 at 481, 1959 A.M.C. 480 at 482 (E.D.La. 1959); *Aberdeen Grit Co.* v. *Ellerman's Wilson Line* (1932), 44 Ll.L.Rep. 92 at 95-97, *per* Lord Clyde, Lord Blackburn and Lord Morison (Ct. Sess., Scot.).

[43] See *The Ardennes*, *supra* note 39 at 59, *per* Lord Goddard C.J.

[44] See Tetley, *supra* note 1 at 217, opposing a characterisation as pure contracts of adhesion.

[45] For the definition of "contract of carriage", see *Hague and Hague/Visby Rules*, *supra* note 14, art. I(b): "from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same." See also *The Vickfrost*, [1980] 1 Ll.L.Rep. 560 (C.A.).

[46] With regard to this expression, see Tetley, *supra* note 1 at 219, distinguishing between *contract of*

that bill to an innocent third party purchaser for value, who is not a party to the charterparty contract, then the bill becomes the contract of carriage and the Hague and Hague/Visby Rules become effective as regards the third party. The terms of the charterparty may still be incorporated into the contract of carriage by a suitable incorporation clause in the bill. The terms will only be valid to the extent that they do not conflict with the Rules, otherwise they will be rendered null and void.[47]

IV. Negotiable Document of Title

A. Negotiability

As its third fundamental function, the bill of lading represents a negotiable document of title, permitting the parties to transfer title to the goods or to pledge them as security to a creditor while in transit. One may say that the bill "represents the goods" inasmuch as possession of the bill of lading is equivalent to possession of the goods themselves.[48] Since the goods are not "commercially immobilised" while in transit at sea and it is possible to "negotiate" them, the bill of lading may be considered a "negotiable instrument" or at least a "quasi-negotiable instrument".

Negotiability is achieved by requiring that the goods may only be delivered to a holder of an original bill of lading, which at destination must be surrendered to the carrier in return for the goods.[49] Only order bills of lading under which the carrier agrees to deliver the goods at their destination to a named consignee or to his order or assigns can operate

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carriage (bill of lading, waybill) and *contract of hire of the ship* (demise charterparty, time charterparty, voyage charterparty).

47 See Lloyd's of London Press, *A Guide to the Hague and Hague-Visby Rules, An LLP Special Report*, (London: Lloyd's of London Press Ltd., 1985) at 15 [hereinafter *Guide to the Hague and Hague-Visby Rules*].

48 J. Ramberg, "Subject IV, Bills of Lading and other Documents, 1. Bills of Lading" in Associacion Argentina de Derecho Maritimo, *La Responsabilidad del Transportador de Mercaderias por Agua, Seminario de Buenos Aires 1980* (Milano: Dott. A. Giuffrè Editore, 1983) 305.

49 This description does not, however, include the custom of issuing several originals of one bill of lading and the customary stipulation in bills of lading to the effect that additional originals will become void when the goods have been delivered in return for one original at the destination.

as such a document of title.[50] There are basically two approaches regarding the transfer of property interests in goods by transfer of a document of title.[51] The "common law theory" adopts the embodiment doctrine in its literal sense according to which the document represents the goods. Thus, the endorsee of the bill of lading acquires only those proprietary rights that the endorser could have transferred by an actual delivery of the goods. According to the "mercantile theory" the bill of lading is treated much like a bill of exchange or promissory note. By negotiating the bill of lading, the endorsee may receive a better title than the endorser had or than he could have given by actually delivering the goods. This approach invests the bill of lading with a broader form of negotiability than does the common law.

B. "Quasi-negotiable"

Nevertheless, it is generally accepted[52] that under the applicable sale of goods statute[53] the bill of lading may not be "negotiable" in the same sense as, *e.g.*, a bill of exchange or a cheque.[54] Under English law, the holder of a bill of lading – as opposed to the holder of a bill of exchange – cannot, in principle, acquire a better title than his predecessor possessed. Thus, the bill of lading is rather assignable or transferable[55] and owing to this difference it may only be considered "quasi-negotiable".

C. The Hague and Hague/Visby Rules

The Hague and Hague/Visby Rules do not deal with the allocation of rights between

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[50] See *Handerson* v. *The Comptoir D'Escompte De Paris* (1873), L.R. 5 P.C. 253; Wilson, *supra* note 13 at 144.

[51] See "Notes, Ocean Bills of Lading and Some Problems of Conflict of Laws" (1958) 58 Colum. L. Rev. 212 at 225-226.

[52] With regard to the characteristics of negotiability, see *Gurney* v. *Behrend* (1854), 3 E.&B. 622 at 633-634, 118 E.R. 1275 at 1279.

[53] This includes, besides national law, international conventions such as the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), April 10, 1980, U.N. Doc. A/Conf. 97/18.

[54] See *Kum* v. *Wah Tat Bank*, [1971] 1 Ll.L.Rep. 439 at 446, *per* Lord Devlin (P.C.).

[55] Until the entering into force of the *Bills of Lading Act*, *supra* note 31, in 1855, only the title to the goods passed when the bill of lading was transferred. See *Bills of Lading Act, 1855*, *ibid.*, preamble; *Lickbarrow* v. *Mason*, *supra* note 10; *Sewell* v. *Burdick*, *supra* note 39 at 105.

successive holders of the bill of lading when it has been transferred or negotiated.[56] Instead, the Rules only contain provisions as to rights between the holder of the bill of lading and the carrier. Consequently, additional aspects of negotiability fall under the applicable sale of goods statute.[57] Title to the goods often passes by endorsement of the original, signed bill of lading by the person to whose order the bill is addressed,[58] whereas rights of action originally vested in the shipper under the contract are transferred to the endorsee by the various bills of lading statutes.[59]

V. Received-for-Shipment and Shipped Bills of Lading

Maritime law distinguishes between a "received-for-shipment" bill of lading and a "shipped" bill of lading. The "received-for-shipment" bill of lading[60] is given to the shipper after the carrier has received the cargo for carriage but before the goods have actually been placed on the vessel.[61] It serves as a receipt for the goods and as evidence of the contract of carriage. It indicates that the carrier has received the goods in its custody, as well as the place and date and that the goods are to be subsequently loaded on a particular vessel or some substituted vessel.[62] As soon as the cargo is loaded, the shipper may demand the issuance of a "shipped" bill in place of a "received" one.[63] The major practical advantages[64] of the "received-for-shipment" bill of lading[65] are twofold. First, the

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56 Neither do the *Hamburg Rules*, *supra* note 15, deal with this issue.

57 Ramberg, *supra* note 48, 305 at 306. See *e.g. Sale of Goods Act, 1979* (U.K.), c. 54, ss. 16-19.

58 See *The Aliakmon*, [1985] 1 Ll.L.Rep. 199 (C.A.) at 204, *per* Sir John Donaldson M.R., at 219, *per* Goff L.J., holding that the transfer of a bill of lading only creates a *presumption* that the title to the goods was meant to pass to the transferee by such transfer. See also *The San Nicholas*, [1976] 1 Ll.L.Rep. 8 (C.A.) at 10, *per* Lord Denning M.R.

59 See *e.g. Bills of Lading Act, 1855*, supra note 31; *Federal Bills of Lading Act, 1916*, *supra* note 30.

60 Regarding the historical development of the "received-for-shipment" bill, see H.J. Berman & C. Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)" (1978) 19 Harv. Int'l L. J. 221 at 254.

61 See *Hague and Hague/Visby Rules*, *supra* note 14, art. III(3).

62 See Berman & Kaufman, *supra* note 60 at 254.

63 See *Hague and Hague/Visby Rules*, *supra* note 14, art. III(7), pursuant to which the shipper may, where a "received-for-shipment" bill of lading was issued, demand upon loading a shipped bill of lading or (at the option of the carrier) to have the "received-for-shipment" bill of lading noted with the name of the ship and date of shipment. See Dalhousie Ocean Studies Programme, *supra* note 32 at 110.

64 See J.C. Singer, *Liner Bills Of Lading And The International Convention For The Unification Of Certain Rules Relating To Bills Of Lading* (London: Thomas March, 1923) at 35, stating that "'received-

bill can be sent to the consignee prior to the loading of the goods.[66] Second, it can be used as evidence of the contract of carriage regardless of whether or not the goods are shipped. However, there is considerable doubt as to whether the "received-for-shipment" bill of lading is subject to the Hague and Hague/Visby Rules.[67] *COGSA, 1992* (U.K.), however, explicitly applies to "received-for-shipment" bills of lading.[68] In practice, though, it seems as if this bill complies with Article III(3) of the Hague and Hague/Visby Rules. At common law, however, only the "shipped" bill of lading is recognised as a document of title.[69] English courts are particularly unwilling to accept any other document that may have been developed by mercantile practice.[70]

VI. Nominate Bill of Lading

In a nominate bill of lading a specified person is indicated. This type of bill of lading may neither be transferred, nor assigned.

VII. Order Bill of Lading

An "order bill of lading"[71] would bear on its face a stipulation such as "to order of XYZ Co. Ltd. or assigns". The goods are consigned to the order of a specified person, often the

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for-shipment' bills of lading were a necessity of commerce".

65 "Received for shipment" bills of lading governed by the Hague or Hague/Visby Rules frequently contain clauses that purport to exonerate the carrier from liability for cargo claims prior to loading, since the Rules apply only from tackle to tackle.

66 See Dalhousie Ocean Studies Programme, *supra* note 32 at 110.

67 See *e.g.* W.E. Astle, *Shipping and the Law* (London: Fairplay Publications, 1980) at 41.

68 See *COGSA, 1992* (U.K.), *supra* note 28, s. 1(2)(b).

69 See *The Marlborough Hill* v. *Cowan & Sons,* [1921] 1 A.C. 444 (P.C.); as opposed to *Diamond Alkali Export Corp.* v. *Bourgeois* (1921), 3 K.B. 443, [1921] 1 All E.R.Rep. 283 where the same legal quality as a "shipped" bill of lading was denied. See also New Zealand *Mercantile Law Amendment Act, 1922* (13 Geo. V), No. 25, s. 3(1)-(4), amending the *Act To Amend The Mercantile Law Act, 1908* (October 16, 1908), according to which a "received-for-shipment" bill of lading shall, subject to certain provisions, be deemed a valid bill of lading for all purposes.

70 See G. Gilmore, "The Commercial Doctrine of Good Faith Purchase" (1954) 63 Yale L. J. 1057 at 1058 *et seq.*

71 See *Federal Bills of Lading Act, 1916, supra* note 30, the definition in § 3.

seller himself. The seller endorses the bill of lading to the buyer upon payment, thereby transferring title to the goods covered by the bill. Most modern ocean bills of lading are "order" bills of lading.[72] The shipper, the consignee and all intervening parties holding negotiable order bills of lading depend on the bill of lading for the following three vital statements:[73]

(1) The statement as to the accuracy of the loading tally with respect to whether the goods were shipped or received on board;

(2) The statement as to the correctness of the "clean" outward appearance and condition of the cargo; and

(3) The statement as to the correctness of the date of loading. (Confirmed documentary credits are restricted to the ship by the specified date, otherwise the credit conditions will not be satisfied.) The negotiable bill of lading may be negotiated by delivery if it is made to "order", thus converting it into a bearer bill, or by endorsement either in blank or to a special person.[74]

VIII. Bearer Bill of Lading

A "bearer bill of lading" is a bill which either:[75]

(1) explicitly states that the bill is "to bearer";

(2) makes no mention of the consignee on the bill;

(3) does not mention to whose order the bill of lading is, if an "order bill of lading"; or

(4) is endorsed in blank by the person named in an "order bill of lading".

IX. Straight Bill of Lading

The definition of a bill of lading contained in Article I(7) of the Hamburg Rules does not include the "straight" or non-negotiable bill of lading, since the key element of the

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[72] Secretariat of UNCTAD, *supra* note 9 at 24.

[73] *Ibid.* at 24.

[74] See Williams, *supra* note 5 at 562.

definition is "negotiability". It is defined as "[a] bill in which it is stated that the goods are consigned or destined to a specific person."[76] Straight or non-negotiable bills of lading are defined in § 80103(b) of the *Federal Bills of Lading Act, 1994*.[77] The "straight" bill of lading may be compared with a "named" or "nominate" bill of lading. The nominate bill of lading does not specify "to order or assigns" and, although a document of title, is not negotiable.[78] According to Article VI of the Hague and Hague/Visby Rules, the straight bill of lading may be used for extraordinary contracts of carriage.

X. Through Bill of Lading

A through bill of lading is often found where "transhipment" takes place. In transhipments, the carrier, who contracted with the shipper ("contracting carrier"), transfers the goods to another carrier ("on-carrier" or "successive carrier") during the transport of goods under a contract of carriage. Through bills of lading may be divided into two categories. In the first category, a "port of discharge" at which it is specifically agreed that transhipment shall take place, is indicated. The transfer of responsibility for carriage from the contracting carrier at an intermediate point is usually specifically provided for in the contract of carriage. In connection with this transfer of responsibility, the contracting carrier acts only as an agent for the owner of the goods in arranging for the forwarding of the goods. As distinct from that, the second category does not explicitly designate an intermediate port of discharge which may thus serve as an alternative port of discharge under the contract.[79]

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[75] See Tetley, *supra* note 1 at 221.

[76] See also *Federal Bills of Lading Act, 1916, supra* note 30, the definition in § 2.

[77] § 80103(b):

> (1) A bill of lading is nonnegotiable if the bill states that the goods are to be delivered to a consignee. The indorsement of a nonnegotiable bill does not–(A) make the bill neotiable; or (B) give the transferee any additional right. (2) A common carrier issuing a nonnegotiable bill of lading must put "nonnegotiable" or "not negotiable" on the bill. This paragraph does not apply to an informal memorandum or acknowledgment.

[78] See Tetley, *supra* note 1 at 183.

[79] See UNCITRAL, *International Legislation on Shipping, Report of the Working Group on the Work of its Fifth Session, held in New York from 5 to 16 February 1973, Addendum*, A/CN.9/76/Add.1 (1973) at 38-39.

CHAPTER ONE

I. Historical Development

It cannot be exactly determined when bills of lading were first used, although records of cargoes being placed on board ocean-crossing vessels have probably existed for well over a thousand years.[80] In Greek and Roman times no formal sea code existed and maritime law evolved from the customs and practices of the early seafaring traders.

A. 11th to 16th Century

One of the earliest references to the keeping of records of goods loaded on board ships that represents unquestionable evidence of delivery are the *Ordinamenta et Consuetudo Maris de Trani* of 1063, which refer to a ship's book or register. This statute, passed by various commercial cities of the Mediterranean, required every ship's master to take with him a clerk, who was obliged to swear an oath of fidelity and to enter the record of the goods received from the shipper into his parchment book.[81] These entries had to be made in the presence of the master, the shipper, and one other witness. Moreover, the *Ordinamenta et Consuetudo Maris de Trani* stipulated that the register would act as evidence of the receipt of the goods and that the clerk was neither an agent of the shipper nor of the master but a public officer, appointed to safeguard the interests of both.[82] Another reference can be found in the *Traité de Droit Commercial Maritime,*[83] in which a similar codification of 1255, *The Fuero Real*, is cited, according to which the owners of ships should "cause to be enrolled in the register all the articles put on board ships, giving

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[80] See A. Mitchelhill, *Bills of Lading-Law and Practice* (London, New York: Chapman and Hall, 1982) at 1; C.B. Mclaughlin, Jr., "The Evolution of the Ocean Bill of Lading" (1925) 35 Yale L. J. 548 at 550.

[81] See J.-M. Pardessus, *Collection de Lois Maritimes Antérieures Au XVIIIe Siècle*, vol. 5 (Paris: L'Imprimerie Royale, 1839) [Pardessus, vol. 5] at 242 (c. XXXI, art. XVI).

[82] See Mclaughlin, *supra* note 80 at 550. See also other codifications of Italian city-states of the eleventh century which include the *Tables of Amalfi* (1131) and the *Constitutum usus* (1161).

[83] See Mclaughlin, *ibid.* at 552, citing A. Desjardins, *Traité de Droit Commercial Maritime* (1885), s. 1 (art. 904).

their nature and quantity". A similar codification was *L'Ordonnance sur la police de la navigation de 1258.*[84] Subsequently, like statutes were passed which also appeared in *Los Partidos.*[85]

Whereas these recorded details formed part of the ship's papers when merchants travelled with their goods, the development of a receipt from the master did not come until much later. Such a "register book", which had to be kept by the ship's clerk, is mentioned in the 14th century manuscript *Compilation connue sous le nom de consulat de la mer,* which is preserved in Paris but believed to have been drawn up at Barcelona.[86] This manuscript further states that the merchants ought to make known to the ship's clerk as soon "as the ship sets sail" of any goods other than those entered in writing, as the owner would not be held responsible for damage to goods other than those recorded. Furthermore, this record included an account of receipts and payments.[87] At this time an early and rudimentary form of bills of lading appears to have been both a document of title as well as evidence of the merchant's right to the goods entered in his name at the end of the voyage.[88] This manuscript may therefore be regarded as proof of a transitional period during which oral evidence of shipment was replaced by the ship's register, which eventually led to the private contract made between the individual merchant and the master. At the same time, the practice emerged in which merchants no longer travelled with their goods. Instead, they simply dispatched them to a consignee, a custom which necessitated a signed extract from the register book as a separate and distinct document of title. It became very difficult to prove title if this single document were lost, as the shippers were in all respects at the mercy of the master, who possessed the sole proof of the contract.

Pursuant to the provisions of a 1397 statute of the City of Ancona, every clerk had to

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[84] See Pardessus, vol. 5, *supra* note 81 at 339.

[85] See J.-M. Pardessus, *Collection de Lois Maritimes Antérieures Au XVIIIe Siècle,* vol. 6 (Paris: L'Imprimerie Royale, 1839) at 17 & 43 [hereinafter Pardessus, vol. 6].

[86] See M.A.P. Melendez, *Los Titulos Representativos de la Mercancia* (Madrid: Marcial Pons, Ediciones Juridicas, S.A., 1994) at 42-43.

[87] See J.-M. Pardessus, *Collection de Lois Maritimes Antérieures Au XVIIIe Siècle,* vol. 2 (Paris: L'Imprimerie Royale, 1831) at 66 *et seq.* [hereinafter Pardessus, vol. 2].

give a copy of his register to those having a right to demand it, "and this in spite of any prohibition by the master or owner".[89] In addition to the delivery of the copies to the shipper, a copy of the register had to have been left at the port of departure in the hands of a safe person, "so that in event of an accident to the clerk or his books, proof of that which was laden on the vessel, of its quality and quantity could be found in the copy so deposited".[90] In requiring that an excerpt from the register be delivered to the shipper, the statute of the City of Ancona reflects the beginning of the "bill", as opposed to the "book" of lading.[91]

Drawing a conclusion one may say that rudimentary bills of lading had come into existence by the late 14th century and that, at the time, it was not contemplated that they would be transferred. They served as some sort of a receipt but it is not known if possession of the document entitled the possessor to delivery of the cargo.[92] There is no proof, despite the contention to the contrary made by some authors, that the early bills represented a "most natural indicium of title."[93] Instead, when the goods were consigned to a correspondent, it was merely required that the latter produce evidence of its identity, as would the consignee under a non-negotiable bill today. Furthermore, even if the bill were considered as essential to delivery, it need not be an indicium of title in the sense of ownership. Lastly, the bill may not yet be regarded at this point in time as having performed a contractual function which bound the carrier to the terms of shipment.

B. 16th to 18th Century

In France a statute with stipulations similar to those of the City of Ancona was passed in 1552[94] and, by the end of the 16th century, the use of the bill of lading had become

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88 See Mitchelhill, *supra* note 80 at 1.
89 Pardessus, vol. 2, *supra* note 87 at 116 & 128.
90 Mclaughlin, *supra* note 80 at 551.
91 *Ibid.*
92 See *ibid.* at 557.
93 B. Kozolchyk, "The Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective" (1992) 23 J. Mar. L. & Com. 161 at 167.
94 See Mclaughlin, *supra* note 80 at 551, citing *Ordinance de Charles V.* See also Pardessus, vol. 6, *supra* note 85 at 66 & 67.

widespread.[95] By then the bill was defined as "the acknowledgement which the master of the ship makes of the number and quality of the goods loaded on board".[96] It is noteworthy that the French statute of 1552 already provided that the clerk had to enter in the book not only a description of the boxes received, but also of the merchandise contained in them.[97] Also in the 16th century, in the case of *Chapman* v. *Peers*,[98] it was expressly acknowledged that it had long been the practice of merchants and a rule of law that no liability attached to the master or owner of the ship for goods not entered in the "book of lading".[99] Since the document could provide evidence of the merchant's right to the goods entered in his name, it had the character of an early document of title.[100] The spread of commerce and the increasing complexity of business brought about the need to transfer the title to the goods *before* they arrived at their destination.[101] Bills of lading as proof of transferability became increasingly important regarding delivery of the goods to the shipper or his agent,[102] their assigns,[103] or those providing for delivery to a third person or his assigns.[104]

Another step in the development towards the present bill of lading was made with the requirement of "trois coppies" under the *Ordinance of Louis XIV*, published by the king in 1681. One copy of the bill of lading had to remain with the shipper, one with the

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[95] See Mclaughlin, *supra* note 80 at 552; *The Thomas* (1538), File 5 (large bundle) No. 64-65, reprinted in *Extracts from the Records of the High Court of Admiralty (A.D. 1527-1545), (1894) Selden Society, Select Pleas in the Court of Admiralty*, R.G. Marsden, ed., vol. 1 (London: Quaritch, 1894) at 61-62 [hereinafter *(1894) Selden Society, vol. 1*].

[96] Mitchelhill, *supra* note 80 at 1; Mclaughlin, *supra* note 80 at 552, citing A. Desjardins, *Traité de Droit Commercial Maritime* (1885), s. 1, art. 904.

[97] See Mclaughlin, *supra* note 80 at 552.

[98] See *(1894) Selden Society, vol. 1*, *supra* note 95 at 44-45 & 184-185.

[99] *Chapman* c. *Peers* (1534), *(1894) Selden Society, vol. 1*, *ibid.* at 184-185.

[100] See Bennett, *supra* note 1 at 5 & 9.

[101] See W.E. Britton, "Negotiable Documents of Title" (1953-54) 5 Hastings L. J. 103 at 104, suggesting that a widespread use of bills of lading did not occur in England until after the sinking of the Spanish Armada in 1588 and after the colonisation of America.

[102] See *The Thomas* (1538), *(1894) Selden Society, vol. 1*, *supra* note 95 at 61-62.

[103] See *The Mary* (1541), File 9 No. 27, *(1894) Selden Society, vol. 1*, *supra* note 95 at 112-113; *The 'John Evangelyst'* (1544), File 12, No. 63-64, *ibid.* at 126; *The Wight Angel* (1549), File 18, No. 173, reprinted in *Extracts from the Records of the High Court of Admiralty, (1897) Selden Society, Select Pleas in the Court of Admiralty (A.D. 1547-1602)*, R.G. Marsden, ed., vol. 2 (London: Quaritch, 1897) at 59-60 [hereinafter *(1897) Selden Society, vol. 2*]; *The George of Legh* (1554), File 23, No. 65-66, *ibid.* at 61.

[104] See *The 'Andrewe'* (1544), File 12, No. 25, *(1894) Selden Society, vol.1*, *supra* note 95 at 126-127; *Bodacar* c. *Block* (1570), File 43, No. 164, *(1897) Selden Society, vol. 2*, *supra* note 103 at 63-64 & 146-147, where it remains unclear whether the consignee was an agent or buyer.

master and one was to be forwarded by another ship to the consignee. On the face of the bill statements about the quantity of merchandise, the marks of the merchandise, its condition, the name of the consignee and the amount of freight had to be indicated. Consequently, endorsement of the bill of lading to the buyer prior to the arrival of the goods became common practice. As proof that the person demanding delivery of the goods at destination was actually entitled to them, bills of lading were respected as the most reliable document.[105] It had also become customary use that "the first of which bills being accomplished, the others to stand void".[106] From the 14th until the end of the 16th century bills of lading had gradually adopted a contractual function, although most bills of lading were still dependent on and referred to charterparties.[107] There were, however, some bills which did not refer to another document.[108] It seems that with the increasing number of cargoes per vessel, entering into a charterparty with all the shippers had become impracticable. Consequently, as today, under these circumstances the contract of carriage was embodied in the bill of lading. Bills of lading then served as evidence of the goods shipped.[109] The writer Malynes states that:

> No ship should be fraighted without a Charterpartie, meaning a Charter or Covenant between two parties, the Master and the Marchant: and Bills of lading do declare what goods are laden, and bindeth the Master to deliver them well conditioned to the place of discharge, according to the contents of the Charterpartie, binding himselfe, his ship, tackle, and furniture of it, for the performance thereof.[110]

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[105] See Bennett, *supra* note 1 at 6.

[106] See Mitchelhill, *supra* note 80 at 1. See also the wording in Association for the Reform and Codification of the Law of Nations, *Report of the Tenth Annual Conference, held at Liverpool, August 8th-11th, 1882* (London: William Clowes and Sons, 1883) at 104 [hereinafter *Liverpool Conference, 1882*].

[107] See *The 'John Evangelyst'* (1544), File 12, No. 63-64, *(1894) Selden Society, vol.1*, *supra* note 95 at 126; *The 'Mary'* (1541), File 9, No. 27, *(1894) Selden Society, vol.1*, *ibid.* at 112-113; *Hurlocke and Saunderson* c. *Collett* (1539), File 7, 20th membrane from end, *(1894) Selden Society, vol. 1*, *ibid.* at 88-89.

[108] See *The Job* (1557), File 27, bundle, Trin. & Mich., No. 1, *(1897) Selden Society, vol. 2*, *supra* note 103 at 61-62; *The George of Legh* (1554), File 23, No. 65-66, *(1897) Selden Society, vol. 2*, *ibid.* at 61; *The Wight Angel* (1549), File 18, No. 173, *(1897) Selden Society, vol. 2*, *ibid.* at 59-60; *The 'Andrewe'* (1544), File 12, No. 25, *(1894) Selden Society, vol. 1*, *supra* note 95 at 126-127; *The Thomas* (1538), File 5 (large bundle) No. 64-65, *(1894) Selden Society, vol. 1*, *ibid.* at 61-62.

[109] See G. Malynes, *Consuetudo, vel, Lex Mercatoria, or the Ancient Law-Merchant: Divided into Three Parts: According to the Essential Parts of Trafficke* (London: Adam Islip, 1622) at 137, giving a precedent of a charterparty stating that the merchant shall "deliver all the said goods, well-conditioned, and in such sort as they were delivered unto him, to such a Merchant the fraightor shall nominate and appoint, according to the bills of lading made or to be made thereof".

This phrase may be interpreted to mean that the bill of lading, when in the hands of a transferee, was intended to bind the carrier contractually. It is submitted that the bill of lading bound the carrier by virtue of its being evidence against it of the quantity and quality of goods loaded, whereas the carrier's obligations were fixed by the charterparty.[111] According to Postelthwayt, the bill of lading was "a memorandum, of acknowledgement, signed by the master of the ship; and given to a merchant, or any other person, containing an account of the goods which the master has received on board from that merchant or other person, with a *promise* to deliver them at the intended place, for a certain salary."[112]

It may be concluded, after having examined the relevant case law, that charterparties embodying the contract were commonly used and that bills of lading were only regarded as containing the contract in cases where they were issued to shippers who were not parties to the charterparty. However, the practice of only issuing bills of lading was beginning to develop in the custom of merchants. This custom involved the drawing up of bills before the shipper had actually determined for whom the cargo was destined. The carrier then delivered the goods to the first person who presented the bill. By virtue of the custom, holders of a bill came to be thought of as entitled to delivery. Correspondingly, carriers were regarded as being under an obligation to compensate holders for their failure to deliver.[113]

C. 18th to 20th Century

By the end of the 17th century,[114] the transferable bill of lading appears to have been

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[110] *Ibid.* at 134.

[111] This view of the interaction of the bill of lading with the charterparty is *e.g.* supported by G. Jacob, *Lex Mercatoria: or, The Merchant's Companion*, 2d ed. (London: E. & R. Nutt, & R. Gosling, for B. Motte, J. Clarke, J. Lacy, 1729) at 82.

[112] M.D. Bools, *The Bill of Lading, A Document of Title to Goods, An Anglo-American Comparison* (London: Lloyd's of London Press, 1997) at 7, citing Postelthwayt, *The Universal Dictionary of Trade and Commerce; Translated from the French of the Celebrated Monsieur Savory*, 2d ed. (1757) [emphasis added].

[113] Which may be supported by the common clause of "the first of which bills will be accomplished".

[114] *Re* assignability of a bill of lading, see *Evans* v. *Martell* (1697), 1 Ld. Raym. 272, 3 Salk. 290; *Wiseman* v. *Vandeputt* (1690), 2 Vern. 203, 23 E.R. 732. See also Bennett, *supra* note 1 at 10; W. Holdsworth, *A*

well established.[115] In 1794, in the leading case of *Lickbarrow* v. *Mason*,[116] a verdict of a jury of the City of London decided that bills of lading were "judicially" recognised as negotiable and transferable documents of title. In this decision, Lord Loughborough held that "a bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment".[117] However, in cases where goods were lost at sea, this decision was problematic because at the time the goods had arrived, or should have arrived, the buyer would probably already have acquired title to the goods although the contract of carriage had been made with the original shipper. The case dealt with the issue of whether bills of lading had a proprietary function. It will therefore not be further discussed here. This judgement, in connection with the case of *Grant* v. *Norway*,[118] eventually led to the first codification in modern times concerning bills of lading, the *Bills of Lading Act, 1855*.[119]

In *Grant* v. *Norway* the master of a ship signed a bill of lading acknowledging the shipment of 12 bales of silk, although the goods had never been loaded on board the vessel. The bill had been endorsed to a third party as security for a debt. When the debt remained unsettled, proceedings were brought against the shipowner as the consignment had never been shipped. The case was dismissed because the court held that the master's action was outside the scope of his authority and therefore did not bind the shipowner.

Until the end of the 19th century, maritime law generally held the carrier absolutely liable for loss of or damage to cargo, whether or not it had been negligent. The carrier could only avoid liability by proving that the matter fell within one of the "common law exceptions", *i.e.* in cases where loss or damage was caused by an act of God, a public enemy, inherent vice and general average.[120] The carrier, however, remained liable even in those cases where it had been negligent or otherwise at fault. The cargo claimant

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History of English Law, vol. 8 (London: Methuen, 1966) at 256-257.

[115] For the 18th century, see *Snee* v. *Prescott* (1743), 1 Atk. 245 (Ch.), 26 E.R. 157.

[116] See *Lickbarrow* v. *Mason*, *supra* note 10.

[117] *Ibid.* at 359 *et seq.*

[118] See *Grant* v. *Norway* (1851), 10 C.B. 665, 138 E.R. 263; 20 L.J.C.P. 93; 15 Jur. 296 [hereinafter *Grant* v. *Norway* cited to C.B.].

[119] See *Bills of Lading Act, 1855*, *supra* note 31.

succeeded if he could prove receipt of the goods for carriage in good order and either non-delivery or delivery in bad order, provided that the carrier could not show that one of the "common law exceptions" had caused the loss or damage. In effect the carrier was a warrantor of safe arrival, and fault was immaterial.[121]

It would seem that not even the common law exceptions availed the shipowner unless they were expressly stipulated in the bill of lading. Thus, in connection with the implied guarantee of seaworthiness of the vessel, the shipowner's liability under both the common law and the civil law codes was, at least in theory, strict.[122] The form of bills of lading remained almost unchanged until the end of the 19th century. In England, in the course of the nineteenth century, the doctrine which equated the public sea carrier with the common carrier was introduced in cargo shipping,[123] thereby rendering the public sea carrier strictly liable for the safety of the cargo.[124] The carrier was able to escape liability only by proving that the cause of the loss or damage was *exempted by the contract.* The common law subjected the exceptions mentioned above to two secondary sources of liability.[125] The carrier barred from taking advantage of the exceptions if the effective cause of the loss or damage was either:

(1) its *failure to supply a seaworthy ship at the beginning of the voyage*[126] or;

(2) its *failure to exercise care in the carriage of the cargo.*[127]

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[120] See Secretariat of UNCTAD, *supra* note 9 at 11-12.

[121] *Ibid.* at 11-12.

[122] See *ibid.* at 12. See also J.F. Wilson, *Carriage of Goods by Sea* (London: Pitman, 1988) at 125.

[123] This doctrine was espoused by Lords Holt and Mansfield. See *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 92 E.R. 107. See also *Forward* v. *Pittard* (1785), 1 T.R. 27 (K.B.).

[124] See *Nugent* v. *Smith* (1875), 1 C.P.D. 19 (C.A.); *Liver Alkali Co.* v. *Johnson* (1874), 43 L.J.Ex. 216, 31 L.T. 95, 2 Asp.M.C. 332, (1872), L.R. 7 Ex. 267; *Riley et. al.* v. *Horne et. al.* (1828), 5 Bing. 217 (K.B.). For the United States, see *S/S Willdomino* v. *Citro Chemical Co. of America,* 272 U.S. 718 (1927), 300 F. 5 (3rd Cir. 1924); *Howland* v. *Greenway,* 62 U.S. 491 (1860).

[125] See *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic Gen. Ins. Co.,* [1940] All E.R. 405 (H.L.), aff'd [1939] 2 All E.R. 855; *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.* (1907), [1908] A.C. 16, 77 L.J.K.B. 82; *The Niagara* v. *Cordes,* 62 U.S. 7 (1859); *Clark* v. *Barnwell,* 53 U.S. 272 (1851).

[126] See *Steel* v. *State Line Steamship Co.* (1877), 3 App.Cas. 72 (P.C.); *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; *The Carib Prince,* 170 U.S. 655 (1897); *The Caledonia,* 157 U.S. 124 (1890).

[127] See *Thomas Wilson Sons & Co.* v. *The Owners of the cargo per The Xantho,* [1887] A.C. 503 at 511-517 (H.L.); *Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225; *The Bradley Fertilizer Co.* v. *The Edwin J. Morrison,* 153 U.S. 199 (1894); *The New Jersey Steam Nav. Co.* v. *The Merchants' Bank of Boston,* 47 U.S. 344 (1848).

"In England of the late nineteenth century the doctrine of freedom of contract was almost sacred."[128] Consequently, English courts diminished the carrier's liability even further by permitting appropriately worded exemptions to relieve the carrier from these secondary obligations.[129] Where exoneration clauses were upheld, the position of the carrier became virtually the reverse of that under the general maritime law.[130] In sharp contrast to the English common law position, U.S. courts did not tolerate additional exceptions in bills of lading[131] issued by the carrier beyond these two, and they would invoke public policy in order to refuse enforcing what they regarded as "unreasonable conditions".[132] This diverging view of public policy was introduced around 1870, after the U.S. courts had initially followed the English rule.[133]

Hence, exemptions for negligence on the part of shipowners or their servants were void if U.S. law was applicable, *i.e.*, where either the contract was governed by the law of the United States, or where the contract was to be wholly or partly performed within the United States,[134] even though the contract had been made abroad with reference to some other law by which the clauses were valid.[135] U.S. law was even applied if there was an express agreement by the parties that the contract should be governed by some other law.[136] An exception, however, was made if the loss or damage had occurred at the foreign port of shipment, and if the contract was valid and effective there.[137] This development eventually led to the adoption of the *Harter Act* in 1893.

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[128] R.P. Colinvaux, *The Carriage of Goods by Sea Act, 1924* (London: Stevens & Sons, 1954) at 1.

[129] *Elderslie Steamship Co., Ltd.* v. *Borthwick*, [1905] A.C. 93 at 95-97 (H.L.); *Westport Coal Co.* v. *McPhail* (1898), 2 Q.B. 130; *Gilroy, Sons & Co.* v. *W. R. Price & Co.* (1892), [1893] A.C. 56 at 61-68 (H.L.), *The Duero* (1869), L.R. 2 A. & E. 393. See also A.N. Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading* (New Orleans: Louisiana University Press, 1962) at 4.

[130] See Secretariat of UNCTAD, *supra* note 9 at 14.

[131] As distinct from charterparties, see *The G.R. Crowe*, 294 F. 506 (2nd Cir. 1923).

[132] *The Guildhall*, 58 F. 796 (S.D.N.Y. 1893); *The Energia*, 56 F. 124 (S.D.N.Y. 1893); *The Iowa*, 50 F. 561 (D.C. Mass. 1892) [hereinafter *The Iowa*]; *The Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397 (1889). See also Colinvaux, *supra* note 128 at 1.

