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Opening address by Sir Anthony Lloyd.

Mr. Chairman, Ladies and Gentlemen,

This is the first colloquium organised by the C.M.I. that I have had the privilege to attend, though naturally I have read with great interest the proceedings at Aix-en-Provence in September 1976 and at Vienna in January 1979. The Chairman on those occasions was, as you know, Lord Diplock. I was with him at a conference in Lima last August. The subject matter of the conference on that occasion was charter parties just as the subject of the present colloquium is Bills of Lading. I know that Lord Diplock wanted very much to be with us today. He sends his very best wishes to you all. He is, I suppose, among the most senior as well as among the most distinguished of all maritime lawyers alive today. When he retires, which I hope will not be for many years yet, he will have left an indelible impression on the commercial law and also on the affairs of the C.M.I. with which he has been associated for over twenty years.

But if we are to lose Lord Diplock we are infinitely lucky to have in his place, as Chairman of this colloquium, Professor Berlingieri. I realise, of course, that many of you, perhaps most of you, here today are what I might call "old hands" of the C.M.I. As a comparative new boy, I thought it might be interesting for me to look back very briefly into the history of the C.M.I. and into the people who have taken part in its proceedings over the years and have made it the highly influential body which it is today. And one thing which struck me is how the same names seem to recur from generation to generation. I am told that Francesco Berlingieri is the third generation of his family to have been associated with the C.M.I. I cannot imagine that we could have a more remarkable or a more distinguished man to serve as our President, both for his great intellectual ability and also for his immensely hard work. Now I have been used to working hard all my life but I am bound to say that Francesco simply takes my breath away. I know well, sitting as a Judge in England, how much the current work of the C.M.I. is influencing the development of our maritime law. With Professor Berlingieri as our President and with a fourth generation of Berlingieris already in the wings waiting to come on, I am confident that this fine tradition will continue. So I say we are indeed lucky to have Professor Berlingieri to chair this colloquium.

We are also infinitely lucky to be holding this colloquium here in Venice, if not in his home city then at least in his home country. Aix-en-Provence and Vienna are splendid cities, but Vienna at least is not immediately and obviously associated in the public mind with maritime affairs. I had better be careful what I say about Aix-en-Provence in the presence of Professor Bonassies. But Venice—there could not possibly, surely, be a more suitable or a more beautiful place in which to attend a conference; and if I were to spend the rest of my life at a never-ending conference on bills of lading then it would be in Venice that I would choose to spend it and even here in this very spot within fifty yards of the most marvellous and remarkable of all the masterpieces of Palladian architecture.

We are all deeply grateful to those who have helped to organise this conference and even furnish us with good weather for the purpose but especially we owe a debt of gratitude to Charles Goldie of Thomas R. Miller & Sons, on whom the main burden has fallen.

I think I am not alone in the views which I have expressed because I am told by Charles Goldie that there has been an almost unprecedented rush of members wanting to attend this colloquium, so much so that extra hotel space has had to be booked. When the original brochure was sent out, it should have had a typescript across it 'Hurry, hurry while the tickets last'. But it is indeed gratifying that so many members have come from so many different countries. I cannot mention them all, but eleven from France, ten from the Federal Republic of Germany, two from the USSR, five from Nigeria, twenty two from the USA, nine from South America, twenty two from Scandinavia, from England twenty two and then, of course, Italy; if I may adapt in this connection the words of Leporello from Mozart's opera Don Giovanni: "In Espagna sei cento quaranta ma in Italia son già mille e tre".

I am glad, as I say, that so many different countries are represented, for this is after all the Comité Maritime International and we have no purpose at all unless it is to bring together representatives from all the maritime nations. That is what we have succeeded in doing today, and I for one hope to learn a great deal in the next two days. It is so easy to get locked into one's own domestic systems of law. It is occasions like this which make one look out, force one to look out, and see what is happening elsewhere.

Now I have mentioned the beauties of Venice, but those beauties are not the only reason why this colloquium is so well attended. There is also our very distinguished list of speakers. They are all remarkable men. You will by now have read their papers, or at least I hope you have, because it is no purpose of mine at this stage to seek to summarise them. Each of them

will introduce his paper briefly in a few moments. But there is one thing which it seems to me that all our speakers have in common, and that is a very high degree of scholarship. You can see that from their papers. Four professors out of six is not a bad proportion, and the other two, as we say in English, are no slouches. But for me the most interesting thing about this colloquium is going to be how their scholarly analysis of the existing law and practice and their suggestions for reform are going to stand up to what I might call the light of common day. Because it is all of you with your vast and varied practical experience who are going to tell us what is really wrong with the present system and what if anything can be done to put it right.

Now the subject of this colloquium, "Bills of Lading", is of course vast, so vast indeed that it seemed right to give it a particular slant. The slant we have chosen is fraud. Of course, we are not limiting ourselves in any way to questions of fraud. There are many other aspects of the bill of lading as a receipt, as a document of title, and as evidence of the contract of carriage, which we are going to cover. But fraud in relation to bills of lading seems to me to be a particularly interesting and, I fear, increasingly relevant aspect of the subject. I am sorry to have to say it, but it is clear to me from where I sit that the amount of fraud in relation to bills of lading is on the increase. I think we all in our hearts know that. It has been the subject of numerous studies, by the IMO, by the ICC, and by the UNCTAD Committee on Shipping. I have found the UNCTAD Secretariat report which was dated June of last year of considerable interest. I would like in that connection also to mention a recent paper which I have read by Dr. Radović from Yugoslavia. So fraud is unquestionably in the air. It seems to me that it is time that we at CMI made our views known.

It so happens, by one of those coincidences which is said to delight little minds, and certainly delights my mind, that it is almost exactly one hundred years ago to the day since one of the most famous of all English cases on bills of lading came before our Court of Appeal. The case is called *Sanders* v. *Maclean* (1883) II Q.B.D. 327, and the question in the case was whether, when a bill of lading is issued in triplicate, a CIF buyer can insist on all three originals being tendered. It was held that he could not. The case was argued by a future Lord Chancellor on one side, a future Attorney General and Lord of Appeal on the other. It came before three of the most eminent Judges who have ever sat in our Court of Appeal. Unlike modern cases, it took only a day to argue. The argument was, of course, that unless all three originals were tendered, there would be an obvious opportunity for fraud. In the course of giving his judgment in favour of the sellers in that case (the date was the 28th of April, 1883) Lord Justice Bowen had this to say, and I hope you will forgive me if I read a paragraph from his Judgment in full because it is so directly relevant to what we shall be discussing at this colloquium and is couched in such superlative prose that I cannot resist the temptation. It is, I think, one of only two passages in all our Law Reports to have found its way into the Oxford Book of English Prose; so apart from its legal merit, I thought you might be interested to hear it as an example of the English language at its best:

"If we were to hold that such a tender is not adequate, that is to say a tender of a single original bill of lading, instead of all three, we must as it appears to me deal a fatal blow at this established custom of merchants according to which time out of mind bills of lading are drawn in sets, and one of the set is habitually dealt with as representing the cargo independently of the rest. If the set for the purposes of contracts like the present must always be kept together, the whole object, be it wise, or unwise of drawing bills of lading in triplicate is frustrated. For, if one of the set were lost or had been forwarded by the shipper or any subsequent owners of the cargo to his correspondent, by way of precaution, the cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods."

And then this great passage: "But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible fraud. The object of mercantile usages is to prevent the risk of insolvency not fraud, and anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case—credit, not distrust, is the basis of commercial dealings. Mercantile genius consists principally in knowing whom to trust, and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery".

So, one hundred years ago, Lord Justice Bowen was saying that commercial documents are designed to meet the risk of insolvency, not the risk of fraud. I suggest that one of the main themes of this colloquium should be whether a hundred years later we can still afford to take that view, whether the time has not come for us now to make a determined effort to combat fraud by reducing the scope and opportunity for dishonest men.

Now I said just now that, sitting where I do, fraud is becoming an increasing problem. We all remember the spectacular fraud by the owners of the Salem in which the conspirators got away with a cargo of crude oil valued at $56 million. There was the very important recent decision of the House of Lords in a case called *United City Merchants* v. *The Royal Bank of Canada* [1983] A.C. 168, a case referred to by Professor Schultsz and Mr. Thomas in their paper. The leading speech in that case was given by Lord Diplock and it contains a masterly analysis of the contractual relationships arising under a documentary letter of credit. More important from our point of view, the House of Lords held that the only exception to the Bank's obligation to pay against documents which appear on their face to be regular is fraud on the part of the beneficiary. Fraud on the part of a third party, in that case an employee of the carriers or their agents, does not suffice. So that, although the Bank knew in that case that the bill of lading had been antedated by a day or so in order to comply with the letter of credit, the Bank was nevertheless obliged to pay because the beneficiary was not party to that fraud.

Let me give you lastly one other illustration of a much more humdrum ordinary kind which came before me only last term. It concerned the liner trade from Europe to West Africa. The ship's agents issued what looked like an ordinary received for shipment bill of lading covering a consignment of goods for shipment to Douala. The bill of lading came into the hands of a bank who lent $ 1.5 million to a dishonest shipper on the security of the bill. The goods were then shipped and the dishonest shipper demanded a shipped bill of lading. The ship's agents were naturally reluctant to issue a shipped bill of lading while the received for shipment bill of lading was still in circulation. But they were persuaded to do so against an undertaking from the forwarding agents to surrender the shipped bill of lading as soon as possible. This of course they never did. When the vessel reached Douala the bank presented the received for shipment bill of lading and demanded delivery. The Master declined to deliver, for he was expecting the shipped bill to be presented at any moment. But it never was, and in the end the master, not knowing what to do, brought the goods back to Europe. The shipowners then interpleaded. I held that the bank was entitled to the goods under their received for shipment bill of lading. But the shipowners then claimed freight for the return voyage out of the proceeds of sale of the goods. I would not agree to that. It seemed to me that they had brought the difficulty on themselves by issuing the shipped bill of lading whilst the received for shipment bill of lading was still in circulation, particularly as the bank had notified the shipowners of their interest and indeed had even sent someone to inspect he goods before there were shipped.

Now the moral of that story is that the shipowners should never have trusted the shipper or accepted the undertaking from the forwarding agent to return the received for shipment bill of lading. If mercantile genius consists, as Lord Justice Bowen said, in knowing whom to trust, it was singularly lacking in that case.

Now I give that just as an example of the sort of case which is becoming increasingly common. I think it would be of great value if in the next few days at this colloquium we were to pool our experiences of other similar frauds so that we can decide what if anything can be done to limit the opportunity for fraud in the use of bills of lading and so that we can then make recommendations accordingly.

Of course, as I said earlier, we are not confining ourselves to fraud. There are many many other matters which we are suggesting for discussion. As the Chairman has explained, we will this afternoon, as in previous years, be splitting up into small working groups so that we can each consider particular aspects of the problems that arise and particular solutions. But it will all be against the background of our determination to do what we can to prevent the opportunity for fraud. That will be the underlying theme.

Now there will be four groups in all. The first group will be chaired by Professor Schultsz and he will be considering among other things the age-old practice of issuing more than one original bill of lading, a practice which lawyers have condemned for a hundred years or more. The question arises: has the time not now come that we should make a concerted effort to get rid of that practice? Professor Schultsz with his group will also be considering the much newer practice of the Master giving delivery against one originall bill of lading which is carried on board. Now to a lawyer that sounds as if it is getting the worst of all worlds. It sounds cockeyed. But it may be that there are good commercial reasons why that practice has sprung up. So those are the sort of questions that the first group will be considering, and there will be a great deal of meat in their discussions.

Then the second group will be under Professor Bonassies and Professor Grönfors. They will be considering in depth the different functions of the bill of lading as a receipt, as a document of title, and as evidence of the contract of carriage. But they will also be considering, and this should be one of the most interesting aspects of this colloquium, whether and to what extent it may now be possible to get rid of the traditional bill of lading

altogether and substitute something more similar to the non-negotiable waybill. Why is it we still stick to the bill of lading in the very many cases where it serves no special purpose? And then what about computerised documents? That is of course a subject on which Professor Grönfors is the leading authority; so that group will have many interesting matters to consider and discuss.

The third group is under Professor Bonelli and Per Gram. They will be considering the vital question of the carrier's rights and obligations where the bill of lading is not produced at destination. What is the carrier to do? Surely it ought to be possible for us here to devise simple guidelines in those circumstances so that P & I Clubs can give their members uniform and certain advice. Closely connected with that question is the Intertanko scheme for a central register of bills of lading which is the brainchild of Per Gram. I must say that, coming fresh to that scheme, I was at first somewhat sceptical. But I have become increasingly enthusiastic as I have learned more about it, not only as a way of dealing with delay in the transmission of bills of lading but also as a possible way of combating fraud. Whether the scheme could ever be made fully effective without an international convention I am not yet sure. But there is a lot from that group which I myself hope to learn over the next few days.

And finally, there is the fourth group under Mr. Thomas. He is going to consider among other things the all-important role of banks in relation to documentary credits and the practice which has been condemned so often but which still continues of antedating bills of lading in order to make them comply with letters of credit. Why does the date of shipment make so much difference? What does it matter whether the buyer gets June goods or July goods? Ah, comes the answer, because the date of shipment is part of the description of the goods. But why should it be? It is a very obvious question to ask but I am not at all sure that I know the answer. While on that aspect, is there any real reason why the distinction between the received for shipment bill of lading and the shipped bill of lading should continue? What if any purpose is served by that distinction? Then Mr. Thomas is going to consider the vexed question of issuing clean bills of lading against letters of indemnity. So again there will be much of great importance and interest for that group to consider.

May I make just one last comment. I myself shall be very disappointed if at the end of the day we have done nothing but discuss things. As the Chairman said, you are not here just to listen, you are not even here just to discuss. Without doubt discussion is of great value, especially when it takes place, as it does here, across national boundaries. But we do not want C.M.I. to get a reputation for being, as it were, nothing but a talking shop. It seems to me that there are a number of matters, some of which I have mentioned, on which we ought to be able to make definite recommendations for action. I do not expect us to be able to solve all the problems of bills of lading within the next two days. But I do hope that when I come to sum up the work of this conference on Wednesday afternoon we shall have some positive recommendations to make, if only in a limited field. I hope that you will all bear that in mind during the next two days. I think all that remains for me to do is to wish you luck in your various groups and we will meet again on Wednesday morning. The Chairman and I will be visiting all the groups in turn in order to learn what is going on and we will be hearing reports from all the groups, as you know, on Wednesday morning.

Thank you very much.

LE CONNAISSEMENT—OBSERVATIONS GENERALES

par

Pierre Bonassies, *professeur à la Faculté de droit et de science politique d'Aix-Marseille.*

Il y a trois cents ans, l'Ordonnance de la Marine de Colbert, que nous citerons non comme un texte de droit français mais comme l'expression, en son temps, du droit commun du monde maritime, définissait le connaissement comme la reconnaissance des marchandises chargées dans le vaisseau, signée par le maître du bâtiment, le capitaine *(Ordonnance, livre troisième, titre II, art. 1)*. Présenter une réflexion générale sur le connaissement, comme nous voudrions le faire, c'est se demander dans quelle mesure la définition de l'Ordonnance de la Marine demeure aujourd'hui exacte, dans quelle mesure elle s'est enrichie ou appauvrie, quel avenir aussi on peut envisager pour le connaissement, certainement l'une des institutions les plus riches à la fois de la pratique professionnelle et de la théorie juridique.

I

Pour répondre à cette question, et parce que le droit maritime, plus que tout autre ensemble de règles juridiques, s'est formé dans l'histoire et par l'histoire, il faut d'abord interroger l'histoire. Et celle-ci nous apprend que le connaissement s'est vu assigner successivement trois fonctions.

Le connaissement a d'abord été, comme le dit l'Ordonnance de la Marine, un reçu du chargement des marchandises, délivré par le capitaine. Sous ce premier aspect, la pratique du connaissement paraît s'être généralisée au quinzième siècle. Antérieurement, aucun reçu n'était délivré au chargeur, le chargement de la marchandise étant seulement constaté sur le registre du navire. Il semble bien, d'autre part, que, dès l'origine, le connaissement ait été un peu plus qu'un simple reçu. L'un des connaissements les plus anciens connus, un connaissement anglais de 1538, constate non seulement la réception des marchandises (26 sacs de sel), mais aussi l'engagement de l'armateur de transporter ces sacs de Londres à Dice Key. Au *dix-septième siècle*, les connaissements se font plus précis encore, indiquant en particulier que le capitaine ne s'engage à délivrer la marchandise dont il donne reçu que sous réserve des périls de la mer, ajoutant, dans tel connaissement français, la formule "selon les us et coutumes de la mer" (voir les connaissements cités par W.P. Bennett, *The History and Present Position of the Bill of Lading*, Cambridge, 1914).

Dans un deuxième temps, la coutume commerciale a conféré au connaissement une seconde fonction, celle d'un titre négociable représentant, incorporant la marchandise chargée à bord du navire. C'est dès le dix-huitième siècle que la pratique anglaise voit ainsi dans le connaissement un titre représentant la marchandise, et les tribunaux anglais reconnaissent valeur juridique à cette pratique dès 1787, dans l'arrêt *Lickbarrow v. Mason (1787) 2 T.R. 63*). En France, l'idée, acceptée dès cette époque par certains tribunaux, rencontre la résistance de certains juristes, cependant éclairés, tel Emerigon qui, en 1783, refuse de considérer le connaissement comme un "papier négociable" (*Traité des assurances, ch. XI, sect. II, no. 8*). C'est seulement en 1859 que tout doute sera levé, la Cour de Cassation française cassant un arrêt de la Cour de Rennes, en posant le principe que "la propriété des marchandises voyageant par la voie de mer est représentée par le connaissement" et que "le connaissement, ainsi que les marchandises dont il est la représentation, se transmet par la voie de l'endossement". (*Cass. civ. 17 août 1859. D. 1859.1.347*).