[133] See Colinvaux, *ibid.* at 2, citing A.W. Knauth, "Transportation Law" in *1951 Annual Survey of American Law* (New York: Prentice-Hall, 1952) 523 at 538-539.

[134] See *Liverpool Co.* v. *Phoenix Ins. Co.*, 129 U.S. 397(1889); *The Brantford City*, 29 F. 373 (S.D.N.Y. 1886).

[135] See *Lewisohn* v. *National S.S. Co.*, 56 F. 602 (E.D.N.Y. 1893); *The Guildhall, supra* note 132.

[136] See *The Kensington*, 183 U.S. 263 at 269 (1901); *Botany Worsted Mills* v. *Knott*, 179 U.S. 69 (1900), 82 Fed.Rep. 471 (2nd Cir. 1897), 76 F. 382 at 385 *per* Brown J. (S.D.N.Y. 1896); *The Brantford City, supra* note 134; *The Iowa, supra* note 132; *Morris* v. *The Oranmore*, 24 F. 922 (N.D. Mld. 1885).

Whereas the English rule had the advantage of providing certainty, the law had become thoroughly unsatisfactory in both countries by the end of the 19th century.[138] The situation at that time is best summarised by the statement of the Imperial Shipping Committee in its report of 1921:

> There is nothing in English law to stop [a shipowner] from contraction out of the whole or any part of his liability, and, by a practice which has gradually extended since about 1880, British shipowners do habitually in their bill of lading contract themselves out of their common law liability to a large extent.[139]

II. International Legislation

A. The Liverpool "Conference Form"

In 1882 a first attempt to achieve international uniformity for the law governing bills of lading was made by the Association for the Reform and Codification of the Law of Nations[140] at Liverpool. This draft of a "model bill of lading" was to restrict the number of clauses being used by carriers to escape and avoid liability for loss of or damage to cargo.[141] The guiding principle was the need for a compromise between cargo and vessel interests.[142] The "Conference form" introduced a liability of the carrier for negligence "in all matters relating to the ordinary course of the voyage" and the obligation of the carrier to exercise "due diligence" to make the ship seaworthy. Furthermore, a package limitation was agreed upon in the absence of a declaration of higher value and the inclusion of specific "exceptions" for which the carrier would not be liable.

As far as the description of the goods in the bill of lading was concerned, the draft only

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[137] *Baetjer* v. *Compagnie Générale Transatlantique*, 59 F. 789 (S.D.N.Y. 1894).
[138] Colinvaux, *supra* note 128 at 1.
[139] Imperial Shipping Committee, *Report of the Imperial Shipping Committee on the Limitation of Shipowners' Liability by Clauses in Bills of Lading and on Certain other Matters relating to Bills of Lading, Presented to the Parliament by Command of His Majesty* (London: His Majesty's Stationery Office, 1921) at 7.
[140] Formed in 1873, which became the International Law Association in 1895.
[141] See Sturley, *supra* note 24 at 4. See also Colinvaux, *supra* note 128 at 5.

stipulated that "1. Quality marks, if any, to be of the same size as and contiguous to the leading marks; and if inserted in the Shipping Notes accepted by the Mate, the Master is bound to sign Bills of Lading conformable thereto."[143]

The "Conference form" never achieved general acceptance, although the New York Produce Exchange publicised amended versions in 1883 and 1884. Only a few features were included in standard bills of lading of the Mediterranean, Black Sea, and Baltic general produce and grain trades in 1885. The Hague Rules eventually incorporated only the distinction between "ordinary" matters, such as stowage and the care of the cargo, and "accidents of navigation". No provisions of the "Conference form" with regard to the evidentiary value of bills of lading were, however, incorporated into the Hague Rules.[144]

After the Association for the Reform and Codification of the Law of Nations had abandoned the "Conference form", a different approach was taken at the Hamburg Conference in 1885.

B. The "Hamburg Rules of Affreightment"

Instead of a detailed model bill of lading, a set of rules was proposed. These "Hamburg Rules of Affreightment"[145] could voluntarily be incorporated into bills of lading by reference, as, for example, the York-Antwerp Rules.[146] With regard to the description of goods in the bill of lading, rule XVI of the Rules provided:

> Weight, measure, quality, contents, and value, although mentioned in the Bill of Lading, to be considered as unknown to the master, unless expressly recognised and agreed to the

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[142] See *Liverpool Conference, 1882, supra* note 106.
[143] *Ibid.* at 104.
[144] See Sturley, *supra* note 24 at 4.
[145] See Association for the Reform and Codification of the Law of Nations, *Report of the Twelfth Conference, held at Hamburg, August 18th – 21st, 1885* (London: William Clowes and Sons, Limited, 1886) [hereinafter *Hamburg Conference*].
[146] The York-Antwerp Rules were first adopted as the Glasgow Resolutions of 1860, to become the York Rules of 1864 and the York-Antwerp Rules of 1877, which were in turn replaced by the York-Antwerp Rules of 1890, 1924, 1950, 1974. The York-Antwerp Rules, 1974, as amended in 1990, were replaced by the York-Antwerp Rules, 1994.

contrary. Simple subscription not to be considered as such agreement.[147]

According to a statement made at the conference, the mere "effect of the clause 'weight, measure, quality, contents, and value unknown'" was to shift the burden of proof to the cargo claimant. It was also held that the qualification "weight, measure, quality, contents, and value unknown" had the effect that the presumption pursuant to rule XVI was irrebuttable if statements as to weight, measure, quality, contents, and value were inserted in the bill. The parties, however, were free to enter into an agreement to a different effect.[148] On the one hand, it was expressed "that captains should be compelled to measure and weigh goods delivered to them",[149] or be prohibited to insert such qualifications.[150] On the other hand, it was declared that rule XVI embodied a usage "which had already become universal". "[N]o shipowner would be willing, considering the different countries in which goods were received, to undertake the responsibility for weight, &c."[151] As a reason for that it was added, "captains had not usually time to undertake such duties as were proposed to be cast upon them."[152]

Yet the rules turned out to be an unworkable compromise since the carrier was to "be responsible for the ... faults and negligence, but not for errors in judgement, of the master, officers and crew". Adopted only by a few German companies, the rules did not have a general impact internationally.[153] In 1887 the Hamburg Rules were "rescinded" by the Law Association and the principles of the Conference form were reaffirmed. Their influence on the Hague Rules, however, was that the format as a set of uniform rules was considered more persuasive than a model bill of lading.[154] The concept of the Hague Rules as to representations in the bill of lading, however, was to be considerably different. Until the adoption of the Hague Rules the common usage was continued,[155] according to which the usual statements in the bill of lading as to weight, a description of the goods and their

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[147] *Ibid.* at 90, 161 & 168.
[148] *Ibid.* at 106 (statement by Herrn Ahlers).
[149] *Ibid.* (statement of Dr. Gensel).
[150] See *ibid.* at 106-107 (statements of Dr. Franck, Herrn Suckau and Herrn Steinacker).
[151] *Ibid.* at 106-107 (statement of Herrn Ahlers).
[152] *Ibid.* at 107 (statement of Herrn Woermann).
[153] See Sturley, *supra* note 24 at 5.
[154] See *ibid.*

estimated value were qualified by such clauses as "weight, measure, quantity, quality, contents and value unknown" in order to relieve the carrier from liability for the delivery of goods of such weight, description and value.[156]

For approximately thirty-five years after the Hamburg Conference no legislative efforts had been made regarding the law governing bills of lading until the initiative of the Comité Maritime International (CMI), founded in 1897, led to the creation of the Hague Rules. This occurred after the CMI had successfully completed its work on the Convention for the Unification of Certain Rules Relating to Collisions Between Vessels and the Convention for the Unification of Certain Rules Relating to Assistance and Salvage at Sea.[157]

III. Early Domestic Legislation

After several countries had unilaterally enacted domestic legislation governing exoneration clauses in bills of lading, an even bigger divergence in the law was created in the international context. Conflicting provisions and different national interpretations of the general maritime law[158] eventually led to increased support on the carriers' part for uniform international legislation.

A. United States

By the end of the 19th century the state of the law on bills of lading had become so chaotic[159] that the *Harter Bill* was introduced in the United States in 1892.[160] The bill was intended to be an instrument of trade war strongly favouring cargo interests.[161] The final

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[155] See H.E. Pollock, *Bill of Lading Exceptions*, (London: Stevens and Sons, 1894).
[156] *Ibid.* at 64.
[157] See *ibid.* adopted at the first diplomatic conference on maritime law in Brussels in 1905.
[158] See Sturley, *supra* note 141 at 5.
[159] See *Ibid.* at 6.
[160] Introduced by Congressman M.D. Harter of Ohio.
[161] See Colinvaux, *supra* note 128 at 2-3.

Harter Act, adopted in 1893,[162] represented more of a compromise between the U.S. and the English views.[163]

With regard to the proper delivery of the cargo, the *Act* declared illegal any clauses exonerating the carrier from liability for loss or damage due to "negligence, fault, or failure". Furthermore, under the *Act* the shipowner is bound to issue a bill of lading or other shipping document stating marks, number or quantity, whether carriers' of shippers' weight, and apparent order or condition. The *Act* further stipulates that such document is *prima facie* evidence of receipt of the merchandise as described.

B. United Kingdom

After the adoption of the *Shipping and Seaman Act* in New Zealand in 1908,[164] the *Sea-Carriage of Goods Act* in Australia in 1904,[165] and the Canadian *Water Carriage of Goods Act*,[166] the Dominions Royal Commission unanimously recommended in its report of

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[162] See *Harter Act, 1893*, Act of February 13, 1893, ch. 105, 27 Stat. 445-446, 46 U.S.C. Appx.190-196.

[163] See Singer, *supra* note 64 at 19-20. See also Colinvaux, *supra* note 128 at 2; A.W. Knauth, *The American Law of Ocean Bills of Lading* (Baltimore, Md.: American Maritime Cases, 1937) at 119, emphasising that even within the U.S. the law had not been uniform since a few courts, *e.g.* those of New York followed the English rule, as opposed to the federal court, which did not.

[164] See New Zealand *Shipping and Seamen Act*, 1908 [No. 178 of 1908] and its subsequent amendments such as the *Shipping and Seaman Amendment Act* [No. 37 of 1911]. The *Act* was substantially the same as the central provisions of the *Harter Act, 1893*. As distinct from the *Harter Act, ibid.*, exculpatory clauses could be upheld if the court "adjudge[d] the [clause] to be just and reasonable." Statements in the bill of lading as to the goods and the evidentiary value of the bill were to the same effect as under the *Harter Act, ibid.*

[165] See *Sea-Carriage Of Goods Act* (Cth.) [No. 14 of 1904]. The *Act* was more generous to cargo interests and was, therefore, regarded as an "improvement" to the *Harter Act, ibid.* The *Act* applied to outward shipments only and it contained a penal provision as does the *Harter Act, ibid.* By virtue of s. 7 of the *Act* carriers were prohibited from inserting "in any bill of lading or document any clause, covenant, or agreement declared by the act illegal." The *Act* did not contain specific provisions obliging the carrier to insert a description of the goods in the bill.

[166] See *Water-Carriage of Goods Act, 1910.* An Act Respecting The Water Carriage Of Goods, 1910 [Assented to May 4, 1910]. An Act To Amend the *Water-Carriage Of Goods Act, 1911* [Assented to May 19, 1911] (Canada). The *Act* closely resembled the *Harter Act, ibid.*, but applied to outward shipments only, and did not cover live animals or lumber. With its innovative package limitation, as well as provisions regarding the requirement of a clause paramount in outbound bills of lading, the prohibition of choice-of-forum clauses depriving Canadian courts of jurdisdiction (s. 5) and the expanded list of the carrier's statutory exceptions, the *Act* became the principal model for the Hague Rules. The *Act* contained an exception for latent defects "arising without [the carrier's] actual fault or privity or without the fault or neglect of [the carrier's] agents, servants or employees" (s. 7). Furthermore, the *Act* obliged the carrier to issue a bill of lading showing marks necessary for

March, 1917,[167] that legislation be enacted along the lines of the Canadian *Water Carriage of Goods Act, 1910.*[168] In 1920 the Imperial Shipping Committee was appointed to inquire into and report on, *inter alia,* all matters connected with ocean freights and facilities, etc. The Committee unanimously recommended legislation along the lines of the Canadian *Water Carriage of Goods Act, 1910.*[169] The work of the Committee and its report had a very important impact on the 1921 Conference at The Hague convened by the Maritime Law Committee of the International Law Association. Legislation was not passed until 1924 with the *Carriage of Goods by Sea Act, 1924* (U.K.)[170] based on the Hague Rules.

identification, as furnished in writing by the shipper, as well as the number of packages or pieces, quantity or the weight and the apparent order and condition of the goods (s. 9). Such a bill of lading was *prima facie* evidence against the carrier.

[167] The report dated February 25, 1921.

[168] See Singer, *supra* note 64 at 6.

[169] See Colinvaux, *supra* note 128 at 6.

[170] See *Carriage of Goods by Sea Act, 1924*, *supra* note 26 (repealed).

CHAPTER TWO

I. The *Travaux Préparatoires* for the Hague Rules

The Maritime Law Committee of the International Law Association, realising that legislation in the United Kingdom and the British Dominions did not have a universal character, decided to work on a set of uniform rules for the international regulation of bills of lading. Eventually, after the conference at the Hague on September 3, 1921, the Hague Rules were adopted, including resolutions recommending their coming into effect on all shipments after January 31, 1922. However, opposition to these Rules[171] led to further negotiations. The Maritime Law Committee revised the Rules (October 9 to 11, 1922) and at the diplomatic conference at Brussels (October 17 to 26, 1922) the Rules, substantially similar to the Rules of 1921, were drafted.[172] In 1923, at Brussels, this draft was amended again by a committee which had been appointed at the Brussels conference. This eventually formed the Hague Rules, as adopted at the diplomatic conference at Brussels in 1924.[173] Each state was to give the Hague Rules statutory force with regard to all outward bills of lading as soon as the Convention became effective, on June 2, 1931.

During the entire process of the *travaux préparatoires* there had been fierce opposition to the common law concept of *prima facie* evidence. The continental European states expressed their fear that their "conclusive evidence concepts" and the fundamental principles of their legal systems were incompatible with a *prima facie* concept of the Rules. The second major issue regarding the evidentiary value of bills of lading was whether statements as to weight and quantity, particularly in the case of bulk cargoes, were to be given the same evidentiary value as other statements.

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[171] A merely voluntary application of the Rules was recommended at the *London International Shipping Conference, 1921*, *infra* note 178.

[172] See Singer, *supra* note 64 at 7-8.

[173] See Colinvaux, *supra* note 128 at 8.

It appears from the *travaux préparatoires* that one of the greatest obstacles regarding the question of the evidentiary value of bills of lading was the fact that the delegates could not even agree upon a uniform interpretation of the state of the common law at the time. Consequently, there was a great deal of uncertainty in the law. At the Brussels Conference, 1922, the opposition by delegates from the continental European states was partly overcome by a report of the sub-committee on marginal clauses. This report stated that the English doctrine of estoppel meant that a bill of lading received in good faith constituted much more than mere *prima facie* evidence. According to this report, the evidentiary value of bills of lading at common law appeared to be very similar to that in the continental European legal systems.[174]

A. The Concept of *Prima Facie* Evidence

At the beginning of the *travaux préparatoires* it was held that, at common law, bills of lading were "not only *prima facie* evidence of the receipt by the carrier, but also evidence of the shipment of the goods".[175] The existing law regarding bills of lading was not to be changed by the proposed Rules, and bills under the Rules "should [therefore not] be differentiated from the common bill of lading as it has been hitherto understood". As expressed at the Brussels Conference, 1922,[176] *prima facie* evidence was a presumption *juris* and *de jure* to the benefit of the third party purchaser in good faith.[177]

As emphasised at the London International Shipping Conference in 1921,[178] the Rules

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[174] *E.g.* "Danish Delegates' Report" in Sturley, *supra* note 24 at 501.

[175] The International Law Association, *Report of the Thirtieth Conference held at the Peace Palace, The Hague, Holland, 30th August – 3rd September, 1921, Vol. II, Proceedings of the Maritime Committee* (London: Sweet & Maxwell, 1922) at 104-105 (Second Day's Proceeding, Wednesday, 31st August, 1921, statement by Mr. W.W. Paine) [hereinafter *The Hague Conference, 1921*].

[176] See "International Conference on Maritime Law, Brussels 1922, Documents and Procès-Verbaux of the Sessions held from 17 to 26 October 1922" in M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, C. Boyle, trans., vol. 1 (Littleton, Co.: Rothman, 1990) 345-415 [hereinafter *Brussels Conference, 1922*].

[177] See *ibid.* at 354 (Part I: Plenary Sessions, Sixth Plenary Session, Tuesday, 24 October 1922, Afternoon Session, statement of Mr. Asser).

[178] See "International Shipping Conference held at the Hotel Victoria, Northumberland Avenue, London, 23rd, 24th, and 25th November, 1921, Sir Owen Phillips, G.C.M.G., M.P., President" reprinted in M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, C. Boyle, trans., vol. 2 (Littleton, Co.: Rothman, 1990) 167-266 [hereinafter *London*

were not to "place an absolute responsibility on the shipowner to deliver the goods as described."[179] They were merely to provide that the bill of lading was "*prima facie* evidence of the nature of the goods, thereby placing on the shipowner the onus of proving that he did, in fact, deliver the goods entrusted to his care". In case the carrier could discharge that burden "the question of liability will not arise."[180]

The concept of *prima facie* evidence was to be a compromise between shipowner interests and cargo interests. Part of that compromise was the cargo interests' concession that, subject to a time limit,[181] the removal of the goods was to be *prima facie* evidence against the receiver of the cargo that it received the same cargo that was delivered to the shipowner.[182] Regarding the concept of *prima facie* evidence and the carrier's obligations under Article III(3) of the Hague Rules, it was declared:

> [W]e all know in the ordinary course of business he [the captain] will not verify, and he has not the opportunity of verifying, the facts are given to him by the owners of the goods, the shippers.[183]

At the conferences the majority of delegates were in favour of a concept of "the bill of lading as employed in England."[184] This system of *prima facie* evidence, filtered through the doctrine of estoppel, was expected to be adopted in the continental European countries without any major difficulties. Similar results concerning the evidentiary value would be assured by the fact that the law in these countries would "not admit, with the same ease as Anglo-Saxon law, evidence against documents" since, in the continental European countries, no witnesses could be heard against documentary evidence,[185] the so called parol evidence rule of the common law.

International Shipping Conference, 1921].

[179] *Ibid.* at 187.

[180] *Ibid.*

[181] See *Hague and Hague/Visby Rules*, *supra* note 14, art. III(6).

[182] See *The Hague Conference, 1921*, *supra* note 175 at 108-109 (statement of Sir Norman Hill).

[183] *Ibid.*. See also Brussels Conference, 1922, *supra* note 176 at 395 (Part II: Meetings of the Sous-Commission, Second Session, Friday, 20 October 1922, statement of Mr. Bagge).

[184] *Ibid.* at 357 (Part I: Plenary Sessions, Sixth Plenary Session, Tuesday, 24 October 1922, Afternoon Session, statement of the Chairman (Mr. Louis Franck)).

[185] *Ibid.* at 357 (Part I: Plenary Sessions, Sixth Plenary Session, Tuesday, 24 October 1922, Afternoon Session, statement of Mr. Chairman).

B. *Prima Facie* v. Conclusive Evidence

"The sting of bills of lading is in the tail." This statement was delivered by one of the delegates at the Hague Conference, 1921. It summarised the basic problem of a lack of uniformity. It was declared that "you never know what it may contain" until one has read the bill and all its stipulations from beginning to end.[186] At the preparatory conferences leading to the Hague Rules, the two different concepts regarding the evidentiary value of bills of lading were opposed to each other.[187] On the one hand, there was the English system, according to which a bill of lading was *prima facie* evidence that the goods to which it refers were shipped.[188] Accordingly, the carrier was bound to deliver the full amount of the goods signed for by the master in a bill of lading. This system of *prima facie* evidence was supplemented by the common law doctrine of estoppel, which denied the defendant shipowner the opportunity to rebut evidence produced by the plaintiff. On the other hand, in the majority of jurisdictions in continental Europe, *e.g.*, France, Denmark, Sweden, the Netherlands and Germany, bills of lading had conclusive evidentiary value in the hands of *all bona fide purchasers* of the bill.[189] Consequently, some delegates from the continental European countries objected to the bill of lading

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[186] See *The Hague Conference, 1921*, *supra* note 175 at 51 (First Day's Proceedings, Tuesday, August 30, 1921, statement by Mr. W.W. Paine of the British Bankers Association).

[187] See *e.g.* International Maritime Committee, *Bulletin Nr. 57 (including Bulletins Nrs. 48 to 56), London Conference, October 1922, President: Sir Henry Duke, I.-Immunity of State-owned ships, II.-Exonerating Clauses in Bills-of-Lading* (Antwerp: J.E. Buschmann, 1923) at 327 *et seq.* (statement of Mr. Otto Liebe (Denmark)) regarding the Danish law) [hereinafter *London CMI Conference, 1922*].

[188] Regarding the English common law see, *e.g. Henry Smith & Co.* v. *Bedouin Steam Navigation Co., Ltd.* (1895), [1896] A.C. 70, 65 L.J.P.C. 8, 12 T.L.R. 65 (H.L.) [hereinafter *Henry Smith & Co.* v. *Bedouin* cited to A.C.].

[189] It will later be shown that this statement was not uniformly accepted. Instead, some delegates were of the opinion that in practice hardly any difference existed. See *e.g.* "Appendix to the Italian Delegates' Report " reprinted in M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, C. Boyle, trans., vol. 2 (Littleton, Co.: Rothman, 1990) 513-544 at 530 *et seq.*, *ibid.* at 530-531 (statement of Prof. Berlingieri). Concerning criticism about the *proviso* in art. III(3), drafted with regard to bulk cargoes, he states:

> The contents [of clauses such as "weight, measure and quantity unknown"] when interpreted according to the prevalent doctrine and jurisprudence of the Continent, has the effect of throwing upon the shippers (when they claim for shortage of weight, measure or quantity), the onus of proving that the weight, measure or quantity of the goods carried, at the time of loading, corresponded with the statements in the bill of lading. This is precisely equivalent to stipulating, as established in the Hague Rules, that the bill of lading does not constitute *prima facie* evidence that the goods were actually loaded on board in the weight and quantity given in the bill of lading.

being regarded as *prima facie* evidence of the receipt of the goods by the carrier.[190] This opposition had earlier[191] led to the proposal of a purely voluntary adoption of the Rules.[192] At the Brussels Conference, 1922, however, delegates from the continental European states had advocated the insertion of an additional paragraph in Article III(4), which permitted individual countries[193] to make representations in bills of lading conclusive evidence.[194] However, this proposal was not adopted at the Conference.[195]

After several attempts at providing further clarification as to the evidentiary value had failed, the opposition began to diminish.[196] Eventually, the inclusion of an objection in the closing protocol of the Conference was proposed stating that the Scandinavian states, Germany, and Holland, had opposed the concept of *prima facie* evidence.[197]

At the Brussels Conference, 1923, delegates again tried desperately to clarify the issue. They proposed to either insert a provision in the convention itself stating that the bill of lading constituted absolute evidence against the shipowner, even if it was the shipper who had issued the bill.[198] Alternatively,[199] they suggested introducing a reservation into the

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[190] See *London CMI Conference, 1922, supra* note 187 at 426-427 (Sitting of Tuesday, 10 October 1922, statement of Dr. Leisler Kiep).

[191] See *London International Shipping Conference, 1921 supra* note 178.

[192] See *ibid.* at 209 (statement of Mr. Moeller).

[193] See *Brussels Conference, 1922, supra* note 176 at 391 (Part II: Meetings of the Sous-Commission, First Session, Thursday, 19 October 1922, statement of Mr. Bagge), proposing the introduction of the stipulation "The expression 'prima facie evidence' does not prevent the contracting countries from recognizing a greater evidentiary value for the bill of lading." See also *ibid.* at 407 (Third Session, Saturday, 21st October 1922, statement of Messrs. Bagge, van Slooten, Molengraaff, and Rambke).

[194] See Great Britain, Delegation to the International Conference on Maritime Law, 5th Session, 1922, Brussels, Belgium, *Maritime Conventions (1922): report of the British delegates at the International Maritime Conference, held at Brussels on the 17th – 26th October 1922* (London: H.M.S.O., 1923) [hereinafter *Report of the British Delegates*].

[195] See *Brussels Conference, 1922, supra* note 176 at 407 (Part II: Meetings of the Sous-Commission, Third Session, Saturday, 21st October, 1922). The proposal was voted down by delegates from Belgium, France, Great Britain, and the United States.

[196] Delegates from Belgium and France had eventually agreed upon the *prima facie* concept at the Brussels Conference. See *Brussels Conference, 1922, supra* note 176 at 407 (Part II: Meetings of the Sous-Commission, Third Session, Saturday 21st October, 1922 (Morning and Afternoon)).

[197] See *Report of the British Delegates, supra* note 194 at 22. See also "United States Delegates's Report, Report of the Delegates of the United States to the International Conference of Maritime Law, 5th Session, Brussels, Belgium, October 17-26, 1922" reprinted in M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, C. Boyle, trans., vol. 2 (Littleton, Co.: Rothman, 1990) at 565.

[198] *Brussels Meeting of the Sous-Commission, 1923, supra* note 24 at 443 (Second Plenary Session,

convention,[200] according to which it would be left to the particular national laws to determine the evidentiary value of bills of lading.[201] Expressing the reluctance of some of the continental European countries to accept the concept of *prima facie* evidence, a delegate declared:

> [I]f the clause were adopted as proposed in the convention, he was not sure that that would oblige England to change its procedural rule of estoppel, which did not exist in the Scandinavian countries. It followed that in England "conclusive evidence" would remain, at least in regard to the state and condition of the cargo, while in Continental countries, which did not possess corresponding rules of procedure, one would have "prima facie evidence".[202]

After both of these attempts to clarify the evidentiary value had failed, a third solution was considered. Article V of the Rules was to be modified[203] in order to explicitly cover "conclusive evidence" clauses.[204] This attempt was not approved by the conference either. One major argument against the *prima facie* concept was that it merely constituted a codification of the English common law at the time and did not reflect the continental European approach, according to which statements in bills of lading had *absolute* evidentiary value as against *all bona fide* purchasers. In defence, delegates supporting the concept of *prima facie* evidence declared that, under English law, a bill of lading "constituted much more than *prima facie* evidence in favour of the *bona fide* holder."[205] Thus, the English delegates, in particular, did not consider that such problems could

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Saturday, 6 October 1923, Afternoon Session, statement of Mr. Berlingieri): "[...] would therefore like the leading marks in the bill of lading constitute conclusive evidence in relation to the whole world: it would be a title whose value could not be contested except in the case of *'dol'* (fraud)."

199 Reservations were made by Italy, Germany, the Scandinavian States, and the Kingdom of Serbia, Croatia, and Slovenia.

200 See *Brussels Meeting of the Sous-Commission, 1923*, *supra* note 24 at 445 (Second Plenary Session, Saturday 6 October 1923, Afternoon Session, statements of the Chairman). *Ibid.* at 470-471 (statement of Mr. Beecher).

201 See *ibid.* at 514-515 (Seventh Plenary Session, Tuesday 9 October 1923, statement of the Chairman).

202 *Ibid.* at 492 (Fourth Plenary Session, Monday, 8 October 1923, Morning Session, statement of Mr. Bagge). *Ibid.* at 491 (statement of Mr. Sindballe), stating that this even "applied to *all* bills of lading that contained an indication of number" [emphasis added].

203 See *ibid.* at 471 (Second Plenary Session, Saturday 6 October 1923, Afternoon Session, statement of Sir Leslie Scott), insertion after "immunity" of "or to increase the liabilities and duties dealt with under article 3". See also *ibid.* at 490 (Fourth Plenary Session, Monday, 8 October 1923, Morning Session, statement of Mr. van Slooten), proposing the introduction of a reservation that one could depart from the system of "*prima facie* evidence".

204 Particularly in the customary use in the timber trade in Scandinavian countries.

205 *Brussels Conference, 1922*, *supra* note 176 at 355-356 (Part I: Plenary Sessions, Sixth Plenary Session, Tuesday, 24 October, 1922, Afternoon Session, statements of Mr. Sindballe and Mr. Sohr).

occur. They even found that there were no differences among the national laws as to the principle itself,[206] due to the common practice of inserting qualifying clauses.[207]

C. Differences Between English and U.S. law

At the Meeting of the Sous-Commission in Brussels in 1923, it was questioned whether the evidentiary value of a bill of lading signed by the *captain* would be the same as if the bill had been issued by the *shipowner*, and whether different results were reached under English and U.S. law. Under English law, a bill of lading "issued by the captain constituted conclusive evidence against him, but not against the shipowner."[208] Thus, the shipowner was not absolutely bound *vis-à-vis* the *bona fide* third party holder.[209] Under the U.S. *Pomerene Act* of 1916, however, no such difference existed.[210] In response, it was stated that the *Pomerene Act*, 1916 "only applied to the carrier in common law", and that the *Act* contained a series of reservations. Furthermore, it was declared that "the Act only sanctioned the right to obtain damages, but did not give an absolute evidentiary value to the bill of lading." In fact, under the *Act* statements in bills of lading "could be rebutted by using contrary evidence."[211] Thus, under U.S. law, there were no provisions as to the contents of the bill of lading and the carrier had the right "to free himself from all liability by the insertion of clauses".[212] A third-party holder in good faith, however, retained an action for damages in the case of inaccurate statements made by the shipper/carrier. Consequently, English and U.S. law were to that extent substantially similar.

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[206] See *Brussels Conference, 1922*, *supra* note 176 at 407 (Part II: Meetings of the Sous-Commission, Third Session, Saturday, 21 October, 1922, statement of Mr. Langton), stating that consequently the words "conclusive evidence", as demanded by Continental European delegates, could be left out.

[207] See *Brussels Meeting of the Sous-Commission, 1923*, *supra* note 24 at 495 (Fifth Plenary Session, Monday 8 October 1923, Afternoon Session, statement of the Chairman). *Ibid.* at 497 (statement of Mr. Sindballe).

[208] *Ibid.* at 443 (Second Plenary Session, Saturday 6 October 1923, Afternoon Session, statement of Mr. Sindballe).

[209] See *ibid.* at 443-444 (statement of Sir Leslie Scott).

[210] See *ibid.* (statement of Mr. Sindballe).

[211] *Ibid.* at 496 (Fifth Plenary Session, Monday 8 October 1923, Afternoon Session, statement of Mr. Beecher).

[212] *Ibid.*

D. Different Evidentiary Value of Statements as to Quantity and Quality

Furthermore, the issue of a different evidentiary value of statements as to quantity and quality was raised. It was held that statements as to the condition of the goods "had a much broader scope" than those as to quantity. Statements as to quality were absolute evidence which "bound the shipowner".[213] Statements as to quantity and weight, however, were rebuttable, representing *prima facie* evidence only. The legal situation was similar in U.S., English and continental European law to the extent that a bill of lading was "evidence of its contents and, consequently, of the condition of the goods." In case statements as to marks, numbers, and weight were not qualified, the shipowner was bound and could not legally offer contrary evidence.[214]

One difference, however, was that "in England one could offer contrary evidence as to nature and weight, but not as to condition, except in respect of a *bona fide* third party holder."[215] It was, nevertheless, emphasised that this was merely the theoretical concept, but that in practice with its common insertion of qualifying clauses, such as "weight unknown" or "said to be", the situation was different.[216]

At the Brussels Conference, 1923, the differences between statements as to quantity and quality of the goods were emphasised. Article III(3) and (4) were to be in line with what was existing practice. Thus, the captain had to verify the "apparent order and condition" of the goods. He could not refer to the declarations of the shipper, however, without verifying the cargo himself.[217] Consequently, it was stressed that the burden of proof was considerably higher regarding "apparent order and condition" than for other declarations in the bill of lading. Even though proof to the contrary was permitted, there might only be a few cases in which this proof could be successful. Such proof might, for instance, succeed where damages were concealed and this could only be discovered

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[213] *Ibid.* at 489 (Fourth Plenary Session, Monday, 8 October 1923, Morning Session, statements of the Chairman and Sir Leslie Scott).
[214] See *ibid.* at 488-489 (statement of the Chairman).
[215] *Ibid.*
[216] *Ibid.*, describing the issue as "a conflict between practical reality and theory".
[217] See *ibid.* at 505-507 (Seventh Plenary Session, Tuesday 9 October 1923, statement of the Chairman).

later.[218]

E. Qualifications

Qualifications, it was declared at the London International Shipping Conference, 1921, would only deal with the burden of proof, and not with liability. Qualifications would merely raise the burden of proving the case. They would not, however, "to the mind of any Judge amount to a disclaimer of liability".[219] Thus, qualifications were in practice no more than "a relief against liability." In particular, tramp carriers wanted to clarify whether qualifications were to be permitted under the Rules at all.[220]

Whether qualifications were permitted remained unclear, even though the issue was particularly important with respect to bulk carriers and their practical problems of weighing and measuring cargoes.[221] There were various and differing opinions on the matter. Whereas, according to the eminent member of the British delegation, Sir Norman Hill, no qualifications were to be permitted under the Hague Rules, the Belgium delegate Louis Franck was of the opposite view.[222] The issue was not resolved until the *travaux préparatoires* were completed.

Favouring the permission of qualifications under the Rules, the French delegate remarked at the Hague Conference, 1921, that the U.S. *Harter Act*, for instance, was interpreted by French courts as permitting the clause "weight unknown". He remarked that pursuant to the *Harter Act*, it was required to indicate in the bill of lading "whether the weight given therein is shipowner's weight, or whether it is shipper's weight", the

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[218] See *ibid.* at 507-508 (statement of Mr. Franck).

[219] *London International Shipping Conference, 1921*, *supra* note 178 at 210-211 (statement of Sir Norman Hill).

[220] See *London CMI Conference, 1922*, *supra* note 187 at 335-340 (Sitting of Tuesday, 10th October 1922, statement of Mr. A.P. Möller).

[221] See *The Hague Conference, 1921*, *supra* note 175 at 94-95 (Second Day's Proceedings, Wednesday, 31st August, 1921, statement of Mr. M.M. Mein), giving the example that there would inevitably be a shortage when coal was loaded, "a gale of wind is blowing [and] the quantity which leaves the staithe head does not reach the hold of the ship."

[222] See *London CMI Conference, 1922*, *supra* note 187 at 340 (Sitting of Tuesday, 10 October 1922, statement of Mr. Louis Franck), "I think nobody has contemplated rendering these clauses void." See

first being checked by the shipowner himself, and the latter not.[223] In case of a qualification a statement on the face of the bill was to be considered "shipper's weight". In response, it was declared that under the U.S. *Harter Act* the clause "Any statement as to the quantity, weight and/or measurement of the goods made in the bill of lading shall not prejudice the carrier, unless the goods have been counted, weighed and/or measured prior to the issue of the bill of lading" was "rendered null and void by the paramount clause in the bill of lading".[224] The English delegates considered any qualifying clause invalid under the Rules. Instead of using qualifications, they advocated an explicit provision in the Rules[225] excepting statements in the bill of lading as to bulk cargoes from the general *prima facie* evidence rule.[226]

It appears from the protocols that the majority of delegates intended to permit qualifications only of statements as to the weight, quantity and the number, and only if the shipowner did not have "reasonable means of checking" the cargo.[227] The captain was to show that he did not have "reasonable means of checking".[228] To discharge that burden it would not suffice to show that there were on board the necessary instruments and organisation to allow the check.[229]

F. Insertion of Statements

As to the insertion of statements into the bill of lading, it was outlined that the shipper

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also *ibid.* at 351-353 (statement of Sir Norman Hill).

223 *The Hague Conference, 1921, supra* note 175 at 90-91 (Second Day's Proceedings, Wednesday, 31st August, 1921, statement of Dr. Léopold Dor).

224 *Ibid.* at 96 (statement of Mr. Rudolf).

225 See *ibid.* at 91-92 (statement of Sir Norman Hill), the proposed qualification read: "In the case of bulk cargoes the shipper shall be bound to prove the number, quantity, or weight actually delivered to the carrier, notwithstanding the terms of the bill of lading.".

226 See *ibid.* at 93-94 (statement of Mr. Robert Temperley).

227 *Brussels Conference, 1922, supra* note 176 at 395 & 396 (Part II: Meetings of the Sous-Commission, Second Session, Friday, 20 October 1922, statement of the Chairman). See also *Brussels Meeting of the Sous-Commission, 1923, supra* note 24 at 49 (Second Plenary Session, Saturday, 6 October 1923, Afternoon Session, statement of the Chairman).

228 *Ibid. Brussels Meeting of the Sous-Commission, 1923* at 49 (statement of Mr. Bagge, the Chairman, Mr. Loder and Sir Leslie Scott). *Ibid.* at 50 (statement of Mr. Sohr).

229 See *ibid.* at 49 (statement of the Chairman).

had the choice[230] of which statements to include, but that the carrier only needed to insert one statement, even if three had been provided by the shipper.[231] It was in the interest of shippers and consignees to increase the value of the bill of lading by taking every care that the bill correctly stated what was put on board. This, it was conceded, would impose "on the shipowner a good deal more labour." If representations in bills of lading were *prima facie* evidence against the carrier, then its opportunity to verify the goods and statements made by the shipper had to be assured.[232]

It may be concluded from the *travaux préparatoires* that the drafters intended that the shipowner or his agents should undertake thorough investigations and profound verifications of the goods before signing a bill of lading.[233] The drafters intended this burden to be placed on the carriers although they were aware of the practical difficulties due to large amounts of cargo, short laytimes and the covering of the goods by packaging or other kinds of containers.[234]

G. Statements as to Weight – Bulk Cargo

As regards bulk cargoes such as grain and timber, Sir Norman Hill suggested at the London International Shipping Conference, 1921, that the Rules would leave the law exactly as it stood at the time under the Canadian *Water Carriage of Goods Act*, 1911,[235] according to which statements regarding bulk cargoes were not *prima facie* evidence against the shipowner.[236] It was doubtful whether "customary" qualifications such as "weight unknown", "measure unknown", "not responsible for weight" would remain valid under the Rules.[237] Therefore, a *proviso* was first suggested at the Hague

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[230] See *London International Shipping Conference, 1921*, *supra* note 178 at 217 (statement of Dr. H.J. Knottenbelt (Netherland Steamship Owners' Association)).
[231] See *ibid.* at 218-219.
[232] See *The Hague Conference, 1921*, *supra* note 175 at 84-85 (Second Day's Proceedings, Wednesday, 31st August 1921, statement of Sir Norman Hill).
[233] *Ibid.* at 100 (statement of Sir Norman Hill), proposing the stipulation "in accordance with s. 3 (a), (b) and (c)" in art. III(3) of the draft.
[234] See *ibid.* at 39-40 (First Day's Proceedings, Tuesday, 30th August, 1921, statement of Sir Norman Hill).
[235] See *Water Carriage of Goods Act, 1910* (Canada), *supra* note 166.
[236] See *London International Shipping Conference, 1921*, *supra* note 178 at 199.
[237] *Ibid.* at 207-210 (statement of Mr. Moeller).

Conference, 1921[238] by bulk cargo interests to exclude statements as to bulk cargoes from being considered as *prima facie* evidence.[239] The *proviso* was intended to relieve a shipowner from liability for issuing a "dishonest document" in cases where "a dishonest man could insist [...] upon the shipowner issuing on his demand a bill of lading describing a state of cargo which the shipowner knew had never been put on his ship."[240] Although approved at the Hague Conference, 1921, the *proviso* was eventually not adopted in the Rules in order to ensure uniform rules as to all kinds of cargo.[241] This proposal was accompanied by other proposals not to make statements as to weight *prima facie* evidence. The concept of a different evidentiary value of statements regarding bulk cargoes, suggested at the International Shipping Conference in 1921,[242] and the Hague Conference, 1921, was eventually abandoned at the 1922 CMI Conference in London.[243] The notion of two different kinds of bills of lading was rejected in order to assure a uniform adoption of the Rules applicable to all kinds of bills of lading.[244]

Drawing a conclusion it is submitted that, particularly at the Hague Conference, 1921, the majority of the delegates was of the opinion that qualifications were not to be allowed under the regime as set out in the Rules. Thus, it was felt that statements as to weight should be treated differently and a *proviso* regarding bulk cargoes was approved,[245] since

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[238] See *The Hague Conference, 1921*, *supra* note 175 at 98-99 (Second Day's Proceedings, Wednesday, 31st August, 1921, statement of Sir Norman Hill), the proposed proviso read: "Provided that no carrier, master or agent of the carrier shall be bound to issue a bill of lading showing description, marks, number, quality, or weight which he has reasonable ground for suspecting do not accurately represent the goods actually received."

[239] See *ibid.* at 101 (statement of Sir Norman Hill). The stipulation read:

> Such a bill of lading issued in respect of all cargoes other than bulk cargoes shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with s. 3 (a), (b) and (c).In the case of bulk cargoes the shipper shall be bound to prove the number, quantity or weight actually delivered to the carrier, notwithstanding the bill of lading.

"Cargo" was subsequently substituted by the word "good". *Ibid.* at 103 (statements of Mr. C.R. Dunlop and the Chairman). See also *ibid.* at 106-107 (statements of Sir Norman Hill and the Chairman).

[240] *Ibid.* at 98-99 (statement of Sir Norman Hill).

[241] See *COGSA, 1924* (U.K.) (repealed), *supra* note 26, s. 5, in which, however, a *proviso* of that kind was included.

[242] See *London International Shipping Conference, 1921*, *supra* note 178, the draft text of art. III(4).

[243] See Sturley, *supra* note 24 at 40. The abolished clause read:

> Upon any claim against the carrier in the case of goods carried in bulk or whole cargoes of timber the claimant shall be bound, notwithstanding the bill-of-lading, to prove the number, quantity, or weight actually delivered to the carrier.

[244] See *London CMI Conference, 1922*, *supra* note 187 at 410, 411 & 419 (statement of Mr. Louis Franck).

[245] See *The Hague Conference, 1921*, *supra* note 175 at 91 (Second Day's Proceedings, Wednesday, 31st

it was considered unjust that a shipowner should be held liable for the weight of a cargo which it had no possibility of weighing.[246]

Against the background of their legal systems, in which bills of lading represented conclusive evidence, delegates from some continental European states opposed Article III(3)(b),[247] declaring that the provision merely reflected the English common law.[248] These delegates lobbied for the permission of qualifications, in particular as to weight, under the proposed Rules[249] in order to allow the carrier relief from the binding effect of Article III(3). The carrier, in their opinion, should not be held responsible for shipper's weights when it had not been able to check them itself.[250] A French delegate mentioned the explicit permission of qualifications such as "weight unknown" under a French bill.[251] According to him, it would be too heavy a burden for the shipowner if the consignee did not even have to prove the former's negligence. Thus, he proposed that under the Rules the consignee should be obliged "to show that there is actually a shortage."[252]

H. Conclusion

The Chairman of the Meeting of the Sous-Commission, 1923 summarised the results of the *travaux préparatoires* as to the evidentiary value of bills of lading pursuant to Article III(3) and (4):

> In present practice in England, practice as on the Continent and in the United States, the bill of lading was evidence of its contents and, consequently, of the condition of the goods.

August, 1921, statement of Sir Norman Hill), stating that the issue was considered very important for a unanimous adoption of the Rules.

246 See *ibid.* at 90 (statement of Dr. Léopold Dor).

247 At this stage it was art. III(3)(c) of the draft convention which was later to become art. III(3)(b) of the Hague Rules. See *Hague and Hague/Visby Rules*, *supra* note 14.

248 See *The Hague Conference, 1921*, *supra* note 175 at 88-89 (Second Day's Proceedings, Wednesday, 31st of August, 1921, statement of Mr. H.J. Knottenbelt (Rotterdam)).

249 See *ibid.*

250 See *ibid.* at 89, holding that the captain should not be compelled to accept from a party he does not know the weight which is given him in writing, and if he accepts it, be responsible towards the receivers for the accuracy of the figures which he could not check.

251 *Ibid.* at 89 (statement of Dr. Léopold Dor). No additional proof of special negligence on the part of the shipowner was required.

252 *Ibid.* at 90.

> When the marks, numbers, and weight were found there without modifying phrases, the shipowner was bound and could not legally offer contrary evidence, with this reservation, however, that in England one could offer contrary evidence as to nature and weight, but not as to condition, except in respect of a *bona fide* third-party holder. But beside theory there was practice. In all bills of lading there were clauses like "weight unknown", "said to be". Reservations as to number were more unusual, but sometimes existed and were valid. In the convention, one had proposed substituting the following system. The captain would indicate in the bill of lading the weight, quantity, and description of the goods specified by the shipper, but he would have a triple right. First, if there were grounds for believing that the weight was false or there were no reasonable means of checking it, he had the right not to insert it in the bill of lading. Secondly, if he so indicated, the bill of lading was evidence but he could offer contrary proof. As this contrary proof was often illusory, he had a third guarantee, which was that the shipper was the guarantor of the weight indicated in the bill of lading.[253]

As the conference materials indicate, there was considerable confusion among the delegates as to the scope of the evidentiary value of bills of lading in the United States, England and the continental European countries.

Some delegates were of the opinion that there were no substantial differences at all. Others did not even notice any practical differences between continental European concepts of absolute evidence and the proposed system of the Hague Rules. The majority of the delegates, however, acknowledged that such differences did indeed exist. The problem remained to clearly define what those differences were. Eventually, the opposition of delegates from France and Belgium was overcome by the argument that the concept of *prima facie* evidence would not change the *status quo* of their law which was conclusive evidence in theory but, due to the common practice of qualifying clauses, not as strict in practice.

In the continental European countries, however, the bill of lading was evidence for *all* parties interested in the cargo, not only the *bona fide* holder for value. Moreover, under continental European law, bills of lading only had an absolute evidentiary value for those descriptions *actually inserted* thereon.[254] Bills of lading without reservations formed a

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[253] *Brussels Meeting of the Sous-Commission, 1923, supra* note 24 at 488-489 (Fourth Plenary Session, Monday, 8 October 1923, Morning Session, statement of the Chairman).

[254] See *Brussels Conference, 1922, supra* note 176 at 355 (Part I: Sixth Plenary Session, Tuesday, 24 October 1922, Afternoon Session, statement of Mr. Sohr).

definitive document of title.[255] The captain, however, was not under any national law[256] obliged to indicate any statements as to the weight, number, and nature of the goods. Consequently, it was not worth checking the descriptions as received from the shipper and it sufficed to include in the bill of lading a clause such as "number, weight, quality unknown".

Under the Rules, nevertheless, the evidentiary value would be reduced to a *simple presumption*.[257] The captain was obliged to insert certain descriptions of the goods and to make certain verifications. The number of instances where he could avoid that obligation was to be limited. The continental system of conclusive evidentiary value, which was easy to circumvent since there was no obligation to insert certain descriptions, was therefore replaced by a system of *prima facie* evidentiary value with a strict obligation to include a description of the goods. Thus, the strict theoretical system of continental European countries was replaced "by a system less advantageous in theory but more effective in practice."[258]

Unfortunately, the *travaux préparatoires* left the question of the evidentiary value of qualifications under the Rules unanswered. Some delegates deemed qualifications to be illegal under the Rules, others considered them legal. No consideration was given whether, for example, only contradictory qualifications clearly describing the reason for the insertion should be permitted, thereby excluding statements, which merely rendered statements in the bill of lading ambiguous.

There is sufficient evidence that the drafters of the Rules intended to allow qualifications under the Rules. This may explain why ultimately no *proviso* for bulk cargoes was introduced into the Rules, although the special circumstances in weighing and measuring bulk cargoes had been acknowledged throughout the entire *travaux*

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[255] See *Brussels Meeting of the Sous-Commission, 1923*, *supra* note 24 at 445 (Second Plenary Session, Saturday, 6 October 1923, Afternoon Session, statement by the Chairman).
[256] See *ibid.*, particularly referring to Belgium law.
[257] See *ibid.* at 525-526 (Observations, Presented by the Various Governments, Observations from Mr. van Slooten of The Netherlands).
[258] *Ibid.*

préparatoires. Instead, the more general *proviso* in Article III(3) covering *all* kinds of statements was agreed upon.

One of the main reasons why the *prima facie* solution was eventually adopted was the fear that the scope of the convention and uniformity of bills of lading would otherwise be undermined.[259] Eventually the participating states wanted to agree upon one single "means of regulation that will be the same the world over."[260] The result was a compromise which left the decisive questions open. The delegates could not agree upon a uniform interpretation of the English common law at the time, which created uncertainty as to the scope of the concept of *prima facie* evidence supplemented by the doctrine of estoppel. They did not even answer the question whether the adoption of the *prima facie* concept would also mean the adoption of the English common law doctrine of estoppel. Thus, Article III(4) became a compromise on the incorporation of *prima facie* evidence. The drafters stopped "half-way" and failed to decide whether the common law rule of estoppel was to be applied in the same way as in the common law with its different treatment of statements as to quantity and quality. Thus, the convention left the question of the evidentiary value of bills of lading in the hands of a *bona fide* third party holder for value an open one.[261]

Due to these ambiguities, it was to be expected that the evidentiary value was going to differ considerably from country to country.

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[259] See *ibid.* at 491 (Fourth Plenary Session, Monday, 8 October 1923, Morning Session, statement of Mr. Loder). See also *ibid.* at 492 (statement of Mr. Beecher).

[260] *Brussels Conference, 1922, supra* note 176 at 356 (Part I: Plenary Sessions, Sixth Plenary Session, Tuesday, 24 October 1922, Afternoon Session, statement of Mr. Langton).

[261] See A. Diamond, "The Hague Visby Rules" in Lloyd's of London Press, *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971* (London: Lloyd's of London Press, 1977) at 5.

II. The Visby-Amendment

Prepared by the Sub-Committee since the Rijeka CMI Conference of 1959, the *prima facie* evidence of bills of lading was one of the amendments discussed at the Stockholm Conference in 1963.[262] An amendment to Article III(4) of the Hague Rules was eventually agreed upon at the Stockholm Conference in 1963.[263] The complete amendment to the Rules, however, was only to be adopted in 1968 at the second part of the Twelfth Diplomatic Conference at Brussels[264] and signed at Visby. Article I(1) of the "Visby-Protocol" reads: "In Article 3, paragraph 4, shall be added: 'However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.'"[265]

The basis for the proposed amendment to Article III(4) of the Hague Rules was explained at the 1959 Rijeka Conference to be that the carrier's unrestricted right of proving the imprecision of statements in the bill of lading, permitted under Article III(4) of the Hague Rules, constituted a deviation from general principles with respect to negotiable documents "which is hardly justifiable", particularly regarding *bona fide*

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[262] The two major amendments proposed regarded "carrier liability for lack of due diligence to make a ship seaworthy, even if he had selected with the greatest care a surveyor to ensure that it was seaworthy" in order to overrule the decisions in *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd. (The Muncaster Castle)*, [1961] A.C. 807 (H.L.), [1961] Ll.L.Rep. 57, 1961 A.M.C. 1357 (1961), and "whether servants of a shipowner should be able to avail themselves of the benefits of the exceptions of the Hague Rules" in order to overrule *Scruttons, Ltd.* v. *Midland Silicones Ltd.*, [1962] A.C. 446, [1961] Ll.L.Rep. 365 (H.L.).

[263] See W.R.A. Birch Reynardson, "The Liability Underwriter's Point Of View", Schedule 2, Summary of Positive Recommendations and other subjects examined of the International Sub-Committee on Bills of Lading Clauses, in *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971*, *supra* note 261 at 8.

[264] The text of the provision was not altered during the first part of the Twelfth Conference on Maritime Law held at Brussels in 1967. See Conférence Diplomatique de Droit Maritime, *Douzième Session (1e phase) Bruxelles 1967, Procès-Verbaux, Documents préliminaires, Documents de travail, Textes et Projets des Convention* (Bruxelles: Ad. Goemaere, 1967) at 721 & 728; see *ibid.* at 675-676, at the conference, minor amendments to the Stockholm draft were suggested by Denmark, Finland, Norway. See also *ibid.* at 690, the amendment suggested by France. None of the suggested amendments were adopted. See also *ibid.* at 696-697.

[265] See International Maritime Committee, *Stockholm Conference, 1963* (Comité Maritime International, 1963) at 92-93. See also *Hague and Hague/Visby Rules, supra* note 14, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25th August 1924, signed at Brussels, February 23rd, 1968 ("*Visby-Rules*").

holders.[266] This problem would be exacerbated by the fact that in some countries courts had interpreted the rule in a way that deprived the carrier of the right to submit proof against statements in the bill of lading. Thus, in some countries, bills of lading actually amounted to conclusive evidence in the hands of all third parties acting in good faith.[267] This, however, was in contravention of the originally intended scope of Article III(4) of the Hague Rules. Accordingly, it was emphasised by the CMI International Sub-Committee on Bill of Lading Clauses[268] that the proposed introduction of the additional provision should merely *clarify* and describe more precisely the existing scope of Article III(4) of the Hague Rules. The amendment was not to extend or modify the scope of the Rules[269] but was to explicitly state what had earlier been developed in the English common law.[270] Others were of the opinion that the amendment would slightly alter the existing scope in that, under the old Rules, the consignee/endorsee would not argue estoppel against the carrier with regard to the quantity shipped.[271]

Furthermore, the problem that contrary proof could only be made against the shipper and not a third party holder of the bill was addressed at the 1963 Stockholm Conference. Thus, in order to avoid any ambiguities the following stipulation was suggested: "However, the contrary proof cannot be applied to any person other than the shipper" or "Such a bill of lading shall be *prima facie* evidence to the sole shipper, of the receipt...etc."[272]

However, Article III(4) of the Hague/Visby Rules no longer appears to require *reliance* on the part of the third party, which used to be the case in order to raise an estoppel under

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[266] *Ibid.* at 92-93 (*Stockholm Conference, 1963*).

[267] See *ibid.* at 131-132 & 187.

[268] See Comité Maritime International, *Rapport de la Commission Internationale des Clauses de Connaissement* (Comité Maritime International, 1962).

[269] See *ibid.* at 47-49.[270] See *Compania Naviera Vasconzada* v. *Churchill & Sim* (1905), [1906] 1 K.B. 237 at 249, *per* Channel J. [hereinafter *Compania Naviera Vasconzada*]

[271] See J. Maskell, "The Influence Of The New Rules On Contracts Of Carriage" in Lloyd's of London Press, *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971* (London: Lloyd's of London Press, 1977) at 4.

[272] *Stockholm Conference, 1963, supra* note 265 at 150 & 186-187.

common law.[273] Furthermore, from the point of view of a third party *bona fide* holder for value, the result under the Hague/Visby Rules is that the carrier has a duty to disclose any information with respect to the goods and to exercise a reasonable control of the information provided by the buyer. The carrier's control is, however, restricted to the "apparent order and condition of the goods". This concept is likely to cause serious problems in modern marine transport where the carrier, in practice, usually has only a limited opportunity to verify the goods.[274]

The 1979 S.D.R. Protocol amending the Hague/Visby-Rules[275] does not affect the evidentiary value of bills of lading.

III. The Hamburg Rules

In the wake of what were viewed as flaws or ambiguities in the Hague Rules, the initiative that created the "Visby-Protocol" amending the Hague Rules was of great influence later on in the creation of the Hamburg Rules. After UNCTAD[276] had published its report on bills of lading in December 1970, the decision to draft a new cargo convention under the auspices of UNCITRAL[277] was taken in 1971. The final draft of the Hamburg Rules was completed in May 1976 before the Rules were eventually adopted in a very amended form at Hamburg in March 1978.[278]

At the conferences leading up to the Hamburg Rules an approach according to which the carrier should specifically acknowledge the "essential characteristics" attaching to the goods received was generally agreed upon.[279] The carrier would not be "unqualifiedly

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[273] See Wilson, *supra* note 13 at 130.
[274] See Ramberg, *supra* note 48 at 305 & 306-307.
[275] See *Hague and Hague/Visby Rules supra* note 14, Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as amended by the Protocols of February 23, 1968, and December 21, 1979.
[276] United Nations Conference on Trade and Development.
[277] United Nations Conference on International Trade Law.
[278] See *Hamburg Rules, supra* note 15.
[279] Secretariat of UNCTAD, *supra* note 9 at 25-26.

liable for the goods in the condition in which it received them."[280] Article 16(3) establishes the same concept of evidence as Article III(4) of the Hague and Hague/Visby Rules. The bill of lading is *prima facie* evidence of the goods described in the bill and conclusive evidence in the hands of a third party acting in good faith for value, including a consignee. The wording of Article 16(3) reflects the case law, which has developed as regards estoppel.[281] It is, however, unclear whether the consignee must have relied to his detriment on the statement. Due to its requirement of "reliance", the provision may be slightly more onerous than Article III(4) of the Hague and Hague/Visby Rules.

A. Differences Between the Hamburg and the Hague/Visby Rules

As regards the evidentiary value of bills of lading, there are several differences between the Hamburg Rules and the Hague and Hague/Visby Rules:

(1) The larger number of particulars enumerated in Article 15(1) of the Hamburg Rules than in Article III(3) of the Hague and Hague/Visby Rules.

(2) While in Article III(3)(a) of the Hague and Hague/Visby the quantity *or* the weight of the goods must be indicated, the Hamburg Rules stipulate that both the quantity *and* the weight of goods must be indicated. This has been criticised for complicating commerce and for not really helping to protect the consignee.[282]

(3) "Apparent good order and condition" includes the apparent condition of the packaging and of containers due to the definition in Article 1(5) of the Hamburg Rules.

(4) The master's signature on the bill of lading is explicitly recognised as an acknowledgement by the carrier according to Article 14(2) of the Hamburg Rules.

(5) Pursuant to Article 15(3) of the Hamburg Rules, the absence of required information will not lead to a sanction against the carrier, although it may affect the evidentiary value of the bill of lading as noted in Article 16(2) and (4). This lack of a sanction has been criticised by some authors.[283]

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[280] *Ibid.*

[281] See W. Tetley, "The Hamburg Rules – Good, Bad and Indifferent" in Lloyd's of London Press, *The Speakers' Papers For The Bill Of Lading Conventions Conference – New York, November 29/30, 1978* (London: Lloyd's of London Press, 1978) at 2.

[282] See *ibid.* at 117-118.

[283] See W. Tetley, "The Hamburg Rules – A Commentary" (1979) L. Mar. & Com. L.Q. 1 at 12

(6) The phrase "general nature of the goods" in Article 15(1)(a) was introduced with regard to the common transport of sealed containers whose contents would otherwise remain unknown. The phrase was defined as requiring a general description of the goods. A reasonable specification of the goods is necessary if the bill is to have any acceptable value. The clause was to be distinguished from "apparent condition" in Article 15(1)(b).[284] On the other hand, it could be argued that the provisions on reservations and the ability to avoid using bills of lading might mitigate some of the potential problems.[285] It was declared that the "general nature of the goods"-clause could not be qualified by such phrases as "said to be" since the function of the qualification – relieving the carrier or his agent from the onerous task of verifying the exact number and/or weight of the goods – was incompatible with the provision.[286]

(7) The approach to reservations in the Hamburg Rules is intended to reflect commercial practice.[287] According to Article 16(1) of the Hamburg Rules, the carrier must include the statements furnished by the shipper, but it "must insert in the bill of lading a reservation" specifying any inaccuracies if it has grounds to suspect that such inaccuracies exist, or if it did not have reasonable means of checking the particulars. According to the UNCITRAL draft of Article 16(1), reservations made by the carrier must contain specific reasons for a reservation in order to exclude general reservations. Article 16(1) of the Hamburg Rules, however, does not require this degree of specificity.[288] Likewise, delegates suggested, albeit unsuccessfully, that the carrier should only be able to insert a reservation if it employed reasonable means to check information concerning any inaccuracies. Thus, suspected inaccuracies are sufficient for inserting reservations.[289]

(8) According to Article 16(2), the carrier is deemed to have inserted in the bill that the

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[hereinafter "The Hamburg Rules – A Commentary"].

284 "Carriage of Goods by Sea: Discussions" in C.C.A. Voskuil & J.A. Wade, eds., *Hague-Zagreb Essays 3, Carriage Of Goods By Sea, Maritime Collisions, Maritime Oil Pollution, Commercial Arbitration, Hague-Zagreb Colloquium On The Law Of International Trade, Session 1978 Opatija*, (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1980) 72 at 78 [hereinafter "Discussions"].

285 See Dalhousie Ocean Studies Programme, *supra* note 32 at 118.

286 "Discussions", *supra* note 284 at 72 & 80.

287 See "The Hamburg Rules – A Commentary", *supra* note 283 at 12.

288 See J.C. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)" (1976) 7 J. of Mar. L. & Com. 615 at 645-653.

289 See *Bills of Lading – Comments on the Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation and Shipping*, U.N. Doc. TD/B/C.4/ISL/19 (30 October 1975) at 37.

goods were in "apparent good condition" where it omits any such statement as to the apparent condition.[290] At the conference, Article 16(2) was widely agreed upon since it was seen as underscoring the duty of the carrier to check the condition of the goods and to disclose damage and defects.[291]

(9) Article 16(4) establishes a presumption that where freight and demurrage are not indicated in the bill of lading it will be *prima facie* evidence that no freight and demurrage are payable to the carrier. Consequently, the carrier will be able to introduce evidence regarding freight or demurrage once the bill of lading is transferred to a consignee.[292]

(10) Article 16(3)(b) explicitly mentions the consignee as a third party. This may help exclude problems concerning the transferability of the bill of lading. It is, however, submitted that "consignee" in this context only includes consignees who are not identical with the shipper or with the charterer.[293] In such cases the bill of lading would have the evidentiary value of *prima facie* evidence.[294] The wording suggests that the consignee has to show that he relied on the statement in the bill of lading as it is required under the common law doctrine of estoppel, but not under the statutory provision of the Hague and Hague/Visby Rules.

(11) In case of transhipment, statements made about goods by an actual carrier shall be regarded, under Article 10(1), as "acts and omissions" in "relation to the carriage performed by the actual carrier" for which the contracting carrier is liable.[295]

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[290] Insertions as to "weight" in case of bulk shipments (*e.g.*, grain) should, nevertheless, be subject to customary tolerances and the carrier had to exercise his discretion to weigh the goods himself or not prior to shipment. Otherwise "his operating costs would rise because of the time occupied in weighing the goods" which could induce him to raise his freight rates.

[291] See S. Mankabady, "Comments on the Hamburg Rules" in S. Mankabady, ed., *The Hamburg Rules on the Carriage of Goods by Sea* (Boston: Sijthoff and Leyden, 1978) 27 at 88.

[292] See *Hamburg Rules*, *supra* note 15, art. 15(1)(k), according to which the bill of lading shall contain statements on freight, but not on demurrage, as had been urged by the UNCTAD Secretariat. See Dalhousie Ocean Studies Programme, *supra* note 32 at 120. See also W. Tetley "Canadian Comments on the Proposed UNCITRAL Rules – An Analysis of the Proposed Uncitral Text" (1978) 9 J. Mar. L. & Com. 251 at 258.

[293] See R. Cleton, "Contractual Liability For Carriage Of Goods By Sea (The Hague Rules And Their Revision)" in C.C.A. Voskuil & J.A. Wade, eds., *Hague-Zagreb Essays 3, Carriage Of Goods By Sea, Maritime Collisions, Maritime Oil Pollution, Commercial Arbitration, Hague-Zagreb Colloquium On The Law Of International Trade, Session 1978 Opatija,* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1980) at 33.

[294] See *ibid.*

[295] E. Selvig, "Through – Carriage and On – Carriage of Goods by Sea" (1970) 27 Am. J. Comp. L. 369 at

B. Conclusion

Although some authors predicted that bills of lading would no longer be as crucial for the application of the Hamburg Rules as they were for the Hague Rules, they were still regarded as the most widely-used carriage document.[296] Compared to Article III(3) of the Hague and Hague/Visby Rules, the stipulation in the Hamburg Rules may be considered an improvement, but it may remain for national laws to determine the precise meaning and effect to be given to it.[297]

As regards the insertion of qualifications, the Hamburg Rules may, however, be a step backwards in that Article 16(2) and (4) cover only some of the requirements of Article 15(1) and 16(1), although they were designed to deal with omissions of information in bills of lading. Furthermore, the question remains unresolved whether the carrier can be bound by information which, although required under the provisions, was not indicated in the bill of lading. Likewise, the evidentiary value of a bill that states the weight but not the quantity, or *vice versa*, and where no qualification is inserted, remains unclear. Finally, the effect of general qualifications such as "weight unknown" or "said to contain", where no further specific information is provided, remains unresolved. One possible solution could be that the cargo owner has the burden of establishing that the carrier should reasonably have inserted the inaccuracies in a bill.

As a conclusion it is submitted that the evidentiary value of bills of lading has evolved from the rather ambiguous *prima facie* evidence provision of the Hague Rules to the Visby-amendment. The Visby-amendment intended to *clarify* the Hague Rules by explicitly stating that in the hands of a *bona fide* third party holder for value the bill constitutes conclusive evidence. Last in this evolution are the Hamburg Rules, which have adopted the solution of the Hague/Visby Rules.[298] The evidentiary value of

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382. See also Dalhousie Ocean Studies Programme, *supra* note 32 at 120-121.

[296] See Dalhousie Ocean Studies Programme, *supra* note 32 at 115.

[297] See *ibid.* at 118. It was criticised that no sanctions could be levied against the carrier if he did not comply.

[298] See Cleton*supra* note 293 at 33.

qualifications may be considered to be the same as in the Hague/Visby Rules.[299] As a result, the carrier would, as against a *bona fide* third party holder for value, be strictly liable for any descriptions of the goods inserted in the bill of lading.

[299] See *ibid.*, see also Chr. Lüddeke & A. Johnson, *The Hamburg Rules From Hague To Hamburg Via Visby*, 2d ed. (London: Lloyd's of London Press, 1995) at 31-32.

CHAPTER THREE

I. The Legal Nature of Representations Made in the Bill of Lading

A. English Law

Generally English courts have held that representations made in bills of lading are not contractual.[300] Accordingly, the bill of lading contract constituted a promise by the carrier to deliver the goods, which it received.

At common law, representations made in the bill of lading may act, first, as evidence of the facts represented therein. Second, representations may operate by estoppel.[301] If the requirements under the doctrine of estoppel are satisfied, then the shipowner is precluded from denying the accuracy of the statement made in the bill of lading. This may enable a third party to bring a claim in contract for loss or damage in transit.[302]

For estoppel to arise at common law, the claimant must show that:[303]

(1) There is a representation as to a set of facts.
(2) The representation was made with the intention of being relied upon.
(3) The party asserting the estoppel has actually relied upon the representation to its detriment.

One reason for the fact that representations are generally not considered contractual terms may be that the bill of lading was originally not traded or negotiated,[304] but

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[300] See *Compania Naviera Vasconzada*, *supra* note 270 at 246-247, *per* Channel J.; *Silver* v. *Ocean S/S Co., Ltd.* (1929), [1930] 1 K.B. 416 at 432 [hereinafter *Silver* v. *Ocean*].

[301] Estoppel has developed in various ways: the kind of estoppel dealt with here is "estoppel in pais", as distinct from *e.g.* "estoppel by convention" or "promissory estoppel".

[302] See Tetley, *supra* note 1 at 273. See also S.C. Boyd, A.S. Burrows & D. Foxton, *Scrutton on Charterparties and Bills of Lading*, 20th ed. (London: Sweet & Maxwell, 1996), arts. 57 & 58.

[303] See *e.g. Silver* v. *Ocean*, *supra* note 300 at 432.

[304] See *supra* Chapter One, I.

represented merely a receipt which recorded the quantity and condition of the goods shipped.[305] In these early times, representations made in the bill of lading did not constitute a part of the contract. Moreover, when merchants began to trade bills of lading, actions taken by transferees against the carrier were pleaded in tort, not in contract.[306] In other words, the transferee had, in the absence of an implied contract, no cause of action in contract against the carrier. The concept of an implied contract bestowing upon the transferee a right to sue was mentioned in English common law,[307] in addition to the statutory right of action.[308] In the United States, on the other hand, the concept of an implied contract was introduced to a more limited extent already in the 19th century.[309] Consequently, an interpretation of the bill of lading as a *contract to deliver the goods specified in the bill* would not have assisted the transferee. However, estoppel was an advantageous argument for the transferee.

A further reason for the fact that representations in bills of lading are not considered contractual terms may be that they used to be regarded as merely "quasi-negotiable", as opposed to the "fully" negotiable bills of exchange. A considerable time after Section 1 of the *Bills of Lading Act, 1855* had been introduced,[310] courts had still not accepted that the transferee could acquire more rights than the shipper had pursuant to the original contract with the carrier. This was demonstrated by such rules that the transferee was not bound by terms in an antecedent contract between the shipper and the carrier,[311] or that it was

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[305] See *Bills of Lading Act, 1855, supra* note 31, even after the passing of which the relationship between shipper and carrier was considered one of *bailment*. Accordingly, the carrier undertook to carry and redeliver the goods to the shipper in the same condition in which they had been received, subject to any excepted perils. See *M'Lean and Hope* v. *Munck* (1867), 5 M. 893 at 902, *per* Lord Neaves (Ct. Sess., Scot.).

[306] See *e.g. M'Lean and Hope* v. *Munck, ibid.* at 899; *Snaith* v. *Burridge* (1812), 4 Taunt. 684 (C.P.); *Cuming* v. *Brown* (1808), 9 East 506 (K.B.); *Haille* v. *Smith* (1796), 1 Bos. & P. 563 at 570 (C.P.).

[307] See *Effort Shipping Co., Ltd* v. *Linden Management SA (The Giannis N.K.)*, [1996] 1 Ll.L.Rep. 577 at 586 (C.A., Civil Div). See the old case *Waring* v. *Cox* (1808), 1 Camp. 369 at 371 (K.B.). The concept was, however, rejected in *Thompson et. al.* v. *Dominy et. al.* (1845), 14 M. & W. 403 at 405 (Ex.). See also *Howard* v. *Shepherd* (1850), 9 C.B. 297 at 319-321 (C.P.)

[308] See *Bills of Lading Act, 1855, supra* note 31, s. 1. See also *Leduc* v. *Ward* (1888), 20 Q.B.D. 475 at 480.

[309] See *Asheboro Wheelbarrow & Mfg. Co.* v. *Southern Ry. Co.*, 62 S.E. 1091 at 1091-1092 (Sup. Ct. Car 1908); *Knight* v. *St. Louis I. M. & S. Rly. Co.*, 30 N.E. 543 at 544 (Sup. Ct. Ill. 1892); *Robinson: McLeod & Co.* v. *Memphis & Charleston R. Co.*, 9 F. 129 at 141 (Cir. Ct., W.D. Tn. 1881), shipper's assignee could only bring an action in his assignor's name and for his use.

[310] See *COGSA, 1992* (U.K.), *supra* note 28, with the same scheme and the same wording.

[311] See *Foster* v. *Colby* (1858), 5 H. & N. 705 at 717 (Ex.Ch.).

unaffected by any estoppel that might operate against the shipper.[312] Upon the transfer of the contract pursuant to Section 1 of the *Bills of Lading Act, 1855*, actions on the original contract were no longer available to the shipper. This led to the present view that the shipper's rights are extinguished, and the holder/transferee's created, when title to the goods shipped passes from the former to the latter. The transferee steps into the shipper's shoes, with respect to the latter's rights, but not its obligations and liabilities.[313] Accordingly, the transferee has a right to delivery only of those goods covered by the original contract between the carrier and the shipper. Moreover, the fact that bills of lading are generally considered "quasi-negotiable", and are, thus, rather of a "symbolic nature",[314] may have also contributed to the view that representations on the bill were more a record of goods than an actual contract.