Au dix-neuvième siècle, enfin, le connaissement acquiert une troisième fonction, celle de document contractuel définissant les obligations et les droits de chacune des parties, les transporteurs d'une part, le binôme chargeur-destinataire d'autre part, ou, si l'on préfère, la marchandise.

Nous l'avons dit, c'est à la vérité dès l'origine que le connaissement contenait des dispositions énonçant, sur tel ou tel point précis, les obligations sinon du chargeur, au moins du capitaine ou du propriétaire du navire. Mais le seul véritable document contractuel demeura longtemps la charte-partie. C'est elle qui fixe le taux du fret, délimite la responsabilité du propriétaire du navire et les "libertés" qui lui sont consenties, par exemple au cas ou le port de destination est bloqué par les glaces. Les choses vont changer, dès les premières années du dix-neuvième siècle, avec l'apparition des lignes régulières.

Lorsqu'il s'agit de transporter une caisse de vin de Bordeaux à Londres, ou un ballot de tissus de laine de Londres à New York, la charte-partie, document lourd et complexe, ne répond plus aux nécessités de la pratique. Seul un connaissement sera établi et remis au chargeur. Mais, parce que aucune charte-partie n'a été rédigée, le connaissement va s'enrichir. On y inscrira des clauses de plus en plus nombreuses, précisant la responsabilité du transporteur, les libertés évoquées ci-dessus, et le connaissement deviendra la formule imprimée à en-tête de la compagnie de navigation que nous connaissons tous.

A la fin du dix-neuvième siècle, l'évolution était achevée dans tout le monde maritime lorsque, en 1893, intervint le *Harter Act* américain. Ce texte est, à notre connaissance, le premier qui, ignorant les affrètements au voyage, a entendu règlementer directement et exclusivement non pas seulement les connaissements, comme l'avait déjà fait, pour partie, le *Bills of Lading Act* britannique de 1855, mais surtout les opérations de transport maritime couvertes par ces seuls documents. Avec la Convention de 1924 d'abord, puis le Protocole de 1968 et les Règles de Hambourg, l'évolution commencée cinq siècles plus tôt s'est achevée. Au terme de cette évolution, qu'est devenu le connaissement?

Nous dirons d'abord qu'il s'est diversifié en la forme. Les premiers connaissements indiquaient comme destinataire une personne dénommée, seule habilitée à recevoir la marchandise à destination. Très vite, la chose est acquise dès la fin du dix-septième siècle au moins, sont apparus des connaissements portant la mention à ordre, puis au porteur, et ces trois formes distinctes, connaissement au porteur, connaissement à ordre et connaissement à personne dénommée, sont expressément visées par l'article 281 du Code de Commerce français de 1807. Les premiers connaissements, aussi, parce qu'ils engageaient le capitaine et que celui-ci n'exerçait ses pouvoirs que sur le navire, étaient des reçus constatant l'embarquement effectif de la marchandise à bord du navire. Avec le développement des transports réguliers, sont apparus des connaissements constatant seulement la réception des marchandises par le transporteur, en vue de leur embarquement. Le connaissement "reçu pour embarquement" est ainsi venu prende place à côté du connaissement "embarqué".

Tous ces connaissements ne peuvent, à l'évidence, avoir la même valeur. On a même pu se demander si certains d'entre eux étaient de véritables connaissements. Un connaissement non embarqué, ou à personne dénommée, est-il un connaissement, ou un simple document de transport? Pour nous, ce serait là aller trop loin. Un document qui porte l'intitulé "connaissement", et comporte les mentions habituelles (nom du transporteur, du chargeur, du destinataire, identification des marchandises, etc..), est un connaissement, même s'il est à personne dénommée, et même s'il indique que la marchandise a été reçue pour embarquement. Il reste que la valeur du connaissement dépendra de sa forme précise, au moins pour ce qui est de certaines des trois fonctions que l'histoire lui a assignées.

II

Envisageons d'abord le connaissement dans sa fonction de reçu des marchandises. Nous constaterons que sa valeur s'est, ici, constamment renforcée avec le temps.

Très vite, il a été admis que les mentions du connaissement faisaient foi non seulement entre les parties au transport, mais aussi à l'égard de certains tiers, et en particulier des assureurs. La règle, recueillie dans l'article 383 du Code de Commerce français, (1807) a été récemment réaffirmée par un arrêt de la Cour fédérale américaine de la Nouvelle Orléans (*Morrison Grain v. Utica*, 8 décembre 1980, 1982 A.M.C. 658).

Mais surtout, c'est la valeur probatoire générale du connaissement qui a été précisée et développée. Dès l'origine, certes, la valeur des mentions du connaissement, par exemple des mentions concernant le poids de la marchandise chargée, est très grande. Mais elle n'a pas un caractère absolu. Tout au long du dix-neuvième siècle, on voit ainsi des tribunaux admettre que le transporteur, voire le capitaine, peuvent faire la preuve que les mentions du connaissement ne traduisent pas la réalité des choses, et ce même à l'encontre du destinataire porteur d'un connaissment. Par exemple, telle est la solution adoptée par la célèbre décision angaise *Grant v. Norway* (1851), 10 C.B. 665). Pareillement, à la même époque, certains textes législatifs admettent la possibilité générale de la preuve contre le connaissement, même au bénéfice du transporteur (voir les Codes brésilien et argentin, cités en Desjardins, Traité de droit commercial maritime, 1885, vol. 4, p. 50). Tel sera encore le cas, au moins dans les termes, de la Convention de 1924, qui stipule, d'une manière générale, que le "connaissement vaudra présomption, sauf preuve contraire, de la réception par le transporteur des marchandises telles qu'elles y sont décrites" (article 3, paragraphe 4).

Mais, déjà en 1924, les choses avaient changé. En droit français, dès la fin du dix-neuvième siècle, les tribunaux se font plus sévères et décident que le transporteur ne peut en aucun cas faire la preuve de l'inexactitude des mentions du connaissement contre le

destinataire. C'est la règle qui sera recueillie par le législateur dans la loi du 2 avril 1936. Ce texte introduit en droit français interne les principles de la Convention de 1924, mais il énonce expressément que le transporteur ne pourra se prévaloir d'une inexactitude des mentions du connaissement "à l'égard de toute autre personne que le chargeur". Pareillement, la loi du 18 juin 1966, qui a tenté de rapprocher plus encore que la loi de 1936 le droit interne français du régime de la Convention de 1924, énonce que le transporteur ne peut se prévaloir de l'inexactitude commise par le chargeur dans ses déclarations "qu'à l'égard du chargeur".

En droit anglais, l'évolution a peut-être été moins nette, mais va dans le même sens. Oubliant quelque peu les leçons de l'arrêt *Grant v. Norway*, les tribunaux ont admis, dans les années 1900, que le transporteur, par application de la théorie de l'*estoppel*, ne pouvait, dans certains cas au moins, contester les mentions du connaissement à l'égard des tiers qui avaient accordé foi à ces mentions, notamment pour se porter acquéreur des marchandises couvertes par le connaissement (voir, entre autres, *Lishman v. Christie*, (1887) 6 Asp. M.C. 186; *Silver v. Ocean Steamship Company*, (1929) 18 Asp. M.C. 74; sur l'autorité, très restreinte, susceptible d'être aujourd'hui encore reconnue à l'arrêt *Grant v. Norway*, voir, *"The Nea Tyhi"*, [1982] 1 Lloyds Rep. 606). En droit américain, la même règle est appliquée, peut-etre plus largement, sur les mêmes fondements (voir, *Westway Coffee v. Netuno*, D.C.N.Y. 1981, 1982, A.M.C. 505 et les références; voir aussi le *Pomerene Act*, de 1916, sect. 22).

L'évolution qui s'est ainsi produite, tant en droit anglais ou français que dans de nombreux autres droits, a conduit à la modification de la Convention de 1924. On le sait, le Protocole de 1968 ajoute ici aux dispositions de la Convention de 1924 l'observation que "la preuve contraire n'est pas admise lorsque le connaissement a été transféré à un tiers porteur de bonne foi". Dans une terminologie plus précise, les Règles de Hambourg énoncent pareillement que "la preuve contraire par le transporteur n'est pas admise lorsque le connaissement a été transmis à un tiers, y compris un destinataire, qui a agi de bonne foi en se fondant sur la description des marchandises donnée au connaissement" (article 16. 3, b; voir, dans le même sens, de nombreux textes nationaux, dont, par example, Code de commerce maritime libanais de 1947 art. 200; le Code de commerce maritime tunisien de 1962, art. 215; le Code maritime de la République Algérienne de 1976, art. 761).

On notera la différence qui existe ici entre la loi française de 1966 et le texte du Protocole de 1968, et plus encore les Règles de Hambourg. En droit français, le transporteur ne peut faire preuve contre le connaissement qu'à l'égard du seul chargeur. Il ne peut faire cette preuve, ni à l'égard d'un destinataire ayant acquis le connaissement à ordre par endossement, ni à l'égard d'un destinataire tenant ses droits d'un connaissement à personne dénommée. Dans une interprétation stricte, mais qui s'impose, le transporteur pourra demain, quand les Règles de Hambourg seront en application, faire la preuve contre les mentions du connaissement à l'égard du destinataire désigné par un connaissement à personne dénommée, car ce destinataire ne peut être considéré comme ayant "agi de bonne foi en se fondant sur la description des marchandises donée au connaissement". Par hypothèse même, en effet, les relations existant entre le chargeur et le destinataire sont antérieures au connaissement. Et, sans doute, en est-il de même déjà aujourd'hui, sous l'empire du Protocole de 1968, car on peut estimer que le destinataire personne dénommée n'est pas un "tiers porteur de bonne foi".

A cette valeur, quasi absolue, du connaissement, le droit actuel, tel que représenté par la Convention de 1924, apporte une exception remarquable en cas de fraude, mais une exception qui ne se retrouve pas dans les Règles de Hambourg.

La problème de la fraude dans le domaine des connaissements est l'un des problèmes spécifiques que le C.M.I. a retenus pour le présent séminaire. Aussi, serons-nous ici trés bref. Rappelons simplement qu'avant la rédaction de la Convention de 1924, les tribunaux, même les plus favorables à la reconnaissance d'une valeur absolue au connaissement, avaient toujours réservé le cas de fraude (voir, en droit français, Cass. Req., 3 janvier 1872, D. 1872, 1.73; en droit anglais, les observations de Lord Esher dans l'arrêt *Lishman v. Christie*, cité supra). La Convention de 1924 a inscrit dans son texte la même réserve, tout en en précisant la portée. Elle dispose que le transporteur est dégagé de toute responsabilité en cas de fraude du chargeur, mais seulement s'agissant d'une fraude sur la valeur ou la nature des marchandises mises à bord. Et il est généralement admis que cette exception de fraude peut être opposée par le transporteur non seulement au chargeur, ce qui va de soi, mais aussi au destinataire tiers porteur de bonne foi du connaissement (voir, entre autres, Cour d'Appel d'Aix en Provence, 10 janvier 1979 Droit Maritime Francais 1980 301; *La Fortune v. S.S. Irish Lash*, New York Court of Appeals, 11 octobre 1974, 1974 A.M.C. 2185).

A cet état de choses, les Règles de Hambourg apportent une modification considérable. Enonçant, nous l'avons vu, que le transporteur ne peut prouver contre les mentions du connaissement à l'égard des tiers de bonne foi, elles ne font nulle part d'exception pour le cas de fraude. Il faut donc en conclure que, demain, le transporteur sera responsable à l'égard du

destinataire de la nature de la marchandise mentionnée au connaissement même en cas de fraude, à moins que les réserves qu'il aura pu éventuellement porter sur le connaissement ne soient considérées comme satisfaisantes.

La charge que fait ici peser sur le transporteur le régime du connaissement est très lourde. Elle l'est d'autant plus que, en droit comme en fait, les mentions les plus importantes concernant la marchandise (nombre, poids, nature) sont portées sur le connaissement sur les déclarations du chargeur, voire par le chargeur lui-même. L'article 3, paragraphe 3 de la Convention de 1924 stipule que le transporteur devra délivrer au chargeur un connaissement, "portant en autres choses. . .ou le nombre de colis ou de pièces, ou la quantité ou le poids, suivant les cas, tels qu'ils sont fournis par écrit par le chargeur". En pratique, c'est très souvent le chargeur lui-même ou son transitaire qui inscrivent sur le formulaire de connaissement établi au nom du transporteur les mentions concernant les marchandises. Et la rapidité des procédures du transport maritime interdit le plus souvent au transporteur d'effectuer un contrôle efficace de la conformité des mentions portées sur le connaissement avec la réalité des choses, lors de la remise des marchandises par le chargeur.

Cet état de choses, lourde responsabilité du transporteur, préparation du connaissement par le chargeur, difficulté du contrôle, a conduit les transporteurs à tenter d'alléger la charger que fait peser sur eux le connaissement, en portant sur le connaissement telle ou telle réserve (par exemple "poids et quantités non vérifiés"), destinée à affaiblir, voire à éliminer la force probante du connaissement.

Cette pratique des réserves est apparue dès le dix-neuvième siècle avec la généralisation des connaissements imprimés. A la fin de ce siècle, l'usage des réserves était devenu systématique, et des réserves générales figuraient, souvent imprimées à l'avance, dans le texte des connaissements. Dans la plupart des pays maritimes, la valeur de ces réserves était reconnue par les tribunaux, Ceux-ci décidaient qu'en présence de semblables réserves, le transporteur n'était pas responsable du poids ou de la quantité de marchandise indiqués au connaissement. Aux Etas Unis, pays pourtant plus favorable aux chargeurs qu'aux armateurs, c'est le législateur lui-même qui, en 1916, dans le *Pomerene Act*, avait reconnu la valeur des réserves, en énonçant que le transporteur peut porter sur le connaissement les mots "*shipper's weight, load, count,*" ou tout autre terme équivalent, et qu'alors, il cesse d'être responsable du fait que les marchandises n' ont pas été remises, ou que leur description est inexacte (*Pomerene Act*, section 21; voir, dans le même sens, Code de Commerce Maritime marocain de 1919, art. 265, pour les réserves "que dit être", ". . poids, qualité et contenu inconnu", et "toutes autres équivalentes"). Mais l'exemple du législateur américain n'a pas été suivi par les rédacteurs de la Convention de 1924. Il semble que ceux-ci aient été influencés par le mouvement d'opinion qui s'était développé, parmi les spécialistes du commerce international, contre les abus de la pratique des réserves. En tout état de cause, la Convention de 1924 n'autorise pas expressément le transporteur à faire des réserves. Elle se borne à disposer dans son article 3, paragraphe 3. "aucun transporteur ne sera tenu de déclarer ou de mentionner dans le connaissement des marques, un nombre, une quantité ou un poids dont il a une raison sérieuse de soupçonner qu'ils ne représentent pas exactement les marchandises actuellement reçues par lui, ou qu'il n'a pas eu les moyens raisonnables de vérifier".

Ces dispositions ont fait l'objet d'une application très confuse par les tribunaux. D'une manière générale, elles ont conduit les tribunaux à exiger des transporteurs des réserves précises, et à écarter toutes les réserves générales imprimées à l'avance ou apposées sur le connaissement à l'aide d'un tampon humide. Cela a été le cas particulièrement en France, où le législateur, dans les textes sur le transport interne, a ajouté aux dispositions de la Convention de 1924 l'obligation pour le transporteur, qui refuse d'inscrire au connaissement les déclarations du chargeur, de faire mention spéciale et motivée des raisons qui lui permettent de douter de leur exactitude, ou de l'impossibilité où il a été de les contrôler. Mais, récemment, les tribunaux ont découvert, au moins aux Etats Unis et en France, une nouvelle lecture de la Convention de 1924. Plusieurs décisions rendues en 1975 dans ces deux pays énoncent que le transporteur qui soupçonne que les déclarations faites par le chargeur ne sont pas exactes ne peut se protéger qu'en refusant d'inscrire sur le connaissement les mentions qu'il met en doute, seule possibilité qui lui soit offerte par la Convention de 1924 (ou, aux Etats Unis, le C.O.G.S.A. de 1936). Si le transporteur n'utilise pas cette possibilité, il ne peut ultérieurement contester les mentions du connaissement, alors même qu'il a apposé sur celui-ci telle ou telle réserve (voir en ce sens, en France, Rouen, 14 février 1975, Droit Maritime Français 1977, 234; aux Etats Unis, voir entre autres *Baby Togs v. S.S. American Ming*, New York, S.D., 6 mars 1975, 1975 A.M.C. 2012; *Westway Coffee v. Netuno*, New York, S.D. 15 septembre 1981, 1982 A.M.C. 505—On notera que ces deux décisions concernent des connaissements couvrant des transports en provenance de l'étranger, non couverts par le *Pomerene Act*). Et, plus récemment, la Cour de Cassation française a donné son adhésion à une telle analyse, dans une décision du 29 janvier 1980 (Droit Maritime Français 1981. 265).