On the basis of this theoretical background, representations in the bill were not construed as enforceable contractual promises. It was held in *Compania Naviera Vasconzada* v. *Churchill & Sim* that:

> [...] the contract must be construed in the same way between the original parties and the substituted parties, and it is necessary to see exactly what the original contract is. It seems to me that the contract is to deliver the goods in the same condition as that in which they are shipped, coupled with an acknowledgement that the condition at the time of shipment was good. The words 'shipped in apparent good order and condition' are *not words of contract* in the sense of a promise or undertaking.[315]

According to the court, the bill of lading contract constitutes a *promise by the carrier to deliver the goods, which it has received.* The contractual terms between the carrier and the transferee/consignee are the same as between the shipper and the carrier. The latter opinion may, however, have become doubtful in light of decisions in which the shipper was allowed to change the name of the consignee and, thus, the terms of the contract of carriage after the bills had been signed.[316]

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[312] See *Edward William Ohrloff et. al.* v. *Thomas Briscall et. al. (The "Helene")* (1866), 4 Moore (N.S.) 70 at 75-76 (P.C.).
[313] See *Effort Shipping Co., Ltd.* v. *Linden Management SA (The Giannis N.K.), supra* note 307 at 586.
[314] Bools, *supra* note 112 at 119.
[315] See *Compania Naviera Vasconzada, supra* note 270 at 246-247 [emphasis added].
[316] See *Elder Dempster Lines* v. *Zaki Ishag (The Lycaon),* [1983] 2 Ll.L.Rep. 548 (Q.B., Com.Div.);

The wording of the relevant statutory provisions in *COGSA, 1971* (U.K.) and *COGSA, 1992* (U.K.) appear to be based on the doctrine of estoppel as well.

B. Alternative Approach

Alternatively, it could be argued that one should rather follow ordinary principles of contract law. Instead of determining *what the contract with the shipper was*, courts should look at *what the contract evidenced by/contained in*[317] *the bill promised.*[318]

In determining what the carrier has promised to do, the court should consider whether a reasonable man in the position of the promisee/transferee would have understood that the carrier promised to deliver the goods recorded in the bill.[319] Although each bill of lading should be interpreted on a case by case analysis, suggestions as to the result can be made since the form and the required statements in bills tend to be similar.[320] A bill will usually record that a particular quantity of goods had been received in a particular order and that these goods will be delivered in a "like" condition to that in which *the bill states they had been received.*[321]

In conformity with this alternative approach, a reasonable man reading such a bill could easily interpret it as a *promise* to deliver the goods indicated in the quantity and the order and condition indicated, subject to any damage caused by circumstances for which the bill excludes liability. Furthermore, it could be argued that today's inquiry by the courts into whether the transferee had reasonably relied upon the truth of the statement and whether

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Mitchel v. *Ede et. al.* (1840), 11 Ad. & El. 888, 113 E.R. 651 (Q.B.).

[317] That bills of lading may be considered as *containing* the contract of carriage can be seen in the statement by Sheen J. in *The Nea Tyhi* (1981), [1982] 1 Ll.L.Rep. 606 at 611[hereinafter *The Nea Tyhi*], "that signature binds the shipowners as principals to the contract *contained in* or evidenced by the bills of lading." [emphasis added].

[318] See Bools, *supra* note 112 at 120.

[319] See W.R. Anson, *Anson's Law of Contract,* 26th ed., A.G. Guest, ed. (Oxford: Clarendon Press, 1984) at 110-114.

[320] See *e.g.* P. Todd, *Modern Bills of Lading,* 2d ed. (Oxford, London, Edinburgh, Boston, Melbourne: Blackwell Law, 1990) at 314-318 (app. F: B.P. Tank Ship Bill of Lading).

[321] See, however, *The Skarp* [1935] P. 134 at 141, 104 L.J.P. 63, 154 L.T. 309, 41 Com.Cas. 1, 52 Ll.L.Rep. 152, 18 Asp.M.C. 590 (Adm.Div.) [hereinafter *The Skarp* cited to P.], where the interpretation of the word "like" was "like condition to that which they [the goods] were in *when* received".

the bill contained a promise to deliver the goods actually shipped, should be combined. This "combined test" would raise the question whether a reasonable man in the position of the transferee would have believed that the carrier was promising to deliver the goods on board and that goods of the quantity and quality recorded were actually loaded on board.[322]

This would lead to a contractual, "alternative" approach, which asks the question whether a reasonable person would believe that the carrier *promised to deliver the goods recorded in the bill.* Not only would this approach be much simpler than the one applied in *Compania Naviera Vasconzada* v. *Churchill & Sim*, but it would also avoid the abuse and misconstruing of the doctrine of estoppel as will be discussed below.[323]

C. United States

1. General Approach

In the United States the law concerning representations made in bills of lading is also based on the doctrine of estoppel.[324] Thus, it has been held that the bill of lading constitutes an acknowledgement by the carrier that it had received the goods described therein.[325] Likewise, the wording of the U.S. enactment of the Hague Rules, U.S. *COGSA, 1936*[326] is based on the common law doctrine of estoppel. Furthermore, the wording of the relevant sections in the primary statute governing interstate and export bills of lading signed in the United States, the *Federal Bills of Lading Act, 1994* appear to be based on that doctrine.

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[322] See also Bools, *supra* note 112 at 120.

[323] See below Chapter Three, V.

[324] See *Strohmeyer & Arpe Co.* v. *American Line S/S Corp.*, 97 F.2d. 360 at 362, 1938 A.M.C. 875 at 878 (2nd Cir. 1938), aff'g 19 F. Supp. 188 at 189 (S.D.N.Y. 1937) [hereinafter *Strohmeyer & Arpe* cited to A.M.C. & aff'g F. Supp.].

[325] See *Continental Distributing Co., Inc.* v. *M/V Sea-Land Commitment*, 1994 A.M.C. 95 (2nd Cir. 1993), aff'g 1994 A.M.C. 82 at 85 (S.D.N.Y. 1992); *Berisford Metals Corp.* v. *S/S Salvador*, 1986 A.M.C. 874 at 879, 779 F.2d 841 at 845 (2nd Cir. 1985), cert. denied, 476 U.S. 1188, 1986 A.M.C. 2701 (1986) [hereinafter *Berisford Metals* cited to F.2d]; *Allied Chem. Int.'l Corp.* v. *Compania de Navegacao Lloyd Brasileiro* 1986 A.M.C. 826 at 827 & 832 (2nd Cir. 1985), cert. denied, 1986 A.M.C. 2700 (U.S. 1986).

[326] See U.S. *COGSA, 1936, supra* note 27.

2. *2nd Circuit Approach*

The U.S. Court of Appeals, 2nd Circuit, however, appears to have taken a different approach. In *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha*,[327] the court held that a carrier was estopped from denying that goods had been loaded on board after it had issued an on-board bill of lading, although the goods had in fact not been loaded and were subsequently destroyed during an earthquake. In this respect the decision took a "normal", conventional approach. Then, however, the court delivered a remarkable decision in respect of a clause contained in the bill limiting the carrier's package liability. The court held that the carrier could not rely on the limitation of liability clause. Relying on two English cases,[328] Hand J. declared:

> It is certainly difficult to apply the doctrine of estoppel half way; or, in other words, to hold it effective in order to charge the carrier with liability for goods never on board, but ineffective so far as exceptions in the bill of lading which benefit the carrier are concerned.[329]

Accordingly, the estoppel prevented the carrier not only from denying that the goods had been loaded, but also from relying upon the per package limitation clause.

The reasoning in *Olivier Straw* may, in particular, be supported by *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*.[330] In *Brandt*, the English Court of Appeal did not allow the carrier to rely on an exclusion clause as it was estopped from denying that the goods were received in apparent good order and condition.

Consequently, Hand J. held in *Olivier Straw* that estoppel prevented the carrier from

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[327] See 47 F.2d. 878 (2nd Cir. 1931), 42 F.2d 717 (S.D.N.Y. 1930) [hereinafter *Olivier Straw* cited to 47 F.2d].

[328] *E.g. Silver* v. *Ocean, supra* note 300, where the court concluded that the carrier who was estopped from showing that the goods were insufficiently packaged where he had signed a bill of lading indicating the goods had been received in apparent good order, could neither rely upon a clause excluding liability for damage to goods through insufficiency of packaging; *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*, [1924] 1 K.B. 575, (1923), 17 Ll.L.Rep. 8 (C.A.) [hereinafter *Brandt* v. *Liverpool* cited to K.B.].

[329] *Olivier Straw, supra* note 327 at 879.

[330] See *Brandt* v. *Liverpool, ibid.* at 579, *per* Scrutton L.J., since there was enough delay to amount to a deviation, the carrier could not rely on the exclusion clause.

attempting to prove that the delay in delivery had not been caused by its fault, but by the earthquake, instead.

The reasoning in *Olivier Straw* could be interpreted in the following manner: representations on the bill of lading constitute a promise to deliver the goods recorded in the bill. The carrier is therefore estopped from denying that the goods stated in the bill were actually shipped. If it does not, however, deliver the goods, it may be sued for a breach of its promise. If the court considers the carrier's promise a fundamental term of the contract, the breach of which amounted to a deviation, then the carrier can rely on neither exclusion nor limitation clauses.[331] To that extent, the result in the *Olivier Straw* would be perfectly in line with English precedent.[332] Then, however, the court applied a completely different, and somewhat revolutionary rule:

> A more logical basis [than estoppel] for the libellant's claim is that the carrier violated its agreement in failing to place the merchandise on board. The bill of lading recited that the goods were shipped in apparent good order and condition. That statement was *a warranty that they were so shipped*, and the libellant, as endorsee of the bill of lading acquired the direct obligation of the carrier and with it the right to sue... .[333]

Thus, Hand J. found that it was a *term* of the bill of lading contract that the goods stated in the bill of lading were shipped in the condition stated. Consequently, the endorsee did not have to rely on the doctrine of estoppel but had an action against the carrier for breach of this term in the bill. He continued:

> The *warranty that the goods were on board* was broken by the failure to ship them, and that breach under the authorities deprived the carrier of the right to invoke the clauses limiting liability...its consequent loss or destruction on land, was no less fundamental than a deviation in the voyage, or than stowage on deck contrary to agreement, or than misdelivery of goods.[334]

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[331] See *Compania Naviera Vasconzada*, *supra* note 270 at 246-247, *per* Channel J. See also Bools, *supra* note 112 at 122.

[332] Recently, however, it has been doubted whether an English court would still equate the effects of a fundamental breach with those of a geographical deviation. See *Photo Production, Ltd.* v. *Securior Transport, Ltd.* [1980] A.C. 827 at 843-846, *per* Lord Wilberforce (H.L.).

[333] *Olivier Straw*, *supra* note 327 at 879-880 [emphasis added].

[334] *Ibid.* [emphasis added].

Since *Olivier Straw*, the 2nd Circuit has applied this approach in *Elgie & Co.* v. *S.S. S.A. Nederburg*[335] and *Berisford Metals Corp.* v. *S/S Salvador*.[336] In both cases the carrier was prevented from relying on the package limitation of § 1304(5) of U.S. *COGSA, 1936*.

D. Conclusion

In the majority of English and U.S. decisions, representations in the bill of lading are not considered contractual terms and the doctrine of estoppel is still applied. Besides § 1303(3) and (4) of U.S. *COGSA, 1936*, and the *Federal Bills of Lading Act, 1994*, the wording of the relevant provisions in *COGSA, 1971* (U.K.) and *COGSA, 1992* (U.K.) also appear to be founded on estoppel. Thus, the legal status of representations in bills of lading is, generally speaking, fairly similar under English and U.S. law. In contrast, the Court of Appeals, 2nd Circuit, has taken a different approach in holding that the carrier's *promise* that the goods stated in the bill of lading were shipped in the condition stated was a *term* of the contract evidenced by the bill of lading. Accordingly, representations in the bill constitute *contractual promises that the goods had been shipped as recorded in the bill of lading*. According to another contractual approach, which may be called the "alternative approach", representations in the bill are *contractual promises to deliver the goods recorded in the bill of lading*.[337] As a result of both contractual approaches, general principles of the law of contracts would be applied.[338] Both approaches have the advantage of preventing the doctrine of estoppel from being abused or misconstrued, as will be seen below. It is submitted that the result for the claimant will probably be the same using either contractual approach. The loss caused by a breach of the *warranty that the goods were shipped as recorded in the bill* will in most cases be the same as the loss caused by the breach of the *promise to deliver the goods as recorded in the bill.*

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[335] See 599 F.2d. 1177 at 1180-1181, 1980 A.M.C. 231 at 236-238 (2nd Cir. 1979), involving a shipment under the *Federal Bills of Lading Act, 1916, supra* note 30.

[336] See *Berisford Metals, supra*, note 325. The case involved a carrier who had issued a bill of lading for goods in fact not received and it was held that the 2nd Circuit's approach "represents just as sound public policy today as it did in 1931."

[337] See Bools, *supra* note 112 at 120-121.

[338] See *e.g. Ansons's Law of Contract, supra* note 319 at 110-114.

II. The Evidentiary Value of the Bill of Lading as Between the Shipper and the Carrier

A. English Law

In the hands of the shipper, the bill of lading constitutes only *prima facie* evidence of the quantity and quality of goods shipped, placing on the carrier the burden of rebutting the presumption by adducing either direct or indirect evidence[339] to the contrary. This principle applies to any original party to the contract and it would not make any difference if an agent of the consignee had signed the contract. Thus, the consignee is bound by the shipper's knowledge, allowing the carrier to rebut statements as against the consignee.[340]

1. Estoppel – Detrimental Reliance

There is no detrimental reliance if the shipper actually or presumedly knows that details in the bill are inaccurate. This may create problems in cases where the shipper employed an independent contractor to deliver goods for shipment and has to rely upon the contractor's information as to whether the goods have been shipped.[341]

2. Receipt

In order to constitute *prima facie* evidence the bill of lading must be a receipt. If on the face of the same bill it is indicated both that the goods were received in "apparent good order and condition" and "quality and condition unknown", then the bill is not a receipt and does not constitute *prima facie* evidence.[342]

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[339] See *Sanday* v. *Strath S./S. Co.* (1921), 90 L.J.K.B. 1349 at 1351.
[340] See *Berkley* v. *Watling* (1837), 7 Ad. & El. 29 at 38-39 (K.B.).
[341] See *Heskell* v. *Continental Express Ltd.*, [1950] W.N. 210, 94 S.J. 339, [1950] 1 All E.R. 1033, (1950), 83 Ll.L.Rep. 438 (K.B.) [hereinafter *Heskell* cited to All E.R.].
[342] See *Attn.-Gen. of Ceylon* v. *Scindia Steam Navigation Co., Ltd.*, [1962] A.C. 60 at 74; [1961] 3 All. E.R.

3. COGSA, 1971 (U.K.)

In order to qualify as *prima facie* evidence under *COGSA, 1971* (U.K.), the bill of lading must, as bills of lading at common law, make an unqualified assertion or representation as to the quantity and quality of the shipment.[343] According to the recent decision in *Noble Resources, Ltd.* v. *Cavalier Shipping Corp. (The Atlas)*[344] such a clause does not violate Article III(8) of the Hague and Hague/Visby Rules, unless the shipper explicitly demands a bill without one.[345]

B. United States

1. Federal Bills of Lading Act, 1994

U.S. courts hold that, as under English law, the holder of the bill of lading must have given value for the bill in good faith and have relied upon the representations in the bill.[346] Under the *Federal Bills of Lading Act, 1994* the shipper will, *a fortiori*, not be able to rely on § 80113(a) if the bill was procured by its or its agent's fraud.[347] The bill can be contradicted as against the shipper for the same reasons as under English law.

The shipper can only recover for loss or damage if the goods concerned have actually been shipped.[348] The shipper can rely on the bill of lading as *prima facie* evidence of

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684; [1961] 2 Ll.L.Rep. 173 (P.C.) [hereinafter *Attn.-Gen. of Ceylon* v. *Scindia* cited to A.C.]; *North Shipping Co., Ltd.* v. *Joseph Rank, Ltd.* (1927), 136 L.T. 415 at 416, *per* Roche J. (K.B.); *New Chinese Antimony Co., Ltd.* v. *Ocean S.S. Co., Ltd.*, [1917] 2 K.B. 664 at 669 & 673 [hereinafter *New Chinese Antimony*]; *The Prosperino Palasso* (1873), 29 L.T. 622 at 625 (Ct.Adm.).

[343] See *Hague and Hague/Visby Rules, supra* note 14, arts. III(3)(a)-(c) & III(4). See *Noble Resources, Ltd.* v. *Cavalier Shipping Corp. (The Atlas)*, [1996] 1 Ll.L.Rep. 642 (Q.B., Com.Ct.) [hereinafter *The Atlas*].

[344] See *ibid.* at 646, *per* Longmore J., due to the clause "weight ... number ... quantity unknown" the bills of lading did not "show" anything at all.

[345] See below Chapter Three, IV. & V., for a further discussion of statements and qualifications in the bill of lading.

[346] See *Strohmeyer & Arpe, supra* note 324 at 189, aff'g at 362; *R.J. Reynolds Tobacco Co.* v. *Boston & M. R. R.*, 10 N.E.2d. 59 at 60 (Sup. Judicial Ct. Mass. 1937).

[347] See *Missouri Pac. Rly. Co.* v. *Askew Saddlery Co.*, 256 S.W. 566 at 570-571 (Ct. App. Mo. 1923).

[348] See *Chicago & N. W. Rly. Co.* v. *Bewsher*, 6 F.2d. 947 at 951-952 (8th Cir. 1925), cert. den. 46 S.Ct. 205 (1925) [hereinafter *Chicago & N.W. Rly. Co.* v. *Bewsher* cited to F.2d].

quantity and quality,[349] but must prove the quantity shipped. For the shipper, this is not too heavy a burden of proof.[350] It suffices, for instance, to adduce some evidence beyond the shipper's count in the bill of lading.[351] Although the carrier is bound to deliver the goods it had actually received,[352] it may deny the *truth* of the statements by inserting a qualification that it does not know the quantity or quality of the goods. In such a case the burden of proof shifts to the shipper.[353]

2. *U.S. COGSA, 1936*

As regards the quality, the shipper may establish a *prima facie* case of liability against the carrier by proving receipt of the cargo by the carrier in good condition and delivery of the cargo in damaged condition (direct evidence).[354] If the shipper cannot prove the good condition at the time of shipment, it may also show that the damage found on delivery was caused while the goods were in transit (indirect evidence).[355] As opposed to the 5th Circuit,[356] the 2nd Circuit[357] also requires the plaintiff to disprove "inherent vice" in

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[349] See *Bluebird Food Prods. Co.* v. *Baltimore & Ohio R.R. Co.*, 492 F.2d 1329 at 1332 (3rd Cir. 1974), relying on *Tuschmann (Chester)* v. *The Pennsylvania Railroad Co.*, 230 F.2d 787 at 791 (3rd Cir. 1956). See also *Bluebird Food Prods. Co.* v. *Baltimore & Ohio R. R. Co.*, 329 F. Supp 1116 at 1118 (E.D. Penn. 1971), restricting the rule in *Tuschman* to merchandise open for inspection.

[350] See *e.g. Joseph Toker Co.* v. *Lehigh Valley R. R. Co.*, 97 A.2d 598 at 600 (Sup. Ct. of N.J. 1953); *Pennsylvania Rly. Co.* v. *Windfall Grain Co.*, 177 N.E. 902 at 904 (App. Ct. Ind. 1931).

[351] See *New York Marine & General Ins. Co., Braha Industries, Inc.* v. *S/S Ming Prosperity*, 920 F. Supp. 416, 1996 A.M.C. 1161 (S.D.N.Y. 1996); *Bally, Inc.* v. *M/V Zim America*, 22 F.3d 65 at 69 (2nd Cir. 1994).

[352] See *Zorilla Commercial Corp.* v. *Ryder/P.I.E. Nationwide, Inc.*, 706 F. Supp. 980 at 983 (D.C. Puerto Rico 1989); *Boatman's Nat. Bank of St. Louis* v. *St. Louis Southwestern Ry. Co.*, 75 F.2d. 494 at 495 (8th Cir. 1935), cert. denied 55 S.Ct. 803 (1935).

[353] See *Hunt-Wesson Foods, Inc.* v. *Central Truck Lines, Inc.*, 446 F. Supp. 1109 at 1111 (S.D. Ga. 1978); *U.S.* v. *Louisville & Nashville R.R. Co.*, 389 F. Supp. 250 at 252 (M.D. Ala. 1975) [hereinafter *Louisville & Nashville*]; *Dwinnel et al.* v. *Duluth, S/S & A. Rly. Co.*, 218 N.W. 649 at 649-650 (Sup. Ct. of Mich. 1928).

[354] See *e.g. C. Itoh & Co. (America), Inc., et. al.* v. *M/V Hans Leonhardt, et. al.*, 1990 A.M.C. 733 at 740 (E.D.La. 1989), where the *Harter Act, 1893, supra* note 164, applied [hereinafter *Itoh* v. *M/V Hans Leonhardt*]. The burden of proof under the *Harter Act, ibid.*, is, however, deemed to be almost identical with that under U.S. *COGSA, 1936*; T.J. Schoenbaum, *Admiralty and Maritime Law*, vol. 2 (St. Paul, Minn.: West Publishing, 1994) at 75 *et seq.*; *Cummins Sales & Service, Inc.* v. *London and Overseas Ins. Co.*, 476 F.2d 498 at 500 (5th Cir. 1973), 1973 A.M.C. 2047 at 2050, cert. denied 414 U.S 1003, 1974 A.M.C. 1889 (1973); *Daido Line* v. *Thomas P. Gonzalez Corp.*, 299 F.2d 669 at 671, 1962 A.M.C. 1295 at 1297 (9th Cir. 1962).

[355] See *Itoh* v. *M/V Hans Leonhardt, ibid.* at 740; *Elia Salzman Tobacco Co.* v. *S/S Mormacwind*, 1967 A.M.C. 277 at 279, 371 F.2d. 537 at 539 (2nd Cir. 1967).

[356] See *e.g. Shell Oil Co.* v. *M/T Gilda*, 790 F.2d 1209 at 1213 (5th Cir. 1986); *Harbert Int.'l Establishment*

showing that the goods were in good condition upon delivery.

3. Discrepancy

The comparison of English and U.S. law reveals a further striking discrepancy: under U.S. law, as distinct from English law, the bill of lading continues to represent *prima facie* evidence in the hands of the shipper where a qualification as to quantity or quality of the goods was inserted by the carrier.[358] Thus, under U.S. law, the burden of proving that the goods recorded in the bill were not shipped is placed on the carrier. Under English law, however, the shipper must show that the goods were in fact shipped.[359] Consequently, U.S. law is more favourable to the shipper than is English law.

C. Contractual Approaches

Under both English and U.S. law the bill of lading is considered *evidence* of the contract between the carrier and the shipper. Both contractual approaches, the first asking whether a reasonable man would construe the representations in the bill of lading as *promises* by the carrier to deliver the goods as recorded in the bill ("alternative approach"), the second asking if the goods had been shipped in the quantity and condition recorded in the bill ("2nd Circuit approach") would normally yield the same result.

Different results would, however, be reached if the bill, as occurred in several U.S. decisions, were construed as having *contained* the contract of carriage.[360] In that case a

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v. *Power Shipping*, 635 F.2d 370 at 375, 1983 A.M.C. 785 at 790-791 (5th Cir. 1981); *Quaker Oats Co.* v. *M/V Torvanger*, 734 F.2d 238 at 241, 1984 A.M.C. 2943 at 2947 (5th Cir. 1984).

[357] See *e.g. United States Steel Int.'l, Inc.* v. *Granheim*, 540 F. Supp. 1326 at 1332, 1982 A.M.C. 2770 at 2779 (S.D.N.Y. 1982); *American Tobacco Co.* v. *Goulandris*, 281 F.2d. 179 at 182, 1962 A.M.C. 2655 at 2659 (2nd Cir. 1960).

[358] See *Louisville & Nashville*, *supra* note 353 at 252, according to which the shipper is free to introduce evidence of his employees and any other evidence of the quantity shipped. See also *Gulf C. & S. F. Rly. Co.* v. *Galbraith*, 39 S.W.2d 91 at 92 (Ct. of Civ. App. 1931), concerning qualification "SL&WTS" [hereinafter *Gulf C. & S. F. Rly.*].

[359] See C.W. O'Hare, "Cargo Disputes and the Metronome Syndrome (Part 1)" (1982) 8 Monash U. L. R. 233 at 245-246.

[360] *The Delaware*, *supra* note 40 at 783, *per* Clifford J.: "It seems to me it would be extremely dagerous [...] to permit any stipulation, express or implied, in these instruments [bills of lading] to be thus [by

particular representation as, for instance, to the quantity or the quality amounted to a *term of the contract.*[361] Thus, the claimant would not only have to show that a reasonable man had not believed that there was a promise to deliver the goods in the condition recorded in the bill of lading. Moreover, and in accordance with principles of the law of contract,[362] he would have to show that a reasonable man in the position of the *particular promisee/shipper* himself would have interpreted the representations in the bill as such promises. Where the bill of lading is considered as containing the contract of carriage, this specific difference, the requirement to prove the interpretation from the *particular* contracting party's point of view, is likely to generate different results. A shipper, for instance, who knows that a statement as to quality or quantity of the goods loaded is inaccurate would not be able to argue that it believed the carrier was promising to deliver the goods as recorded in the bill. A reasonable man, however, from its outside/third party's perspective would be able to argue this.[363]

D. Conclusion

As regards the evidentiary value of representations in the bill of lading in the shipper-carrier relationship, English and U.S. law are very similar. Under both U.S. and English law, the shipper may establish a *prima facie* case by directly proving that the goods were in good condition at the time of the shipment or by indirectly proving that the goods were damaged while in the carrier's custody. As distinct from that, the Court of Appeals, 2nd Circuit, additionally requires the plaintiff to disprove "inherent vice".

As a striking difference, however, the bill of lading continues to be *prima facie* evidence where a qualification as to quantity or quality was inserted. Under U.S. law the burden of proving that the goods recorded in the bill were in fact not shipped is on the carrier. Under English law, however, the burden is on the shipper to show that they were

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parol evidence] varied." See also *The Brush, supra* note 40 at 93.

361 See Bools, *supra* note 112 at 125.

362 See Treitel, *supra* note 25 at 1 & 8-9, regarding the determination of contractual intention.

363 A transferee, though, would even under these circumstances be able to argue that the bill amounted to a promise to deliver the goods as recorded or as a warranty that the goods were shipped as recorded.

shipped. U.S. law is, thus, more favourable to the shipper than English law. This might be explained by, amongst other reasons, the fact that, in its history, the United States was more of a shipping than either a shipowning or carrying nation.[364]

Both contractual approaches would probably lead to the same result where the bill of lading is considered as merely constituting *evidence* of the contract of carriage. If, however, as in some U.S. decisions, the bill of lading is regarded as *containing the contract of carriage* and where representations amount to terms of that contract, the results may differ since this interpretation would have to be made from the *particular* contracting party's point of view.

[364] See above Chapter One, I.

III. The Evidentiary Value of the Bill of Lading as Between the Transferee and the Transferor

A. English Law

Under English law the evidentiary value of representations in the bill of lading as between the transferee and the transferor is based on the concept of a warranty. The warranty arises in virtue of the underlying contract, pursuant to which the bill was transferred. The transferor is deemed to not have warranted anything in the bill by merely transferring the documents.

The most important issue in the relationship between transferor and transferee is the genuineness of the bill of lading.[365] Whether the transferor warranted the genuineness or any other characteristic of the bill must be decided according to the usual test regarding the implication of contractual terms. The plaintiff must show that such an implied contract indeed existed.[366] Under English law, the genuineness of the bill, however, is not warranted as a matter of law.

B. United States

In interstate and export bills of lading in the United States, where the *Federal Bills of Lading Act, 1994* applies, the relationship between the transferor and the transferee is governed by § 80107:

> (a) General rule. – Unless a contrary intention appears, a person negotiating or transferring a bill of lading for value warrants that –
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> (1) the bill is genuine;
>
> (2) the person has the right to transfer the bill and the title to the goods described in the bill;

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[365] See Bools, *supra* note 112 at 137.

[366] See *Trust Co. of New York* v. *Hannay & Co.*, [1918] 2 K.B. 623, involving a forged bill of lading drawn by a fraudulent seller.

(3) the person does not know the fact that would affect the validity or worth of the bill; and

(4) the goods are merchantable or fit for a particular purpose when merchantability or fitness would have been implied if the agreement of the parties had been to transfer the goods without a bill of lading.

(b) Security for debt. – A person holding a bill of lading as security for a debt and in good faith demanding or receiving payment of the debt from another person does not warrant by the demand or receipt –

(1) the genuineness of the bill; or

(2) the quantity or quality of the goods described in the bill.

(c) Duplicates. – A common carrier issuing a bill of lading, on the face of which is the word "duplicate" or another word indicating that the bill is not an original bill, is liable the same as a person that represents and warrants that the bill is an accurate copy of an original bill properly issued. The carrier is not otherwise liable under the bill.

(d) Indorser liability. – Indorsement of a bill of lading does not make the indorser liable for failure of the common carrier or a previous indorser to fulfill its obligations.[367]

Whereas the wording of § 80107 is generally straightforward, its predecessor under the *Federal Bills of Lading Act,* 1916 had given rise to some debate. It was questioned whether, pursuant to the *Act*, "a person" included "a bank". Thus, it was not clear whether the transfer of a bill of lading by "a bank" to a transferee was to the same effect as the transfer effected by "a person". Pursuant to § 80107(a)(2), the person negotiating or transferring a bill of lading for value warrants the transfer of the bill and the title to the goods described in the bill. It was held that to banks no such warranty or implied term applied and that banks warranted neither the genuineness of the bill,[368] nor the quality or quantity of goods described in the bill.[369] Likewise, it had been held that banks were not co-warrantors of the seller/shipper[370] and the buyer of goods who receives the bill from a collecting bank could not attach the payment in the hands of the collecting bank upon payment of a draft.[371]

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[367] *Federal Bills of Lading Act, 1994, supra* note 29.

[368] See *Johnston* v. *Western Maryland Rly. Co.*, 135 A. 185 at 187, 151 Md. 422 at 424 (C.A.Md. 1926).

[369] See *Bishop & Co., Inc.* v. *Midland Bank*, 84 F.2d. 585 at 588 (9th Cir. 1936), thus the bank discounting a draft with a bill of lading attached is not, in the absence of bad faith, answerable to the drawee for the performance of the consignor's contract; *Bank of Italy* v. *Colla et al.*, 161 N.E. 330 at 332-333 (Sup. Ct. Ohio 1928), cert. denied 278 U.S. 619, 49 S.Ct. 22 (1928); *First National Bank of Ripley, Tennessee* v. *Tchula Commercial Co.*, 95 So. 742 at 743, 132 Miss. 58 at 59 (Sup. Ct. Miss., Div. A. 1923) [hereinafter *First National Bank of Ripley* cited to So.].

[370] See *Stacey-Vorwerck Co.* v. *Buck*, 291 P. 809 at 810-811 (Sup. Ct. Wyo. 1930), bank not held liable for seller's breach of warranty, cert. denied 283 U.S. 849, 75 L.Ed. 1458, 51 S.Ct. 559 (1931). *First National Bank of Ripley, ibid.* at 743.

C. The Hague and Hague/Visby Rules

There are no provisions concerning the evidentiary value of representations as between the transferor and the transferee in the Hague and Hague/Visby Rules.

D. Conclusion

Under English law the evidentiary value of representations in the transferor-transferee relationship is based on the concept of a warranty. Whether the transferor warranted the genuineness or any other characteristic of the bill must be decided according to the usual test regarding the implication of contractual terms. The plaintiff must show that there was indeed such an implied contract. In interstate and export bills of lading in the United States, the matter is governed by § 80107 of the *Federal Bills of Lading Act, 1994*. Under this provision, as interpreted by the courts, the evidentiary value of representations made by "banks" differs from those made by "persons". Accordingly, a bank may not become a co-warrantor of a seller/shipper. Thus, the buyer of the goods who receives the bill from a collecting bank may not, upon payment of a draft, attach the payment in the hands of the collecting bank. Neither the Hague/Visby Rules, as enacted in *COGSA, 1971* (U.K.), nor the Hague Rules, as enacted in U.S. *COGSA, 1936*, provide for provisions governing the evidentiary value of representations in the transferor-transferee relationship.

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[371] See Bools, *supra* note 112 at 138.

IV. The Evidentiary Value of the Bill of Lading as Between the Transferee and the Shipper/Carrier

A. *Federal Bills of Lading Act, 1994*

1. § 80113(a) of the Federal Bills of Lading Act, 1994

U.S. *COGSA, 1936* does not contain the conclusive evidence provision inserted into the Hague Rules by the Visby-amendment. Since § 1303(4) of U.S. *COGSA, 1936*[372] is explicitly made subject to the *Federal Bills of Lading Act, 1994*, the effect of representations made in the bill will usually be determined pursuant to the stricter provisions in § 80113 of the *Federal Bills of Lading Act, 1994*, even where U.S. *COGSA, 1936* applies. Thus, the carrier's representations in interstate and export bills of lading is codified in § 80113(a) of the *Federal Bills of Lading Act, 1994*. The provision deals with the insertion of statements in the bill of lading by the carrier and does not distinguish between statements as to quantity and statements as to quality:

> (a) Liability for nonreceipt and misdescription. - Except as provided in this section, a common carrier issuing a bill of lading is liable for damages caused by nonreceipt by the carrier of any part of the goods by the date shown in the bill or by failure of the goods to correspond with the description contained in the bill. The carrier is liable to the owner of or to the holder of a negotiable bill if the owner or holder gave value in good faith relying on the description of the goods in the bill or on the shipment being made on the date shown in the bill.[373]

If the transferee shows that the bill contains an inaccurate statement of either the quantity of goods, the date of shipment or the description of the goods, then the carrier will be *prima facie* liable to the transferee for this loss. Decisions regarding the former § 22 of the *Federal Bills of Lading Act, 1916 (Pomerene Act)* are still good law today in

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[372] See U.S. *COGSA, 1936, supra* note 27, § 1303(3).

[373] *Federal Bills of Lading Act, 1916, supra* note 30, §§ 20-22, re-enacted in *Federal Bills of Lading Act, 1994, supra* note 29,§ 80113. See especially *Federal Bills of Lading Act, 1916, ibid.*, § 22, re-enacted in *Federal Bills of Lading Act, 1994, ibid.*, § 80113(a).

interpreting § 80113(a). Thus, it is still open to debate whether under this provision the common law doctrine of estoppel may be inapplicable to statements in the bill. In *Browne* v. *Union Pacific Rly. Co.*[374] the court held that "since Congress specifically defined the matters as to which the carrier issuing an order bill of lading would be liable, the *liability* goes no further. *Expressio unius est alterius exclusio.*"[375]

This reasoning may be interpreted in two ways. Either the court intended to hold that the common law doctrine of estoppel is generally not applicable to statements which are not mentioned in subsection (a), or alternatively that the provision does not apply to any other statement aside from those mentioned.[376] The latter interpretation is supported by the decision in *Chicago & N. W. Rly. Co.* v. *Stephens National Bank of Fremont*,[377] involving such statements in the bill that the railway cars were sealed, freight had been prepaid and that the cars had been delivered to the carrier. Although the provision does not mention these statements, the court held that they bound the carrier.

Given the general interpretive principle that the legislature is not presumed to alter the common law any further than is necessary to achieve the purpose of the legislation in question,[378] it is submitted that the common law of estoppel remains unaffected insofar as it relates to representations other than those listed in subsection (a).[379]

2. *§ 80113(d) of the Federal Bills of Lading Act, 1994*

The Hague Rules, enacted in U.S. *COGSA, 1936*, oblige the carrier to insert the same statements into the bill of lading as to the Hague/Visby Rules, enacted in *COGSA, 1971* (U.K.).[380] U.S. law differs, however, since § 1303(4) of U.S. *COGSA, 1936* is explicitly

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[374] See 216 P. 299 (Sup. Ct. of Kan. 1923), aff'd 267 U.S. 255 (1925).
[375] *Ibid.* at 301, *per* Dawson J.
[376] See Bools, *supra* note 112 at 128.
[377] See 75 F.2d. 398 at 400-401 (8th Cir. 1935) [hereinafter *Stephens National Bank of Fremont*].
[378] Regarding the English law, see *Black-Clawson International, Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 at 614, *per* Lord Reid (H.L.).
[379] See also Bools, *supra* note 112 at 128.
[380] The carrier is, however, only obliged to insert the statements *upon demand of the shipper* to issue a bill of lading.

made subject to the provisions of the *Federal Bills of Lading Act, 1994*. § 80113(d) of the *Act* is more onerous on the carrier and will, thus, usually apply:

> (d) Carrier's duty to determine kind, quantity, and number–
> (1) When bulk freight is loaded by a shipper that makes available to the common carrier adequate facilities for weighing the freight, the carrier must determine the kind and quantity of the freight within a reasonable time after receiving the written request of the shipper to make the determination. In that situation, inserting the words 'shipper's weight' or words of the same meaning in the bill of lading has no effect.
> (2) When goods are loaded by a common carrier, the carrier must count the packages of goods, if package freight, and determine the kind of quantity, if bulk freight. In that situation, inserting in the bill of lading or in a notice, receipt, contract, rule, or tariff, the words 'shipper's weight, load and count' or words indicating that the shipper described and loaded the goods, has no effect for freight concealed by packages.[381]

Under § 80113(d)(1) the carrier is obliged, upon request of the shipper, to issue a bill of lading indicating the "kind *and* quantity of the freight". The provision does not mention statements as to number and weight.