A la vérité, il est difficile de savoir si cette nouvelle approche du problème des réserves va se généraliser. Les décisions auxquelles nous avons fait référence concernent des transports par conteneur, et des cas où les réserves apposées sur le connaissement étaient demeurées très générales (simple mention *"said to contain"*). Il n'est pas sûr que l'analyse, très rigoureuse, ici faite, soit étendue à des réserves précises, et justifiées sur le connaissement même. Au surplus, il est à noter que les Règles de Hambourg ont, sur ce point, abandonné la rédaction de la Convention de 1924. Sans atteindre la précision du *Pomerene Act*, elles énoncent que le transporteur qui a des doutes sur l'exactitude des mentions du connaissement, ou n'a pas eu les moyens suffisants de les contrôler, "doit faire dans le connaissement une réserve précisant ces inexactitudes, la raison de ses soupçons, ou l'absence d'un contrôle suffisant". Il semble donc bien que, après la mise en application des Règles de Hambourg, on ne pourra plus discuter la valeur des réserves précises et circonstanciées mentionnées sur un connaissement. Il reste que tant que l'on reconnaîtra aux mentions du connaissement une valeur à peu près absolue, le problème des réserves demeurera d'une grande difficulté. Mais cette valeur, nous allons le voir, est le prix que doit payer le connaissement, du fait de son utilisation, comme titre représentant la marchandise, dans le commerce international.

III

La seconde fonction du connaissement, du moins quand il s'agit d'un connaissement à ordre, ce qui est le cas le plus général, c'est d'être un titre négociable, représentant, incorporant la marchandise, Par là, il est appelé à jouer un rôle éminent, tant entre le vendeur et l'acquéreur de la marchandise que vis-à-vis tiers.

Dans les relations entre vendeur et acquéreur, son rôle précis variera selon le système juridique considéré. Dans certains droits, où le transfert de la possession est la condition du transfert de la propriété, tels les systèmes allemand et suisse, le transfert du connaissement apparaîtra, normalement, comme réalisant le transfert de propriété. Dans les systèmes où le transfert de propriété est commandé d'abord par l'intention des parties, tels les systèmes anglais ou français, le transfert de propriété pourra précéder le transfert du connaissement, se réalisant, par exemple, par la remise de la marchandise au transporteur. Mais l'acheteur demeurera un propriétaire très théorique, exposé à bien des dangers, tant qu'il n'aura pas le connaissement en main.

Vis-à-vis des tiers, le connaissement jouera un rôle capital en cas d'insolvabilité de l'acheteur. En effet, le vendeur non payé perdra tout droit à saisir la marchandise en cours de transport *("stoppage in transitu")* dès que l'acheteur aura transmis le connaissement à un sous-acquéreur, porteur de bonne foi (voir, en droit français, l'art. 62 de la loi du 3 juillet 1967; en droit anglais, l'art. 47 du *Sale of Goods Act;* en droit américain, la section 39 du *Pomerene Act).*

L'incorporation de la marchandise au connaissement s'est réalisée, nous l'avons vu, autour de l'année 1800, un peu avant en Grande Bretagne, un peu après en France. Qu'en est-il aujourd'hui du phénomène? D'une manière générale, nous dirons qu'il a pris un développement considérable, qu'il s'est enrichi tant du point de vue juridique que, plus encore sans doute, dans la pratique.

Du point de vue juridique, le connaissement n'incorpore plus, aujourd'hui, seulement la marchandise. Il incorpore aussi les droits de la marchandise contre le transporteur. Le porteur du connaissement a donc non seulement le droit de réclamer la marchandise au transporteur, mais aussi le droit d'intenter contre celui-ci toutes les actions nées du contrat de transport. La solution paraît s'être établie au milieu du dix-neuvième siècle. Elle est, déjà, expressément affirmée par le *Bills of Lading Act* anglais de 1855.

Faire ainsi du connaissement le support mystique, non seulement de la marchandise mais aussi des relations entre les parties au contrat de transport, a des advantages évidents. Mais la solution n'a pas que des advantages; elle peut jouer, à l'occasion, au détriment du transporteur, ou au détriment des véritables intéressés au transport. *Au détriment du transporteur:* il a été admis que le transporteur, strictement tenu envers tout porteur éventuel de bonne foi du connaissement, ne pouvait régulièrement délivrer la marchandise qu'en échange de ce connaissement. Les problèmes que pose cette règle particulière feront l'objet de débats spécifiques, aussi nous bornerons-nous à l'évoquer en passant. *Aux dépens des véritables intéressés à la marchandise* : dans certains systèmes juridiques, et en particulier en droit français, il a été admis que seule la personne dont le nom est indiqué comme destinataire sur le connaissement à ordre, ou l'endossataire régulier de ce connaissement, peut agir en responsabilité contre le transporteur. Lorsque, ce qui est souvent le cas dans la pratique, le connaissement indique comme destinataire un transitaire, le destinataire réel est ainsi privé de toute action contractuelle contre le transporteur. Et la règle a parfois été étendue au chargeur

réel dont le nom ne figure pas sur le connaissement, celui-ci ayant été, là encore, établi par un transitaire sous son propre nom. Semblables conclusions, qui ne sont justifiées par aucune exigence du transport maritime ou du commerce international, et qui méconnaissent que le connaissement, comme nous le verrons tout à l'heure, n'est qu'un des éléments de la preuve du contrat de transport, n'ont pas que des inconvénients pratiques evidents. Elles soulèvent aussi des problèmes très difficiles, quant à l'existence eventuelle d'une action en responsabilité délictuelle contre le transporteur au bénéfice du destinataire réel ou du chargeur réel, et quant aux modalités de cette action.

D'autre part, tandis que la règle était encore discutée au dix-neuvième siècle, il est aujourdhui admis que l'endossement du connaissement transmet à l'acquéreur de bonne foi un titre purgé de tout vice. Cette règle, dite de *l'innoposabilité* des exceptions, est affirmée expressément par la législation de certains Etats, par example par le *Pomerene Act* américain (section 37), et les Codes maritimes marocain (art 249) et tunisien (art. 216). Elle semble largement reconnue par les autres systèmes juridiques.

Mais c'est surtout d'un point de vue pratique que le phénomène du connaissement, titre représentatif de la marchandise, s'est enrichi. Car le connaissement est devenu un instrument fondamental du commerce international, et ce à un double titre.

D'une part, le connaissement est l'instrument de base de nombreuses ventes internationales. Les ventes successives par des négociants spécialisés d'une cargaison de grain ou de café chargée à bord d'un navire se réaliseront par l'endossement successif du connaissement au premier acquéreur, puis à un second acquéreur, et ainsi de suite. Et la pratique reconnaît ici un tel rôle au connaissement qu'elle voit dans la vente CAF plus une vente de documents qu'une vente de marchandises. D'autre part, le connaissement est devenu l'instrument central du crédit documentaire, le vendeur obtenant le règlement du prix par la remise à la banque, chargée du paiement, du connaissement (accompagné des documents, annexes habituels), et les différentes banques intervenant pour réaliser le crédit documentaire obtenant leur règlement de leurs donneurs d'ordres respectifs, contre remise du même connaissement.

Sans doute faut-il ici faire quelques distinctions, apporter quelques nuances. La notion de vente de documents appliquée à la vente CAF ne vaut que pour la vente de marchandises en vrac, grains, cafés, pétrole. La vente d'un matériel industriel n'est jamais une vente de documents, même si elle est conclue CAF. Mais même dans ce cas, un connaissement négociable sera très souvent émis. L'étude de la pratique révèle ainsi que, sur certains trafics, par example les trafics France—Extrême Orient, 90% des expéditions sont couvertes par des connaissements à ordre, alors qu'elles concernent pour l'essentiel des ventes de marchandises individualisées. Pourquoi une telle pratique ? La raison en tient peut-être à la force de l'habitude, qui fait que pour beaucoup de praticiens une vente internationale implique un connaissement à ordre. Mais il y a aussi une raison plus concrète, qui tient aux exigences du financement des entreprises. Les délais de paiement sont souvent très longs sur les trafics considérés. Or, le crédit que peut obtenir le vendeur d'une marchandise dans le cadre d'une opération de crédit documentaire est sensiblement moins onéreux (un taux d'intérêt inférieur de 2 à 3 points à celui que lui accorderait sa banque dans le cadre d'une ouverture de crédit ordinaire).

Pareillement, même dans la vente FOB, où, en stricte analyse, c'est l'acheteur qui est le chargeur, le contrat de transport échappant au vendeur, il est extrêmement fréquent que le contrat de vente prévoie que le vendeur devra procurer à l'acheteur un connaissement qui permettra à celui-ci de revendre la marchandise, ou d'obtenir un crédit documentaire. Et la jurisprudence tend ici à considérer que le connaissement que doit fournir le vendeur est, sauf usage ou clause contractuelle contraire, un connaissement négociable.

On peut, croyons-nous, l'affirmer, c'est un véritable rapport dialectique qui s'est établi entre connaissement et vente internationale. Parce qu'il donne droit à la remise de la marchandise, le connaissement a été peu à peu vu par les marchands comme un titre représentant la marchandise, et est devenu l'objet concret des ventes internationales, puis du crédit documentaire. Mais, parce qu'il était ainsi devenu le support d'opérations importantes, encore que parfaitement étrangères aux transports maritimes, il est apparu nécessaire de conférer au connaissement une sécurité de plus en plus grande. On peut penser que, si les tribunaux, d'abord, puis le législateur international, ont accordé aux mentions du connaissement une valeur de plus en plus grande jusqu'à la valeur quasi absolue qui leur accordent les Règles de Hambourg, c'est en raison même de son rôle dans le commerce international. Le droit maritime, s'est, en quelque sorte, soumis à des nécessités qui n'étaient pas celles du transport, le fait que des règles différentes soient appliquées en transport terrestre et en transport aérien le démontre, mais celles du commerce international des marchandises.

Le phénomène, incontestablement, n'est pas sans aspects positifs. Il est bon que le transporteur soit incité à contrôler avec rigueur les mentions qu'il accepte de voir figurer sur

le-connaissement émis par lui. Mais le phénomène a aussi des aspects moins positifs, voire négatifs. Car ce sont les exigences du commerce international qui expliquent l'apparition de la pratique, critiquable autant que presque inévitable, des *lettres de garantie*. On en connaît les données. Le transporteur, à qui sont remises des marchandises qui ne sont pas en parfait état, par example des grains présentant des traces d'humidité, pourrait protéger facilement ses intérêts en portant des réserves précises sur le connaissement. Il ne le fait pas à la demande du vendeur, et accepte de délivrer à celui-ci un connaissement net de réserves, en échange d'une lettre de garantie. S'il en est ainsi, c'est parce que le vendeur ne pourra obtenir son paiement que s'il remet à la banque qui exécute le crédit documentaire un connaissement net, et parce que le préjudice qui lui serait causé par l'apposition d'une réserve sur le connaissement apparaît comme sans commune mesure avec la nécessité de la réserve en cause. Ici, les exigences du crédit documentaire ont perturbé les pratiques du transport maritime.

Mais ce phénomène des lettres de garantie n'est qu'une distorsion. Pour l'essentiel, c'est le rôle du connaissement dans le commerce international qui a conféré à ce titre de transport une importance exceptionnelle. Cette importance transparaît non seulement dans la pratique quotidienne, mais aussi dans la bibliographie scientifique. Très peu d'études ont été consacrées aux titres de transport non maritimes, lettres de voiture terrestres et lettres de transport aérien. D'innombrables travaux ont été consacrés au connaissement, soit par des spécialistes du transport maritime, soit par des spécialistes du commerce international. Dans l'ouvrage fondamental de David Sassoon sur les *CIF and FOB Contracts*, c'est ainsi plus de cinquante pages, un dixième de l'ouvrage, qui traitent des problèmes du connaissement.

Avec le troisième aspect, la troisième fonction du connaissement nous revenons à des problèmes moins influencés par le droit du commerce international, et beaucoup plus marqués par la spécificité du droit maritime.

IV

La troisième fonction du connaissement, c'est celle d'un titre faisant preuve du contrat de transport et définissant les obligations du transporteur. Deux questions se posent ici. Celle, d'abord, du rôle du connaissement comme critère du régime précis applicable à un transport de marchandises. Celle, ensuite, du rôle du connaissement dans la définition des obligations des parties, pour le transport spécifique en cause.

1. Le rôle du connaissement comme critère est dominé par l'existence de deux régimes juridiques différents applicables aux opérations matérielles de transport martime de marchandises, à ce que l'on pourrait appeler, pour éviter toute connotation juridique, le déplacement de marchandises par voie maritime. Le premier de ces régimes, c'est le régime classique de l'*affrètement*, et en particulier de l'affrètement au voyage. Formellement, il se matérialise par la rédaction d'une charte-partie liant fréteur et affréteur. Matériellement, il se caractérise par une très large liberté pour les parties de déterminer l'étendue exacte de leurs droits et de leurs obligations. La responsabilité du fréteur y est en général limitée à des situations précises et, par exemple, dans la *Gencon*, au cas où le dommage subi par les marchandises résulte, soit d'une faute d'arrimage commise par le fréteur ou par ses préposés, soit d'un manque personnel de diligence du fréteur à mettre le navire en état de navigabilité. Le second régime que nous appellerons, en utilisant la terminologie française, mais une terminologie qui tend peut-être à se généraliser, le régime du *transport maritime de marchandises*, est caractérisé, à l'opposé, par une large référence à des règles d'ordre public que les parties ne peuvent modifier. S'agissant des transports internationaux, il est réglementé dans la plupart des situations par les dispositions de la Convention de 1924 (éventuellement modifiées par le Protocole de 1968), et sera demain régi par les dispositions des Règles de Hambourg. S'agissant des transports maritimes internes (par exemple d'un port du pays A à un autre port du même pays), il est soumis à des règles soit directement copiées sur, soit largement inspirées par la Convention de 1924. Du point de vue de la responsabilité du transporteur, il se distingue des régimes de l'affrètement en ce que le transporteur est responsable de tout dommage ou perte subis par la marchandise, à moins qu'il ne puisse faire la preuve que le dommage en cause est la conséquence de l'un des cas exceptés prévus par le texte applicable. Encore le destinataire conserve-t-il alors le droit de démontrer que la faute, ou en tout cas le manque de diligence du transporteur, ont contribué au domage. En bref, la Convention de 1924, comme les textes nationaux qui s'en sont inspirés, fait peser sur le transporteur une véritable obligation de résultat, limitée par un certain nombre de cas exceptés.

Certes, l'analyse ici faite de la responsabilité du transporteur maritime dans le régime du contrat de transport, qui est fidèle à la lecture française de la Convention de 1924 telle qu'elle apparaît dans la loi du 18 juin 1966, peut être contestée. L'opinion se retrouve dans une grande partie de la doctrine, et dans nombre de décisions de justice, que la responsabilité du transporteur est fondée, dans la Convention de 1924, sur une présomption de faute, sinon sur la faute. Mais, quand on va au fond des choses, on perçoit que cette idée de présomption de faute ne traduit pas la réalité concrète. Car chacun est d'accord pour dire que, dès lors que le destinataire établit que la marchandise lui a été délivrée en mauvais état, alors qu'elle avait été confiée au transporteur en bon état, le transporteur est a priori responsable, *prima facie* responsable selon la terminologie des tribunaux américains (voir, entre autres, *Pacol* v. *MV Minerva,* D.C.N.Y. 16 janvier 1981, 1982 A.M.C. 1365 et les nombreuses références). Et le transporteur ne peut se dégager de cette responsabilité qu'en faisant la preuve que le dommage provient d'un cas excepté précis, survenu sans sa faute ou sans celle de ses préposés (exception faite du cas particulier de la faute dans la navigation ou l'administration du navire). Car, même l'article 4, paragraphe 2, lettre (q) de la convention de 1924 exige du transporteur plus que la preuve de l'absence de faute, la preuve effective que le dommage subi par la marchandise résulte d'une "cause ne provenant pas du fait ou de la faute du transporteur ou du fait ou de la faute des agents ou préposés du transporteur". Pour nous, il y a là le mécanisme même d'une responsabilité de type non fautif. La responsabilité du transporteur, dans la Convention de 1924, n'est pas, au contraire de ce qui paraît avoir été l'opinion des rédacteurs des Règles de Hambourg, une responsabilité fondée sur la faute ou sur une présomption de faute. C'est une responsabilité de type objectif, ou en tout cas spécifique, responsabilité de plein droit allégée par un certain nombre d'exceptions précises.

Au delà des divergences éventuelles de l'analyse théorique, une chose est, en tout cas, certaine. Présomption de faute ou responsabilité de plein droit, la responsabilité du transporteur dans le régime de la Convention de 1924, comme dans celui des textes qui s'en sont inspirés, est incontestablement beaucoup plus lourde que la responsabilité qui pèse habituellement sur le frêteur au voyage. La distance entre ces deux types de responsabilité s'élargira encore avec la maise en application des Règles de Hambourg. Certes, en définitive, celles-ci, dans la plupart des cas, ne changeront rien à la responsabilité du transporteur. Il serait aisé de démontrer, par une analyse précise de la jurisprudence, que dans la plupart des cas où le transporteur sera demain responsable en application des Règles de Hambourg, il l'est déjà aujourd'hui, en application de la Convention de 1924, telle qu'appliquée par les tribunaux des principaux pays martimes. Que l'on se souvienne seulement de l'arrêt *"Muncaster Castle"*. Il reste que, sur un point important, les Règles de Hambourg apportent une modification fondamentale au droit des transports maritimes. Demain, le transporteur ne pourra plus invoquer la faute du capitaine dans l'administration ou la navigation du navire comme excluant sa responsabilité. Cet alourdissement de la responsabilité du transporteur ajoute à l'importance que revêt déjà le problème de la valeur du connaissement comme critère de choix entre les différents régimes de transport maritime.

Dans une première lecture de la Convention de 1924, point de départ nécessaire de toute analyse en la matière, on pourrait penser que le rôle du connaissement est ici essentiel. L'émission d'un connaissement serait à la fois le critère et la condition d'application du régime prévu par la Convention de 1924 et les textes qui s'en sont inspirés. Mais une telle lecture, encore qu'elle ait été celle des rédacteurs de la loi française du 2 avril 1936, est, dans notre opinion, inexacte. Le connaissement n'a pas, ici, un rôle exclusif de critère. Il peut être remplacé par d'autres documents. La Convention de 1924 peut même s'appliquer en l'absence de tout document. En revanche, le connaissement conserve un rôle fondamental dans le cas classique, et très fréquent, où un affréteur au voyage se fait remettre par le frêteur des connaissements qu'il endosse à des tiers.

Envisageons d'abord le cas normal, celui de marchandises remises à un armateur exploitant un navire de ligne régulière. Le connaissement joue ici un rôle peut-être statistiquement primordial, mais qui, juridiquement, n'est pas exclusif. Statistiquement, de très nombreux transports maritimes sont encore couverts par des connaissements négociables. Mais, juridiquement, le connaissement, et plus encore le connaissement négociable, ne peut être considéré comme le seul critère du régime spécifique du transport maritime (Convention de 1924 ou texte analogue).

Déjà, l'analyse des dispositions de la Convention de 1924 montre que la rédaction d'un connaissement n'est pas la condition de l'application du régime institué par les textes. Certes, la Convention de 1924 s'intitule "Convention internationale pour l'unification de certaines règles en matière de connaissement". Son article premier prévoit que le terme "contrat de transport" s'applique uniquement au contrat de transport constaté par un connaissement. Enfin, son article 10 (dans la rédaction du Protocole de 1968) prévoit que la Convention s'appliquera "à tout connaissement relatif à un transport de marchandises entre ports relevant

de deux Etats différents, quand : (a) le connaissement est émis dans un Etat contractant. . . etc". Mais, la Convention elle-même étend son application bien au delà des transports couverts par un connaissement. Dans son article 2, elle stipule que les responsabilités et obligations qu'elle définit s'appliqueront au transporteur "dans tous les contrats de transports de marchandises par mer." Dans son article 1, elle définit la notion de contrat de transport comme s'appliquant "aux contrats de transport constatés par un connaissement ou par tout document similaire formant titre pour le transport de marchandises par mer". Dans la pratique, de nombreux documents peuvent être considérés comme formant ainsi "titre pour le transport des marchandises par mer," le transporteur qui les signe s'engageant irrévocablement à transporter les marchandises à lui confiées. Il en sera ainsi, par exemple, comme les tribunaux l'ont souvent relevé, d'un connaissement reçu pour embarquement, d'un connaissement non négociable, voire d'une simple note de chargement (*mate's receipt*) faisant référence aux conditions des connaissements du transporteur (voir, Aix en Provence, 31 octobre 1980, Droit Maritime français 1982.23; *The Toledo*, D.C.N.Y. 1939, A.M.C. 1300; comp. les observations du Juge Devlin, in *Pyrene Co. v. Scindia Steam Co.*, [*1954*] 1 Lloyd's Rep. 321).

Mais il faut aller plus loin. Dans son article 3, paragraphe 3, la Convention prévoit que le transporteur, après avoir reçu et pris en charge les marchandises, devra, sur demande du chargeur, délivrer à celui-ci un connaissement se conformant à ses dispositions. Or, il y a là une obligation qui est imposée par la Convention au transporteur à un moment où le contrat de transport a certainement été conclu, et a déjà commencé à s'exécuter. Par là même, les dispositions de la Convention témoignent que l'émission d'un connaissement n'est pas nécessaire à son application, que l'existence d'un connaissement n'est pas le critère qui permet de déterminer les transports qui lui sont soumis et ceux qui ne le sont pas.

Où est alors le critère ? Il est dans l'intention des parties et dans l'usage. Chaque fois qu'une marchandise est remise à un transporteur dans l'intention qu'elle soit transportée sous le régime de la Convention, chaque fois qu'en l'absence d'intention particulière tel est l'usage, la Convention devra s'appliquer, au moins si aucun autre document contredisant son application (c'est-à-dire une charte-partie au voyage, ou autre document impliquant référence au régime de l'affrètement) n'a été émis.

Certaines législations ont pris conscience de l'ambiguité du texte de la Convention de 1924 sur ce point. Elles ont donc abandonné toute référence au connaissement dans la définition des transports soumis au régime spécifique des transports maritimes, par opposition au régime de l'affrètement. Tel est le cas de la loi française du 18 juin 1966 qui définit le contrat de transport de marchandises non par le document qui le couvre, mais par le contenu matériel du contrat, contrat par lequel "le transporteur s'engage à acheminer une marchandise déterminée d'un port à un autre" (art. 15; dans le même sens, art. 738 du Code maritime algérien). Et l'on sait que la solution adoptée par le droit français a été recueillie par les rédacteurs des Règles de Hambourg. Celles ci s'appliqueront demain à "tout contrat par lequel le transporteur s'engage, contre paiement d'un fret, à transporter des marchandises par mer d'un port à un autre" (article 1, paragraphe 6), quel que soit le document de transport, et même en l'absence de tout document, sauf au cas "le les parties auraient conclu un contrat d'affrètement. Il reste que, même dans le cas d'affrètement, sous les Règles de Hambourg comme il en est aujourd'hui, le connaissement conservera un rôle fondamental pour déterminer le régime précis applicable aux relations du fréteur avec les tiers destinataires de la marchandise.

La situation la plus nette est celle de l'affrètement au voyage. La charte, par exemple une charte Gencon, prévoit que le capitaine devra signer les connaissements présentés par l'affréteur. Au dix-neuvième siècle, quand cette pratique s'est établie, la signature des connaissements par le capitaine n'avait que des conséquences limitées. Certes, dès lors que l'un des connaissements émis était endossé à un tiers, cas très fréquent, le fréteur devenait contractuellement tenu à l'égard de ce tiers. Mais le contenu de sa responsabilité n'était guère modifié. Car le connaissement signé reprenait les mêmes stipulations de non responsabilité que la charte, ou renvoyait à la charte, dont les dispositions devenaient opposables au tiers porteur, sauf à résoudre quelque problème mineur de contradiction entre telle mention du connaissement et telle mention de la charte. La Convention de 1924 a bouleversé les données du problème. Aux termes de son article 1 (b), qui définit la notion de contrat de transport, notion, nous l'avons vu, fondamentale à la détermination du domaine d'application de la Convention, cette notion s'applique non seulement au contrat de transport constaté par le connaissement, mais elle s'applique "également au connaissement ou document similaire émis en vertu d'une chart-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement". Ainsi, dès que le connaissement signé par le capitaine a été transmis à un tiers porteur, une véritable novation se réalise : le fréteur n'est plus responsable selon le régime de l'affrètement tel que précisé dans les dispositions de la charte-partie ; il

devient responsable à l'égard du tiers selon les dispositions de la Convention de 1924. Nous référant à la terminologie française, nous dirons que le fréteur devient transporteur, avec les conséquences que nous avons analysées ci-dessus. Ici, l'émission d'un connaissement a une portée considérable.

Les conséquences de l'émission d'un connaissement dans le contrat d'affrètement à temps sont plus difficiles à cerner. Une chose est certaine. Un point important reste en débat.

Une chose est certaine. Comme il en est pour les affrètements au voyage, l'émission d'un connaissement, dès lors que celui-ci est remis à un tiers porteur permet à ce dernier d'invoquer les dispositions de la Convention de 1924. Et, sans doute faut-il ici élargir la règle et considérer, comme le font les Règles de Hambourg (article 2 paragraphe 3) que la Convention s'applique dès que le connaissement émis a été remis à une autre personne que l'affréteur à temps, même s'il ne s'agit que d'un chargeur ou d'un destinataire dénommé.

Un point est en débat, qui est de savoir qui doit être considéré comme transporteur à l'égard du porteur du connaissement. Ici, l'incertitude règne entre les différents systèmes juridiques, voire à l'intérieur d'un même système.

En droit français, il semble clair que c'est l'affréteur qui sera considéré comme lié par le connaissement, même si celui-ci est signé par le capitaine. La solution résulte de l'article 21 du décret du 31 décembre 1966, énonçant que "le gestion commerciale du navire appartient à l'affréteur". Et cette solution s'applique même si le connaissement contient une clause "*identity of carrier*". Car cette clause est en général considérée comme inefficace par les tribunaux. Un problème particulier peut toutefois se poser, si le connaissement est établi sur une formule à en-tête du fréteur, les tribunaux permettant alors au destinataire de se prévaloir de l'apparence du titre.

En droit anglais, la règle serait plutôt à l'inverse. Même quand le connaissement est signé par l'affréteur, c'est le fréteur qui sera considéré comme le transporteur, ainsi qu'il est relevé par le Juge Brandon dans une décision récente ("*The Berkshire*," 16 novembre 1973, [1974] 1 Lloyd's Rep. 185). Mais une solution différente peut être adoptée, eu égard aux circonstances de l'espèce, par exemple à l'encontre d'un armateur exploitant une ligne régulière et qui affrète un navire pour l'affecter à cette ligne, en utilisant les connaissements qui lui sont habituels.

Le droit américain paraît se situer à mi-chemin entre le droit français et le droit anglais. Le fréteur à temps n'est lié par le connaissement que si celui-ci est signé par le capitaine. Le fréteur n'est pas lié par un connaissement signé par l'affréteur, même "*for the master*", encore que le navire reste susceptible d'une action in rem (voir, Wilford, Coghlin et Healy, *Time Charters*, 1978, p. 152 et les références).

Il reste que, pour le transport réalisé dans le cadre d'un affrètement au voyage ou à temps comme pour les transports réalisés directement par un armateur propriétaire, le connaissement peut être remplacé par un autre titre de transport; c'est, là encore, le régime de la Convention de 1924 qui s'appliquera.

2. Nous l'avons relevé, au dix-neuvième siècle, le connaissement était le document contractuel fondamental dans la détermination des obligations des parties, dans tous les cas où, s'agissant de transporter une marchandise individualisée, aucune charte-partie n'avait été signée. Il apparaissait comme la source principale sinon exclusive des obligations du transporteur. Et les stipulations du connaissement étaient strictement appliquées par les tribunaux, qui ne les écartaient qu'exceptionnellement, en cas de faute très grave du transporteur.

Aujourd'hui, le connaissement a conservé, en ce domaine, une partie importante de ses fonctions. C'est lui qui précise le taux du fret, et si celui-ci a été payé à l'avance ou reste dû; qui indique, par exemple, que la marchandise devra être transportée en cale, ou à telle température. Et il y a là des indications d'autant plus essentielles que le porteur du connaissement négociable a le droit d'en exiger strictement le respect. Plusieurs décisions récentes de la Cour d'Aix en Provence ont ainsi décidé que le transporteur qui avait émis un connaissement fret "*prepaid*" ne pouvait imposer au destinataire le paiement d'une surcharge de fret, appliquée dans les ports français en raison d'accords entre armateurs et entreprises de manutention (voir Aix en Provence, 20 november 1980, Droit Maritime Français 1982.32; 2 juillet 1981, non publié).

Pareillement, les obligations et les droits des parties continuent à être commandées par les mentions, très nombreuses, figurant au dos du connsaissement, par exemple quant au droit du transporteur de faire transborder les marchandises sur un navire autre que celui indiqué au connaissement comme navire transporteur. Cependant, ici, le rôle du connaissement, en particulier dans la détermination des obligations du transporteur, s'est assez fortement affaibli. et ce pour trois raisons.

En premier lieu, il faut ignorer, dans le connaissement, toutes dispositions qui sont contraires soit aux règles de la Convention de 1924, soit aux règles de la loi nationale applicable. Par exemple, telle stipulation, que l'on retrouve encore dans nombre de

connaissements, énonçant que le déchargement de la marchandise se fera aux risques de celle-ci, devra être ignorée, comme contraire aux dispositions de l'article 3, paragraphe 2, de la Convention de 1924.

En second lieu, même quand telle disposition du connaissement n'est pas directement contraire aux règles d'ordre public de la Convention ou du texte national applicable, les tribunaux ont une tendance de plus en plus marquée à affaiblir la portée concrète de la clause en cause, en imposant au transporteur une obligation générale de bonne foi, une obligation d'agir raisonnablement, obligations indépendantes de l'obligation générale de diligence qui lui est faite par la Convention de 1924. Par exemple, tel arrêt français observe que le transporteur ne peut se prévaloir de la clause du connaissement autorisant expressément le transport en pontée d'une marchandise, parce que le mauvais temps régnant sur l'Atlantique au départ du navire aurait dû le conduire à ne pas utiliser la liberté qui lui était accordée (Cour de Paris, 21 juin 1972. Droit Maritime Français 1972. 673). Pareillement, tel arrêt américain refuse au transporteur de se prévaloir d'une clause, même licite, de glace parce qu'il ne pouvait ignorer que le port de chargement serait pris par les glaces, avant que les opérations de chargement ne fussent achevées *(Orient Mid-East Lines v. Cooperative for American Relief*, C.A., D.C., 6 février 1969, 1969, A.M.C. 1658).

Enfin, de plus en plus, les dispositions du connaissement doivent être combinées avec les stipulations particulières liant les parties pour déterminer les obligations de chacun. Souvent, l'émission du connaissement est précédée de négociations, conduites par télex ou simplement par téléphone, et précisant sur tel ou tel point les exigences du chargeur et l'accord du transporteur. Parce que le connaissement n'est pas la seule preuve du contrat de transport, mais un élément de cette preuve, ces négociations doivent être prises en compte dans la détermination des obligations de chacun, et souvent les tribunaux les font prévaloir sur la lettre du connaissement. Particulièrement typique à cet égard est un arrêt de la Cour d'Appel fédérale de New York du 7 mars 1975 (*Hellenic Lines v. U.S.A.*, 1975 A.M.C. 697). La Cour décide que les négociations par téléphone, intervenues entre le Gouvernement américain et un transporteur grec pour préciser les modalités d'un transport de blé à destination de réfugiés palestiniens, l'emportaient sur les mentions du connaissement conférant au transporteur de très larges libertés.

On le voit, diminué dans son rôle de critère du régime juridique applicable à l'opération de transport maritime, le connaissement l'est aussi dans son rôle de document définissant les obligations des parties. Qu'en est-il, plus généralement, de son avenir?

V

S'interroger sur l'avenir du connaissement, c'est rechercher comment le connaissement est susceptible de réagir aux changements intervenus ou prévisibles tant dans le transport maritime que dans le commerce international, eu égard aux interactions que nous avons décelées entre connaissement et commerce international.

Ici, le rôle du connaissement nous paraît devoir être affecté, s'il ne l'est pas déjà, par deux ordres de phénomènes. D'une part, les changements intervenus dans les techniques du transport international, d'autre part l'évolution prévisible dans les techniques de documentation, du fait du développement de l'informatique et de celui de la télématique.

1. Changements dans les techniques de transport. Il s'agit principalement, d'une technique matérielle, utilisation du conteneur, et d'une technique de gestion, la technique du transport multimodal.

L'utilisation du conteneur pose au transport maritime en général de nombreux problèmes. Certains de ces problèmes, qui concernent d'ailleurs aussi d'autres types de charges, comme le Doyen Rodière l'a montré, sont étrangers au droit du connaissement, et nous les ignorerons. En revanche, le problème des conteneurs à colis multiples, le conteneur incluant 1.200 caisses de matériel électrique, a une incidence directe sur le régime du connaissement. On sait, en effet, que, s'inspirant de certaines solutions jurisprudentielles, le Protocole de 1968 pose ici la règle que "lorsqu'un cadre, une palette ou tout engin similaire est utilisé pour grouper des marchandises, tout colis ou unité énuméré au connaissement comme étant inclus dans cet engin sera considéré comme un colis ou unité" au sens du texte sur la limitation de responsabilité du transporteur. Et c'est ici que des problèmes spécifiques au connaissement couvrant un transport par conteneur apparaissent.

Le premier de ces problèmes est de savoir ce qu'il faut entendre par colis ou unité "énuméré au connaissement". Il semble que les tribunaux aient adopté, sur ce point, une interprétation assez souple : dès que le connaissement indique le nombre précis des colis contenus dans le conteneur, il est considéré comme "énumérant" ces colis. Mais, le problème le plus aigu est de savoir si la règle posée par le Protocole doit s'appliquer, et le transporteur déclaré responsable, dans l'exemple pris ci-dessus, à hauteur de 1200 colis, si ledit

transporteur a apposé sur le connaissement telle ou telle mention indiquant qu'il ne garantit pas le nombre de colis inclus dans le conteneur, lequel a été "empoté" par le chargeur.