§ 80113(d)(2) has been interpreted such as not only to oblige the carrier to count the packages of goods, if package freight, or determine the kind of quantity, if bulk freight, but also to record in the bill the information so obtained.[382] Although the carrier is, in the case of packaged goods, under no obligation to determine the contents of the packages, it may do so. When the carrier has determined the contents, it may qualify[383] any statements in the bill as it sees fit.[384] If it does not qualify any statement, its liability will be governed by § 80113(a).[385]

It is submitted that this rule represents a fair solution to both the carrier and the consignee/transferee of the bill. Otherwise the latter, receiving a bill containing statements as to the goods shipped without a "shipper's load and count"-clause, would not be in the position to determine who loaded the goods. If the consignee/transferee could

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[381] See *Federal Bills of Lading Act, 1994*, *supra* note 29.
[382] See *Leigh Allis & Co.* v. *Payne*, 274 F. 443 at 446 (N.D.Ga. 1921), aff'd on other grounds, 276 F. 400 (5th Cir. 1921), aff'd 260 U.S. 682, 43 S.Ct. 243, 67 L.Ed. 460 (1923) [hereinafter *Leigh Allis & Co.* cited to 274 F.]
[383] See below Chapter Three, V.
[384] See *Leigh Allis & Co.*, *supra* note 382 at 446.

not rely on the accuracy of the statement, the negotiability of bills of lading would be seriously impaired. The most common representation made by the carrier is one with regard to the quality of the goods.

B. The Hague and Hague/Visby Rules – The Carrier's Obligation to Insert Statements

Where the Hague and Hague/Visby Rules do not apply,[386] or where the shipper did not demand the issuance of a bill of lading under the Rules, the carrier is under no obligation to issue a bill at all.[387] Nor is the carrier obliged to issue a bill which complies with the Rules,[388] unless the shipper has requested one.[389] If, however, the shipper so demands, the bill must comply with Article III(3)(a)-(c) of the Hague and Hague/Visby Rules.[390] Where the shipper has requested a bill and does not object to any of its contents, the rights of the indorsees of the bill will be governed by its actual terms.[391] The evidentiary value of the bill will then be determined under the common law rule of estoppel. In this case, the interests of consignees and assignees of the bill are prejudiced, since neither has the right to demand the bill's compliance with the Rules. In practice, however, the carrier will almost always issue bills of lading for its own purposes.

The carrier is not obliged to acknowledge more than one and can disclaim knowledge of the other statements. According to the nature of the cargo and the nature of the

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[385] See *ibid.* at 447.

[386] See *COGSA, 1971* (U.K.), *supra* note 26, pursuant to art. I(3) and (6) and art. X of the Schedule.

[387] See *Hague and Hague/Visby Rules, supra* note 14, art. III(3). See also *Vita Food Products* v. *Unus Shipping Co.*, [1939] A.C. 277, (1939), Ll.L.Rep. 21, 1939 A.M.C. 257, [1939] 2 D.L.R. 1 (P.C.) [hereinafter *Vita Food* cited to A.C.]

[388] See *Dorsid Trading Co.* v. *S/S Rose*, 343 F. Supp. 617 (S.D. Tex. 1972); *Canada and Dominion Sugar Co., Ltd.* v. *Canadian National (West Indies) Steamships, Ltd.* (1946), [1947] A.C. 46 at 57, 80 Ll.L.Rep. 13 at 18 (P.C.) [hereinafter *Canada and Dominion Sugar Co., Ltd.* cited to A.C.].

[389] See *Attn.-Gen. of Ceylon* v. *Scindia, supra* note 342, where it was held that the shipper could have demanded an unqualified bill of lading that complied with the Hague Rules, but since no demand was made the shipper-consignee was bound by the bill of lading that was issued; *Canada and Dominion Sugar Co., Ltd., supra* note 388. See also *Vita Food, supra* note 387 at 294.

[390] See *COGSA, 1971* (U.K.), *supra* note 26, art. III(3), Sched. 1. See also U.S. *COGSA, 1936, supra* note 27, § 1303(3).

[391] *Pendle & Rivett, Ltd.* v. *Ellerman Lines, Ltd.* (1927), 29 Ll.L.Rep. 133 at 134-136, *per* MacKinnon J (K.B.) [hereinafter *Pendle & Rivett*]; *Attn.-Gen. of Ceylon* v. *Scindia, supra* note 342.

information supplied by the shipper the carrier will, for instance, be able to choose which of the three methods of quantifying cargo it acknowledges.[392] If the carrier indicated more than one statement in the bill of lading, then the question arises whether both or just one of the statements are binding on the carrier. When only one of the statements is binding, it must be determined which of the statements shall be binding.

1. Carrier Bound by Only One Statement

A restrictive interpretation of the provisions of Article III(3) of the Hague and Hague/Visby Rules suggests that the carrier is required to mention in the bill of lading only one characteristic, either "the number of packages or pieces, or the quantity or weight".[393] Its obligation appears to be limited to one statement only and it would have to indicate for a cargo of bags the exact number, for a car the mark and measurements and for bulk goods the nature of the goods and the weight.[394] An additional statement would usually only be inserted for calculating the amount of freight, etc. Thus, where the carrier only delivered in full the total weight, but not the number of packages mentioned in the bill of lading, he would not be held liable for the missing packages.[395]

2. Carrier Bound by All Statements

Some authors favour the solution that all statements should bind the carrier.[396]

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[392] See Wilson, *supra* note 13 at 133.

[393] See Tetley, *supra* note 1 at 280; S. Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules)*, 2d ed. (Gateshead on Tyne: Witherby, 1960) at 87-88; R. Temperley, *Carriage of Goods by Sea Act, 1924*, 4th ed. (London: Stevens & Sons, 1932) at 34, adding that the carrier may strike out or qualify as "unknown" the other particular furnished by the shipper; Knauth, *supra* note 163 at 180.

[394] See *Pendle & Rivett*, *supra* note 391 at 136, *per* MacKinnon J.

[395] See *Spanish-American Skin Co.* v. *The M/S Ferngulf*, 1956 A.M.C. 2238 at 2242-2244, 143 F. Supp. 345 at 350 (S.D.N.Y. 1956), rev'd in 242 F.2d 551, 1957 A.M.C. 611 (2nd Cir. 1957) [hereinafter *The Ferngulf* cited to 1956 A.M.C. 2238]; *Queensland Ins. Co.* v. *A. Messina & Co.*, 1955 A.M.C. 1131 (Ct. App., Alexandria/Egypt), where number of boxes indicated in the bill of lading was delivered, weight delivered did not have to correspond with weight stated.

[396] See Dor, *supra* note 393 at 88. See also J. Moore, "Subject IV, Bills of Lading and other Documents, 2. Reservations" in Associacion Argentina de Derecho Maritimo, *La Responsabilidad del Transportador de Mercaderias por Agua, Seminario de Buenos Aires 1980* (Milano: Dott. A. Giuffrè Editore, 1983) 313 at 318.

According to this solution, the carrier is not bound to state the number of packages *and* their weight. If, however, the carrier elects to do so, both statements shall bind him.[397] This rule should also apply to bulk cargo unless the bill of lading actually states that the weight of the cargo was ascertained or accepted by a third party. *Oricon Waren-Handels G.m.b.H.* v. *Intergraan N.V.*[398] involved bills of lading acknowledging the receipt of 2000 packages of copra cake "said to weigh gross 105,000 Kgs ... for the purposes of calculating freight only". The court appears to support this opinion by holding that the bills of lading were *prima facie* evidence of the number of packages. The only reason why the weight inserted did not bind the carrier was that the carrier had effectively qualified this statement.[399]

3. Critique

The *travaux préparatoires* of the Rules appear to support the latter opinion since the original draft of the present Article III(3)(b) was separated into two sub-rules requiring the master to indicate the number *and* the weight, quantity or measure.[400] Thus, one could argue that Article III(3)(b) was adopted in its present form as the result of an error.[401] It may furthermore be considered as misleading for third parties if a partial qualification, which only applies to one of two or more statements is inserted on the face of the bill of lading. Where, for instance, the number and the weight were inserted, the latter opinion would lead to the incongruous result that, if the carrier was only responsible for the

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[397] See *The Ferngulf*, *supra* note 395. The court held that carrier is liable for each statement inserted into the bill of lading.

[398] See [1967] 2 Ll.L.Rep. 82 (Q.B. Com.Ct.). Therefore the burden of proof rested with the consignee to establish the weight of cargo shipped before he could succeed in his action for short delivery. In order to assist the consignee in discharging this heavy burden courts may allow the plaintiff to calculate the weight *e.g.* according to the average weight of sacks actually delivered.

[399] See *ibid.* at 90, *per* Roskill J; followed in *Pendle & Rivett*, *supra* note 391 at 136, *per* MacKinnon J.; *The Harry Culbreath*, 1950 A.M.C.1347 at 1350-1352 (S.D.N.Y. 1950), aff'd 1951 A.M.C. 754 at 757 (2nd Cir. 1951) [hereinafter *The Harry Culbreath*].

[400] The wording was: "(a) the number of packages or pieces and; (b) as the case may be, the weight, quantity or measure." See *The Hague Conference, 1921*, *supra* note 175. When delegates suggested that these two items be combined into one single paragraph they did not intend to modify the principle previously adopted, but to make it clearer that the master was required to state the weight or quantity and also the number of packages according to the information furnished by the shipper. See also Dor, *supra* note 393 at 88.

[401] See *The Ferngulf*, *supra* note 395, 1956 A.M.C. 2238 at 2242-2244.

number of packages, it could then deliver all of the packages entirely empty. English and U.S. courts seem to be in favour of the latter interpretation as well.

On the basis of the contractual approaches, which interpret representations in the bill of lading from a reasonable third party's point of view, *all* statements on the face of the bill would have to be taken into consideration. *All* statements become part of the carrier's *promise* that *the goods had been shipped as recorded in the bill of lading* ("2nd Circuit approach"), or *to deliver the goods recorded in the bill of lading* ("alternative approach"), and, thus, they should all be binding on the carrier. This approach would produce reasonable and just results. If the carrier does not want to be bound by a statement, he should not insert it in the bill.

C. Statements as to the Quality and the Condition of the Goods

1. Apparent Good Order and Condition

Where the Hague and Hague/Visby Rules apply, the carrier is obliged to insert into the bill of lading a statement whether it received the goods in "apparent good order and condition". If the bill of lading does not bear any qualification indicating that the goods or the containers in which they are packed were in any manner defective at the time when the carrier received the goods, the bill is "clean". If, however, it bears a qualification,[402] the bill is "foul" and not a document which "on its face appears to be in order".[403] In case of a qualification rendering the bill of lading "unclean" or "foul", it would be for the claimant to prove that the ship had actually received the quantity of goods declared at the time of shipment or, where the Hague and Hague/Visby Rules apply, that the carrier in fact had "reasonable means of checking it".[404] If the accuracy of the data is contested, it would be the carrier's burden to prove that it had good reasons for inserting qualifications in the bill of lading.

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[402] See below Chapter Three, V., for a further discussion of qualifications.
[403] See G. Gilmore & Ch.L. Black, Jr., *The Law of Admiralty*, 2d ed. (Mineola, N.Y.: The Foundation Press, 1975) at 122 (§ 3-13).
[404] See *e.g. The Flying Spray*, 1957 A.M.C. 43 (S.D.N.Y. 1957).

The statement "received in apparent good order and condition", although appearing to be sufficiently unambiguous for establishing an estoppel, has in fact been interpreted in various ways. According to a great number of decisions the phrase "apparent" in connection with different phrases such as "order" or "condition" refers to what is directly observable upon a reasonable examination.[405] By inserting the statement into the bill of lading, the carrier expresses that it deems the goods to be apparently in a condition to be carried safely,[406] and that their packing is strong enough to safely withstand the voyage.[407]

The meaning of the phrase "condition" depends on the nature of the goods concerned. Where goods are not packaged and only their external appearance is observable the phrase refers to the external appearance, even where it is not qualified by the phrase "apparent".[408] Where, however, the goods are inside packages, "condition" refers to the observable characteristics of the goods inside the packages.[409] In *Silver* v. *Ocean Shipping Co., Ltd.*[410] the court held that "insufficiency of packaging" meant that the goods could not be described as being in "apparent good order and condition". The court, nevertheless, left the question whether the goods were therefore not in "good condition" or not in "good order" unanswered. According to Greer L.J., the term merely covered the absence

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[405] See *Re Owners of Motor-Tanker Athelviscount and the National Petroleum Co.* (1934), 39 Com.Cas. 227 (Com.Ct.); *Silver* v. *Ocean, supra* note 300 at 426-427, 434 & 441. See also *American Industries Corp.* v. *M/V Margarite*, 1982 A.M.C. 2861 (S.D.N.Y. 1982); *Caemint Food* v. *Lloyd Brasileiro*, 1981 A.M.C. 1801 at 1808-1809 (2nd Cir. 1981); *Molinelli, Giannusa & Rao* v. *Italian Importing Co. (The Carso)*, 41 Ll.L.Rep. 33 at 37 (2nd Cir. 1931).

[406] See *Dent* v. *Glen, supra* note 23.

[407] See Dor, *supra* note 393 at 102.

[408] See *Compania Naviera Vasconzada, supra* note 270 at 245, *per* Channel J.

[409] See *e.g. The Tromp*, [1921] P. 337 at 348; *Martineaus, Ltd.* v. *Royal Mail Steam Packet Co., Ltd.* (1912), 106 L.T. 638 at 639, *per* Srutton J. (K.B.) [hereinafter *Martineaus, Ltd.* v. *Royal Mail* cited to L.T.]; *The Peter der Große* (1876), 34 L.T. 749 at 751 (C.A.), aff'g (1875) 1 P.C. 414 [hereinafter *The Peter der Große* cited to L.T.]; *Jensen* v. *Matsen Navigation Co.*, 71 F. Supp. 939, 1947 A.M.C. 1082 (D.Hai. 1874) [hereinafter *Jensen* v. *Matsen*], according to which the statement is no proof that "each case was first opened and the condition of the contents inspected"; *Fidelis Fisheries, Ltd.* v. *The Kristina Thorden et. al.*, 142 F. Supp. 798, 1956 A.M.C. 2245 (S.D.N.Y. 1956); *Copco Steel Engineering Co.* v. *S/S Alwaki*, 131 F. Supp. 332; 1955 A.M.C. 2001 (S.D.N.Y. 1955) [hereinafter *Copco Steel Engineering Co.* v. *S/S Alwaki* cited to F. Supp.]; *Crispin Co.* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, 1955 A.M.C. 1613 (S.D. Tex. 1955); *Navarro* v. *John Doe (The Ciano)*, 69 F. Supp. 35, 1947 A.M.C. 1477 (E.D. Pa. 1946).

[410] See *Silver* v. *Ocean, supra* note 300 at 427 & 440-441.

of "acquired damage".[411] Furthermore, U.S. courts held that "apparent good order" did not refer to such unobservable conditions as are encompassed by the phrase "inherent vice".[412]

Where the carrier inserted the statement that goods had been received in "apparent good order and condition" although the packaging was apparently insufficient, it may not base its defence on Article IV(n) of the Hague Rules as enacted in *COGSA*, 1924 (U.K.).[413] If the goods are inside packages, then the phrase "condition" is to be distinguished from "good order", with the latter merely referring to the appearance of the packages,[414] and not to their quality.[415] In the case of perishable goods it has been held that "apparent good order and condition" included the apparent ability to withstand ordinary methods of transport.[416]

If the statement "shipped in good order and condition" is not inserted in the bill at all, it is arguable that such a bill of lading is not even *prima facie* evidence of the condition of the goods on shipment. In the alternative one could, however, argue that the bill of lading implies that the goods had been in good condition, provided there are no other indications in the bill of lading for a bad order or condition of the goods.[417]

Where defects were not "apparent", the carrier may be exonerated according to Article IV(2)(n), insufficiency of packing, or Article IV(2)(m), inherent vice,[418] as well as Article

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[411] *Ibid.* at 432-433.

[412] *The Katingo Hadjipatera*, 81 F. Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948). See also *The San Diego*, 1945 A.M.C. 436 (2nd Cir. 1945); *Roberts (T.) & Co.* v. *Calmar S/S Corp.*, 59 F. Supp. 203, 1945 A.M.C. 375 (E.D.Pa. 1945).

[413] See *Phillips & Co. (Smithfield), Ltd.* v. *Clan Line Steamers, Ltd.* (1943), 76 Ll.L.Rep. 58 at 59-60 (K.B.), involving bills of lading governed by *COGSA, 1924* (U.K.), *supra* note 26, (repealed). See also *Dent* v. *Glen, supra* note 23; *Brown, Jenkinson & Co., Ltd.* v. *Percy Dalton*, [1957] 2 Ll.L.Rep. 1, [1957] 2 Q.B. 621.

[414] See *The Peter der Große, supra* note 409.

[415] See *Cox* v. *Bruce* (1886), 18 Q.B.D. 147 [hereinafter *Cox* v. *Bruce*].

[416] *Dent* v. *Glen, supra* note 23.

[417] See *Tokio Marine & Fire Insurance Co.* v. *Retla S/S. Co.*, 426 F.2d 1372; 1970 A.M.C. 1611 (9th Cir. 1970), [1970] 2 Ll.L.Rep. 91 (9th Cir. 1970) [hereinafter *Tokio Marine & Fire Insurance Co.* cited to F.2d]; *The Isle de Panay*, 267 U.S. 260 (1925).

[418] See *Renfield Importers Ltd.* v. *Anchor Line*, 1957 A.M.C. 1505 (S.D.N.Y. 1957), where the carrier was not held liable for breakage of bottles in cases, this damage having resulted from insufficiency of packing which could not be detected by a normal inspection. See also *Goodwin, Ferreira & Co., Ltd.* v. *Lamport & Holt, Ltd.* (1929), 34 Ll.L.Rep. 192, damage resulting from bad nailing down of cases, this defect not being visible in an ordinary examination; *The Rita Sister*, 69 F. Supp. 480, 1946 A.M.C. 910 (E.D. Pa. 1946); *Granadaisa Foods, Inc.* v. *Compania de Navegacao "Carregadores Acoreanos"*, 1956

IV(2)(c). In *Copco Steel Engineering Co.* v. *S/S Alwaki*,[419] no estoppel could be raised against the carrier although it had inserted the "apparent good order and condition" of the goods. It was not held liable because the court found that the damage was of a kind which normally or inevitably occurs with that particular kind of cargo.

2. *Verification of the Goods*

The assessment of the "apparent order and condition" is made upon "reasonable" verifications of the goods.[420] The skills expected from the carrier or his agent differ between those of "an unskilled person"[421], and a "basic knowledge of the kind of goods normally carried."[422] The carrier need not have a particular expertise in the physical condition of the goods enabling it to detect features which are not normally observable. The carrier may employ experts for the verification of the goods. In *Westcoast Food Brokers* v. *The Hoyanger*[423] a carrier who relied on an inspectors' report was not estopped from denying the good order and condition of the goods at loading, where the expert turned out to be inexperienced and failed to detect features which would usually not have been observable.[424]

3. *Containers*

An estimated 40 per cent of cargo claims against insurers involve losses inside containers.[425] When goods are carried in containers, a reasonable examination required by

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A.M.C. 1152 (E.D.N.Y. 1956); *Jensen* v. *Matsen*, *supra* note 409; *Borthwick & Sons, Ltd.* v. *New Zealand Shipping Co., Ltd.* (1934), 49 Ll.L.Rep. 19 (K.B.).

[419] See *Copco Steel Engineering Co.* v. *S/S Alwaki*, *supra* note 409, where the court considered it unreasonable to expect that long bundles of steel bars would be handled without contact with the sides of the hatches.

[420] According to the *proviso* in art. III(3) of the Rules, the carrier is not obliged to insert a statement which he has had "no reasonable means of checking".

[421] *Groban* v. *S/S Pegu*, 1972 A.M.C. 460 (S.D.N.Y. 1971). See also *Compania Naviera Vasconzada*, *supra* note 270 at 245, *per* Channel J.

[422] *Dent* v. *Glen*, *supra* note 23.

[423] See *Westcoast Food Brokers Ltd.* v. *The Hoyanger*, [1979] 2 Ll.L.Rep. 79, 1980 A.M.C. 2193 (Fed.C.A. of Can. 1979) [hereinafter *The Hoyanger* cited to Ll.L.Rep.].

[424] See *ibid.* at 89, *per* Addy J.

[425] See M. Clarke, "Containers: Proof That Damage To Goods Occurred During Carriage" in C.M. Schmitthoff & R.M. Goode, eds., *The International Commercial Law Series, Volume I, International*

the carrier includes an inspection of the external appearance of the container. There appears to be no positive duty on the carrier's part to investigate under the Hague Rules,[426] *i.e.* to open packaging and containers, unless there was reason to do so.[427] A reasonable outward inspection will therefore in most cases only refer to the outward appearance of a container or packaging, but not to the condition of the goods inside.[428] As a result, the shipper will be anxious to avoid any such insertions on the bill since it may be obliged to produce a "clean" bill of lading in order to obtain a documentary credit from a bank.[429]

When a sealed container arrives without any signs of external damage or tampering, it will usually be much more difficult for the cargo claimant to establish a *prima facie* case with regard to the quality than to the quantity of the contents. In the latter case, the cargo claimant, in its attempt to prove that the loss occurred during transport, will be assisted by the fact that the container was sealed. With regard to the quality of the goods, however, it is the exact opposite argument. Since the container was sealed, the success of the cargo claimant's argument that the damage occurred during transport will depend on external factors. It may introduce weather reports or prove that cargo damage was due to the weather, moisture, or other causes which did not affect the container but only the cargo.[430]

It was held in *Ace Imports Pty. Ltd.* v. *Companhia de Navegacio Lloyd Brasilero (The Esmeralda 1)*,[431] an Australian case governed by the Hague Rules, that where a statement

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Carriage of Goods: Some Legal Problems and Possible Solutions (London: Centre for Commercial Law Studies, 1980) 64 at 71.

[426] As e.g. opposed to the Convention on the Contract for the International Carriage of Goods by Road, Geneva, May 19, 1956 (CMR), art. 8.3.

[427] See *Berisford Metals, supra* note 325 at 847. See also *American Foreign Insurance Assn.* v. *Seatrain Lines of Puerto Rico*, 689 F.2d 295 (1st Cir. 1982), concerning apparent defects in the shipper's loading and stowage; *Poliskie Line Oceaniczne* v. *Hooker Chemical Corp.*, 1980 A.M.C. 1748 at 1751-1754 (S.D.N.Y. 1980). See also *Mooney Ltd.* v. *Farrell Lines Inc.*, 1980 A.M.C. 505 at 512 (2nd Cir. 1980); *Houlden & Co. Ltd.* v. *S/S Red Jacket*, 1977 A.M.C. 1382 (S.D.N.Y. 1977), aff'd 582 F.2d 1271 (2nd Cir. 1978), converning suspicious external condition.

[428] See Wilson, *supra* note 13 at 133.

[429] See *e.g. Compania Naviera Vasconzada, supra* note 270.

[430] See Clarke, *supra* note 425 at 64 & 81-82.

[431] See *Ace Imports Pty. Ltd.* v. *Companhia de Navegacio Lloyd Brasilero (The Esmeralda 1)*, [1988] 1 Ll.L.Rep. 206 at 210 (Sup.Ct. N.S.W., Com. Div. 1987) [hereinafter *The Esmeralda 1*]. The clause on the face of the bill of lading read "Containers, packages or other units or weight of other cargoes

on the face of the bill of lading which refers to both "packages" and "containers", then the phrase "packages" only referred to those "packages" for which no container was used. Thus, no representation whatsoever had been made by the carrier with respect to the number of boxes contained in a container. The court found that the representation as to the number was therefore not *prima facie* evidence as against the carrier.[432]

4. Common Law

At common law, the carrier is almost invariably estopped from denying that it had received the goods in bad order or condition if itself inserted the statement "apparent good order and condition" but did not effectively qualify that statement.[433]

D. Statements as to the Quantity

1. Common Law

The rule under the English common law is that the ship must deliver the goods received as she received them, unless relieved of liability by the excepted perils. The bill of lading is *prima facie* evidence that the goods were shipped, and thus the burden of disproving this is shifted onto the carrier.[434] If the carrier wants to rebut the *prima facie* evidence established by the insertion of statements as to quantity or weight of goods shipped, it must prove that the goods were in fact not shipped as indicated in the bill of lading. This proof must be "clearly established". Proof on a balance of probabilities does not, therefore, suffice. Lord Shand in, *Henry Smith & Co.* v. *Bedouin Steam Navigation Co., Ltd.*, held that "the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped, but that in point of fact they were not

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specified on the face hereof [the bill].".

[432] See below Chapter Three, V., where the question of qualifications of statements as to the condition of the goods will be discussed below, outlining the difference between the evidentiary value of representations as to quantity and quality of the goods.

[433] *E.g. Compania Naviera Vasconzada, supra* note 270. See also *Silver* v. *Ocean, supra* note 300.

[434] See *Attn.-Gen. of Ceylon* v. *Scindia, supra* note 342; *Bennett & Young* v. *John Bacon, Ltd.* (1897), 13 T.L.R. 204; 2 Com.Cas. 102 (C.A.); *Henry Smith & Co.* v. *Bedouin, supra* note 188 at 79; *Harrowing* v.

shipped."[435]

In practice this burden is difficult to discharge for the carrier. Only under rare circumstances[436] will it be able to prove that it was not aware of the fact that the goods concerned were not shipped when it had actually signed the bill of lading.[437]

a) No Goods Loaded

The carrier may escape liability at common law, even with respect to a *bona fide* transferee of the bill for value, if it can establish that the goods concerned had actually never been shipped. One would assume that in this situation the doctrine of estoppel could be applied in the same way as with statements as to condition. However, since the leading case of *Grant* v. *Norway*,[438] estoppel has not been applied in such cases. This different treatment as compared with statements concerning the condition of the goods is justified on the grounds that the master has no ostensible authority to bind the shipowner by inserting such statements in the bill.[439] In *Grant* v. *Norway* the master signed a bill acknowledging the shipment of 12 bales of silk, none of which had actually been loaded. The court held that the plaintiffs, indorsees of the bill for value, had no remedy when the carrier established that no bales had been shipped. Jervis C.J. concluded that:

> [It was] not contended that the captain had any real authority to sign bill of lading unless the goods had been shipped. [...] nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bill, whether the goods were on board or not.[440]

Katz (1894), 10 T.L.R. 400 (C.A.).

[435] *Henry Smith & Co.* v. *Bedouin*, *supra* note 188 at 79. See also *Attn.-Gen. of Ceylon* v. *Scindia*, *supra* note 342.

[436] See *Sunday* v. *Strath SS. Co.* (1920), 26 Com.Cas. 277 (C.A.). See also *Hine Bros. et. al.* v. *Free, Rodwell & Co., Ltd.* (1897), 2 Com.Cas. 149 at 151-152 (Com.Ct.), where the carrier was able to discharge the burden by adducing evidence of disputed tallies, the mate's receipt and of the ship's draught.

[437] This would *e.g.* be the case where goods were found still lying in the warehouse at the port of loading.

[438] See *Grant* v. *Norway*, *supra* note 118.

[439] See below Chapter Three, VII.

[440] *Grant* v. *Norway*, *supra* note 118 at 688-689, *per* Jervis C.J.

b) Less Goods Loaded

Similarly, in a case where the bill of lading indicated a greater quantity of goods shipped than were actually loaded on board, it was held that estoppel could not be raised.[441] This rule has been approved in a number of cases in England[442] and Australia.[443] In more recent English cases, however,[444] this principle has been criticised and some courts have refused to apply it.[445]

2. *United States*

According to the Court of Appeals, 2nd Circuit, the carrier accepts liability for the quantity in accepting the cargo checker's report as to quantity, etc. and in issuing a bill of lading thereon. In these cases the carrier's defence that it delivered all the goods which were loaded on board does not suffice.[446] Even if it appears that the quantity stated in the bill of lading is rather doubtful, the carrier is held liable for the shortage. Compared with the English common law, U.S. law thus appears to be stricter on the carrier.

3. *Burden of Proof – Liquid Cargo*

In *Anonima Petroli Italiana S.p.A.* v. *Marlucidez Armadora S.A. (The Filiatra*

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[441] See *V/O Rasnoimport* v. *Guthrie & Co., Ltd.* (1965), [1966] 1 All E.R. 1, 1 Ll.L.Rep. 1 (Q.B. Com.Ct.) [hereinafter *V/O Rasnoimport* v. *Guthrie*]. This was also intended by the drafters of the Hague Rules. See *Brussels Conference, 1922, supra* note 176 at 189-190 (Part II: Meetings of the Sous-Commission, Second Session, Friday, 20 October 1922, statement of the Chairman). See also *ibid.* at 200 (Third Session, Saturday, 21 October 1922, statement of the Chairman).

[442] See *Uxbridge Permanent Building Soc.* v. *Pickard*, [1939] 2 K.B. 248; *Kleinwort Sons & Co.* v. *Associated Automatic Machines Corp. Ltd.* (1935), 151 L.T. 1 (H.L.); *Russo-Chinese Bank* v. *Li Yau Sam* (1909), [1910] A.C. 174 at 176 (P.C.).

[443] See *Rosenfeld, Hillas & Co.* v. *Port Laramie* (1923), 32 C.L.R. 25 (Melbourne 1923).

[444] See *The Saudi Crown* (1985), [1986] 1 Ll.L.Rep. 261 at 264-265, *per* Sheen J. (Q.B., Adm.Ct.) [hereinafter *The Saudi Crown*]; *The Nea Tyhi, supra* note 317 at 611, *per* Sheen J.

[445] For a further discussion of the problem see below Chapter Three, VII.

[446] See *The Ferngulf, supra* note 395; *Plata American Trading Inc.* v. *Lancashire et. al.*, 1958 A.M.C. 2329; [1957] 2 Ll.L.Rep. 347 (N.Y.Sup. Ct. App. Div. 1957); *S/S Shickshinny*, 1955 A.M.C. 2171 (2nd Cir. 1955), aff'd 123 F. Supp. 99, 1954 A.M.C. 1616 (S.D.N.Y. 1954); *The Harry Culbreath, supra* note 399.

Legacy)[447] the rules with regard to statements as to quantity were applied to liquid cargoes as well. Leggatt J. emphasised the evidentiary value of the statements in the bill of lading in pointing out that the carrier was liable if it could give neither direct nor indirect proof that the quantity actually loaded was not the quantity stated in the bill:

> [U]nless there is some evidence pointing to diversion after discharge or air in the pipeline, it is for the shipowners to counter the evidence or establish to a high degree of probability that a short delivery was impossible.[448]

E. Statements as to Leading Marks

I. Common Law – Identification and Identity

Any identifications or quality marks on goods shipped are usually recorded in the bill of lading. As a condition of its assumption of liability for the goods, the carrier may insert stipulations in the bill of lading such as "correctly marked" or that the goods were marked in a particular way.[449]

The case of *Parsons* v. *New Zealand Shipping Co.*[450] established the rule that, unless such marks are essential to the identity or description of the goods, the carrier is not estopped from denying that the goods were shipped under the marks as described in the bill. The case involved a consignment of frozen carcasses of lamb exported from New Zealand under a bill indicating that 608 carcasses had been shipped, each bearing the mark 622X. In fact, only 507 carcasses bore this mark, while 101 others carried the different mark 522X. The endorsees for value refused delivery of these 101 carcasses arguing that the shipowners were estopped from denying that all 608 carcasses shipped bore the 622X mark. The trial judge found that all carcasses were of equal value and

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[447] See (1989), [1990] 1 Ll.L.Rep. 354 (Q.B. Com.Ct.), [1991] 2 Ll.L.Rep. 337 (C.A.).

[448] See *ibid.* at 358-359, *per* Leggatt J., according to whom another possible proof by the carrier could be air in the pipeline. See also *Amoco Oil Co.* v. *Parpada Shipping Co., Ltd. (The George S)* (1988), [1989] 1 Ll.L.Rep. 369 at 376 (C.A.).

[449] See *e.g. British Imex Industries, Ltd.* v. *Midland Bank, Ltd.* (1957), [1958] 1 Q.B. 542, [1958] 2 W.L.R. 103, 102 S.J. 69, [1958] 1 All E.R. 264, [1957] 2 Ll.L.Rep. 591 [hereinafter *British Imex Industries* cited to Ll.L.Rep.].

[450] See [1901] 1 K.B. 548.

quality and that the sellers attached the marks only for bookkeeping purposes. The majority of the Court of Appeal held that there was no estoppel since the marks were not material for the *identification* of the goods, but only for their *identity*:

> It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which would not be material to such identity need be embraced in the estoppel. It is obvious that where marks have no market meaning, and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying, it is absolutely immaterial to him whether the goods bear one mark or another.[451]

The court concluded that "a mistaken statement as to marks of this class merely makes identification more difficult; it does not affect the existence or identity of the goods."[452] Accordingly, only where marks are essential for the *identification* of the goods are they *prima facie* evidence as against the carrier and conclusive evidence when the bill is in the hands of a *bona fide* endorsee for value.

2. *The Hague and Hague/Visby Rules*

The common law principle was incorporated into Article III(4) pursuant to which only "leading marks necessary for identification of the goods" provide *prima facie* evidence and conclusive evidence if the bill is in the hands of a third party acting in good faith. Sub-rule (a) stipulates that the leading marks have to be "shown clearly" upon the goods or their packaging "in such manner as should ordinarily remain legible until the end of the voyage". Also in line with the common law principles, it has been held that there is no obligation on the part of the shipowner to acknowledge in the bill of lading any quality marks attached to the goods unless they are essential to the identification of the goods.[453]

The requirement that any marks be legible will vary according to the individual

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[451] *Ibid.* at 564, *per* Collins L.J.

[452] *Ibid.* The clause "correctly marked" in the bill of lading was construed as meaning "marked in accordance with the marks on the bills of lading". See also *Sandeman* v. *Tyzack and Branfoot S/S Co.*, [1913] A.C. 680, 1913 S.C. 84 (H.L.), stating the effect of the clause as excusing the shipowner from delivering the actual goods shipped if the goods have become mixed and unidentifiable.

[453] See Wilson, *supra* note 13 at 139.

circumstances. Operators may stipulate minimum sizes of letters/figures in their conditions in an effort to assist themselves in later claiming the defence of insufficiency of marks (Article IV(2)(o)), wherein the burden would be on them to show that such insufficiency rather than some other reason was the proximate cause of the loss or damage. Article III(3)(a) must be read in connection with Articles III(5) and IV(2)(o) of the Rules. Inadequate or imperfect markings are a defect which can almost always be detected by the carrier, providing it exercises a careful and reasonable verification of the goods.[454]

F. Conclusion

Under the common law doctrine of estoppel, representations as to quantity and quality are treated differently. § 80113(a) of the *Federal Bills of Lading Act, 1994*, however, does not draw this distinction and deals with representations by the carrier as to quantity of goods, the date of shipment or a description of the goods. It appears that under § 80113(a) the estoppel is unaffected insofar as it relates to representations other than those mentioned in the provision. § 1303(4) of U.S. *COGSA, 1936* is explicitly made subject to the provisions of § 80113 of the *Federal Bills of Lading Act, 1994*. § 80113(d) obliges the carrier to record and verify the kind and quantity of the cargo. Statements as to number and weight are, however, not mentioned in the provision. The carrier must qualify the statements, record any damages, etc. to avoid liability under § 80113(a). It is therefore submitted that § 80113(a)-(b) is more onerous for the carrier than Article III(3) and (4) of the Hague and Hague/Visby Rules, which oblige the carrier only upon demand of the shipper, to insert statements as to quantity, number, marks and apparent order or condition of the goods. It is submitted that the carrier should be bound by *all* statements it itself has inserts, and not just by *one* of them.

The apparent order of the goods only refers to their outward appearance. Courts do not generally expect specific knowledge of the particular cargo on the part of the carrier for the verifications.

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[454] See Dor, *supra* note 393 at 84.