La question de la valeur des réserves inscrites par le transporteur sur le connaissement a déjà retenu notre attention. Elle mérite d'être examinée à nouveau à propos des conteneurs, car elle est particulièrement difficile à résoudre ici, en raison du texte précis du Protocole de 1968. Ce texte prévoit que le transporteur sera responsable du nombre de colis tel qu'énuméré au connaissement, sans faire aucune exception particulière et sans permettre aucune réserve. Il n'y a donc, semble-t-il, qu'un moyen pour le transporteur d'échapper à sa responsabilité. Moyen qui constitue d'ailleurs la règle, comme nous l'avons vu, si on s'attache aux dispositions précises de la Convention de 1924. Le transporteur qui ne veut pas être déclaré responsable du nombre de colis énumérés doit refuser de porter la mention de ce nombre sur le connaissement. Alors, à l'évidence, le problème est résolu, puisque l'on n'est plus en présence d'un connaissement qui "énumère" les colis qu'il inclut.

La solution, sévère, a été affirmée dans plusieurs décisions récentes (voir Cour de Cassation française, 29 janvier 1980, et *Westway Coffee v. Netuno*, cités supra). On peut espérer qu'une solution différente sera admise quand les Règles de Hambourg seront en application, puisque, nous l'avons vu, les Règles admettent que le transporteur puisse contester la force probante des mentions du connaissement s'il a apposé sur celui-ci une réserve motivée. Mais, peut-être faudrait-il aller plus loin et, pour les connaissements empotés par le chargeur, introduire dans le transport international la règle inscrite en droit américain dans le *Pomerene Act*, règle selon laquelle, nous l'avons vu, la mention que le chargement a été effectué par le chargeur entraîne un renversement de la charge de la preuve. On peut, en effet, estimer que la marchandise est suffisamment garantie par la limitation de responsabilité calculée au poids, alors que, s'il le veut, le chargeur peut prendre toute garantie complémentaire (assurance ; constatation de l'empotage par un agent du transporteur ou par un expert indépendant).

Les conséquences du développement du transport multimodal sur le connaissement sont plus diverses et méritent une réflection plus systématique. On connaît les données du phénomène, qui prend aujourd'hui une ampleur considérable. Un transport international de marchandises du point d'expédition (magasin du fabricant) au point de destination finale (magasins de l'acquéreur) implique souvent une succession de transports de modes différents, transport routier, transport maritime, transport par chemin de fer. Ce transport pourra être pris en charge par un opérateur unique, l'opérateur de transport multimodal, O.T.M. Celui-ci délivrera un document unique, couvrant la totalité du transport, le document de transport multimodal, D.T.M. L'incidence d'une telle technique de gestion du transport sur le connaissement dépendra de différents facteurs, et en particulier du rôle précis de l'O.T.M.

L'O.T.M. peut, en effet, être une entreprise spécialisée, qui n'effectue elle-même aucune partie du transport, contractant avec chacun des transporteurs nécessaires, et en particulier avec le transporteur maritime. Dans une telle situation, l'émission du D.T.M. n'entraîne pas la disparition du connaissement. Car l'O.T.M. exigera un connaissement du transporteur martime auquel il confie la marchandise. Ce connaissement pourra, certes, être un simple connaissement nominatif, voire une lettre de transport maritime ou un document analogue, en raison des relations très étroites et particulièrement confiantes qui peuvent exister entre le transporteur maritime et l'O.T.M. Mais il peut aussi, et en fait il est souvent dans la pratique actuelle, un connaissement classique.

Mais, l'O.T.M. peut aussi être un transporteur maritime, soit agissant à titre indépendant, soit, cas assez fréquent, membre d'un pool. Dans cette seconde situation, le connaissement classique disparaît, car le transporteur maritime, qui délivre au chargeur un titre qui couvre l'ensemble des opérations de transport, n'a aucune raison de lui délivrer un second titre couvrant la seule partie maritime. Et, en fait, il ne le fait pas.

Ainsi, de nombreux transports maritimes qui, hier encore, donnaient lieu à l'émission d'un connaissement, par exemple le transport de conteneurs de Munich à Houston, ne donnent plus lieu à semblable émission. Et le risque de voir les connaissements maritimes disparaître du transport multimodal est d'autant plus grand que la pratique s'oriente vers la reconnaissance aux documents de transport multimodal de la valeur de titre négociable qui est reconnue au connaissement. Certes, aujourd'hui les D.T.M. ne sont pas encore pleinement des titres négociables. Mais, déjà, la C.C.I. a mis à l'étude un projet de réforme des règles et usances du crédit documentaire qui prévoit l'accès au crédit documentaire des D.T.M.. La portée exacte des projets de la C.C.I. peut être discutée. La valeur de titre d'un document de transport intéresse aussi les tiers, directement affectés par les règles édictées par la C.C.I.. Il n'est pas sûr que ces règles leur sient opposables, si représentative que soit cette institution. Mais il sera difficile aux tribunaux de résister à la pression des milieux professionnels, et on peut penser qu'assez vite l'usage contractuel créé par la C.C.I. deviendra une véritable coutume. De surcroît, la Convention conclue à Genève en 1980 sur le transport multimodal international

de marchandises reconnaît la possibilité d'émettre un document de transport multimodal sous forme négociable (à ordre ou au porteur).

Ainsi, il est à penser que, dans les années à venir, le connaissement maritime sera, sur de nombreux trafics, remplacé par le D.T.M. Mais il n'y a lieu ni de s'en féliciter ni de s'en inquiéter. Le connaissement n'est qu'un outil juridique. Tout outillage s'use avec le temps, et chacun doit accepter qu'il soit remplacé par un outillage mieux adapté aux besoins de la pratique. On peut faire la même réflexion pour ce qui est de l'influence future de l'informatique et de la télématique sur le sort du connaissement.

2. Les problèmes posés par le développement de l'informatique et de la télématique dans les transports maritimes sont d'une telle ampleur qu'il n'est guère possible de proposer ici que des observations très générales. Aussi bien, ces problèmes ont-ils fait l'objet d'études nombreuses et de grande qualité, connues par tous les spécialistes de droit maritime.

Problèmes techniques d'abord. Est-il possible, avec une fiabilité suffisante, d'enregistrer dans un système informatique l'ensemble des données et des transactions que met en oeuvre l'émission et la circulation d'un connaissement ? La réponse à cette première question ne paraît guère faire de doute. L'informatique est devenue tellement sophistiquée que l'on imagine mal qu'elle ne puisse répondre avec succès a n'importe quelle requête des praticiens du transport martime ou du commerce international, qu'il s'agisse d'enregistrer les mentions du connaissement décrivant la marchandise, les éléments du contrat de transport, les endossements successifs dont le connaissement est l'objet. S'agissant de la fiabilité d'un système informatique, même s'il est vrai que les clés électroniques les mieux étudiées ont leurs faiblesses, comme l'a révélé la grande presse, il reste que l'informatique permet d'atteindre une fiabilité suffisante, les risques de fraude n'étant pas plus grands que ceux qui existent aujourd'hui avec le système des connaissements-papier.

La compatibilité de l'électronique avec les règles juridiques applicables aux transports maritimes pose des problèmes qui varient selon la complexité de la situation envisagée.

C'est ainsi que les problèmes sont au minimum si on applique l'informatique au transport d'une marchandise expédiée à une personne déterminée. Dans le principe, l'établissement d'un connaissement écrit n'est pas ici nécessaire à la validité du contrat de transport. Certes, la Convention de 1924 prévoit que le transporteur devra, sur demande du chargeur, délivrer à celui-ci un connaissement, et certains droits exigent plus impérieusement la délivrance d'un connaissement ou autre document de transport écrit, tel le *Harter Act*. Mais les données enregistrées par l'ordinateur pourront à tout moment être imprimées sur un support écrit, et le chargeur alors satisfait dans sa demande d'un connaissement. La signature du transporteur pourra même être apposée sur le document écrit par un moyen électronique, quand les Règles de Hambourg seront en application, et si la législation du pays où le connaissement est émis le permet. Nous observerons que ce système de documentation "informatique" est expressément prévu par la Convention de Genève de 1980 sur le transport multimodal, pour les documents non négociables (article 5, paragraphe 4).

Pareillement, le recours à l'informatique ne pose aucun problème du point de vue de la force probatoire des mentions du "connaissement informatique". On voit mal le transporteur contester la conformité de mentions qu'il a lui-même enregistrées sur la déclaration du chargeur. Quant à la question de la force probante des mentions du "connaissement informatique" par rapport au chargeur, elle ne se pose pas en termes juridiques, sauf peut-être en droit français. Il a, en effet, toujours été admis que les mentions du connaissement n'avaient, à l'encontre du chargeur, qu'une simple valeur de présomption. Leur enregistrement par ordinateur n'altérera en rien, ici, les droits du chargeur. Toutefois, en droit français, lequel exige que le connaissement soit signé du chargeur, comme dans les systèmes juridiques qui suivent ici la règle française, on doit se demander si le fait que le "connaissement informatique" n'aura pas été signé par le chargeur n'affaiblira pas la force probante de ce document à l'égard de celui-ci. En l'absence de jurisprudence précise en la matière, il est malaisé de donner une réponse à cette question. Simplement peut-on relever que les tribunaux sont généralement réservés pour admettre les contestations d'un chargeur fondées seulement sur le défaut de signature du connaissement. Reste un problème psychologique d'ordre général. Si la valeur des mentions du connaissement est rarement mise en cause par un chargeur, c'est, en partie, parce que, ayant reçu le connaissement sans protestation, il lui est difficile de le contester ultérieurement. Dans un système informatisé, il est à craindre que ce frein psychologique ne joue pas. Ou alors, il faudra que le transporteur adresse systématiquement au chargeur le texte des états successifs du "connaissement informatique", le recours à l'informatique ayant pour conséquence imprévue de rendre plus abondante la documentation, même s'il en simplifie l'établissement.

Reste un dernier problème, celui de l'intégration des conditions générales du transporteur au contrat de transport. Habituellement, cette intégration résulte de la mention de ces conditions au dos du connaissement, ou de tout autre document de transport imprimé. Mais,

ici où semblable document n'existe pas, comment réaliser l'intégration désirée?

La pratique paraît s'être orientée vers une simple mention de référence figurant sur "le connaissement informatique". Celui-ci, après avoir récapitulé les mentions enregistrées par l'ordinateur indique que le transport s'effectue "aux conditions imprimées sur le verso du connaissement du transporteur". Il n'est pas sûr qu'une telle référence soit toujours considérée comme suffisante, notamment à l'égard du chargeur non-professionnel du commerce international, voire même d'un chargeur professionnel; l'example de l'arrêt *Hong Kong Producer* en témoigne (*Encyclopaedia Britannica v. Hong Kong Producer,* C.A., New York, 1969, 1969, A.M.C. 1741). Il serait donc sage que les transporteurs envisagent ici des méthodes plus sûres d'intégration, au moins à l'égard des chargeurs qui ne sont pas leurs clients habituels.

Les choses deviennent plus complexes si l'on veut substituer l'utilisation de l'informatique à la technique du connaissement négociable. Car le connaissement constitute ici un support indispensable au bon fonctionnement des mécanismes juridiques (ventes successives de la marchandise ; crédit documentaire gagé sur le connaissement). Seule une réforme législative pourrait permettre une pleine utilisation de l'informatique. On a d'ailleurs du mal à en imaginer le contenu, et l'on comprend que les rédacteurs de la Convention de 1980 sur le transport multimodal, dont nous avons vu qu'ils ont admis la documentation informatique en matière de documents non négociables, n'aient pas étendu leur bienveillance aux documents négociables. En l'absence d'une telle réforme, il ne paraît guère possible d'imaginer que des mécanismes de remplacement, tels ceux déjà utilisés sur certains trafics (voir l'étude du Professeur K. Grönfors). De ces mécanismes, nous dirons seulement que, s'ils font parfois intervenir les transporteurs maritimes comme pivot central de l'operation, ils ressortissent beaucoup plus aux techniques du crédit bancaire qu'à celles du transport maritime. Aussi n'irons nous pas plus loin dans leur analyse.

Concluons. Le connaissement est aujourd'hui encore l'un des documents juridiques les plus importants et les plus remarquables du commerce international. Il est possible que son rôle aille en s'affaiblissant, et qu'il soit remplacé par des documents d'un type nouveau, ou par des techniques nouvelles. Mais l'évolution dont les premiers éléments sont perceptibles soulève des problèmes tellement nombreux et tellement complexes que les juristes de droit maritime pourront, longtemps encore, s'intéresser au connaissement.

THE BILL OF LADING-GENERAL OBSERVATIONS

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Three hundred years ago Colbert's "Ordonnance de la Marine", which we will refer to not as a text of French law but as the expression in its time of the law which all the maritime world had in common, defined the bill of lading as the acknowledgement given for goods loaded on a ship, an acknowledgement signed by the master of the vessel, the captain (See "Ordonnance" book 3, title II, article 1). To present a general commentary on the bill of lading, as we should like to do, means that we must ask ourselves to what extent the position as set out in the "Ordonnance de la Marine" remains true today, to what extent the law as set out there has been elaborated and enriched, or reduced, and so what future we can envisage for the bill of lading, which is among the richest creations both in the sphere of professional practice and that of legal theory.

I

In order to answer this question, and because maritime law more than any other body of legal rules has been formed in history and by history, it is necessary first of all to examine the historical background. We learn from that examination that over the years the bill of lading has been given three functions one after the other.

The bill of lading was first, as the "Ordonnance de la Marine" recites, a receipt for goods loaded on the ship, a receipt issued by the captain. So far as concerns this first function, the practice in relation to the bill of lading seems to have become fairly generalised in the fifteenth century. Before that time no receipt was given to the shipper, and the loading of the goods was recorded only in the ship's register. Further, it seems to have been the case that from the beginning the bill of lading was something more than a mere receipt. One of the oldest bills of lading known to us, an English bill of lading dating from 1538, records not only the receipt of the goods (26 bags of salt) but also the undertaking given by the shipowner to carry those bags from London to Dice Key. By the seventeenth century bills of lading have become even more precise. They record in particular that the captain only undertakes to deliver the goods, for which he has given a receipt, under the reserve of perils of the sea, and in a French bill of lading of that type the words are added "in accordance with the usages and customs of the sea" (see the bills of lading quoted by W.P. Bennett in "The History and Present Position of the Bill of Lading", Cambridge 1914).

In the following period, commercial custom gave the bill of lading a second function, that is to say the function of negotiable document representing and incorporating the goods loaded on board the ship. Thus we see that from the eighteenth century the practice adopted in England recognised in the bill of lading a document of title representing the goods, and the English courts gave legal support to this practice from 1787 in the judgement in the case of *Lickbarrow* v. *Mason* (1787) 2 T.R. 63. In France this idea, which was accepted from the same time by certain courts, met with resistance on the part of some lawyers, specialists who were enlightened legal thinkers notwithstanding their views on this point, such as Emerigon who in 1783 refused to accept the notion that the bill of lading could be a "negotiable document" ("Traité des assurances", ch. XI, sect. 11, no. 8). It was only in 1859 that all doubt was removed when the Cour de Cassation in France allowed an appeal from the Court of Rennes and established the principle that "the property in goods carried by sea is represented by the bill of lading" and that "the bill of lading and also the goods represented by the bill of lading will be transferred by means of endorsement" (Cass. civ 17 August 1859, D. 1859.1.347).

Finally in the nineteenth century the bill of lading acquired a third function, that is to say the function of contractual document establishing the rights and obligations of each of the parties, the carriers on the one hand and the shipper/receiver on the other hand (or the goods, if that description is preferred).

As we have already mentioned it is true to say that from its very beginnings the bill of lading contained provisions which recorded in relation to various points of detail the obligations if not of the shipper then at least of the master or of the owner of the ship. However, the only real contractual document remained for a long time the charterparty. It was the charterparty which established the amount of freight payable and which set out the responsibility of the owner of the ship and the "liberties" permitted to the owner, for example in circumstances in which the port of destination was inaccessible because of ice. We shall see, however, that this situation changed and that the change began during the first few years of the nineteenth century with the appearance of shipowners offering liner services.

When it was a question of the carriage of a case of wine from Bordeaux to London or a bale of wool from London to New York the charter-party, a lengthy and complex document, no longer satisfied practical needs. It therefore came about that only a bill of lading would be drawn up and issued to the shipper. But because no charterparty had been agreed the bill of lading was enlarged. We see that it acquired more and more numerous clauses setting out the responsibilities of the carrier and the liberties referred to above, and the bill of lading was to become in this way the document which we all know today bearing at its head the name of the shipping company.

By the end of the nineteenth century this evolution had been completed throughout the maritime world when in 1893 the Harter Act became law in the United States of America. So far as we are aware this statute is the first law which, taking no account at all of voyage charterparties, had as its purpose the establishing of rules directly and solely applicable not only to bills of lading, as had already been done to some extent in the United Kingdom by the Bills of Lading Act of 1855, but above all the operations of sea carriage covered by bills of lading alone without any charterparty in the background. With the 1924 Convention first of all, and then the 1968 Protocol and the Hamburg Rules, the evolution which had begun five centuries earlier came to its conclusion. What has become of the bill of lading in the course of this evolution?

The first point to be made is that the bill of lading has become more diverse in form. The first bills of lading indicated as consignee a named person who was the only person entitled to receive the goods at the port of destination. Very soon, the practice being well established from the end of the seventeenth century at least, there appeared bills of lading that were "to order", then bearer bills, and these three distinct forms, that is to say bearer bills, order bills and bills with reference to a named consignee, were expressly dealt with in article 281 of the French "Code de Commerce" of 1807. Further, the first bills of lading, since they bound the master of the ship and since the master could only exercise his authority on board the ship, were receipts recording the shipment of the goods on the ship. With the development of regular liner services there appeared bills of lading recording only the receipt of the goods by the carrier for the purpose of shipment. Thus the "received for shipment" bill of lading was developed and took its place alongside the "shipped" bill.

These various bills of lading could not, clearly, all have the same value. One might even ask whether some of them were real bills of lading at all. A bill of lading which is not a shipped bill, or a bill addressed to a named person might well be said to be a simple document of carriage rather than a bill of lading. In our view it would be going too far to say that. A document which bears the title "bill of lading" and includes the usual information (name of the carrier, name of the shipper, name of the consignee, details of the goods, etc.) is a bill of lading even if addressed to a named consignee and even if it indicates that the goods have been received for shipment. It remains true, however, that the value of the bill of lading will depend on its precise form at least so far as concerns certain of the three functions which history has assigned to it.

II

Let us consider first of all the bill of lading in its function as a receipt for goods. We will see that in this sphere its value has constantly increased with the passage of time.

It was admitted and accepted very early on that the information in the bill of lading was binding not only on the parties to the contract of transport but also so far as concerned certain third parties and insurers. The rule, which is set out in article 383 of the French "Code de Commerce" of 1807, was recently reaffirmed by a judgement of the U.S. Federal Court of New Orleans *(Morrison Grain* v. *Utica,* 8 December 1980, 1982 A.M.C. 658).

It is, however, the general evidential value of the bill of lading which has been defined and developed over the years. From the very beginning, it is true, the value of the details recorded in the bill of lading was very great, for example the details relating to the weight of the goods loaded. However, those details in the bill did not have the characteristic of absolute and incontrovertible fact. Throughout the nineteenth century, therefore, we see the courts

allowing the argument that the carrier or the captain could provide proof that the information recorded in the bill of lading did not correspond with the truth. This argument was even allowed to prevail against a receiver holding a bill of lading. This was the approach adopted for example in the celebrated English case of *Grant* v. *Norway* (1851) 10 C.B. 655. Similarly, at the same time, certain statutes allowed the general possibility of evidence that the details in the bill of lading were not correct even when the argument was put forward by the carrier. See on this the Brazilian and Argentinian Codes quoted in Desjardins "Traité de droit commercial maritime" 1885, vol. 4, p. 50. This approach was still followed at least in the terms adopted, in the 1924 Convention which stipulates in a general manner that "a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described" (Article 3, paragraph 4).

However, even by 1924 things had changed. In French law we see that from the end of the nineteenth century the French courts developed a more severe approach and decided that the carrier could not in any case offer proof against the receiver that the details recorded in the bill of lading were not correct. This is the rule which we see followed by the legislators in the law of 2nd April 1936. This law introduces into French municipal law the principles of the 1924 Convention but states expressly that the carrier will not be entitled to avail himself "in regard to any person other than the shipper" of inaccuracy of the details recorded in the bill of lading. Similarly, the law of 18th June 1966, in which an attempt was made to bring French municipal law closer into line with the 1924 Convention than had been done with the law of 1936, states that it is only as against the shipper that the carrier can avail himself of inaccuracies in the information provided by the shipper and recorded in the bill of lading.

In English law the evolution of this idea has perhaps been less clear but it has been in the same direction. Forgetting to some extent the lessons of the judgement in *Grant* v. *Norway*, the courts accepted in the period around 1900 that by application of the theory of "estoppel" the carrier could not, at least in certain cases, challenge the accuracy of information recorded in the bill of lading at least so far as concerned claims by third parties who had relied on the information in the bill, in particular to acquire by purchase the goods covered by the bill of lading. See, among other cases, *Lishman* v. *Christie* (1887) 6 Asp. M.C. 186; *Silver* v. *Ocean Steamship Company* (1929) 18 Asp. M.C.74. On the very restricted authority which may still be given today to the decision in *Grant* v. *Norway*, see the *"The Nea Tyhi"* [1982] 1 Lloyds Rep. 606. In American law the same rule has been applied, and perhaps even more extensively, on the same basis. See *Westway Coffee* v. *Netuno*, D.C.N.Y. 1981, 1982, A.M.C. 505 and the cases referred to there. See also section 22 of the Pomerene Act 1916.

The evolution which took place in this way in English and French law and also in numerous other legal systems lead to the modification of the 1924 Convention. As we are aware, on this point, the 1968 Protocol adds to the terms of the 1924 Convention the provision that "proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith". Using more precise terminology, the Hamburg Rules also state that "proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein" (Article 16, paragraph 3 (b)). See along the same lines a number of laws of various countries, for example Article 200 of the Lebanese Code of Maritime Commerce of 1947, Article 215 of the Tunisian Code of Maritime Commerce of 1962, or Article 761 of the Algerian Maritime Code of 1976.

We note here the difference which exists between the 1966 French law and the text of the 1968 Protocol to the Convention, and the even greater difference between the French law and the Hamburg Rules. Under French law, it is only against the shipper that the carrier is permitted to prove that the facts recorded in the bill are not correct. He is not permitted to avail himself of such proof as against a receiver who has acquired an order bill by endorsement nor as against a receiver whose rights are based on a bill of lading naming him as consignee. On a strict interpretation, which we must nevertheless accept as correct, it may be that when the day comes that the Hamburg Rules are applied the carrier may be permitted to prove the inaccuracy of the facts in the bill of lading in a claim by or against a receiver who is named as the consignee in the bill of lading, because such receiver could not be considered to be a person who had "acted in good faith in relying on the description of the goods contained in the bill of lading". One might even put forward the argument that in effect the relations existing between the shipper and the receiver antedate the bill of lading. And it could be said that the same is true today under the regime of the 1968 Protocol, for it could be said that the receiver who is named in the bill of lading as consignee is not a "third party holder of the bill of lading in good faith".

The law today, as established by the 1924 Convention, allows one notable exception to the almost absolute value of the bill of lading in this context, and that is the exception of fraud. This, however, is an exception which one does not find in the Hamburg Rules.

The problem of fraud in the sphere of bills of lading is one of the specific problems which the C.M.I. has intended for discussion during this seminar. We shall therefore be brief in this paper. Let us simply remember that before the 1924 Convention was drawn up even those courts most disposed to favour the acceptance of the bill of lading as a document containing incontrovertible facts had always allowed as an exception cases of fraud. See in French law Cass. Req. 3 January 1872 D.1872, 1.73 and in English law the comments of Lord Esher in his judgement in *Lishman* v. *Christie* referred to above. This same reservation or exception was included in the text of the 1924 Convention though its scope was delimited. The Convention provides that the carrier is free of all responsibility in cases of fraud by the shipper only when it is a case of fraud relating to the value or the nature of the goods loaded on the ship. And it is generally accepted that the exception of fraud is available for the protection of the carrier not only as against the shipper, which goes without saying, but also as against the third party holder in good faith of the bill of lading. See among other judgements the judgement of the Court of Appeal of Aix-en-Provence 1 January 1979, reported in Droit Maritime Francais 1980 at page 301. See also *La Fortuna* v. *S.S. Irish Lash,* New York Court of Appeals 11 October 1974, reported in 1974 A.M.C. 2185.

The Hamburg Rules have considerably modified the position. We have seen that the Rules stipulate that the carrier may not provide proof challenging the accuracy of information in the bill of lading if the bill of lading has been transferred to a third part including a consignee who in good faith has acted in reliance on the description of the goods in the bill of lading. There is nowhere in the Hamburg Rules any exception of fraud in this context. We must therefore conclude that when the Hamburg Rules come to be applied, the carrier will be responsible to the receiver for the accuracy of the information about the goods recorded in the bill of lading even in case of fraud unless he has been able to include in the bill of lading sufficient reservations to protect himself.

The burden which is in this way placed on the carrier by the regime of the bill of lading is very heavy. It is all the more heavy in that in law as in fact the most important information relating to the goods (number, weight and nature of the goods) are inserted in the bill on the basis of information provided by the shipper or even inserted by the shipper himself. Paragraph 3 of Article 3 of the 1924 Convention stipulates that the carrier shall issue to the shipper a bill of lading "showing among other things...either the number of packages or pieces or the quantity or weight as the case may be as furnished in writing by the shipper". In practice, it is very often the shipper himself or his agent who will write on the bill of lading issued in the name of the carrier the facts and information relating to the goods. And the speed of the operations of carriage by sea more often than not make it impossible for the carrier to carry out any check at the time when he receives the goods from the shipper, to establish whether the information then recorded in the bill of lading corresponds with reality.

This state of affairs—heavy responsibility placed on the carrier, drawing up of the bill of lading by the shipper, difficulty in checking—lead carriers to try to lighten the burden which the bill of lading placed on them. They tried to do this by inserting in the bill of lading various types of reservations (for example "weight and quantity not checked") the purpose of which was to reduce or even to eliminate the evidential value of the bill of lading.

This practice of inserting reserves appeared from the nineteenth century with the general use of printed forms of bills of lading. At the end of that century the use of reservations or exceptions had become systematized, and general exceptions often appeared printed in advance in the texts of bills of lading. In most maritime countries the courts gave effect to these reservations or exceptions. Those courts reached decisions to the effect that where reservations or exceptions of this type were used the carrier was not responsible for the weight or the quantity of the goods indicated in the bills of lading. In the United States, even though that country was disposed to favour the shipper rather than the shipowner, it was the legislature itself which in 1916 in the Pomerene Act accepted the effect and value of reservations and exceptions. This statute provided that the carrier was permitted to insert in the bill of lading the words "shipper's weight, load, count" or any other equivalent expression and that if this was done the carrier was no longer responsible in circumstances in which the goods were not shipped or in which their description was not correct (see section 21 of the Pomerene Act and see also the similar provisions adopted by the Moroccan "Code de Commerce Maritime" of 1919 in which article 265 deals with reservations such as "said to be" and "weight, quality and contents unknown" and "all other equivalents"). However, the example set by the legislation in the United States was not followed by those who drafted the 1924 Convention. They were influenced it seems by the way in which opinion had developed among specialists in international trade against the abuse of the use of reservations and exceptions. Whatever the underlying reasoning may have been, the 1924 Convention does not contain any express authority to the carrier to insert reservations and exceptions. The Convention limits itself to the provision in paragraph 3 of Article 3 which reads "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".

These provisions have been applied in a very confused way by the courts. Generally speaking, the provisions of the Convention have lead the courts to require of carriers very precisely worded reservations and exceptions and not to give effect to general reservations and exceptions printed in advance in the bill of lading or stamped on the bill of lading. This has been so particularly in France where the legislation relating to internal transport added to the provisions of the 1924 Convention a further obligation under which any carrier who refuses to insert in the bill of lading the facts declared by the shipper must make special reference to the reasons which lead him to doubt the correctness of the information, and explanations for this, or refer specifically to the impossibility of checking the information. Recently, however, the courts have discovered, at least in the United States and in France, a new interpretation of the 1924 Convention. In a number of decisions handed down in 1975 in both these countries, the court have held that the carrier who suspects that the declarations of fact made by the shipper are not correct can only protect himself by refusing to insert in the bill of lading the elements of fact about which he has doubts. This is the only action available under the 1924 Convention or, in the United States, the Carriage of Goods by Sea Act of 1936. If the carrier does not avail himself of this possibility he cannot later challenge the facts recorded in the bill of lading even when he has inserted in the bill of lading a reservation or exception. See on this point in France the decision of the court in Rouen, 14 February 1975, reported in Droit Maritime Francais 1977 at page 234. In the United States see among other cases *Baby Togs* v. *S.S. American Ming*, New York, S.D. 6 March 1975, reported in 1975 A.M.C. at page 2012 and *Westway Coffee* v. *Netuno*, New York S.D. 15 September 1981, reported in 1982 A.M.C. at page 505. It will be noted that these two decisions of the courts relate to bills of lading covering carriage of goods imported into the United States from abroad and therefore not covered by the Pomerene Act. And more recently the Court of Cassation in France endorsed this approach to the problem by a decision of 29th January 1980, reported in Droit Maritime Francais 1981 at page 265.

It is in truth difficult to know whether this new approach to the problem of resevations will become more generally accepted. The court decisions to which we have referred were concerned with carriage by containers and they were cases in which the the reservations inserted in the bill of lading were of a very general nature (referring simply to "said to contain"). It is not certain whether the very strict analysis made by the courts in those cases would be extended in its application to cases in which the reservations were more precise and supported by justification in the terms of the bill of lading itself. Further, one should note that the Hamburg Rules have on this point abandoned the terms of the 1924 Convention. Without achieving the precision of the Pomerene Act, the Hamburg Rules provide that the carrier who has doubts about the correctness of the facts recorded in the bill of lading or who has not had sufficient means of checking those facts "must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking". It seems therefore that when the Hamburg Rules come into force it will no longer be possible to advance arguments about the effect of precise and reasoned reservations inserted in a bill of lading. It remains true that so long as the information inserted in the bill of lading is given a more or less absolute value the problem of reservations will remain one which poses great difficulties. That value, however, as we shall see, is the price which the bill of lading must pay as a consequence of its use in international trade as a document of title representing the goods.

III

The second function of the bill of lading, at least when it is a bill made out to order, is that of a negotiable document of title representing and incorporating the goods. In this function the bill of lading is required to play a very important role both in the relationship between seller and buyer of the goods and also in relations with third parties.

In the relations between seller and buyer the precise role of the bill of lading will vary depending on the legal system one is considering. In certain legal systems, where the transfer of possession is a condition of the transfer of property, such as the German and Swiss systems, the transfer of the bill of lading will normally effect the transfer of property. In systems where the transfer of property is achieved first of all in accordance with the intention of the parties, such as the French or English systems, the transfer of property may precede the transfer of the bill of lading and may be achieved, for example, by the delivery of the goods

to the carrier. However, the buyer will remain owner of the goods only in a very theoretical way and exposed to very many dangers so long as he does not have in his hand the bill of lading.

As against third parties the bill of lading will play a very important role in cases where the buyer becomes insolvent. In effect, the seller who has not been paid will lose all right to seize the goods during the course of transport ("stoppage in transitu") from the moment when the buyer has transmitted the bill of lading to a sub-buyer who is a holder in good faith. (See in French law Article 62 of the law of 3 July 1967; in English law Article 47 of the Sale of Goods Act; in American law Section 39 of the Pomerene Act.)

The incorporation of the goods in the bill of lading was achieved as we have seen around the year 1800, slightly earlier in Great Britain and slightly later in France. What is the situation today? Speaking generally, we will say that there has been a great deal of development and the use of the bill of lading has been much added to both from the legal point of view and, even more, in practical terms.

From the legal point of view, the bill of lading today incorporates not only the goods but also the rights of the owner of the goods against the carrier. The holder of the bill of lading therefore has not only the right to claim the goods from the carrier but also the right of bringing against the carrier any form of claim or action arising out of the contract of transport. This seems to have become established towards the middle of the nineteenth century and was expressly acknowledged as early as 1855 in the English Bill of Lading Act.

To make the bill of lading in this way represent not only the goods, but also establish the basis of the relations between the parties to the contract of carriage, has evident advantages. However, the solution that was found in this development does not only have advantages. It can, on occasion, bring disadvantages to the carrier or to those with true interests in the carriage. Dealing first with the disadvantages for the carrier, it has become accepted that the carrier who has strict obligations towards any eventual holder in good faith of the bill of lading cannot properly deliver the cargo except when that bill of lading is surrendered to him. The problems caused by this rule will be discussed in detail during the colloquium so that for present purposes we shall limit ourselves to referring to it only in passing. Turning next to the disadvantages of, or detriment to, those with true interests in the goods, in certain legal systems and, in particular, under French law, it has been accepted that only the person whose name is indicated as receiver in a bill of lading made out to order, or the endorsee in proper form of a bill of lading, can bring an action against the carrier. When as often happens in practice, the bill of lading indicates as receiver a forwarding agent or other agent, the true receiver is thus deprived of any right of action in contract against the carrier. And this rule has sometimes been extended to the true shipper whose name does not appear on the bill of lading, when the bill of lading has again been drawn up in terms referring to a forwarding agent as shipper in his own name. Conclusions of this type which are not justified by any need of maritime transport, and which take a wrong view of the fact that the bill of lading is, as we shall see later, only one of the elements providing evidence of the contract of carriage, do not only produce obvious practical difficulties. They also give rise to very difficult problems so far as concerns the availability of an action in negligence against the carrier by the real receiver or the real shipper and in the area of the form of such possible action.

On the other hand, though the rule was still under discussion in the nineteenth century it is accepted today that the endorsement of the bill of lading transmits to the person acquiring the bill of lading in good faith a document of title which is free of any defect. This rule, sometimes described as the rule forbidding the raising of exceptions, has been expressly affirmed by the law of certain states, for example by the Pomerene Act in the United States (Section 37) and the maritime codes of Morocco (Article 249) and Tunisia (Article 216). The principle also seems to be generally accepted by other legal systems.

It is, however, above all from the practical point of view that the concept of the bill of lading as a document of title representing the goods has been developed. For the bill of lading has become a fundamental element in international trade, and this in two ways.