Where goods are transported inside sealed containers, the carrier encounters greater difficulties in attempting to establish *prima facie* evidence as to the quality than it does as to the quantity. In the case of a short delivery, the carrier will be assisted by the fact that the container was sealed. With regard to the quality, however, it is the opposite situation. Since the container was sealed, the success of the cargo claimant's argument that the damage occurred during transport will depend on external factors, such as weather reports, etc. At common law, *prima facie* evidence is more difficult to establish with regard to quality than to quantity. The rule is that the ship must deliver what she receives and as she receives it, unless excepted by *prima facie* evidence. If the carrier had actually not received *any* goods or *less* goods than indicated in the bill of lading, no estoppel can be raised.

In the United States the carrier's liability seems to be stricter, because it was held that the carrier is even estopped, where the statement as to quantity which the shipper had furnished, was doubtful, but where the carrier, nevertheless, inserted the statement into the bill of lading.

The common law principle as to leading marks, that no estoppel may be raised where the marks are not material for the *identification* of the goods but for their *identity*, was incorporated into Article III(3) of the Hague and Hague/Visby Rules.

V. Qualifications Made in the Bill of Lading

The discussion of the evidentiary value of bills of lading and representations made in them focuses on the legal character of qualifications in the bill. Qualifications are the most common source of ambiguity regarding representations in bills of lading. One may distinguish two types of qualifications:

(1) Qualifications negating a statement; and

(2) Those which add to a statement's ambiguity without negating it.

First will be discussed whether qualifications are valid under the Hague and Hague/Visby Rules.

A. Validity of Qualifications under the Hague and Hague/Visby Rules

1. Arguments Against the Validity of Qualifications

Under the Hague and Hague/Visby Rules, statements as to the "apparent order and condition of the goods" depend solely on the observation of the goods by the carrier, master or carrier's agent.[455] It could be argued that any qualification is invalid under the Hague and Hague/Visby Rules. Instead, the carrier, master or carrier's agent is obliged to indicate the "apparent order and condition" of the goods, *i.e.*, he must insert on the face of the bill of lading a positive statement as to any existing damage.[456] Moreover, one could argue that qualifications such as "quantity or weight unknown" should be considered ineffective under the Hague[457] and Hague/Visby Rules[458] in light of Article III(8), in virtue of which any clauses purporting to relieve the carrier from its liability, either entirely or in

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[455] See Dor, *supra* note 393 at 95; Temperley, *supra* note 393 at 36.

[456] See *The Skarp*, *supra* note 321.

[457] See J. Kooyman, "Cargo Claims Recoveries" in *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971*, *supra* note 261 at 3.

[458] See S.D. Cole, *The Carriage of Goods by Sea Act, 1924*, 4th ed. (London: Sir Isaac Pitman & Sons, 1937) at 56, criticising the pre-Hague Rules decision *New Chinese Antimony*, *supra* note 342.

part, shall be "null and void and of no effect".[459] Finally, one could be of the opinion that "received in apparent good order" shall not be affected by a clause such as "quality unknown" since "quality" referred to something not apparent.

The validity of qualifications was discussed in *Spanish American Skin* v. *M/S Ferngulf*.[460] Besides statements as to number and weight, the carrier had indicated in the bill of lading the "rubber stamp" qualifying clause: "Steamer not responsible for weight, quality or condition of contents". The 2nd Circuit, nevertheless, considered the bill as *prima facie* evidence of both number and weight. In its decision the court specifically referred to the possibility of inserting qualifications under the *proviso* in § 1303(3)(c) of U.S. *COGSA, 1936*.[461] The court found that only the elimination of general, pre-printed qualifications could promote the uniformity and negotiability of ocean bills of lading. It concluded that qualifications should only be permitted under the *proviso* of § 1303(3)(c) of U.S. *COGSA, 1936*.[462]

As opposed to the English common law rule,[463] the court in *Austracan (USA) Inc.* v. *Neptune Orient Lines Ltd.*[464] held qualifications such as "said to contain" or "weight unknown" to be ineffective under U.S. *COGSA, 1936* if the carrier issued a bill of lading including statements as to quantity or weight.[465] One reason for this result may be that the qualification contravenes Article III(3), first paragraph. The decision could, however, also be explained on the basis of the common law rule that the carrier is held responsible for any ambiguities in the bill. The court in *Austracan* developed a different, third, reasoning for deeming such qualifications ineffective. The case involved a container load covered by a bill of lading bearing the qualification "shipper's load, count and seal". Above this

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[459] See *The Ferngulf, supra* note 395; *Pettinos Inc.* v. *American Export Lines*, 159 F.2d 247, 1947 A.M.C. 418 (3rd Cir. 1947), 68 F. Supp. 759, 1946 A.M.C. 1252 (E.D. Pa. 1946).
[460] See *The Ferngulf, ibid.*
[461] See *Hague and Hague/Visby Rules, supra* note 14, art. III(3).
[462] See *The Ferngulf, supra* note 395 at 553-554.
[463] See *Lebeau* v. *The General Steam Navigation Co.* (1872), L.R. 8 C.P. 88, 42 L.J.C.P. 1, 27 L.T. 447, 1 Asp.N.S. 435 [hereinafter *Lebeau* v. *The General Steam Navigation Co.* cited to L.T.].
[464] See 612 F. Supp. 578 (S.D.N.Y. 1985) [hereinafter *Austracan*].
[465] See *ibid.*

phrase the carrier typed the conflicting clause "pier-to-house".[466] The court held that due to the latter clause a reasonable consignee would have concluded that the carrier had loaded the container. Thus, the carrier was bound by the contents inserted in the bill.

This reasoning may be criticised on the grounds that the two conflicting clauses could equally be reasonably interpreted in the opposite way. However, the result may be the same as under the English common law approach according to which the carrier would probably be estopped from denying that it had loaded the quantity indicated in the bill of lading because its representations were not "clear and unambiguous."[467] However, from the reasoning in *Austracan* it is just a small step to the contractual approaches according to which the test would be whether the carrier's representations constituted a *promise to deliver the goods as recorded in the bill of lading* or a *promise that the goods had been shipped as recorded in the bill.*

2. *Arguments in Favour of the Validity of Qualifications*

It could also, however, be argued that the insertion of clauses such as "value and contents unknown" or "quality unknown" is permitted under the Rules.[468] Some authors only consider qualifications as to the nature and value of the goods valid. They argue that, in contrast with the obligatory nature of declarations of quantity or weight, the carrier is not obliged to declare the nature and value of the goods.[469] Thus, it would seem that clauses qualifying those statements are effective. According to others, the prohibition of qualifications under the Rules is impractical and causes unjust results, in particular with

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[466] The clause has the trade meaning that the container was loaded by the carrier.

[467] See *Drexel Burnham Lambert International N.V.* v. *Mohamed Schaker Salim Abou El Nasr and Establishment Abou Nasr El Bassatni*, (1985), [1986] 1 Ll.L.Rep. 356, [1986] 1 F.T.L.R. 1 (Q.B. Div., Com.Ct.) [hereinafter *Drexel Burnham Lambert International* cited to Ll.L.Rep.]; *Bremer Handelsgesellschaft m.b.H.* v. *Vanden Avenne-Izegem PVBA*, [1978] 2 Ll.L.Rep. 109 (H.L.), rev'g [1977] 2 Ll.L.Rep. 329 (C.A.), rev'g (1976), [1977] 1 Ll.L.Rep. 133 (Q.B. Div. Com.Ct.) [hereinafter *Bremer Handelsgesellschaft* cited to [1978] 2 Ll.L.Rep.]; *Woodhouse A.C. Israel Cocoa, Ltd.* v. *Nigerian Produce Marketing Co., Ltd.*, [1972] A.C. 741 (H.L.) [hereinafter *Woodhouse A.C. Israel Cocoa, Ltd.*].

[468] See Maskell, *supra* 271 at 4. See also J. Richardson, "The Hague-Visby Rules – A Carrier's View" in Lloyd's of London Press, *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971* (London: Lloyd's of London Press, 1977) at 4.

[469] See Dor, *supra* note 393 at 36.

regard to containerised cargo.[470]

English courts have construed qualifications as to the quality to be effective by applying a very technical reasoning. In *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National Steamships Ltd.*,[471] in response to the plaintiff's argument that the shipowner's marginal clause "signed under the guarantee to produce ship's clean receipt" was void under the Hague Rules, Lord Wright utilised a very technical argument. According to Lord Wright, Article III(3) of the Hague Rules "expressly applies only if the shipper demands a bill of lading showing the apparent order and condition of the goods." In the case at hand, however, there was no evidence that the shipper had made such a demand. Moreover, no such demand was alleged. Thus, the condition of the rule was not fulfilled.

3. Critique

Apart from the above-mentioned arguments against the validity of qualifications it is furthermore submitted that qualifications create an anomaly[472] within the regime of the Hague and Hague/Visby Rules. It can scarcely be justified that a bill of lading containing a qualification with regard to a container (*e.g.*, "said to contain ... packages") should be binding for limitation purposes, but that the same bill should not be binding in a dispute as to whether some of the packages had ever been shipped.

The wording of the *proviso* in Article III(3) of the Hague and Hague/Visby Rules suggests that the carrier is only authorised to omit from the bill of lading certain statements supplied by the shipper. It is, however, common practice for carriers to include qualifications as to all of the statements in the bill, which veracity or accuracy it deems questionable.[473] Some authors have suggested that the carrier should be entitled to qualify the statements as to the quantity and number of packages loaded. It should not fail to state any particulars if these have been furnished in writing by the shipper where the carrier has

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[470] See Maskell, *supra* note 271 at 4.
[471] See *e.g. Canada and Dominion Sugar Co., Ltd.*, *supra* note 388.
[472] See Diamond, *supra* note 261 at 20.
[473] See Dalhousie Ocean Studies Programme, *supra* note 32 at 112.

"reasonable grounds for suspecting" that the statements made by the shipper do not accurately "represent the goods actually received" or where the carrier does not have "reasonable means of checking" them.[474] This opinion is supported by the following statement formulated by the Chairman of the Sub-Committee at the Brussels Conference of October 1922:

> If a shipowner has no reasonable means of checking cargo received by him he may still use such phrases as "about", "more or less", "weight, quantity and number unknown" in qualification of statements in the bill of lading; but if the shipowner has in fact reasonable means of checking, he must issue a bill of lading giving quantity, etc., without qualifying phrases.[475]

According to this statement, which reflects the rationale underlying the provisions of Article III(3) and (4) of the Hague and Hague/Visby Rules, it must be determined when, under the conditions of modern means of transportation, the shipowner does not have "reasonable means of checking". The answer to that question will depend on the particular circumstances of each individual case. It is submitted that the shipowner will usually not have "reasonable means of checking" closed or sealed containers and will, therefore, be permitted to insert qualifications. It is submitted that the Hague and Hague/Visby Rules are in that respect absolutely deficient. Thus, clear guidance in the matter remains to be provided by future legislative work. In accordance with this interpretation, the Hague and Hague/Visby Rules enunciate conditions for the insertion of qualifications regarding statements such as quantities, etc.[476] For the insertion of qualifications it would, therefore, not suffice for the master to have reasonable grounds for suspecting the accuracy of the shipper's statements, if he did not take the trouble to verify them when it had the opportunity to do so. If, nevertheless, it is *materially* impossible for the master to verify the shipper's statements, then qualifications would be considered valid whether or not in the circumstances the master had reasonable grounds

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[474] *Hague and Hague/Visby Rules*, *supra* note 14, art. III(3).

[475] *Report of British Delegates*, *supra* note 194 at 71. See also *Pendle & Rivett*, supra note 391; Dor, *supra* note 393 at 91.

[476] See *London CMI Conference, 1922*, *supra* note 187, at which the phrase "or he has had no reasonable means of checking" was planned to protect the interest of carriers of bulk cargo, as it is often very difficult or even impossible, to check the weight and quantity of this type of cargo, was suggested. See also Dor, *supra* note 393 at 91.

for suspecting the accuracy of the shipper's statements, this being especially the case with bulk cargo.[477] Against the effectiveness of a standard qualification "quality unknown" it could finally be argued that the assessment of the "quality" of a particular cargo depends on a judgement which, in turn, depends on the knowledge and skills of the person making the assessment. Yet, the result may be the same as under the English common law approach according to which the carrier would probably have been estopped because his representations were not "clear and unambiguous."[478] However, from the reasoning in the *Austracan* it is just a small step to the contractual approaches, according to which the test would be whether the carrier's representations constituted a *promise to deliver the goods as recorded in the bill of lading* or a *promise that the goods had been shipped as recorded in the bill.*

4. § 80113(b) and (c) of the Federal Bills of Lading Act, 1994

§ 80113(b) and (c) of the *Federal Bills of Lading Act, 1994* permit the carrier to insert in a bill of lading, covering packaged goods or bulk cargo that was loaded by the shipper, the express qualifications under § 80113(b)(A) and (B).[479]

B. Negating Qualifications

Negating qualifications are usually inserted with regard to statements as to the number or weight of the goods, or their leading marks. Courts interpret negating qualifications as representations in which the carrier denies that the statement concerned is of its own making. It impliedly states that the carrier's agent has not verified a statement furnished by the shipper. Courts usually permit the shipowner to negate the *prima facie* evidence of representations in the bill of lading by a suitable indorsement of a clause such as "said to contain", "weight unknown", "shipper's count" or "said to weigh". When the carrier has

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[477] See *Hellenic Lines* v. *Louis Dreyfus Corp.*, 372 F.2d 753, 1967 A.M.C. 213 (2nd Cir. 1967), 249 F. Supp. 526 at 528, 1966 A.M.C. 1566 at 1568 (S.D.N.Y. 1966). See also Dor, *supra* note 393 at 92.

[478] *Drexel Burnham Lambert International, supra* note 467. See also *Bremer Handelsgesellschaft, supra* note 467; *Woodhouse A.C. Israel Cocoa, Ltd., supra* note 467.

[479] See *Industria Nacional del Papel, CA.* v. *M/V Albert F,* 730 F.2d 622 at 625, 1985 A.M.C. 1437 at 1440 (11th Cir. 1984), where "particulars furnished by the shipper" do not suffice.

inserted a negating qualification, it has not made any representation. Thus, it cannot be stated that the transferee had relied on the carrier's representation and, consequently, no estoppel may be raised against the carrier. The carrier may then adduce evidence to contradict the weight recorded in the bill. Where a valid qualification was inserted into the bill of lading, the burden of proving the amount actually shipped is on the cargo-claimant.[480]

1. Qualifications as to the Quantity and the Weight

This interpretation was applied by the court in *New Chinese Antimony Co.* v. *Ocean Steamship. Co.*[481] concerning a cargo of antimony oxide where the bill of lading stated that 937 tons had been shipped. The body of the bill contained the printed clause "weight, measurement, contents and value (except for the purpose of estimating freight unknown)". The Court of Appeal was of the opinion that the written statement in the bill did not even provide *prima facie* evidence of the quantity shipped. The court held that "the true effect of this bill of lading is that the words 'weight unknown' have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers' representative says weighs 937 tons but which he does not accept as being of that weight. The weight was unknown to him, the carrier did accept the statement as to a weight of 937 tons only for the purpose of calculating freight."[482]

In the English case *Rederiaktiebolaget Gustav Erikson* v. *Dr. Fawzi Ahmed Abou Ismail (The Herroe and Askoe)*[483] this rule was upheld. The case involved a shipment of potatoes under bills of lading which contained a "quantity unknown" clause in respect of some of the voyages undertaken. The court found that the shipowner was not liable. Since the statements did not represent *prima facie* evidence, the plaintiff had to show that the

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[480] See *Jessel* v. *Bath* (1867) L.R. 2 Ex. 267, 36 L.J.Ex. 149 [hereinafter *Jessel* v. *Bath* cited to L.R. 2 Ex.]; *Lebeau* v. *General Steam Navigation, supra* note 463. See also *The Esmeralda 1, supra* note 431; *Rederiaktiebolaget Gustav Erikson* v. *Dr. Fawzi Ahmed Abou Ismail (The Herroe and Askoe).* [1986] 2 Ll.L.Rep. 281 (Q.B., Com.Ct.) [hereinafter *Rederiaktiebolage*].

[481] See *New Chinese Antimony Co., supra* note 342.

[482] *Ibid.* at 669, *per* Viscount Reading L.J. See also *The Esmeralda 1, supra* note 431.

[483] See *Rederiaktiebolaget, supra* note 480.

goods were actually shipped in order to succeed with its claim. In keeping with the rule, the court in *Noble Resources Ltd.* v. *Cavalier Shipping Corporations (The Atlas)*[484] recently held that due to the qualification "weight unknown" a statement as to weight was not *prima facie* evidence of the quantity shipped.[485]

The effect of a "weight unknown" clause may, for instance, be overcome by the cargo claimant by producing the mate's receipt, the hatch loading report, or an inspection report if these documents can "convincingly establish" that the cargo loaded was less than indicated in a "clean" bill of lading.[486] As distinct from English, Canadian and Australian courts,[487] it was held in the United States[488] that the carrier was even *obliged* to accept a statement as to weight furnished by the shipper without any qualifications. The carrier, it was held, could not insert a doubtful statement at first, and qualify it afterwards. An exception could only be made where it did not have the reasonable means of checking.[489] This will usually not be allowed in the case of sealed containers where the carrier still has the possibility to weigh the loaded container, thus obtaining the weight of the contents by deducting the tare weight of the container.

2. *Qualifications as to Leading Marks*

Sometimes difficulties occur in identifying iron and steel shipments owing to the breaking up of bundles and the absence of identifying marks on arrival at destination. Such a problem occurred in *British Imex Industries, Ltd.* v. *Midland Bank, Ltd.*[490] where

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[484] See *The Atlas, supra* note 343 at 646-647, *per* Longmore J., holding that tally documents afford admissible evidence of weight, provided they are supplied by someone whose duty is to weigh the billets.

[485] See *Hague and Hague/Visby Rules, supra* note 14, art. III(4).

[486] *The Blomer Chocolate Co. and Insurance Co. of North America* v. *M/V Nosira Sharon*, 776 F. Supp. 760, 768 (S.D.N.Y. 1991).

[487] See *The Esmeralda I, supra* note 431; *Ermua* v. *Couthino, Caro & Co. (Canada) Ltd.*, [1982] 1 F.C. 252; *Oricon* v. *Intergraan, supra* note 398; *Attn. Gen. of Ceylon, supra* note 342 at 74.

[488] See *Austracan (US)* v. *Neptune Orient*, 612 F. Supp. 578 (S.D.N.Y. 1985); *Romiso Textile Ltd.* v. *S/S Nura del Mar* 1983 A.M.C. 1753 (S.D.N.Y. 1982); *Sankyo Seiki Inc.* v. *S/S Korean Leader*, 556 F. Supp. 337 (S.D.N.Y. 1982); *The Netuno, Westway Coffee Corp.* v. *M/V Netuno*, 1982 A.M.C. 1640 (2nd Cir. 1982); *The Ferngulf, supra* note 395.

[489] See *Hague and Hague/Visby Rules, supra* note 14, art. III(3).

[490] See *British Imex Industries, supra* note 449.

marking and bundling were suspect. The carrier had inserted the following standard printed clause in its bills of lading:

> Vessel not responsible for correct delivery unless (a) every piece is distinctly and permanently marked with oil paint, (b) every bundle is securely fastened, distinctly and permanently marked with oil paint and metal tagged - so that each piece or bundle can be distinguished at port of discharge. All expenses incurred at port of discharge, consequent upon insufficient securing or marking, will be payable by consignees.[491]

The court held that such a clause did not render the bill of lading unclean. It added that the carrier was not obliged to explicitly acknowledge that the printed clause had been complied with.

In the U.S. case of *Ashcraft Wilkinson Company* v. *Steamship Santos (The Santos)*[492] a carrier was relieved from liability although no qualifications were inserted in the bill at all. Instead, the shipper was held liable for shipping bags of different kinds of fertiliser without any distinguishing marks and without advising the ship that the contents of the bags were different. The same rule applies to cases in which leading marks do not remain legible until the end of the voyage in spite of their good appearance at loading.[493] By inserting qualifications such as "no marks" or "marks illegible" the carrier may impose on the claimant the burden of proving that the goods were in fact correctly marked and that the misdelivery was caused by the fault of the carrier. It is arguable that the qualification "marks unknown" may also be inserted if the carrier had reasonable grounds for suspecting the accuracy of the marks and did not have reasonable means of checking them.[494]

3. COGSA, 1971 (U.K.) and COGSA, 1992 (U.K.)

Under *COGSA, 1971* (U.K.) qualifications as to statements pursuant to Article III(3) are covered by Section 4 of *COGSA, 1992* (U.K.). Thus, qualifications will be effective

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[491] Dor, *supra* note 393 at 85.
[492] See 1940 A.M.C. 1660 (E.D. Va., 1940).
[493] See Dor, *supra* note 393 at 85.
[494] See *ibid.*

since they prevent the bill from being one which "represents goods to have been shipped".[495]

4. § 80113(b) and (c) of the Federal Bills of Lading Act, 1994

The legal effect of qualifications negating statements pursuant to § 80113(a) of the *Federal Bills of Lading Act, 1994* is governed by subsections (b) and (c):

> (b) Nonliability of carriers. – A common carrier issuing a bill of lading is not liable under subsection (a) of this section –
>
> (1) when the goods are loaded by the shipper;
>
> (2) when the bill –
>
> (A) describes the goods in terms of marks or labels, or in a statement about kind, quantity or condition; *or*
>
> (B) is qualified by 'contents or condition of contents of packages unknown', or 'said to contain', 'shipper's weight, load and count'[496] or words of the same meaning; and
>
> (3) to the extent the carrier does not know whether any part of the goods were received or conform to the description.
>
> (c) Liability for improper loading. – A common carrier issuing a bill of lading is not liable for damages caused by improper loading if –
>
> (1) the shipper loads the goods; and
>
> (2) the bill contains the words 'shipper's weight, load and count', or words of the same meaning indicating the shipper loaded the goods.[497]

In order to avoid liability, the carrier must prove each of the cumulative requirements mentioned in subsection (b)(1)-(3).[498] The clauses in subsection (b)(2)(B) are all negating qualifications,[499] which imply that the representations in the bill are those of the shipper.[500] It was held that the carrier may also use clauses of the same meaning, such as "S.L. and

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[495] Bools, *supra* note 112 at 129.

[496] See the proposed amendment of *COGSA* by the U.S. Maritime Law Association (MLA), prepared by the M.L.A. Committee on Carriage of Goods (CoCoG), approved at the AGM of the M.L.A. in New York on May 3, 1996 by a vote of 278 to 33. M.L.A. Document 724. To be presented to Congress in 1997-1998 for possible adoption [hereinafter *CoCoG/COGSA*]. § 1303(3)(c)(iii)(a) of *CoCoG/COGSA* provides for a similar provision which reads "shipper's load, stow and count".

[497] See *Federal Bills of Lading Act, 1916, supra* note 30, § 21, re-enacted in the *Federal Bills of Lading Act, 1994, supra* note 29, § 80113(b) & (c).

[498] Despite the word "or" between subsection (b)(2)(A) and (B) which makes the provision a bit unclear.

[499] See *Dei Dogi Calzature Spa* v. *Summa Trading Corp.*, 733 F. Supp. 774 at 775-776 (S.D.N.Y. 1990) [hereinafter *Dei Dogi Calzature Spa*].

[500] See *Stephens National Bank of Fremont, supra* note 377 at 401.

WTS",[501] "S.L. & C.",[502] and "S.T.C.".[503] Thus, the carrier will not be liable where the shipper loaded the goods and the carrier knew nothing of their condition, despite the fact that this was not recorded in the bill.

An important difference between the English and the U.S. statutory estoppel is contained in § 80113(b)(3) in connection with subsection (d) of the *Federal Bills of Lading Act, 1994*. Pursuant to these provisions the statement in a qualification must be *true*.[504] Consequently, the qualification "contents and condition of the packages unknown" does not protect the carrier in a case where goods are loaded in bulk and are visible to the carrier.[505] In English law, on the other hand, the qualification need not have stated the truth in order for the defendant to ground an estoppel on it.

a) Transferee's Reliance

At first glance, the U.S. statutory provision grants the transferee greater rights than does its English counterpart since the carrier is obliged to make a *true* statement in its qualification as to a representation made in the bill of lading. However, § 80113(a) of the *Federal Bills of Lading Act, 1994* creates an uncertainty as to the transferee's reliance on the description of the goods in the bill since it is difficult to explain how a transferee may have relied upon a statement, which is negated by another one, whether it being true or, unknown to it, untrue.

A possible interpretation for this might be that, where a qualification negates a statement, the effect of the first is to make the latter a representation by the shipper upon which veracity the transferee may rely. This might be the kind of reliance required under the provision. Thus, the carrier would be liable because it had inserted a qualification

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[501] See *Gulf C. & S. F. Rly., supra* note 358 at 92, "Shipper's load and weights".
[502] See *Perkel* v. *Pennsylvania Rly. Co.*, 265 N.Y.S. 597 at 603 (1933) [hereinafter *Perkel* v. *Pennsylvania*]; *Zorrilla Commercial Corp.* v. *Ryder/P.I.E. Nationwide, Inc.*, 706 F. Supp. 980 at 983 (D.C. Puerto Rico 1989), "Shipper's load and count".
[503] See *Dei Dogi Calzature Spa, supra* note 499 at 775.
[504] See *Carrier Corp.* v. *Furness, Withy & Co., Ltd.*, 131 F. Supp. 19 at 21 (E.D. Penn. 1955).
[505] See *Alton Iron & Metal Co.* v. *Wabash Rly. Co.*, 235 Ill. App. 151 at 157-159 (App. Ct. 1st Dist. 1927);

regarding a shipper's statement without having checked it, although it had the means of checking the qualification.[506]

In contrast, where *COGSA, 1971* (U.K.) does not apply, the carrier is not obliged to check the shipper's statement of the goods, even though it would have had the means.

b) Truth of a Statement where no Goods had been Loaded

Under subsection (b)(3) it is an established rule that a qualification stating that the goods were loaded by the shipper is deemed to be entirely true, even though only a part of the goods were actually loaded.[507] The question arose whether a qualification to that effect could also be true if *no goods at all* were loaded. In *Chicago & N.W. Rly. Co.* v. *Stephens National Bank of Fremont*[508] the protection afforded to the carrier was interpreted extensively. It was held that the purpose of the provision[509] was to *generally* preserve the carrier's defence of nonreceipt of goods where the shipper loaded goods concealed in a railway car or container, and where the carrier inserted the qualification "shipper's load and count". Thus, it would not make a difference whether the goods concerned had only been partially loaded or not at all. According to the decision, the carrier would not be held liable in either case, and the shipper could be said to have shipped "goods" under the provision.

c) Critique

It is, however, problematic whether this rule should also stand regarding bulk and package freight. It is arguable that it would be consistent with § 80113(d)(1) and (2) of the *Federal Bills of Lading Act, 1994* if the carrier were liable where no goods were in fact shipped. This is due to the fact that these subsections specifically place on the carrier

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rev'd on other grounds, 159 N.E. 802 (Sup. Ct. Ill. 1927).

[506] See Bools, *supra* note 112 at 130.

[507] See *Peoples' Savings Bank of Saginaw* v. *Pere Marquette Rly., Co.* 209 N.W. 182 at 184 (Sup. Ct. of Mich. 1926).

[508] See *Stephens National Bank of Fremont, supra* note 377.

[509] See *Federal Bills of Lading Act, 1916, supra* note 30, § 21, with which the decision dealt.

a higher burden of verifying the goods in case of bulk cargo and packages. Moreover, this interpretation would correspond with the principle that a carrier is liable if it inserts the qualification "shipper's load and count" knowing that the goods had in fact not been loaded.[510] The court arrived at this result by construing the qualifications as not only expressing that the goods were loaded and counted by the shipper, but also as meaning that the carrier had no knowledge of the truth of the statements.[511] The latter will usually be the case in container shipments.[512]

A different approach could overcome the interpretive difficulties. It would not be too onerous a position to hold the carrier liable for all inaccuracies, about which it should reasonably have known.[513] According to this approach the carrier would be held liable where it inserted a shipper's load qualification and where the goods had in fact not been loaded. It would render the distinction between "true" and "untrue" qualifications as to statements on quantity and quality moot where goods had not been shipped at all. Furthermore, this approach would be in line with the interpretation of Article III(4) of the Hague/Visby Rules, under which statements as to quantity and quality should, as distinct from the common law rule in *Grant* v. *Norway*, be treated equally.

d) No Qualification Necessary

In *Josephy* v. *Panhandle & S. F. Rly.*[514] the rule was established that, even if a carrier had not inserted in the bill of lading the qualification "shipper's load and count", there was no representation made by the carrier within the meaning of subsection (a). This rule would apply in circumstances where it "plainly appears that contents are unknown to the carrier and that the words of description are the words of the consignor and are

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[510] See *Perkel* v. *Pennsylvania, supra* 502 at 604.
[511] See *Perkel* v. *Pennsylvania, ibid.* at 603-604; *Robinson* v. *New York Central Rly. Co.*, 282 N.Y.S. 877 at 879-880 (1935).
[512] See *Royal Typewriter Co.* v. *M/V Kulmerland*, 483 F.2d 645, 1973 A.M.C. 1784, [1973] E.T.L. 705 (2nd Cir. 1973); *Dei Dogi Calzature Spa, supra* note 499 at 775.
[513] See Bools, *supra* note 112 at 131.
[514] See 139 N.E. 277 (Ct. App. of N.Y. 1923) [hereinafter *Josephy* v. *Panhandle*]

superfluous except for the purpose of identification".[515] This decision perfectly corresponds with the purpose of the qualifications in subsection (b) to ensure that representations in the bill of lading are negated by stating that they are representations by the shipper.[516]

5. Contractual Approaches

The English law regarding negating qualifications would change neither under the "alternative approach", nor under the "2nd Circuit approach". Where qualifications are inserted in the bill of lading, a "reasonable third party" would neither construe representations in the bill as a *promise to deliver the goods as recorded*, nor as a *promise that the goods were shipped as recorded in the bill of lading*. It will be clear from a reasonable transferee's perspective that the bill contained representations by the shipper, which the carrier could not have verified. It would be obvious from a reasonable third party's point of view that the carrier was merely a conduit through which the information was passed.[517]

6. Conclusion

U.S. law under the provision of § 80113(b) and (c) of the *Federal Bills of Lading Act, 1994* is very similar to English common law estoppel in its restrictive approach as regards qualifications of statements. The main difference, however, is that under § 80113 of the *Act* the statement in the clause must be *true*. A more straightforward interpretation could be based on the contractual approaches, which would construe the representations made in the bill from the point of view of a "reasonable third party". As a result, the carrier would be held liable for all inaccuracies about which it should reasonably have known.

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[515] *Ibid.* at 278.
[516] See *Stephens National Bank of Fremont, supra* note 377.

C. Contradictory Qualifications

Aside from negating qualifications, there are qualifications which merely partly contradict a statement in the bill. Such qualifications are usually inserted with regard to statements as to the order or condition of the goods. These qualifications, which may be called contradictory qualifications, are the kind of qualifications where the doctrine of estoppel leads to unsatisfactory results. Contradictory qualifications raise in particular the question whether representations in the bill of lading are "clear and unambiguous", as required under the common law doctrine of estoppel.

1. The Difference

There is a very important difference between qualifications as to the condition and order, and as to the number or quantity of the goods, or their leading marks. Whereas a statement such as "apparent good order and condition" purports to be a statement made by the shipowner/carrier after a reasonable inspection of the goods, statements as to the number, quantity or the leading marks are merely acknowledgements by the shipowner of information supplied to it by the shipper. Therefore, courts construe clauses intended to negate the effectiveness of statements as to the condition of the goods more strictly than clauses concerning statements as to the quantity and weight. Accordingly, the court held in *The Peter der Große* that the qualification "weight, contents and value unknown" did not displace a positive statement by the shipowner that the goods were shipped in good order and condition since it was held to be not sufficiently specific.[518] Even stricter, U.S. courts have held that the qualification "contents and condition of contents of packages unknown" is of no effect at all when any words of description are used in the bill of lading.[519]

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[517] See Bools, *supra* note 112 at 132.
[518] See *The Peter der Große*, *supra* note 409.

2. *United States*

a) Statutory Law

(1) § 80113(b) of the Federal Bills of Lading Act, 1994

Only those qualifications explicitly listed in § 80113(b)(2)(B) of the *Federal Bills of Lading Act, 1994* or words with the same meaning as the statutory qualifications can relieve the carrier from liability pursuant to § 80113(a) of the *Act*. Two circumstances are theoretically possible:

(1) where the carrier's qualification is ambiguous, or

(2) where the shipper's statement as to quantity or quality is already ambiguous.

In the first case, the qualification can neither be one of the statutory qualifications, nor one of a similar meaning. Therefore, the carrier will be held liable under subsection (a). In the latter case, an ambiguous description of the goods made by the shipper will still constitute a "description contained in the bill" within the scope of subsection (a). Provided the qualification inserted by the carrier is recognised under § 80113(b)(2)(B), the alleged representations in the bill of lading will have to be interpreted from a reasonable transferee's point of view.[520]

(2) § 80113(a) of the Federal Bills of Lading Act, 1994

Pursuant to § 80113(a) of the *Federal Bills of Lading Act, 1994* the owner or holder of a bill of lading must have given "value in good faith relying on the description of the goods in the bill or on the shipment being made on the date shown in the bill."

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[519] See *Josephy* v. *Panhandle, supra* note 514 at 307.

[520] Regarding a "reasonable reader", see *The Skarp, supra* note 321 at 140-144.

b) The "Retla"-Clause

As was the case in *The Tokio Marine & Fire Insurance Co.* v. *Retla SS. Co.*,[521] it has become common practice for the carrier to include in the bill of lading a definition of the phrase "good order and condition".[522] In *The Tokio Marine*, although rust and wetness were noted on the tallysheets and the mate's receipt, a clean bill of lading was issued for a shipment of galvanised and ungalvanised pipes from Yokohama to Los Angeles. The shipper had not requested a substitute bill. The court concluded that the clause was valid under the Hague Rules and that the consignee was caught by the qualification.

Accordingly, in the recent case of *G.F. Co.* v. *Pan Ocean Shipping (The Pan Queen)*,[523] the Court of Appeals, 9th Circuit, reversed a decision[524] which considered a similar clause ("wood clause") invalid.

It remains, however, very questionable whether consignees or assignees can be deprived of their protection by the simple insertion of this type of clause. Interestingly enough, the U.S. Court of Appeals, 9th Circuit, was of the opinion that the bill of lading had to be *read as a whole*. This constitutes a technique very similar to the contractual approaches outlined above where the representations made in the bill of lading are interpreted from a reasonable third party's point of view whether they constitute a *promise* to deliver the goods as recorded in the bill of lading or a *promise* that the goods had been shipped as recorded in the bill.

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[521] See 426 F.2d 1372, 1970 A.M.C. 1611, [1970] 2 Ll.L.Rep. 91 (9th Cir. 1970) [*The Tokio Marine* cited to F.2d].

[522] *Ibid.* at 1374: "Apparent good order and condition when used in this bill of lading...does not mean that the goods, when received, were free of visible rust or moisture. If the shipper so requests, a substitute bill of lading will be issued omitting the above definition and setting forth any notations as to rust or moisture which may appear on the Mate's or Tally Clerk's receipts".

[523] See *G.F. Co.* v. *Pan Ocean Shipping, No. 92-56615*, 23 F.3d 1498 at 1500, 1994 U.S. App. LEXIS 10040 at 10044, 28 Fed. R. Serv. 3d (Callaghan) 1020 at 1024, 1994 A.M.C. 1739 at 1743 (9th Cir. 1994) [hereinafter *The Pan* Queen]; Oricon v. *Intergraan, supra* note 398.

[524] See *G.F. Co.* v. *Pan Ocean Shipping (The Pan Queen)*, 795 F. Supp. 1001 at 1007, 1992 U.S. Dist. LEXIS 17788 at 17809, 1992 A.M.C. 2298 (C.D. Cal. 1992].