On the one hand, the bill of lading is the basic document in numerous international sale and purchase transactions. Successive sales by specialised traders of a cargo of grain or of coffee loaded on board a ship will be carried out by successive endorsements of the bill of lading, first to the first buyer then to a second buyer and so on. And in this context, practice has conferred on the bill of lading so important a role that the CIF sale has become a sale of documents rather than a sale of goods. On the other hand, the bill of lading has become the central element in documentary credits where the buyer obtains payment of the price upon delivering, to the bank which has undertaken to pay, the bill of lading (together with certain attached documents which must normally go with the bill). The different banks involved in the sale and purchase transactions then become involved in order to give effect to the documentary credit. They obtain payment from those who opened the credit with them

against the handing over of the same bill of lading.

It is no doubt necessary at this point to make a few distinctions and to consider certain variations. The idea of the sale of documents, applied to the CIF sale, only holds good in the case of sale of goods in bulk such as grain, coffee and oil. The sale of industrial goods is never a sale of documents even if it is on a CIF basis. But even in that case a negotiable bill of lading will very often be issued. Study of practice has shown that in certain trades, for example, the trade from France to the Far East, 90% of the goods shipped are covered by bills of lading made out to order even though they are essentially sales of individual parcels of goods. Why is this practice adopted? Perhaps the reason may be found in the force of habit which has lead many of those involved in trade on an international basis to think that an international sale involves the use of a bill of lading made out to order. But there is also a more concrete reason which has to do with the financing needs experienced by companies. Delays in payment are often very long in the trade referred to. And the credit which the seller of goods can obtain within the context of a documentary arrangement is a good deal less onerous (with a rate of interest lower by 2 or 3 points) than the credit that would be available from the bank as part of a normal loan arrangement.

Similarly, even in the case of an FOB sale in which, on a strict analysis, it is the buyer who is the shipper since the seller does not become party to the contract of carriage, it very frequently happens that the contract of sale provides that the seller will obtain for the buyer a bill of lading which will allow the buyer to re-sell the goods or to obtain a documentary credit. And on this point the law tends towards the view that a bill of lading of this sort, which the seller is obliged to provide, is a negotiable bill of lading unless custom or contractual clauses lead to a different conclusion.

We think that it is possible to state that there has been and there is in a very real sense a dialectical relationship between the bill of lading and international sale. Because the bill of lading confers the right to delivery of the goods, little by little it came to be seen by merchants as a document of title representing the goods and became the concrete object of international sales and thereafter of documentary credits. But because the bill of lading thus became a basic document in important operations even though those operations were completely extraneous to the carriage by sea, it became necessary to confer on the bill of lading a greater measure of security. It may be thought that if the courts first of all, and then international legislation, gave to the information recorded in the bill of lading an ever greater value leading to the virtually absolute value given to that information in the Hamburg Rules, this is because of the role which is played by the bill of lading in international trade. Maritime law has therefore to some extent become subject to requirements which were not requirements of carriage by sea, as can be seen by the fact that different rules apply to sea carriage on the one hand and to land or air carriage on the other. They are, rather, the requirements of international trade.

This phenomenon is without doubt positive in some of its aspects. It is good that the carrier should be urged to check rigorously the details which he agrees to have inserted in a bill of lading issued by him. But the phenomenon also has less positive, sometimes even negative aspects. For it is the requirements of international trade which explain the appearance of the practice, a practice which is an open to criticism as it is almost inevitable, of the issuing of letters of guarantee. The situation is familiar. The shipper produces for shipment goods which are not in perfect condition, for example grain with traces of moisture. In this situation, the carrier could very well protect his interests by inserting reservations in the bill of lading. He does not do this because the shipper asks him not to do it. He agrees instead to issue to the shipper a clean bill of lading in exchange for a letter of guarantee or indemnity. If this is what happens it is because the shipper will not be able to obtain payment unless he hands over a clean bill of lading to the bank which has opened the documentary credit, and because the prejudice or loss which would be caused to the shipper by the insertion of a reservation in the bill of lading seems out of proportion with the need to insert the reservation which should be used. In this sphere, the requirements of the documentary credit system have disrupted the carriage by sea.

But this phenomenon of letters of guarantee or indemnity is only a sideline. So far as concerns the essential points it is the role of the bill of lading in international trade which has conferred on that document of transport such exceptional importance. This importance is clearly seen not only in daily practice but also in technical literature. There are very few studies of documents in non-maritime transport such as land waybills and air waybills. However, innumerable studies have been devoted to the bill of lading either by specialists in maritime transport or by specialists in international trade. Thus we see in the fundamental work by David Sassoon on CIF and FOB contracts more than 50 pages, one-tenth of the whole work, dealing with the problems of the bill of lading.

When we come to the third aspect, the third function of the bill of lading, we come back to problems which are less influenced by the law relating to international trade and much more by the specific provisions relating to maritime law.

IV

The third function of the bill of lading is that of a document which provides evidence of the contract of carriage and sets out the obligations of the carrier. Two questions arise in this context. The first is the role of the bill of lading as a document to which reference must be made to ascertain the precise rules applicable to carriage of goods by sea. There is then the second which is the role of the bill of lading in the definition of the obligations of the parties in any given case of transport.

1. The role of the bill of lading as the basis for determination of the rules applicable to carriage of goods by sea is dominated by the existence of two different legal regimes applicable to the operation of carriage of goods by sea or what, in order to avoid any legal connotation, one might call the movement of goods by ship. The first of these regimes is the classical one of chartering and, in particular, voyage chartering. In a formal sense this is effected by the drawing up of a charterparty linking the shipowner and the charterer. In the material sense, it is characterised by the very wide liberty allowed to the parties to determine the exact extent of their rights and of their obligations. The responsibility of the shipowner is generally limited to particular situations and, for example, in the Gencon charterparty to the situation in which the loss or damage suffered by the goods arose as a consequence of bad stowage by the shipowner or his servants or agents or as a consequence of a personal want of due diligence on the part of the shipowner in making the ship seaworthy. The second regime we shall describe by using French terminology which is, however, a terminology which might be said to have become more generally adopted later. This is the regime of maritime transport of goods and in contrast to the regime of the charterparty this regime of transport of goods is characterised by a considerable reference to rules of public order and public law which the parties are not permitted to modify. In the case of international transport the carriage of goods by sea is regulated in most situations by the provisions of the 1924 Convention (modified later on by the 1968 Protocol), and it will at some time in the future be regulated by the provisions of the Hamburg Rules. When it is a question of internal water carriage (for example from one port in a given country to another port in the same country) it is subject to rules which are either directly copied from or largely inspired by the 1924 Convention. From the point of view of the liability of the carrier this regime of carriage of goods by sea differs from, the charterparty in that the carrier is responsible for all loss or damage suffered by the goods unless he can prove that the loss or damage in question is the consequence of one of the excepted causes provided for in the relevant law. Even then the consignee gains the right to prove that the fault or in any event the want of diligence of the carrier contributed to the loss or damage. In brief, the 1924 Convention and also the national laws which were inspired by it impose on the carrier what is, in fact, an obligation based on what has taken place, a strict obligation limited only by a certain number of exceptions.

Certainly, the analysis given here of the responsibility of the carrier by sea under the regime applying to the contract of carriage, an analysis which follows the French interpretation of the 1924 Convention as set out in the law of 18th June 1966, can be challenged. In a very large proportion of the many legal commentaries, and in a number of court decisions, we find the view expressed that the responsibility of the carrier in the 1924 Convention is based on a presumption of fault if not on fault itself. But when one looks into the matter in depth, one sees that this idea of presumption of fault does not reflect the true reality of the situation. For in every case there is agreement in saying that when the receiver establishes that the goods were delivered to him in damaged condition, whereas they had been entrusted to the carrier in good condition, the carrier is *a priori* liable or, to use the terminology adopted by the United States courts, *prima facie* liable (see, among other cases, *Pacol* v. *M.V. Minerva*, D.C.N.Y. 16 January 1981, 1982 A.M.C. at page 1365 and the numerous cases referred to in that judgement). And the carrier cannot exonerate himself from that liability unless he proves that the cause of the damage falls within a precise excepted peril and that the damage took place without his fault or without the fault of his servants or agents (other than the particular category of fault which is fault in navigation or management of the ship). For even paragraph 2 (q) of Article 4 of the 1924 Convention requires of the carrier more than proof of absence of fault. It requires of the carrier in effect

proof that the loss or damage suffered by the goods arose as a consequence of a "cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier". In our opinion, this provides the framework even for a system of responsibility of the type based not on fault. The liability of the carrier in the 1924 Convention is not, contrary to what seems to have been the opinion of those who drafted the Hamburg Rules, a responsibility or liability based on fault or on a presumption of fault. It is responsibility or liability of an objective type or, in any given case, responsibility or liability in law the burden of which is relieved by a certain number of precise exceptions.

Going beyond the divergences of opinion which may exist in legal analysis, there is one thing which is in any case certain. This is that the presumption of fault or responsibility in law, the responsibility of the carrier under the regime of the 1924 Convention as under the regime provided for by the various laws inspired by the Convention, is incontestably a far heavier burden than the responsibility imposed in the normal course of events on the shipowner who charters out his ships. The difference between these two types of responsibility is great and will become even greater with the coming into force of the Hamburg Rules. Certainly, to be clear about this, the Hamburg Rules will not in the majority of cases in any way change the responsibility of the carrier. It would be easy to demonstrate by means of a precise analysis of decided cases that in most of the cases in which the carrier will in future be held responsible by the application of the Hamburg Rules he already incurs liability today by the application of the 1924 Convention as applied by the courts of the various principal maritime countries. One has only to remember the judgment in the case of the *"Muncaster Castle"*. It remains true, however, that on one important point the Hamburg Rules do bring about a fundamental modification in the law of maritime transport. When those Rules come into force the carrier will no longer be able to avail himself of the defence of act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship. This increasing of the burden of responsibility of the carrier adds to the importance already present in the bill of lading when one comes to consider the factors that may lead to choice between the different regimes governing any given case of transport by sea.

From a first reading of the 1924 Convention, which is a necessary point of departure for any analysis of this subject, one might think that the role of the bill of lading is essential in this sphere. The issuing of a bill of lading could be seen to be both the basic standard for, and the condition of application of, the regime provided for in the 1924 Convention and those other laws inspired by it. But this reading, even though it was the one adopted by those who drafted the French law 2nd April 1936, is in our view not correct. The bill of lading does not in this context have the exclusive role of standard or criterion. It can be replaced by other documents. The 1924 Convention can even be applied in the absence of any document. On the other hand, the bill of lading does retain a fundamental role in the classic case which occurs very frequently where the owner of the chartered ship issues to the voyage charterer bills of lading which the charterer then endorses to third parties.

Let us consider first the normal situation which is that in which goods are entrusted to a shipowner who is operating a ship in regular liner service. Here the bill of lading has a part to play which may be of the first importance statistically but which, from the legal point of view, is not exclusive. Statistically, very many cases of carriage by sea are still covered by negotiable bills of lading. However, looking at the matter from the legal point of view the bill of lading and even more so the negotiable bill of lading can not be considered the only criterion for the applicability of the specific regime of carriage by sea (the 1924 Convention or a law drafted along similar lines).

Already we see that analysis of the terms of the 1924 Convention shows that the drawing up of a bill of lading is not a condition precedent to the application of the regime established by these laws. Certainly, the 1924 Convention has the title of "International Convention for the Unification of certain Rules of Law relating to Bills of Lading". The first Article of the Convention provides that the expression "contract of carriage" applies only to contracts of carriage covered by a bill of lading. Then Article 10 of the Convention (in the text of the 1968 Protocol) lays down that the Convention will be applied "to every bill of lading relating to the carriage of goods between ports in two different states if (a) the bill of lading is issued in a contracting state..." etc. However, the Convention itself by its terms extends its application a good deal further than carriage covered by a bill of lading. Under Article 2 the Convention lays down that the responsibilities and obligations defined in the text will be applied to the carrier "under every contract of carriage of goods by sea". In Article 1 the Convention defines what is a contract of carriage by reference "to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea". In practice, numerous documents could be considered as being in this way 'documents of title relating to the carriage of goods by sea", given that the

carrier who signs such documents undertakes irrevocably to carry the goods entrusted to him. This would be so, for example, as the courts have often noted, in the case of a received for shipment bill, or of a non-negotiable bill or even simple mate's receipt, which contains references to the terms and conditions of the carrier's bills of lading (see Aix en Provence, 31 October 1980 commented on in Droit Maritime Francais 1982. 23. See also *"The Toledo"*, D.C.N.Y. reported in 1939 A.M.C. at page 1300 and compare the comments of Mr. Justice Devlin in *Pyrene Co.* v. *Scindia Steam Co.* [1954] 1 Lloyd's Report, 321).

But it is necessary to go further. In paragraph 3 of Article 3 the Convention provides that after having received and taken charge of the goods the carrier shall on demand of the shipper issue to the shipper a bill of lading drawn up in conformity with the requirements of the Convention. Now that is an obligation which is imposed by the Convention on the carrier at a time when the contract of carriage has certainly been concluded and, indeed, when performance of the contract has already begun. We can see in that way that the provisions of the Convention show that the issuing of a bill of lading is not a necessary pre-condition to the application of the Convention and that the existence of a bill of lading is not the criterion which allows one to determine which carriage by sea is subject to the terms of the Convention and which is not.

What therefore is the criterion? It is found in the intention of the parties and in accepted usage. Every time that goods are delivered to the carrier with the intention that those goods should be carried subject to the terms of the Convention, or each time that in the absence of any express intention to the contrary that is the accepted usage, the Convention must be applied at least unless any other document provides that the Convention should not apply (such other document might by a voyage charterparty or another document implying a reference to the regime of the charterparty).

In some laws the draftsmen have taken into account the ambiguity of the text of the 1924 Convention on this point, and have therefore abandoned any reference to the bill of lading in the definitions of the categories of transport subject to the specific regime of carriage of goods by sea as opposed to the regime of the charterparty. This is so in the French law of 18th June 1966 which defines the contract of carriage of goods not by reference to the document covering the transport but by the material content of the contract, a contract under which "the carrier undertakes to move given goods from one port to another" (Article 15. See to the same effect article 738 of the Algerian Maritime Code). And we know that the solution adopted in French law was accepted by those who drafted the Hamburg Rules. The Hamburg Rules will in future apply to "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another" (Article 1, paragraph 6), whatever may be the document of transport and even in the absence of any such document but in the situation in which the parties have agreed a contract in the form of a charterparty. It remains true that even in the case of a charterparty the position under the Hamburg Rules will remain as it is today, that is to say the bill of lading will retain a fundamental role in the determination of the precise regime applicable to the relations between the shipowner who has chartered his ship and the receivers of the goods.

The clearest situation is found in cases of voyage charters. The charterparty, for example a Gencon charter, will provide that the captain is to sign bills of lading presented by the charterer. In the nineteenth century when this practice was established, the signature of bills of lading by the captain only had limited consequences. Certainly, from the moment that any bill of lading issued was endorsed over to a third party, which happened very frequently, the shipowner became contractually bound with that third party. However, the terms and extent of his responsibility were not modified in any way. This was because the bill of lading which had been signed contained the same terms regarding responsibility or non-responsibility as would be found in the charterparty, or made reference to the charterparty whose terms and conditions then became applicable in the contract with the third party subject to the solution of minor problems of inconsistency between particular terms of the bill of lading and particular terms of the charterparty. The 1924 Convention upset the basic elements of the problem. On the basis of Article 1 (b) of the Convention, which defines the concept of the contract of carriage, a concept which as we have seen is fundamental in the determination of the extent of application of the Convention, there are brought within the category of contract of carriage not only the contract of carriage evidenced by the bill of lading but also "any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty 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". Thus as soon as the bill of lading signed by the captain has been transferred to a third party holder of the bill a novation in the true sense is effected. The shipowner is no longer responsible under and in accordance with the regime of the charterparty set out in the terms and conditions of the charterparty but is responsible for the relations with the third party and in accordance with the terms of the 1924 Convention.

Referring here to the terminology used in France, we can say that the shipowner becomes carrier. In these circumstances, the issuing of a bill of lading has far reaching consequences.

The consequences of the issuing of a bill of lading under a time charter-party are more difficult to analyse clearly. We can be certain about one point. One other point remains uncertain and subject to debate.

The certainty is this. Just as is the case with voyage charters, the issuing of a bill of lading has the effect that from the moment that the bill of lading is transferred to a third party holder the latter may invoke the terms of the 1924 Convention. And no doubt we should here enlarge the rule and conclude, as do the Hamburg Rules (paragraph 3 of Article 2), that the Convention is to be applied from the moment when the bill of lading which has been issued has been transferred to any person other than the time charterer even if it has been transferred only to a shipper or to a named consignee or receiver.

The point which is uncertain and open to debate is the question who is to be considered the carrier in the relationship with the holder of the bill of lading. On this point, uncertainty prevails and different solutions are applied in the different legal systems and even within a legal system.

Under French law, it seems clear that it is the charterer who will be considered bound by the bill of lading even if that bill of lading is signed by the captain. This is the effect of the application of Article 21 of the decree of 31st December 1966 which recites that "the commercial management of the ship falls to the charterer". And this is the solution which is applied even if the bill of lading contains an "identity of carrier" clause, for such a clause is in general considered by the courts to be without effect. A particular problem can, however, arise when the bill of lading is drawn up on a form which carries at its head the name of the shipowner. In such a case the courts allow the receiver to rely on the form of the bill of lading and maintain a claim against the shipowner.