3. *English Law*

a) Common Law – "Clear and Unambiguous"

According to the English doctrine of estoppel, representations made in the bill must be *"clear and unambiguous"*. Thus, it is not enough for the transferee to show that it reasonably interpreted representations in the bill and relied on them. Moreover, he must show that the carrier's representations were clear and unambiguous. Courts, however, acknowledge that representations are capable of being interpreted in varying manners and have not applied this requirement all that strictly.[525] It was argued whether the shipowner should precisely specify the damage in order to effectively qualify a statement. Otherwise the representation as to the condition would be too ambiguous to found an estoppel. English and U.S. courts have, however, held that qualifications do not have to be accompanied by additional indications. Where the Hague and Hague/Visby Rules apply, the judge must only consider whether such indications were justified under Article III(3) of the Rules.[526]

The requirement of clarity was established in *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National Steamships Ltd.*[527] regarding a shipment of sugar. To facilitate its business arrangements the shipper did not want to obtain an "unclean" bill of lading. Therefore, the carrier agreed to issue a bill of lading before the completion of loading, after having received an assurance from the shipper that there was nothing wrong with the cargo. The carrier inserted the qualification "signed under guarantee to produce ship's clean receipt" against the statement that the goods had been "shipped in apparent good order and condition". However, the sugar had been damaged while lying on the wharf awaiting shipment. Accordingly, the mate's receipt indicated "many bags stained, torn

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[525] See *Woodhouse A.C. Israel Cocoa, Ltd. S.A.* v. *Nigerian Produce Marketing Co., Ltd.*, [1971] 1 All E.R. 665 at 672, 675 & 677, [1972] A.C. 741 at 755-757, *per* Lord Hailsham. See also *ibid.* at 767-768, *per* Lord Cross of Chelsea; *ibid.* at 771, *per* Lord Salmon (H.L.).

[526] See *The Flying Spray,supra* note 404, regarding arbitrary weights in case of bulk cargo. See also *Pendle & Rivett, supra* note 391.

[527] See *Canada and Dominion Sugar Co., Ltd., supra* note 388. A similar situation arose in *Tokio Marine & Fire Ins. Co., supra* note 417.

and resewn". The Privy Council found that the assignees could not rely on an estoppel unless the statement in the bill of lading as to the condition of the goods was unambiguous and unqualified. However, this would not have been so if the bill contained a clause such as the one mentioned above. The Court held:

> [It] was a stamped clause clear and obvious on the face of the document and reasonably conveying to any business man that, if the ship's receipt was not clean, the statement in the bill of lading, as to apparent order and condition could not be taken to be unqualified.[528]

Besides the actual qualification on the face of the bill of lading the court also took into consideration the fact that the mate's receipt was available to a prospective buyer.[529] Consequently, the carrier was able to deny the truth of those representations as reasonably interpreted.

b) The Skarp

(1) Reasoning

A different approach was taken in *The Skarp*.[530] This case involved a bill containing the statement "shipped in good order and condition" which was qualified by a clause stating that the condition of the goods was unknown. First, the court construed this qualification contradictory rather than negating. Thus, the court, according to the distinction between negating and contradictory qualifications given above, was of the opinion that the qualification merely partly contradicted the statement in the bill. Second, the court put the burden of proving the ambiguous nature of the representations on the *carrier*, not on the transferee, holding that:

> [I]t is difficult to understand why the affirmation of acceptance of one untruth should be cured by a deliberate statement of another untruth" under circumstances where "it would bring to the *mind of the reader* the fact that a man who had been at no pains to clause the bill

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[528] *Canada and Dominion Sugar Co., Ltd., supra* note 388 at 54.
[529] See *ibid.* at 54-56.
[530] See *The Skarp, supra* note 321.

of lading in the natural way meant to convey that the goods were or might be damaged.[531]

More importantly, the court applied principles whose source can be traced to the law of contract. Quite similarly to the "alternative approach" or the "2nd Circuit approach", the court in *The Skarp* questioned how a reasonable reader would interpret the representations made in the bill.[532] The court clearly did not apply the recognised requirements of the common law doctrine of estoppel.

(2) Conclusion

The rule in *The Skarp* is quite similar to the test of whether the representations amounted, in the mind of a reasonable reader/transferee of the bill, to a *promise* to deliver the goods as recorded in the bill ("alternative approach"), or that the goods were shipped as recorded in the bill ("2nd Circuit approach"). The advantages of this interpretation are threefold. First of all, it a just approach that the carrier should bear the risk that a reasonable interpretation of representations in the bill of lading might not accord with the true quantity or quality of the shipment. This appears to be the correct result since it is in the carrier's realm of power to make sure that any ambiguity does not appear in the bill. Second, by applying principles stemming from the law of contracts the common law doctrine of estoppel would be prevented from being misapplied and distorted. Thus, an ambiguous representation would not simply have to be dismissed but would have to be reasonably interpreted.[533] Last, the promissory interpretation assures a degree of uniformity in the law regarding the evidentiary value of bills of lading, which at present is sorely lacking.

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[531] *Ibid.* at 140-144 [emphasis added].
[532] The court defined "reasonable" as "natural and ordinary reading when the document is presented to a merchant in the course of business".
[533] See Bools, *supra* note 112 at 133.

c) Common Law – Detrimental Reliance

(1) The Law

As opposed to § 80113 of the *Federal Bills of Lading Act, 1994*, the transferee must, at common law, show detrimental reliance on representations made by the carrier under the doctrine of estoppel. Courts, however, have not applied this requirement all that strictly. An exemplary statement was delivered in *Silver* v. *Ocean S.S. Co., Ltd.*,[534] in which it was held that the rebuttable presumption of detrimental reliance was raised where a transferee had accepted a bill of lading without raising any objection.[535] In other cases detrimental reliance was affirmed where a transferee would have had a right to reject the documents had they been accurate, but instead accepted and paid for the documents in full or in part.[536] Another decision in the affirmative was justified with the transferee being deprived of its right of rejection.[537] It was even held that the act of payment constituted sufficient detriment in a case where the transferee had a right to the return of the money paid.[538]

Once the presumption of detrimental reliance has been raised, the burden of proving that the transferee did not rely upon the representation shifts to the carrier. The carrier may then establish, for instance, that the transferee was contractually bound to accept the bill. This rebuttal would raise the further presumption that the transferee actually suffered no detriment.[539] The burden of proving detriment would then revert to the transferee. It could establish, on a balance of probabilities, that it would have rejected the bill and breached its contract if the bill had been accurate.[540]

Furthermore, it is a requirement that the transferee's reliance on the representations

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[534] See *Silver* v. *Ocean*, *supra* note 300.
[535] See *ibid.* at 428, 434 & 441, *per* Scrutton L.J.
[536] See *Martineaus, Ltd.* v. *Royal Mail*, *supra* note 409 at 639, *per* Scrutton J.
[537] See *Dent* v. *Glen*, *supra* note 23 at 255-256, *per* Atkinson J. (Com.Crt.); *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha* (1919), 1 Ll.L.Rep. 51 at 53, *per* Roche J. (K.B.Div., Com.Ct.).
[538] See *Compania Naviera Vasconzada*, *supra* note 270 at 249-250, *per* Channel J.
[539] See *The Skarp*, *supra* note 321 at 147-149.

must have been *reasonable.* A "reasonable reliance" was, for example, denied in *Simmonds* v. *Rose* where no qualifications had been inserted in the bill but where the transferee knew that the master did not have any means of checking weight, number or quantity.[541] Reasonableness was even affirmed under circumstances in which the transferee received information from a third party as to clear statements in the bill. It was held, however, that the contrary evidence must make the falsity of the statement "absolutely clear to him" and must be of "absolutely conclusive and overwhelming importance".[542]

(2) Critique

It is submitted that detrimental reliance will almost always be present. It will either be present because the shipment formed part of an international sale and the purchaser was induced to pay the contract price by the presentation of the bill, or it will be present because the consignee of the bill obtained delivery of the goods by presenting the bill and paying the required freight. The estoppel, it was held, could even be raised in favour of a party who had advanced money to the shipper on the security of the bill.[543] The party had subsequently obtained delivery of the goods from the carrier on presentation of the bill and payment of the freight even though it was not technically a party to the contract of carriage. Under English common law it will therefore be very difficult for the carrier to rebut the presumption that the transferee did in fact rely on the bill to its detriment. This, it is submitted, is a positive result which bolsters the negotiability of the bill of lading.

d) *COGSA, 1992* (U.K.)

Under Section 4 of *COGSA, 1992* (U.K.) the legal effect of contradictory qualifications of statements still remains to be defined with greater clarity. It remains an open question

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[540] See *Cremer et. al.* v. *General Carriers S.A.* (1973), [1974] 1 W.L.R. 341 at 351-353, *per* Kerr J. (Q.B.).
[541] See (1893), 10 T.L.R. 125 at 126, *per* Wills J. (Q.B.).
[542] *Evans* v. *James Webster & Bros., Ltd.* (1928), 32 Ll.L.Rep. 218 at 223, *per* Wright J., 45 T.L.R. 136, 34 Com.Cas. 172 (K.B.) [hereinafter *Evans* v. *Webster* cited to 32 Ll.L.Rep.].
[543] See *Brandt* v. *Liverpool, supra* note 328.

whether or not the courts should apply the doctrine of estoppel with its requirement that representations made in the bill of lading are "clear and unambiguous". Furthermore, although the wording of Section 4 of *COGSA, 1992* (U.K.) appears to be based on the common law doctrine of estoppel, the provision does not require the common law element of a third party's detrimental reliance on the statement.[544] This, one could argue, is in conformity with the general intent of the drafters of the *Act* to simplify actions against carriers who have caused loss, thereby enhancing the tradability of bills of lading.[545]

Since Section 4 explicitly abandons one requirement of the estoppel, one could argue that the provision does not necessarily require the application of the other requirements either. Instead, one could argue that under Section 4 of *COGSA, 1992* (U.K.) it is possible to apply the contractual "alternative approach" or the "2nd Circuit approach" according to which representations made in the bill of lading are interpreted whether they constitute *promises* to *deliver the goods as recorded*, or that *the goods were shipped as recorded in the bill of lading.*

4. Conclusion

It may be concluded that § 80113 of the *Federal Bills of Lading Act, 1994* is more onerous on the carrier than the English common law according to which a test of clarity and unambiguity. Moreover, the provision goes further than both the "alternative approach" and the "2nd Circuit approach" since it does not allow for a reasonable interpretation of representations but provides for a list of permitted qualifications. The only interpretive freedom which exists is whether a carrier's qualification was of "like purport" to any of the statutory phrases.[546]

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[544] See *ibid.* at 134.

[545] See *COGSA, 1992* (U.K.), *supra* note 28, s. 2(4), enabling the holder of a bill of lading to recover for damage to the goods without proving either ownership of the goods or that it has suffered loss.

[546] *Chicago & N.W. Rly. Co.* v. *Bewsher, supra* note 348 at 952, with a restrictive interpretation of *Federal Bills of Lading Act, 1916, supra* note 30, § 21. It was held that in a case of *bulk freight* "weight subject to correction" was not of "like purport". But see *Leigh Allis & Co., supra* note 382 at 476-477, for a more liberal interpretation in a case of *package freight.*

The particular wording of § 80113(a) and the rare cases on the issue prove that the reliance required is less than under the English common law since under English common law the transferee's reliance must also be reasonable.[547]

There are but few reported cases in England and the United States in which detrimental reliance on the part of the transferee was not affirmed. The bill's foremost function of tradability/negotiability is confirmed by the fact that courts do not generally inquire whether the transferee was able or willing to reject the bill under its contract of sale. Courts thereby recognise that even in cases in which a transferee would not have been able to reject the document had the details of the goods been accurately stated, or even if it would not have breached its contract, the transferee is still likely to have been prejudiced by the inaccuracies in the bill. One such disadvantage is that the transferee might be deprived of his best source of evidence of a non-conforming shipment as against its seller.[548]

Consequently, detrimental reliance is hardly ever an issue before a court of law. This practice that courts almost always affirm detrimental reliance is, however, inconsistent with the formal requirements of the doctrine of estoppel and leads to uncertainty in the law. Furthermore the requirement of detrimental reliance does not correspond with Section 4 of *COGSA, 1992* (U.K.) and Article III(4) of the *Hague and Hague/Visby Rules* which do not require the transferee to show detrimental reliance.

In order to ensure uniformity in the law as well as legal certainty and clarity, the "alternative approach" or the "2nd Circuit approach" should instead be applied. It is submitted that the contractual approach would provide a doctrinally straightforward solution and the doctrine of estoppel would not have to be misused or distorted. The test would be whether, from a reasonable transferee's point of view, a representation in a bill of lading would be interpreted as a *promise to deliver the goods as recorded in the bill* ("alternative approach") or as a *promise that the goods had been shipped as recorded in*

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[547] See *Josephy* v. *Panhandle, supra* note 514 at 278.
[548] See Bools, *supra* note 112 at 136.

the bill ("2nd Circuit approach"). Accordingly, representations in a bill of lading would not amount to such a promise where, for instance, a transferee knew that a carrier did not have any means of verifying particular statements. Neither would representations amount to such a *promise* where the transferee received information from a third party regarding inaccuracies of statements made in the bill.

Finally, it is submitted that the contractual approaches would be in line with the legislator's intent to improve and assure the tradability of bills of lading. If transferees were to show detrimental reliance this legislative intent would be undermined and frustrated.

VI. Conclusive Evidence Clauses

A. The Effect of "Conclusive Evidence" Clauses

If a "conclusive evidence" clause is introduced into the bill of lading, no evidence will be permitted to rebut statements introduced into the bill, even when the claim has been brought by the shipper, or when the carrier can prove that the goods were never actually shipped.[549] Conclusive evidence clauses had been used particularly in bills of lading covering timber,[550] but also in the coal[551] and sugar trade[552] at the beginning of the 20th century. The clauses stipulated that statements as to the quantity of received or shipped cargo[553] were to be conclusive evidence as against the shipowner.[554] Although they contravene the rule in *Grant* v. *Norway*, conclusive evidence clauses in both bills of lading and charterparties were held valid and binding on the shipowner as against the transferee of the bill[555] or the charterer[556] as to the quantity recorded in the bill.[557] Consequently, as opposed to the rule in *Grant* v. *Norway*, the shipowner is liable for short delivery, although it is otherwise clear that the goods had in fact not been received or loaded on board.[558]

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[549] See *Fisher, Renwick & Co.* v. *Calder & Co.* (1896), 1 Com. Cas. 456 at 458-459, *per* Mathew J. (Com.Ct.) [hereinafter *Fisher, Renwick*].

[550] See *Lishman* v. *Christie & Co.* (1887), 19 Q.B.D. 333, 56 L.J.Q.B. 538, 57 L.T. 552, 35 W.R. 744, 6 Asp.M.C. 186 [hereinafter *Lishman* v. *Christie* cited to Q.B.D.]; *Evans* v. *Webster, supra* note 542.

[551] See Cole, *supra* note 458 at 59.

[552] See *Royal Commission on Sugar Supply* v. *Hartlepools Seatonia S.S. Co.*, [1927] 2 K.B. 419, 96 L.J.K.B. 959, 43 T.L.R. 542, 32 Com.Cas. 300 [hereinafter *Royal Commission on Sugar Supply* cited to K.B.].

[553] "Received" and "shipped" were held to be to the same effect merely expressing the same procedure from different points of view. See *Crossfield & Co.* v. *Kyle Shipping Co., Ltd.*, [1916] 2 K.B. 885 at 891, 897 & 900 [hereinafter *Crossfield & Co.* v. *Kyle Shipping*].

[554] See *COGSA, 1924* (U.K.) (repealed), *supra* note 26, s. 5, in which later bulk cargoes were treated differently as well, as discussed during the *travaux préparatoires*. See *Water Carriage of Goods Act, 1910* (Canada), *supra* note 166, ss. 2 & 9, which similarly provided for specific provisions as to description and shipment of wood goods.

[555] See *Lishman* v. *Christie, supra* note 550 at 338; *Crossfield & Co.* v. *Kyle Shipping, supra* note 553 at 891, 897 & 900.

[556] See *Fisher, Renwick, supra* note 549 at 458, *per* Mathew J.

[557] See *e.g. Pyman & Co.* v. *Burt, Bolton et al.* (1884), Cab. & El. 207 at 211-212, *per* Field J. (in Cham.) [hereinafter *Pyman & Co.* v. *Burt, Boulton et al.*].

[558] See *Nordborg (Owners)* v. *Sherwood*, [1939] P. 121, 108 L.J.P. 113, 44 Com.Cas. 66, 160 L.T. 451, 55 T.L.R. 252, (1939), 62 Ll.L.Rep. 213; *Lauro* v. *Dreyfus* (1937), 59 Ll.L.R. 110 at 116; *Mediterranean*

The clauses were, however, held not to be conclusive evidence where the shipper/endorsee knew about the inaccuracies.[559] It was also held that fraud on the part of the shipper would not affect the endorsee unless the latter was also a party to the fraudulent act.[560] Occasionally, it was stipulated in bills of lading that these statements were only conclusive "in the absence of error or fraud". In this case the carrier did not only have to show that the statement itself was wrong, but it had also to adduce evidence proving how the error occurred.[561] To avoid liability the carrier must prove that the loss occurred due to excepted perils after "taking on board".[562]

Conclusive evidence clauses were frequently combined with a clause pursuant to which a master was to sign bills of lading recording the figures as furnished by the shipper. In *Crossfield & Co.* v. *Kyle Shipping Co., Ltd.*[563] the court held that according to a reasonable interpretation of such a clause the master could either clause or refuse to sign the bill of lading if he knows the figures are inaccurate. If he clauses the bill, it would no longer be an assertion of the quantity loaded.[564]

Where the clause also contained the stipulation that the bill of lading shall be conclusive evidence "unless error be proved", it has been interpreted as *prima facie* evidence only. In that case it would not suffice to prove that an error existed; the carrier would have to prove the exact source of the error.[565]

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and New York S/S Co. v. *Mackay*, [1903] 1 K.B. 297, 72 L.J.K.B. 147, if one bill of lading represents different goods, one of them being over-delivered, the other short-delivered, the carrier is bound by both statements as to quantity and cannot take the two statements together as representing the total quantity of both.

559 See *Pyman & Co.* v. *Burt, Boulton et al.*, *supra* note 557 at 213.

560 See *Evans* v. *Webster*, *supra* note 550 at 220, *per* Wright J. (K.B.).

561 See *Royal Commission on Sugar Supply*, *supra* note 552 at 431.

562 See *Oostzee Stoomvart* v. *Bell* (1906), 11 Com.Cas. 214; *J. Lohden & Co.* v. *Charles Clader & Co.* (1898), 14 T.L.R. 311 (Q.B.) [hereinafter *Lohden & Co.* v. *Charles Clader*]; *Fisher, Renwick*, *supra* note 549, according to which excepted perils "alongside the ship" would be insufficient.

563 See *Crossfield & Co.* v. *Kyle Shipping*, *supra* note 550 at 896-897.

564 See *Lohden & Co.* v. *Charles Clader*, *supra* note 562.

565 See *Royal Commission on Sugar Supply*, *supra* note 552.

B. The Hague and Hague/Visby Rules

Since conclusive evidence clauses increase the liability of carriers, they do not contravene Article V of the Rules. In case of a short delivery, the carrier may be entitled to an indemnity from the shipper.

C. Interpretation on the Basis of the Doctrine of Estoppel

In construing conclusive evidence clauses on the basis of the doctrine of estoppel courts have held that the clauses gave the master actual or apparent authority to sign bills of lading as presented.[566] Where a clause also contained the stipulation that the master's signature was "in all cases binding on the owner", it may be interpreted in two ways:

(1) either as evidencing the master's actual authority to bind the carrier, even in cases where the statements by the shipper were inaccurate; or
(2) as a representation by the carrier that the master had such authority.

In order to estop the shipowner from denying its representation, the shipper or endorsee would have to show reasonable reliance and detriment. The decisions in which it was held that a shipper or endorsee could not rely upon a conclusive evidence clause may be explained on the basis of an absence of detrimental reliance. Correspondingly, those cases where the master had claused a bill containing a conclusive evidence clause and where the carrier was not held liable may be explained by an absence of a representation.

However, this interpretation on the basis of the common concept of estoppel is not satisfactory since it neglects the parties' intent as expressed in the bill of lading that it be conclusively binding on the carrier. Furthermore, it is difficult to explain why the statements in the bill should be binding on the carrier as against the shipper, since the latter is unlikely to have relied upon the statement in the bill to its detriment.[567]

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[566] See *e.g. V/O Rasnoimport* v. *Guthrie, supra* note 441 at 10, *per* Mocatta J.
[567] See Bools, *supra* note 112 at 147.

D. Conclusion

Due to the difficulties which have arisen in interpreting conclusive evidence clauses, it is submitted that they should therefore be interpreted on the basis of the "alternative approach" or the "2nd Circuit approach".

Thus, a conclusive evidence clause should be interpreted from a reasonable third party's point of view of whether it constitutes a *promise to deliver the goods as recorded in the bill* ("alternative approach") or as a *promise that the goods have been shipped as recorded in the bill* ("2nd Circuit approach"). There would usually be no difficulties in finding that in cases where the conclusive evidence clause was part of the contract between the shipper and carrier, it amounted to a contractual promise to the shipper to deliver the goods as recorded, or that the goods have been shipped as recorded in the bill, rather than as delivered by the shipper.

VII. The Authority of the Carrier's Agents to Make Representations in the Bill of Lading

The authority of the carrier's agents to make representations is of utmost importance since it is usually not the carrier who actually signs the bills of lading, but one of its agents, usually the ship's master. Representations will only affect the carrier insofar as they are made by the carrier itself, or if they are within the master's *actual or apparent authority*. Until the adoption of the Hague Rules it was uncertain whether the captain or the carrier's agent in signing the bill of lading could bind the carrier when the goods described in the bill had in fact never been shipped. Accordingly the court held in the case of *Jessel* v. *Bath* that the signature of the carrier's agents on a bill of lading acknowledging receipt of a greater quantity than was actually shipped did not bind the defendant carrier.[568] It is arguable that this uncertainty was eliminated by the Visby-amendment to Article III(4) of the Hague Rules, which explicitly states that the information in the bill of lading is conclusive evidence as against the carrier once the bill of lading has been transferred to a third party.[569]

A. English Common Law

1. Grant v. *Norway*

Regarding statements as to the quantity, it was held in the leading case of *Grant* v. *Norway* that the master had neither *actual* (express or implied), nor *apparent authority* to sign bills for goods *not received*.[570] This *doctrine of apparent authority* was based on the reasoning that there was no contract where there was no shipment. However, concerning statements as to *quality* it was held in a later case that the master had not only the authority to sign a bill recording the condition of the goods, but also the apparent

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[568] See *Jessel* v. *Bath*, *supra* note 480.
[569] See Dalhousie Ocean Studies Programme, *supra* note 32 at 114.
[570] See *Grant* v. *Norway*, *supra* note 118 at 688-689

authority to sign bills incorrectly stating the condition of the goods.[571] The essence of *Grant* v. *Norway* is that where there are no goods, there is no contract. Consequently, there can be no action of the transferee against the shipowner.

Due to the holding in *Grant* v. *Norway,* representations as to the quality and to the quantity had a different evidentiary value.[572] From a transferee's point of view, from whose perspective the representation of authority must be judged, it could no longer be argued that the master appeared to have authority to sign bills bearing inaccuracies as to the *quantity* of the goods in the same way as he appeared to have authority to sign bills with inaccuracies as to the *quality* of the goods. Soon after *Grant* v. *Norway* it was held that, since the master had no authority to sign bills where *no* goods were shipped, he could not have had authority to sign bills indicating that *more* goods were shipped than actually loaded.[573] In this case, the transferee could only take action the master himself.

2. *Heskell* v. *Continental Express, Ltd. et. al.*[574]

Heskell v. *Continental Express, Ltd.*[575] dealt with an action of a shipper against a shipowner's agent for breach of warranty of authority.[576] The shipowner's agent issued a bill of lading with goods recorded, which had neither been loaded nor received by the carrier. Moreover, no contract of carriage had been concluded. This raised the question whether the carrier was estopped from denying the fact that a contract had actually been concluded.

Counsel for the shipper argued that, although in fact no contract of carriage had been concluded, the carrier was estopped from denying the existence of the contract. It seems as if counsel assumed that ordinarily, in delivering the goods to the ship, the shipper makes a unilateral offer to conclude the contract. According to that assumption, the

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[571] See *Compania Naviera Vasconzada, supra* note 270 at 246, *per* Channel J.
[572] See above Chapter Three, V.
[573] See *M'Lean and Hope* v. *Munck, supra* note 305 at 899; *Hubbestry* v. *Ward* (1853), 8 Ex. 330 at 332.
[574] See *Heskell, supra* note 341.
[575] See *ibid.* at 1036-1040.
[576] Besides an action for breach of contract against the shipper's own warehousemen.

carrier accepts the offer by issuing the bill of lading and it need not notify the shipper of the acceptance of the offer. Plaintiff's counsel concluded that the shipper relied on the carrier's representation to its detriment and was therefore estopped.

The court held that the shipowner's agent did not have the authority to issue bills of lading for goods which had actually not been loaded. Furthermore, the court held that the contract of carriage was not concluded by the mere issuance of a bill of lading.[577] Thus, even if the carrier's agent would have had authority, and the carrier may have been estopped from denying the receipt of the goods, the plaintiff would not have had a cause of action in contract against the carrier.[578] The court added that even if the agent had authority, and the carrier was estopped from denying that it had received the goods for shipment, the plaintiff could not succeed. The reason was that the shipper could not assert that the carrier is estopped from denying the existence of the contract and, thus, that it had shipped the goods, and simultaneously that it breached the contract because it did not actually ship the goods. The court held that the shipper's action in contract would therefore fail, and that its loss was the loss of the action in contract. As in *Grant* v. *Norway*, the transferee did not have an action against the shipowner.

3. *Contractual Approaches*

According to the "alternative approach" and the "2nd Circuit approach" the question would be asked whether from a reasonable third party's point of view the carrier's representations in the bill of lading amounted to a *promise to deliver the goods recorded in the bill of lading* ("alternative approach") or to a *promise that the goods had been shipped as recorded in the bill of lading* ("2nd Circuit approach"). In the affirmative, the shipper could then sue for breach of that *promise*. Consequently, the shipper would not have to show that the goods were actually shipped, but rather that the goods recorded in

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[577] *Heskell*, *supra* note 341: "in the absence of a contract of carriage the bill of lading was a nullity".

[578] It is noteworthy that *Heskell*, *ibid.*, predates the revolutionary decision of *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.* (1963), [1964] A.C. 465, [1963] 3 W.L.R. 101, 107 S.J. 454, [1963] 2 All E.R. 575, [1963] 1 Ll.L.Rep. 485 (H.L.), aff'g [1962] 1 Q.B. 396, according to which it might today be possible to hold the signer of a bill of lading liable for a negligent misstatement in the bill, but which would still not render the carrier vicariously liable for its servant's actions.

the bill of lading were not delivered. The shipper would thereby avoid the simultaneous and contradictory assertions which were criticised by the court in *Heskell*. If the shipper can estop the carrier from denying that it loaded the goods recorded in the bill of lading, he could estop the carrier from denying the acceptance of the offer and the existence of a contract of carriage. Thus, an action in contract would be available to the shipper.[579]

4. Voluntary Insertion of Statements by the Master

Cox v. *Bruce*[580] involved a master who had voluntarily inserted a statement as to leading marks. The court held that the shipowner was not estopped from subsequently proving that goods of a different quality had been shipped where the master had incorrectly entered in the bill quality marks on a consignment of jute. According to the Court of Appeal it was not "the master's duty to insert these quality marks at all." Lopes L.J. concluded that "[the master] had not authority to make such a representation and, I do not think that any man of business was entitled to assume that he had such authority."[581]

5. Liability of the Carrier's Agent

The liability of the carrier's agent in signing the bill is based on the concept of an implied contract between the holder of the bill and the signer of the bill.[582] The signer is presumed to "promise to the world"[583] that it has authority to sign bills of lading for goods not received. If the agent had authority to sign the bill of lading, the shipowner would have been estopped from denying the statements at common law, but not under Section 3 of the *Bills of Lading Act, 1855* since the shipowner was not the "master or the shipowner's agent signing" the bill. Today, however, the shipowner would be estopped under Section 4 of *COGSA, 1992* (U.K.).[584]

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[579] See also Bools, *supra* note 112 at 144.
[580] See *Cox* v. *Bruce, supra* note 415.
[581] *Ibid.* at 154.
[582] See *V/O Rasnoimport* v. *Guthrie, supra* note 441; Grant v. *Norway, supra* note 118.
[583] *V/O Rasnoimport* v. *Guthrie, ibid.* at 11-13, *per* Mocatta J.
[584] See below Chapter Three, VII.C.

B. United States

1. Case Law

The U.S. Supreme Court approved and followed the doctrine of apparent authority as seen in *Grant* v. *Norway* in several cases.[585] These decisions were one of the major reasons for the enactment of the former *Federal Bills of Lading Act* in 1916.[586] In *Freeman* v. *Buckingham* the court held:

> The taker assumes the risk not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons.[...] But the authority in each case arises out of, and depends upon, a particular state of facts.[...] and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends.[587]

Thus, the investigation begins with an assessment of the facts upon which the master's authority is founded. In the second step, the *scope* of the master's actual authority is appraised. Consequently, and as distinct from the English doctrine of apparent authority, the transferee is not entitled to rely on the fact that the signing master was appointed by the shipowner precisely to sign bills of lading. In fact, the transferee must investigate one step further in order to rely on the master's *apparent* authority. He would have to inquire whether the facts necessary to give the master *actual* authority had actually arisen.[588]

2. Statutory Law

Pursuant to § 80113(a) of the *Federal Bills of Lading Act, 1994*[589] the transferee must

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[585] See *Freeman* v. *Buckingham*, 59 U.S. 341 (1855). See also *Missouri P.R. Co.* v. *McFadden*, 38 L.Ed. 944 at 947, 154 U.S. 155 (1894); *Friedlander* v. *Texas & P.R. Co.*, 32 L.Ed. 991 at 994, 130 U.S. 416 (1889); *Pollard* v. *Vinton*, 26 L.Ed. 998 at 1000, 105 U.S. 7 at 9 (1881).

[586] See *Federal Bills of Lading Act, 1916*, *supra* note 30, § 22 as the relevant provision, re-enacted in 49 U.S.C. § 80113(a).

[587] *Freeman* v. *Buckingham*, *supra* note 585 at 345.

[588] See also Bools, *supra* note 112 at 139.

[589] The provision also governs the carrier's liability for non-negotiable bills of lading, which are also

show that it is a "common carrier" who has issued the bill of lading. To interpret this requirement, § 22 of the former *Federal Bills of Lading Act*, 1916 may provide some guidance. § 22 states that the bill must have been issued by a carrier or by an agent or employee "the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor ...". The provision continues that the carrier is liable for damages caused by nonreceipt "of any part of the goods". § 22 of the former *Federal Bills of Lading Act*, 1916 made clear that "part" included "all". The carrier is held liable even though the bill might have been issued in breach of the master's or any other agent's authority.[590] Likewise, the carrier is liable where an agent fraudulently issued a bill in his own, and not the carrier's, interest.[591]

C. English Statutory Law

1. Section 3 of the repealed Bills of Lading Act, 1855

An attempt to reform the rule in *Grant* v. *Norway* lead to the enactment of Section 3 of the *Bills of Lading Act, 1855*. Pursuant to Section 3, bills of lading in the hands of consignees or endorsees were deemed to be conclusive evidence of such shipment "as against the master or other person signing the same".

There were three problems with Section 3. First, Section 3 did not bind the shipowner, but rather the person making the representation.[592] Thus, if the bill was signed by another agent it had to be determined on whose behalf this agent signed. Since another agent would usually sign on behalf of the master, the owner or charterer was not liable.[593] This was the case, unless the holder of the bill had actual notice that the goods were not so

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transferable under U.S. law. See *G.A.C. Commercial Corp.* v. *Wilson*, 271 F. Supp. 242 (S.D.N.Y. 1967), where it was held that the carrier was estopped from denying the truth of statements as to the condition of the goods and the date of shipment, but not as to the quantity of the goods, concluding that where no goods are loaded, there could be no *owner* thereof. See *ibid.* at 246.

590 See *Gleason* v. *Seaboard Air Line Rly. Co.*, 279 U.S. 349 at 355-357 (1928); *Chicago & N. W. Rly. Co.* v. *Bewsher*, *supra* note 348 at 953.

591 See *Gleason* v. *Seabord Air Line Rly.*, *ibid.* at 353 & 355.

592 See *M'Lean and Hope* v. *Munck*, *supra* note 305 at 899 & 901.

593 See *Jessel* v. *Bath*, *supra* note 480 at 273-274; *Brown* v. *The Poell Duffryn Steam Coal Co.* (1875), L.R.

shipped, or that the misrepresentation in the bill was made without any fault on the part of the person signing, but wholly[594] by the fraud of the shipper,[595] the holder, or some other person under whom the holder claimed. Second, Section 3 caused problems concerning the interpretation of "such shipment". The court in *Parsons* v. *New Zealand Shipping Co.*[596] held in the minority that the bill of lading evidenced that goods with the particular marking 622X were shipped. Section 3 prevented the carrier or its agent from arguing that there was in fact no "shipment" since the bill was conclusive evidence for goods with the marking 622X.[597] The majority of the court agreed that Section 3 prevented the carrier or its agent from arguing that there was "such shipment". The majority concluded that the carrier could, however, escape liability by showing that the goods represented to have been shipped remained the same, regardless of any wrong marks on them. As discussed above,[598] it was concluded that "marks" only related to the *identification*, and not to the *identity* of the goods.[599]

2. *COGSA, 1971 (U.K.)*

a) Conclusive Evidence

Where the Hague/Visby Rules apply, statements as to the quantity cannot be contradicted if the bill of lading is in the hands of the transferee.[600]

b) Statements as to the Date and Place of Issuance

Apart from those statements explicitly mentioned in the Hague and Hague/Visby Rules other statements may be included in the bill of lading. Their evidentiary value is

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10 C.P. 562 at 567; *Thorman* v. *Burt, Bolton & Co.* (1886), 54 L.T. 349 at 350.

[594] Even if the misrepresentation in the bill was caused directly by the mate it was held to be "wholly caused" by the shipper. See *Valeri* v. *Boyland* (1866), L.R. 1 C.P. 382 at 385.

[595] This also covers the shippers' agent or someone acting for him. See *ibid.* at 384-385.

[596] See [1901] 1 Q.B. 548 [hereinafter *Parsons* v. *New Zealand Shipping*].

[597] See *ibid.* at 559, *per* A.L. Smith MR.

[598] See above Chapter Three, IV.D.

[599] See *Parsons* v. *New Zealand Shipping, supra* note 596 at 565, 567 & 571-572.

[600] See *COGSA, 1971* (U.K.), *supra* note 26, art. III(4), schedule 1.

questionable. *The Saudi Crown*[601] involved the insertion of the date of the issuance of the bill. The court held that a master or other agent in fact had the authority to insert the date and place of issuance of the bill, provided that the agent had been authorised to sign bills on behalf of the shipowner. *The Saudi Crown* involved bills of lading that were to be issued upon loading of the goods on a particular date. Although loading had actually not been completed until that date, the master issued bills which authorised payment for the goods by the buyer. Because these goods arrived later than expected, the buyer had to purchase replacements in order to meet his existing commitments. The court entitled the buyer to recover damages for misrepresentation from the shipowner, holding:

> [I]t cannot be said that the nature and limitations of the agent's authority are known to exclude authority to insert the dates on the grounds that the ascertainment of the correct date is obviously quite outside the scope of the functions or capacities of those agents.[602]

The court thereby rejected the shipowner's argument based on *Grant* v. *Norway* that the agent acted outside the scope of his authority.[603]

3. *COGSA, 1992 (U.K.)*[604]

Where Article III(4) of *COGSA, 1971* (U.K.) does not apply, the evidentiary value of statements as to the quantity is governed by Section 4 of *COGSA, 1992* (U.K.):[605]

> A bill of lading which–
> (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
> (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods, or as the case may be of their receipt for

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[601] (1985), [1986] 1 Ll.L.Rep. 261. See also *Rudolf A. Oetker* v. *I.F.A. Internationale Frachtagentur A.G. (The Almak)* [1985] 1 Ll.L.Rep. 557 at 560, *per* Mustill J. (Q.B.D., Com.Ct.).

[602] See *The Saudi Crown*, *supra* note 444, at 265, *per* Sheen J.

[603] See also *Westpac Banking Corporation and Commonwealth Steel Co., Ltd.* v. *South Carolina National Bank*, [1986] 1 Ll.L.Rep. 311 at 316 (P.C.), regarding the evidentiary value of the date inserted on the face of the bill of lading.

[604] See *COGSA, 1992* (U.K.), *supra* note 28, s. 5(5), the provisions of *COGSA, 1992* (U.K.) operate without prejudice to those of *COGSA, 1971* (U.K.).

[605] See D.G. Powles "Sea Transport" (1993) J. Bus. L. 61 at 64-65.

shipment.

COGSA, 1992 (U.K.) only applies to bills of lading,[606] and thus does not have as broad an application as § 80113(a) of the *Federal Bills of Lading Act, 1994*, because the *Federal Bills of Lading Act, 1994* also applies to sea waybills and other non-negotiable bills.[607] There are some other significant differences between the U.S. and the English statutes.

4. *Comparison of § 80113(a) of the Federal Bills of Lading Act, 1994 and Section 4 of COGSA, 1992 (U.K.)*

First, as distinct from the U.S. provision, the master is deemed to have authority to bind the carrier under Section 4 of *COGSA, 1992* (U.K.).[608] Consequently, the holder of a bill of lading is not required to show that it relied to its detriment on the master's apparent authority based on the appointment of the master by the carrier. In practice, however, the difference will be rather minimal. Since U.S. courts but rarely deny the holder's detrimental reliance on representations in the bill of lading, they will hardly ever deny the holder's reliance on the master's apparent authority to issue bills. Second, as opposed to Section 4 of *COGSA, 1992* (U.K.), § 80113(a) of the *Federal Bills of Lading Act, 1994*, still explicitly requires proof of detrimental reliance on the part of the holder, although it may undermine and contravene the negotiability of bills of lading. However, the practical relevance of this requirement will be rather minimal since U.S. courts hardly ever deny detrimental reliance. Third, since Section 4 of *COGSA, 1992* (U.K.) neither requires proof of detrimental reliance nor the claimant to show that it personally suffered a loss, a shipper who is a lawful holder might be able to claim against the carrier to recover damages for goods not shipped.[609] Finally, whereas Section 4 of the English Act confers a right to sue on a "lawful holder", the U.S. *Act* requires that the negotiable bill be in the possession of a "holder". That the claimant be a "holder" is according to § 80105(a) of

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[606] See *COGSA, 1992* (U.K.), *supra* note 28, s. 1(2).

[607] See *ibid.*, which, compared to the U.S. provision, appears to be even more restrictive since under neither waybills nor non-negotiable bills are capable of being transferred in the same way as under U.S. law.

[608] See also Bools, *supra* note 112 at 142.

[609] See *ibid.* at 143.

the *Federal Bills of Lading Act, 1994* only one requirement for title and rights of suit. Moreover, the bill must have been duly negotiated to the person concerned. Therefore, "holder" is more narrowly construed under U.S. law than under English law.

D. Conclusion

Representations made by the carrier's agents will only affect the carrier insofar as they are made by the carrier itself, or if they are within the master's actual or apparent authority. The agent's liability at common law is based on the concept of a breach of warranty of authority. One could be of the opinion that cases in which no goods were actually shipped may be distinguished from those involving short delivery. Based on the reasoning in *Grant* v. *Norway* that where no goods were loaded, there is no contract, one could argue that, because in the latter case goods were in fact shipped, although less than indicated, then therefore exists a contract.[610] To refute this argument it is, however, submitted that it should not make any difference for the transferee if no goods at all or less goods than recorded were actually shipped. Such a distinction seems artificial and impractical.

In favour of the rule, that the carrier is not liable for its agent's voluntary insertions in the bill of lading, one may argue that in most cases the master will not possess the commercial knowledge or expertise necessary to conduct an adequate check of their accuracy.[611] Moreover, the carrier is not liable at common law where the shipowner's agent did *not* have authority, and *no* contract of carriage was concluded. Whereas under Section 3 of the *Bills of Lading Act, 1855* the shipowner was not estopped, he would be estopped under Section 4 of *COGSA, 1992* (U.K.).[612]

Before the passing of the *Federal Bills of Lading Act*, 1916, the rule in *Grant* v. *Norway* was followed in the United States. Thus, the transferee was not entitled to rely on

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[610] See Ch. Debattista, "The Bill of Lading as a Receipt – Missing Oil in Unknown Quantities" (1986) L. Mar. & Com. L. Q. 469 at 472.
[611] See also Wilson, *supra* note 13 at 139.
[612] See Powles, *supra* note 605 at 65.

the fact that the signing master was appointed by the shipowner. As opposed to that, the carrier is under § 80113(a) of the *Federal Bills of Lading Act, 1994* liable although the bill might have been issued in breach of the master's or other agent's authority, even if the agent issued a bill of lading fraudulently in his own, and not the carrier's interest.

Consequently, it is submitted that the carrier's liability is considerably stricter under the *Federal Bills of Lading Act, 1994* than at English common law. It appears unjust that, on the one hand, the carrier is not estopped where its agent inserted an inaccurate statement as to the quantity in the bill of lading, but that the carrier is, on the other hand, usually estopped where its agent inserted an inaccurate statement as to the quality of the goods.

The different treatment of statements as to quantity and as to quality at common law could be overcome by an *interpretation according to the contractual approaches*. The test should be applied whether, from a reasonable third party's perspective, the master had authority to enter the contract on the terms upon which the transferee relied. This authority would also include the authority to insert common statements in the bill, such as the date of shipment. The contractual approaches would furthermore deliver a just result in a case where the goods were neither loaded nor received, and where no contract of carriage had been concluded.[613]

Section 4 of *COGSA, 1992* (U.K.) appears to be more progressive than § 80113(a) of the *Federal Bills of Lading Act, 1994* in not requiring detrimental reliance any longer. Since this requirement is rarely denied by U.S. courts there will, however, be no practical difference. It is submitted that after the adoption of *COGSA, 1992* (U.K.) situations where actions for breach of warranty of authority might be useful have become rare and may be limited to such unusual circumstances where it is more attractive for the holder of the bill to sue the *agent* than the carrier. It could include such circumstances where the carrier is an overseas corporation, belongs to the same corporation or where it is insolvent.[614]

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[613] See above Chapter Three, VII.A.2.
[614] See Bools, *supra* note 112 at 147.

CHAPTER FOUR

I. The Influence of Electronic Data Interchange on the Liability of the Carrier

The most innovative and advanced step in the development of bills of lading and in simplifying the documentary process is the use of electronic data. The International Chamber of Commerce (ICC) admits that "the main reason for the 1990 revision of INCOTERMS was the desire to adapt terms to the increasing use of electronic data interchange."[615] With regard to bills of lading it was explicitly acknowledged in the INCOTERMS 1990 that "in spite of the particular legal nature of the bill of lading it is expected that it will be replaced by EDI procedures in the near future."[616]

New legal issues are expected to arise as more and more electronically transferred messages are incorporated into regular business activities. When transport information, traditionally included in the bill of lading can be electronically transmitted within a computer system, concerns about the legal status of electronic documents arise. As a consequence of the replacement of traditional paper transactions by EDI the legal discussion focuses on the difficulties regarding the evidentiary value of bills of lading.

Before EDI completely supplants the traditional bill of lading as a record of the contents of an agreement, the use of EDI will have to be confidently accepted by the shipping industry and all other interested parties, such as banks. Moreover, the absence of the requisite technology in various parts of the world, the incompatibility of computer systems, as well as the fact that every port authority or agent will have to be equipped with the necessary computer facilities are impediments to establishing the widespread use of EDI. One of the key questions which will have to be addressed is how the reliability of

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[615] *INCOTERMS 1990, supra* note 34 at 46.
[616] *Ibid.* at 15.

EDI messages as evidence may be ensured.[617]

Evidentiary concerns regarding the implementation of EDI focus on the issue of how EDI may fulfil the different "writing requirements" under various domestic statutes. The writing requirement depends, in particular, on the different legal rights "writing" embodies. The result is that "there is no legally recognised means presently by which an EDI message can, in the applicable commercial context, function in the same manner as an equivalent paper document in transferring certain legal rights."[618] Furthermore, the debate centres on the question of whether and how traditional signatures may be substituted by modern means of authentication. Examples include the confidential exchange of signatures to authenticate the parties and the context of documents which are transmitted or received, the exchange of encryption keys (by which the content of communications may be scrambled and unscrambled only pursuant to the exchanged keys), physical control of access to equipment and facilities, and the exchange of identifying information regarding the terminals from which authorised EDI transmissions may originate.[619] Whereas the Hamburg Rules[620] allow for electronic data in satisfaction of its signature requirements, most national statutes do not. Besides these two concerns, the influence of EDI on the evidentiary value of bills of lading as a receipt for goods is an important one. The various concepts which have been presented and are currently developed in order to make bills of lading electronically transferable will be discussed.

II. International Legislative Projects

A. The UNCITRAL Model Law

In June 1996 the Model Law on Legal Aspects of Electronic Data Interchange and

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[617] The other major issues are: admissibility of EDI, enforceability of an electronic contract and allocation of liability for incorrect or fraudulent messages.

[618] Economic Commission for Europe, *Commercial and Legal Aspects of Trade Facilitation-Detailed Action Programme*, U.N.Doc. TRADE/W.P.4/R.697 (1990), para. 4.5.4.

[619] See Williams, *supra* note 5 at 573.

Related Means of Communication was adopted by UNCITRAL.[621] The convention applies to all kinds of information transferred by means of a "data message", including ocean bills of lading. In order to eliminate many of the barriers that until now have kept electronic messages from enjoying the same legal status as paper messages, the convention applies a "functional equivalence approach". This approach entails that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message".[622] Where a law requires a "signature"[623] or that information shall be in "writing",[624] the Model Law takes a "functional equivalence approach". Furthermore, the use of the "best evidence rule" and the "hearsay rule" are prohibited.[625]

The objective of the convention is to ensure that only those techniques which ensure the same evidentiary value of bills of lading in EDI as with the traditional paper document are recognised. Thus, the evidentiary value of the electronic bill of lading is not expected to differ from that of traditional bills of lading.

B. The CMI Rules

In 1990, the CMI adopted a set of voluntary rules for electronic bills of lading.[626] The Rules are based on the concept of a central registry, which was also established in 1990.[627]

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[620] See *Hamburg Rules*, *supra* note 15, art. 14(3).

[621] See UNCITRAL, *Model Law on Electronic Commerce in Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session (28 May-14 June 1996)*, UNGA, 51st Sess., Supp. No. 17 (A/51/17) [hereinafter *Model Law*].

[622] See *ibid.*, art. 5.

[623] See *ibid.*, art. 7, according to which the requirement is met where:

> (a) 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.

[624] See *ibid.*, art. 6, the requirement is met where "information contained therein [in the message] is accessible so as to be usable for subsequent reference".

[625] See *ibid.*, art. 9.

[626] See *Rules for Electronic Bills of Lading, Comité Maritime International, Paris, June 29, 1990*, reprinted in R.B. Kelly "The CMI charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading" (1992) 16 Tul. Mar. L. J. 349 at 366 *et seq.* [hereinafter *CMI Rules for Electronic Bills of Lading*].

[627] The *CMI Rules for Electronic Bills of Lading* apply where the parties have agreed upon their application

After receipt of the goods, the carrier notifies the shipper in a message addressed to the shipper's electronic address. This message is, for evidentiary purposes, equivalent to a paper bill of lading. The message must contain a description and the condition of the goods, including any "representations and reservations", just as if a paper bill of lading were being used.[628] This stipulation appears to have the same scope as Article III(3) of the Hague and Hague/Visby Rules.

Furthermore, the message must indicate the name of the shipper,[629] contain the date and place of the receipt of the goods,[630] and refer to the carrier's terms[631] and a "private key"[632] to be used.[633] Upon confirmation of that message, the shipper becomes the holder of the bill and may request that the date and the place of shipment are updated as soon as the goods are loaded on board. The holder of the bill may sell the goods during transit. In that case he must notify the carrier who must confirm the message and transmit all the traditional bill of lading information to the proposed new holder. Once the proposed new holder notifies the carrier of its acceptance, the carrier issues a new "private code"[634] to him and cancels the old one.[635] Remarkably, the CMI Rules provide that at any time prior to delivery of the goods, the holder of the private key may demand that a paper bill of lading be issued.[636] When the CMI Rules apply the substantive bills of lading provisions will continue to be controlled by the relevant applicable law.[637]

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and upon employing EDI bills of lading.

[628] See *CMI Rules for Electronic Bills of Lading, supra* note 626 art. 4(b)(ii).

[629] See *ibid.*, art. 4(b)(i).

[630] See *ibid.*, art. 4(b)(iii).

[631] See *ibid.*, art. 4(b)(iv).

[632] See *ibid.*, art. 8, for a definition. A "private key" is a form of electronic identification which is unique to its individual holder.

[633] See *ibid.*, art. 4(b)(v).

[634] See *ibid.*, art. 7 & 8.

[635] See Williams, *supra* note 5 at 583-584.

[636] See *CMI Rules for Electronic Bills of Lading, supra* note 626, art. 10.

[637] *Ibid.*, art. 6: "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."

C. BOLERO

BOLERO[638] (Bills Of Lading For Europe) is based on a centralised online registry, which validates, authenticates and transmits messages among its registered users. More importantly, users are able to exchange messages directly between themselves. The registry contains details of shipping documents in "consignment records". These details are accessible by participants who possess the appropriate authority. Strong security controls are enforced by the use of digital signatures.[639] The participants in the BOLERO project explicitly declare that they are not "involved in business process re-engineering" and state that they are trying to establish the exact electronic equivalent of a paper bill of lading.[640]

D. The Sea Docs Register

The first experiment in electronic bills of lading was undertaken in 1986. It consisted of the deposit of a paper bill of lading in a central registry where computerised changes were kept and changes on the paper bill indicated. Any changes in title to the goods had to be notified to the registry via electronic messages. The registry issued to the new titulary an electronic test key to accompany future messages.[641]

III. National Legislation

Until now there has only been very little domestic legislation passed which would permit the use of electronically transferred bills of lading.

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[638] Trials began in 1995. The project is funded, in part, by the European Commission. Participants are located in Hong Kong, the Netherlands, Sweden, the United Kingdom, and the United States; Bolero is operated by a consortium of shipping companies, banks, and telecommunications firms.

[639] See J. Livermore & K. Euarjai, "Electronic Bills of Lading" (1997) 28 J. Mar. L. & Com. 55 at 58.

[640] See D. Faber, "Electronic Bills of Lading" (1996) L. Mar. & Com. L. Q. 232 at 243, there may, however, be a new legal relationship created between the carrier and the holder of the bill of lading if the registry is considered an agent of the carrier in transferring the right of control. It may be defined as an attornment or promise to deliver the goods to the new holder of the bill in accordance with his instructions.

A. *COGSA, 1992* (U.K.)

COGSA, 1992 (U.K.)[642] explicitly permits its provisions to be applied to EDI transactions.

B. *Sea-Carriage Documents Bill, 1996* (Australia)

The Australian *Sea-Carriage Documents Bill*[643] was introduced into the federal parliament in March 1996. An act has not yet entered into force. The bill applies to "electronic and computerised sea-carriage documents" and their communications and is based on the UNCITRAL Model Law.[644] The amendment of the Australian *Carriage of Goods by Sea Act, 1991* came into force on September 15, 1997.[645] The *Act* explicitly mentions as one of its purposes "to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form)".[646]

C. Proposed Amendments to U.S. *COGSA, 1936*

On May 3, 1996 the Maritime Law Association of the United States adopted a proposal to amend U.S. *COGSA, 1936*.[647] The proposal explicitly states that "in this Act, the term "electronic" shall include Electronic Data Interchange (EDI) or other computerised media. If the parties agree to use an electronic bill of lading, it shall be a 'contract of carriage' governed by this Act and the procedures for such bills of lading shall be in

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[641] See *ibid.* at 242.
[642] See *COGSA, 1992* (U.K.), *supra* note 28, s. 1(5)-(6).
[643] See *Sea-Carriage Documents Bill, 1996*. The bill was presented to the Australian parliament in March 1996.
[644] *Ibid.*, art. VI:

> (1) This Act applies, with necessary changes, 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. (2) This Act applies, with necessary changes, 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.

[645] See *Australian Carriage of Goods by Sea Act*, 1991, No. 160 of 1991 (as amended by the Carriage of Goods by Sea Amendment Act, which came into force on September 15, 1997).
[646] See *ibid.*, Part 2. s. 7.(2)(a).
[647] See *CoCoG/COGSA, 1996, supra* note 496.

accordance with rules agreed upon by the parties."[648]

D. *Utah Digital Signature Act, 1997*

The *Utah Digital Signature Act, 1997*[649] is the first legislation in the world to authorise the use of digital signatures.[650] The *Act* provides a system of two encryption keys; one private key for encrypting and one public one used for verifying the digital signature. The *Act* does not explicitly mention bills of lading, but is intended to cover a wide variety of documents. Thus it may also apply to bills of lading.[651]

IV. Conclusion

Many initiatives and projects, both on the national and international fronts, attempt to provide a legal and procedural basis for establishing the use of electronic bills of lading. This attempt to replace paper bills of lading by a comprehensive EDI system, however, has proven to be difficult. The chief impediment appears to be the formal documentary requirements of the many different parties involved.[652] The evidentiary value of electronic bills of lading is the main concern and major issue of the different initiatives and projects. There is a general consensus that the evidentiary value of EDI should remain the same as for paper bills of lading. Moreover, it is the explicit intent of the various international legislative projects and already enacted national statutes that substantive bill of lading provisions should continue to apply without any changes to electronic bills .[653]

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[648] *Ibid.*, s. 1, 46 U.S.C. § 1301(g).
[649] See Utah Code Ann. §§ 46-3-101 *et seq.*
[650] See Livermore & Euarjai, *supra* note 639 at 58, note 8. Similar Acts may now be found in other states, such as Washington, California and Florida.
[651] See *ibid.*
[652] Carriers, forwarders, bankers, underwriters, government agencies, etc.
[653] National legislation as well as the Hague/Visby Rules will have to be amended in order to explicitly apply to electronic bills of lading.

CONCLUSION

I. The Conventional Approach - Estoppel

The question from the transferee/consignee's point of view is how it can be certain of its rights against the carrier, and to what extent it can rely on the representations made in the bill of lading. According to the conventional approach which is usually applied under both English and U.S. law, representations in the bill of lading are not contractual terms. Thus, the transferee/consignee must show that the carrier is estopped from denying the truth of the statements.

II. The Contractual Approaches–"2nd Circuit Approach" and "Alternative Approach"

In contrast to the conventional approach, it is submitted that *general principles of the law of contracts* should be applied when interpreting representations made in the bill of lading. According to the contractual approaches, the "2nd Circuit Approach"[654] and the "Alternative Approach"[655], representations should be interpreted as to whether they represent a *promise that the goods were shipped as recorded in the bill* or a *promise to deliver the goods as recorded in the bill.* The main advantage of these approaches would be that they abolish the need for the transferee to show either that the representation was *unambiguous* or that it relied upon the representation to its *detriment.* Whilst abolishing the abuse and misinterpretation of the doctrine of estoppel, these approaches would preserve other recognised rules stemming from the law of contracts.[656] Furthermore, the contractual approaches would guarantee just results where it is doubtful whether the

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[654] See above Chapter Three, I.C.2.
[655] See above Chapter Three, I.B.
[656] See above Chapter Three, I.D.

carrier's agent had the *authority* to make representations in the bill of lading.[657]

III. Historical Background

Representations made in the bill of lading originally constituted a function as a mere receipt for goods. In the 17th century, bills of lading adopted a contractual function, although most bills were still dependent on charterparties and referred to the latter. Already in these early times, statements can be found to the effect that the bill of lading was an acknowledgement that the goods were received and that it constituted a *promise* to deliver them at the intended place.[658] When in the 19th century, due to the increasing number of cargoes per vessel, it had become impractical to enter into a charterparty with each shipper, the bill of lading bound the carrier by virtue of it being evidence against it of the quantity and quality of the goods, whereas the carrier's obligations were fixed in the charterparty. By the end of the 19th century, the carrier was absolutely liable for the goods at common law. Practically, however, it could be relieved of all liability by inserting exoneration clauses which were generally upheld as valid.[659]

IV. The Hague Rules, the Hague/Visby Rules and the Hamburg Rules

The *prima facie* concept adopted at the Hague Rules was a compromise between English common law and continental evidentiary principles which lacked sufficient clarity and led to disparate interpretations.[660] The "Visby-Protocol" of 1968 was to *clarify* but not meant to alter the intent of the original drafters and it explicitly stated that all statements made in the bill of lading were conclusive evidence in the hands of a *bona fide* third party holder for value.[661] This concept was also adopted in the Hamburg Rules of

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[657] See above Chapter Three, VII.D.
[658] See above Chapter One, I.B.
[659] See above Chapter One, I.C.
[660] See above Chapter Two, I. H.
[661] See above Chapter Two, II.

1978.[662] Under the Hague/Visby Rules, the common law principle, established in *Grant* v. *Norway*,[663] that statements as to quantity and as to quality are treated differently, was to be abandoned. By abandoning this "anomalous" treatment, it was to be recognised that a consignee or assignee relies as much on representations as to the quantity as on representations as to the condition or quality of the goods shipped. Under the Rules, as at common law, statements as to the quantity are *prima facie* evidence, when the bill of lading is in the hands of the *shipper*. The Rules differ, however, from the common law rule in treating statements as to the quantity, like those as to the condition of the goods, as conclusive evidence once the bill has been transferred to a *bona fide* third party holder for value. A further difference between the common law and the Hague/Visby Rules is that under the Rules the third party must not have "*relied to his detriment*" on the representation made in the bill of lading in order to raise the estoppel. The third party is merely obliged to have acted in good faith.

V. The Evidentiary Value of Bills of Lading as between the Shipper and the Carrier

The evidentiary value of representations in the bill of lading as between shipper and carrier is very similar under English and U.S. law. Under both the shipper may establish a *prima facie case* by *directly proving* that the goods were in good condition at the time of the shipment or by *indirectly proving* that the goods were damaged while in the carrier's custody. As distinct from that position, the Court of Appeals, 2nd Circuit, additionally requires the plaintiff to disprove "inherent vice".

In striking contrast, however, the bill of lading continues to constitute *prima facie* evidence in the United States if a qualification as to quantity or quality was inserted. Under U.S. law, the *burden of proving* that the goods recorded in the bill were not in fact

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[662] See above Chapter Two, III.
[663] See *Grant* v. *Norway*, *supra* note 118, where the principle was first established.

shipped is on the carrier.[664] Under English law, however, the burden is on the shipper to show that the goods were shipped. U.S. law is, thus, more favourable to the shipper than is English law. The contractual approaches would lead to the same results where the bill of lading is considered as constituting *evidence* of the contract of carriage.[665]

VI. The Evidentiary Value of Bills of Lading as between the Transferee and the Transferor

The evidentiary value of representations in the bill of lading as between the transferor and the transferee is based on the *concept of a warranty* under English law.[666] Whether the transferor warranted the genuineness or any other characteristic of the bill must be decided according to the usual test regarding the interpretation of contractual terms. The plaintiff must show that there was indeed such an implied contract. In interstate and export bills of lading in the United States, the matter is governed by § 80107 of the *Federal Bills of Lading Act, 1994* which is interpreted in such a way that banks may not become a co-warrantor of a seller/shipper. Thus, the buyer of the goods who has received the bill from a collecting bank may not, upon payment of a draft, attach the payment in the hands of the collecting bank.[667] There are no equivalent provisions under the Hague and Hague/Visby Rules.

VII. The Evidentiary Value of Bills of Lading as between the Transferee and the Shipper/Carrier

As distinct from the common law doctrine of estoppel, representations as to quantity and quality are of equal evidentiary value under § 80113(a) of the *Federal Bills of Lading*

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[664] See above Chapter Three, II.B.3.
[665] See above Chapter Three, II.D.
[666] See above Chapter Three, III.A.
[667] See above Chapter Three, III.D.

Act, 1994. The provision deals with representations by the carrier as to the quantity of goods, the date of shipment or a description of the goods. It appears that under § 80113(a) the estoppel is unaffected insofar as it relates to representations *other* than those mentioned in the provision.[668] § 80113(d) obliges the carrier to record and verify the kind and quantity of the cargo. Statements as to number and weight are, however, not mentioned in the provision.[669] The carrier *must* qualify the statements, record any damages, etc. to avoid liability under § 80113(a). It is therefore submitted that § 80113(a)-(b) is more onerous on the carrier than Article III(3) and (4) of the Hague and Hague/Visby Rules, which oblige the carrier only *upon demand* of the shipper to insert statements as to quantity, number, marks and apparent order or condition of the goods.

As regards the Hague and Hague/Visby Rules, it is submitted that the carrier should be bound by *all* statements it has itself inserted and not just by one of them.[670]

A. Qualifications Made in the Bill of Lading

Qualifications as to statements made in the bill of lading should be interpreted restrictively under the Hague/Visby Rules. The carrier may only insert qualifications where it was *materially* impossible for the master or other agents of the carrier to verify the shipper's statements.[671] U.S. law, under the provision of § 80113(b) and (c) of the *Federal Bills of Lading Act, 1994* is very similar to the English common law estoppel in its restrictive approach as regards qualifications of statements. The main difference, however, is that under § 80113 of the *Act* the qualification must be *true*.[672]

A more straightforward interpretation could be based on the contractual approaches, which would construe the statements and the qualifications made in the bill from the point of view of a reasonable third party. As a result, the carrier would be held liable for *all*

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[668] See above Chapter Three, IV.A.1.
[669] See above Chapter Three, IV.A.2.
[670] See above Chapter Three, IV.B.
[671] See above Chapter Three, V.A.
[672] See above Chapter Three, V.B.2.b.

inaccuracies about which it should *reasonably have known*.[673]

B. Deficiency of the Doctrine of Estoppel – "Clarity and Unambiguity"

The difficulties with the doctrine of estoppel are bigger with regard to contradictory than to negating qualifications.[674] Under the doctrine of estoppel it is not enough for the transferee to show that it reasonably interpreted representations made in the bill and relied on them. Moreover, representations made in the bill of lading must be *"clear and unambiguous"*. Thus, the burden is on the transferee to show that the representations made by the carrier in the bill were *"clear and unambiguous"* and that it reasonably interpreted these representations.[675]

Instead of the common law doctrine, the contractual approaches should be applied. The interpretation from a reasonable third party's point of view, whether representations made in the bill of lading amounted to a *promise* by the carrier *to deliver the goods as recorded in the bill of lading* ("alternative approach") or to a *promise that the goods were shipped as recorded in the bill of lading* ("2nd Circuit approach") would guarantee just results. According to these contractual approaches, the carrier would bear the risk of any ambiguities and that the quantity or quality stated does not accord with the true quantity or quality. This result may be justified by the fact that it is *in the carrier's realm of power* to make sure that any ambiguity does not appear in the bill. Furthermore, an ambiguous representation would *not simply have to be dismissed but would have to be reasonably interpreted*. The contractual approaches would therefore prevent the doctrine of estoppel from being misapplied and distorted by the application of principles stemming from the law of contracts[676] in order to ease the transferee's burden of showing that the representations in the bill were "clear and unambiguous".[677]

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[673] See above Chapter Three, V.B.3.
[674] See above Chapter Three, V. for the distinction between negating and contradictory qualifications.
[675] See above Chapter Three, V.C.3.
[676] See *The Skarp*, *supra* note 321, where the court questioned how a *reasonable reader* would interpret the representations made in the bill.
[677] See above Chapter Three, V.C.

§ 80113 of the *Federal Bills of Lading Act, 1994* is more demanding on the carrier than the English common law, according to which a test of clarity and unambiguity is applied. Moreover, the provision goes further than both the "alternative approach" and the "2nd Circuit approach" since it does not allow for a reasonable interpretation of representations, but provides for a list of permitted qualifications. The only interpretive freedom which exists is whether a carrier's qualification was of "like purport" to any of the statutory phrases.

C. Deficiency of the Doctrine of Estoppel – Detrimental Reliance

Moreover, difficulties with the doctrine of estoppel are caused by the requirement that the transferee must have *reasonably relied to his detriment* on the representations made in the bill of lading. Detrimental reliance is also required under § 80113(a) of the *Federal Bills of Lading Act, 1994*. As opposed to the common law estoppel, however, the provision does *not* require that the transferee's reliance must be *reasonable*.[678] Consequently, the reliance required is *less* than under English common law. There are but few reported cases in England and the United States in which detrimental reliance on the part of the transferee was not affirmed. Thus, it will *usually* be very difficult for the carrier to rebut the presumption that the transferee did in fact rely on the bill to its detriment. The practice that courts will almost always affirm detrimental reliance is, however, *inconsistent* with the formal requirement of the doctrine of estoppel and leads to uncertainty in the law.[679]

The contractual approaches should instead be applied. These approaches would provide a *doctrinally straightforward* solution and the doctrine of estoppel would not have to be misconstrued or distorted. The contractual approaches would also provide a doctrinally straightforward interpretation of conclusive evidence clauses.[680]

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[678] See above Chapter Three, V.C.3.c).
[679] See above Chapter Three, V.C.4.
[680] See above Chapter Three, VI.

D. The Alternative Approaches Correspond with Modern Legislation

A further advantage of the contractual approaches is that they accord with the legislators' intent to *simplify* actions against carriers[681] and to improve and assure the *tradability and transferability* of bills of lading in modern legislation such as the *Federal Bills of Lading Act, 1994* and *COGSA, 1992* (U.K.). If transferees were to prove detrimental reliance, this legislative intent would be undermined and frustrated. Under Section 4 of *COGSA, 1992* (U.K.) and Article III(4) of the Hague/Visby Rules detrimental reliance is no longer required. It is submitted that the application of the contractual approaches under the progressive *Carriage of Goods by Sea Act, 1992* (U.K.) appears to be possible.

VIII. The Authority of the Carrier's Agents to make Representations in the Bill of Lading

Representations made by the carrier's agents will only affect the carrier insofar as they are made by the carrier itself, or if they are within the master's *actual or apparent authority*. The agent's liability at common law is based on the concept of a *breach of warranty of authority*. The different treatment of statements as to the quantity and as to the condition also defeats the purpose of requiring that the master acknowledge the quantity of cargo shipped, since he will usually try to avoid liability for such statements by inserting standard qualifying clauses in the bill.[682] The master faced personal liability for inaccurate statements and could arguably be sued for damages to cover any loss resulting from the breach of his warranty of authority in making the statement under the former Section 3 of the *Bills of Lading Act, 1855*.[683] According to Section 4 of the new *Carriage of Goods by Sea Act, 1992*, however, the bill is "conclusive evidence *against*

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[681] See *e.g. COGSA, 1992* (U.K.) *supra* note 28, s. 2(4).
[682] See above Chapter Three, VII.A.1.
[683] See *Bills of Lading Act, 1855*, *supra* note 31, s. 3 according to which the bill of lading represented conclusive evidence only against the "master or other person signing" the bill.

the carrier of the shipment of the goods".[684] Thus, Section 4 of the *Carriage of Goods by Sea Act, 1992* and Article III(4) of the *Carriage of Goods by Sea Act, 1971* have the same object to improve the negotiability of bills of lading.

As opposed to the English law, the carrier is under § 80113(a) of the *Federal Bills of Lading Act, 1994* liable although the bill might have been issued in breach of the master's or other agent's authority, even if the agent issued a bill of lading fraudulently in his own, and not the carrier's interest. It is submitted that the carrier's liability is considerably stricter under the *Federal Bills of Lading Act, 1994* than at English common law. Finally, Section 4 of *COGSA, 1992* (U.K.) appears to be more progressive than § 80113(a) of the *Federal Bills of Lading Act, 1994* in not requiring detrimental reliance any longer. Since detrimental reliance is hardly ever denied by U.S. courts there will, however, be no practical difference.

Instead of the conventional approaches, the *contractual approaches* should be applied. Accordingly, the question would be asked whether, *from a reasonable third party's point of view*, the carrier's agent had authority to enter the contract on the terms upon which the transferee relied. The agent's authority would also include the authority to insert common statements in the bill, such as the date of shipment. The contractual approaches would furthermore deliver just results in a case where the goods were *neither* loaded *nor* received, and where *no* contract of carriage had been concluded.[685]

IX. The Future Prospects for the Evidentiary Value of Bills of Lading

The future of bills of lading does not appear to be uncertain in an environment of faster ships, shorter loading times, the competition of modern sea waybills and the introduction of new technologies for the transfer of data. Whatever innovations may be introduced, the evidentiary value of bills of lading as a receipt for goods is not expected to change. All

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[684] See *COGSA, 1992, supra* note 28, s. 4 [emphasis added].
[685] See above Chapter Three, VII.A.2.

legislative projects aimed at implementing a modern and reliable system of electronically transferable bills of lading in the carriage of goods by sea, explicitly state that they do *not* intend to change the evidentiary value of the bill of lading. Instead, the projects will not come into force until it will be absolutely certain that the new means of transferring bills of lading will ensure *exactly the same* evidentiary value as it already exists. Consequently, it can be expected that bills of lading will remain *the* transport document where goods are subject to negotiation while in transit.

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APPENDIX

THE DRAFTING HISTORY OF ARTICLE III(3) AND III(4) OF THE HAGUE AND HAGUE/VISBY RULES

I. Article III(3)

A. Article III(3)(a)

1. Brussels Meeting of the Sous-Commission, 1923 (ratified)

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things –
The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

2. Brussels Conference, 1922 (approved)/London CMI Conference, 1922

After receiving the goods into his charge the carrier of the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing amongst other things:
The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such manner as should ordinarily remain legible until the end of the voyage;

3. The Hague Conference, 1921 (approved)

After receiving the goods into his charge the carrier or the master or agent of the carrier shall on the demand of the shipper issue a bill of lading showing amongst other things
the leading marks necessary for identification of the goods as the same are furnished in

writing by the shipper before the loading starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as will remain legible until the end or the voyage;

4. The Hague Rules (initial draft by the International Law Association)

The carrier, master or agent of the carrier shall on the demand of the shipper issue a bill of lading showing, amongst other things –
The marks necessary for identification of the goods as the same are furnished in writing by the shipper, provided such marks are stamped or otherwise shown clearly upon the goods, or on the cases or coverings in which such goods are contained, in such a manner as will remain legible until the end of the voyage.

B. Article III(3)(b)

1. Meeting of the Sous-Commission, 1923 (ratified)/Brussels Conference, 1922 (approved)/London CMI Conference, 1922

Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

2. The Hague Conference, 1921 (approved)

... the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper before the loading starts;

3. The Hague Conference, 1921 (initial draft by the International Law Association)

The number of packages or pieces.
The quantity, weight, or measurement, as the case may be, as furnished in writing by the shipper.

C. Article III(3)(c)

Brussels Meeting of the Sous-Commission, 1923 (ratified)/Brussels Conference, 1922/London CMI Conference, 1922/The Hague Conference, 1921 (approved)/The Hague Conference, 1921 (initial draft by the International Law Association, Article

III(3)(d))

The apparent order and condition of the goods:

D. Article III, *proviso*

1. The Hague Conference, 1922/London CMI Conference, 1922

Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

2. Brussels Meeting of the Sous-Commission, 1923 (ratified)

Provided, That no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

3. The Hague Conference, 1921

Provided that no carrier, master or agent of the carrier shall be bound to issue a bill of lading showing description, marks, number, quantity, or weight which he has reasonable ground for suspecting do not accurately represent the goods actually received.

4. There is no comparable provision in the initial draft by the International Law Association for The Hague Conference, 1921

II. Article III(4)

1. 1963 CMI Stockholm Conference Article 1, § 2 of the draft Protocol amending the Hague Rules (The Visby-Amendment)

However proof to the contrary shall not be admissible when the Bill of Lading has been

transferred to a third party acting in good faith.

2. 1963 CMI Stockholm Conference proposal (by a minority of the sub-committee)

Such a bill of lading when transferred to a third party who is acting in good faith shall be conclusive evidence of the receipt by the carrier of the goods as therein described in accordance with 3 (a), (b) and (c).

3. Brussels Meeting of the Sous-Commission, 1923 (ratified)

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

4. Brussels Conference, 1922 (approved)

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. London CMI Conference, 1922

Such a bill of lading shall be prima facie evidence or the receipt by the carrier of the goods as therein described in accordance with section 3 (a), (b), and (c).

6. The Hague Conference, 1921

Such a bill of lading issued in respect of goods other than goods carried in bulk and whole cargoes of timber shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with section 3 (a), (b) and (c).
Upon any claim against the carrier in the case of goods carried in bulk or whole cargoes of timber the claimant shall be bound notwithstanding the bill of lading to prove the number, quantity or weight actually delivered to the carrier.

7. The Hague Rules, 1921 (initial draft by the International Law Association)

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described.