Under English law the rule is rather the other way round. Even when the bill of lading is signed by the charterer it is the shipowner who will be considered the carrier, as was held by Brandon J. in the recent decision of *"The Berkshire"*, a judgement given on 16th November 1973 and reported in [1974] 1 Lloyd's Reports 185. A different solution can, however, be adopted having regard to the circumstances of the particular case, for example when it is a case of a shipowner who operates a regular liner service and who charters in a ship for the purposes of that line and uses the bills of lading which he customarily employs in the service.

American law appears to reach a solution half-way between French law and English law. The shipowner who charters his ship out on a voyage charter basis is only bound by the bill of lading when that bill of lading is signed by the captain. The owner of a chartered ship is not bound by a bill of lading signed by the charterer even when the signature is recorded as being "for the master", though the ship is still exposed to the risk of an action in rem (See Wilford, Coghlin and Healy "Time Charters" 1978 at page 152 and the cases referred to there).

It remains true that for transport carried out within the frame-work of a voyage charter or a time charter, just as in the case of transport carried out directly by a shipowner in his own name, the bill of lading can be replaced by another document of transport. There again, the rules of the 1924 Convention will be applied.

2. We have already mentioned that in the nineteenth century it was the bill of lading which was the basic contractual document for the purposes of determination of the obligations of the parties in every case in which the transport was of particular parcels of goods and no charterparty had been signed. The bill of lading appeared as the principal or even the only source of the obligations of the carrier. And the terms and conditions of the bill of lading were strictly applied by the courts which only disallowed them in exceptional cases of very serious fault on the part of the carrier.

Today, the bill of lading has retained in this sphere an important part of its functions. It is the bill of lading which states the freight payable and also records whether this freight has been pre-paid or has still to be paid. It is the bill of lading also which will indicate, for example, whether the goods must be carried in the hold of the ship and whether they are to be carried at a particular temperature. And those recitals in the bill of lading are all the more essential in that the holder of the negotiable bill of lading has the right to demand that the provisions of the bill are strictly observed. Thus in a number of recent judgements the court of Aix-en-Provence has held that the carrier who had issued a freight pre-paid bill could not oblige the receiver to pay a freight surcharge applied in French ports by virtue of agreements between shipowners and stevedoring companies (see the decision of the court in Aix-en-Provence dated 20th November 1980 reported in Droit Maritime Francais 1982.32. There is also an unreported decision to the same effect dated 2nd July 1981).

Similarly, the obligations and rights of the parties continue to be governed by the very numerous clauses set out on the reverse side of the bill of lading, for example clauses dealing with the right of the carrier to tranship the goods on a ship other than the one indicated in the

bill of lading as the carrying vessel. Here, however, the role of the bill of lading, and particularly in the determination of the obligations of the carrier, has been much reduced, and this for three reasons.

First of all, one must take no account of any clause in the bill of lading which is contrary either to the rules of the 1924 Convention or to the rules of any applicable national law. A clause of this type might be, for example, the one which is still found in a number of bills of lading providing that the discharge of the goods will be at the risk of the goods. No effect will be given to such a clause since it is contrary to paragraph 2 of Article 3 of the 1924 Convention.

Secondly, even when such a clause in the bill of lading is not directly contrary to the rules of public order of the Convention or of the applicable national law, the courts have shown a more and more marked tendency to reduce the practical effect of the clause in question. They tend to impose on the carrier a general obligation of good faith, an obligation to act reasonably. These obligations are independent of the general obligation of diligence which is imposed on the carrier by the 1924 Convention. For example, there are judgements of the French courts in which it has been held that the carrier cannot avail himself of the clause in the bill of lading expressly authorising the carriage of goods on deck, and the reason why the carrier could not avail himself of the clause was that bad weather prevailing in the Atlantic at the time of the sailing of the ship should have lead the carrier not to use the liberty given to him in the bill (see the decision of the court of Paris dated 21st June 1972 reported in Droit Maritime Francais 1972 at page 673). Similarly, there are American judgements in which the courts have not allowed the carrier to avail himself of a perfectly proper ice clause in the bill of lading on the grounds that the carrier must have been aware that the loading port would be obstructed by ice before the loading operations were completed. (See *Orient Mid-East Lines* v. *Cooperative for American Relief*, C.A. D.C. 6 February 1969 reported in 1969 A.M.C. at page 1658).

Finally, there has developed more and more the view that the terms and conditions of the bill of lading must be considered in conjunction with the particular terms of agreement linking the parties in order to determine the obligations of each of the parties. The issue of a bill of lading is often preceded by negotiations carried out by telex or sometimes only by telephone. These telexes may refer in detail to this or that point recording the needs of the shipper and the agreement of the carrier. Because the bill of lading is not the only evidence of the contract of carriage but one element of the evidence of the terms of that contract, these negotiations must be taken into account in determining the obligations of the parties, and the courts often allow agreements made during negotiations to prevail over the terms of the bill of lading. A particularly clear illustration of this approach is found in a judgement of the Federal Court of Appeal of New York dated 7th March 1975 *Hellenic Lines* v. *U.S.A.* reported in 1975 A.M.C. 697. In that case the court held that negotiations carried out over the telephone between the United States Government and a Greek shipowner, in order to make clear the details relating to the carriage of a cargo of grain destined for Palestinian refugees, prevailed over the terms of the bill of lading which purported to confer on the carrier very wide liberties.

Thus one can see that the bill of lading, whose role as the criterion on the basis of which is determined which legal regime is applicable to the carriage by sea has been diminished, has also seen some reduction in its role as the document to which to refer to establish the obligations of the parties. What then can we see as the future of the bill of lading?

V

To consider the future of the bill of lading it is necessary to study how the bill of lading may be capable of modification to adapt itself to changes which have taken place or which can be foreseen both in carriage by sea and in international commerce, bearing in mind the interaction which we have seen exists between the bill of lading and international trade.

Here, it seems to us that the role of the bill of lading must be affected if indeed it has not already been affected by two categories of phenomena. These are, on the one hand, the changes which have taken place in the techniques of international transport and, on the other hand, foreseeable evolution in the techniques used in relation to documentation because of the development of communications and computerisation.

1. Changes in the techniques of carriage. Here it is a matter mainly of new techniques in equipment such as the use of containers and of new techniques of management and organisation such as the system of multimodal transport.

In general, the use of the container poses numerous problems for maritime transport. Some of these problems, which for that matter also affect other types of cargo as Doyen Rodiere has shown, have nothing to do with the law relating to bills of lading and we will therefore not deal with them. However, the problem of containers in which are carried a number of packages, such as a container of 1,200 cases of electrical material, has a direct effect on the legal rules applicable to the bill of lading. In fact, as we know, the 1968 Protocol, taking its inspiration from certain solutions to the problem found in judgements of the courts, provides on this point that "where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph" (Article 4, rule 5(b)) in the context of the section of the rules dealing with the question of limitation of liability of the carrier. And it is here that specific problems appear in relation to a bill of lading covering carriage by container.

The first of these problems is the question of the meaning of the words "packages or units enumerated in the bill of lading". On this point, it seems that the courts have adopted a fairly flexible approach. In any case in which the bill of lading indicates the precise number of packages in the container, the bill of lading is held to "enumerate" those packages. But a more difficult problem is to know whether the rule set out in the Protocol should be applied and so whether the carrier should be held liable, in the example given above, on the basis of 1,200 packages if the carrier has inserted in the bill of lading clauses or statements indicating that he gives no warranty as to the number of packages in the container where that container has been "stuffed" by the shipper.

We have already considered the effect of reservations inserted by the carrier in the bill of lading. It is worth examining this again in the context of the use of containers, for in that context the question is particularly difficult to answer because of the precise terms of the text of the 1968 Protocol. That text provides that the carrier will be responsible for the number of packages as enumerated in the bill of lading and the text allows no specific exception and does not permit the use of any reservations. It seems, therefore, that there is only one way in which the carrier may escape responsibility. As we have seen, moreover, this way is found in the observance of the rule, if effect is given to the precise provisions of the 1924 Convention. The carrier who does not wish to be held responsible for the number of packages enumerated must refuse to insert that number in the bill of lading. If that is done, then it seems that the problem is solved since one is no longer dealing with a bill of lading which "enumerates" the packages.

This rather strict solution has been affirmed in a number of recent judgements. See, for example, the judgement of the Cour de Cassation in France dated 29th January 1980 and also the United States case of *Westway Coffee* v. *Netuno*, both referred to above. One may hope that a different solution will be admitted when the Hamburg Rules are in force since, as we have seen, those Rules allow the carrier to challenge the evidential effect of statements in the bill of lading if he has inserted in the bill of lading reasoned reservations. It may be, however, that one should go further and, in the case of bills of lading covering containers stuffed by the shipper, introduce in international transport the rule which is found in American law in the Pomerene Act, a rule in accordance with which as we have seen a reference in the bill of lading to the fact that the shipment has been effected by the shipper brings about the consequence of a reversal of the burden of proof. One may indeed come to the conclusion that the goods and the owner of the goods are sufficiently protected by the package limitation calculated on the basis of weight, bearing in mind that, if he wishes, the shipper may if he thinks it necessary obtain other forms of security such as insurance or checking by an agent of the carrier, or by an independent expert, of the goods loaded in the container.

The consequences for the bill of lading of the development of multimodal transport are more diverse and merit a more systematic consideration. We are all aware of the scope of this phenomenon which is becoming very widespread today. International carriage of goods from the place where the carriage begins (the warehouse of the manufacturer) to the place of final destination (the warehouse of the buyer) often involves a succession of different forms of transport carried out by different means—by road, by sea, by rail. This carriage may be undertaken by a single operator, the multimodal transport operator (m.t.o.). He will issue a single document covering the whole of the transport, the multimodal transport document (m.t.d.). The effect of this system for the organisation of transport on the bill of lading will depend on different factors and, in particular, on the precise role of the m.t.o.

The m.t.o. may in fact be a specialist firm which does not itself carry out any phase of the transport but enters into contracts with each of the carriers whose services are required and in particular with the carrier by sea. In such a situation, the issuing of the m.t.d. does not have the consequence of the disappearance of the bill of lading for the m.t.o. will require a bill

of lading from the carrier by sea to whom he entrusts the goods. This bill of lading may, it is true, be a simple bill of lading with a named consignee, or a waybill or similar document, bearing in mind the very close relationship and the confidence which may exist between the carrier by sea and the m.t.o. But it may also be and in fact in practice often is a bill of lading in the traditional sense.

The m.t.o. may, however, also be himself a carrier by sea either acting in an independent capacity or, as very often happens, a member of a pool. In this second situation, the bill of lading disappears, for the carrier by sea who issues through the shipper a document covering the whole of the operations of carriage has no reason to issue to the shipper a second document covering only the sea carriage portion of the transport. And, in fact, he does not issue such a document.

Thus numerous types of carriage by sea which, even fairly recently, gave rise to the issuing of a bill of lading such as, for example, the carriage of containers from Munich to Houston, no longer give rise to the issuing of such a bill. And the risk that we may see bills of lading for carriage by sea disappearing in multimodal transport is all the greater to the extent that practice is tending towards acknowledging multimodal transport documents as negotiable documents in the same way that the bill of lading is used as a negotiable document. The International Chamber of Commerce has already put in hand a study of a plan for reform of the rules and customs relating to documentary credits and this envisages the acceptance of multimodal transport documents for the purposes of documentary credits. It may be open to discussion how far these plans of the International Chamber of Commerce extend. The value, as document of title, of a document used in carriage is of interest also to third parties who will be directly affected by the rules pronounced by the International Chamber of Commerce. It is not certain whether such third parties can be said to be subject to those rules, however wide the representation of the International Chamber of Commerce may be. It will, however, be difficult for the courts to resist the pressure of professional groups and it may well be that the contractual custom or usage created by the International Chamber of Commerce will fairly quickly become a custom or usage in the true sense. Further, the 1980 Geneva Convention on multimodal transport of goods recognises the possibility of the issuing of a multimodal transport document in a negotiable form (made out to order or to bearer).

One may therefore come to the conclusion that in the years to come the bill of lading for carriage by sea will in a number of trades be replaced by the multimodal transport document. But this need cause us neither satisfaction nor concern. The bill of lading is no more than a tool used for legal purposes. All tools become worn out with time and we must accept that every tool may be replaced by an improved model better adapted to the needs of practice. One may come to the same conclusion so far as concerns the future influence of computerised and other new techniques on the fate of the bill of lading.

2. The problems posed by the development of computerised and other new techniques in maritime transport are so wide in scope that it is in no way possible to consider here any more than very general observations. Furthermore, these problems have been the subject of numerous studies of very high quality which are well known to all specialists in maritime law.

Let us consider technical problems first. Is it possible to have sufficient confidence in a system of registration which would be used to record the aggregate of the elements of fact and the transactions for which the issuing and circulation of a bill of lading are used under the traditional system? There seems no doubt about the answer to this first question. Computerized systems have become so sophisticated that it is difficult to believe that they cannot respond successfully to any requirement which those involved with sea carriage or international commerce may make, whether it is a question of registering the facts recorded in the bill of lading describing the goods or recording the terms and conditions of the contract of carriage or the successive endorsements of the bill of lading. When we turn to the question of the safety and reliability of a system of this type, then even though it is true that electronic methods and even the most highly developed of them have their weaknesses, as has been reported generally by the press, it remains true also that computerised and other similar systems permit the achieving of sufficient security, and the risks of fraud are no greater than those which exist today with the use of the traditional type of bill of lading.

Whether electronic systems are compatible with the legal rules relating to carriage by sea, and if so to what extent, is a question which poses problems which vary depending on the complexity of the situation which is considered.

Thus the problems are fewest and of least importance if computerised techniques are applied to the carriage of a parcel of goods destined for a named person. In principle, the drawing up of a bill of lading in writing is not, in cases such as that, necessary to establish the validity of the contract of carriage. Certainly, the 1924 Convention provides that the carrier shall on demand of the shipper issue to the shipper a bill of lading and under certain systems of law there is a more imperative requirement that a bill of lading or other written transport

document shall be issued. See for example the provisions of the Harter Act. However, the facts recorded in a computer can at any time be printed out in a supporting document and the shipper's requirement of a bill of lading can be met in this way. It will even be possible to affix the signature of the carrier to the written document by electronic means when the Hamburg Rules come into force, in circumstances in which the law of the country where the bill of lading is issued permit this. We observe that this system of computerised documentation is expressly dealt with in the 1980 Geneva Convention on multimodal transport so far as concerns non-negotiable documents (paragraph 4 or article 5).

Similarly, the use of computerised documents does not give rise to any problem from the point of view of the evidential effect of the information recorded in the computerised bill of lading. It is difficult to see how the carrier could challenge the accuracy of information which he has himself recorded on the basis of the declarations of fact made by the shipper. When one comes to the question of the evidential force of the matters recorded in the computerised bill, so far as concerns the shipper this does not appear to be a legal problem except perhaps under French law. It has indeed always been accepted that the information recorded in the bill of lading did not have, as against the shipper, any more than the value of mere presumptions. Their recording in a computer will not in this sphere alter the rights of the shipper in any way at all. However, under French law which requires that the bill of lading should be signed by the shipper, and also in systems of law which on this point follow the French rule, one must ask oneself whether the fact that the computerised bill has not been signed by the shipper may not reduce the evidential effect of this document in relation to the position of the shipper. In the absence of any precise legal decisions on this point, it is difficult to give an answer to this question. One may perhaps only point out that the courts are generally slow to admit arguments by the shipper challenging the terms of the bill of lading when these arguments are based only on the lack of a signature on the bill of lading. There remains one psychological problem of a general nature. If the value of the information recorded in the bill of lading is only rarely challened by a shipper, this is in part because having received the bill of lading without protest, it is difficult for him to challenge it at a later date. In a system of recorded information one may fear that this psychological brake will not be applicable. Or alternatively, it will be necessary for the carrier to make known to the shipper on a systematic basis the text of the successive versions of the computerised bill, though if the carrier had to do this the use of computerised techniques would have, as one of its unforeseen consequences, an increase in the amount of documention used even though the setting up of that documentation is in the first stage made easier.

There remains a last problem which is that of the incorporation into the contract of carriage of the general terms and conditions used by the carrier. Usually, this incorporation is achieved by reference to these conditions on the reverse side of the bill of lading or of any other printed document relating to carriage. But in the case we are considering where such a document does not exist, how will it be possible to achieve the incorporation which is desired?

Practice in this area seems to have tended towards the use of a simple mention of a reference to the carrier's terms in the text of the computerised bill. After having recapitulated the details recorded in the computer, this bill will indicate that the carriage is undertaken "on the basis of the printed conditions found on the reverse side of the carrier's bill of lading". It is not certain that a reference of this type will always be considered sufficient particularly in relations with a shipper whose business is not international commerce, and indeed the same may apply even where the shipper is professionally involved in international commerce. See on this point, for example, the judgment in the case of the *"Hong Kong Producer" (Encyclopaedia Britanica* v. *Hong Kong Producer* C.A. New York, 1969 reported in 1969 A.M.C. at page 1741). It would therefore be prudent for carriers to consider more certain and effective methods of incorporation into the contract of their general terms and conditions of carriage, at least when they are dealing with shippers who are not their usual clients.

Matters become more complex if it is a question of replacing the negotiable bill of lading by computerised techniques. This is because in this sphere the bill of lading is an indispensable support for the proper working of legal transactions such as successive sales of the goods or documentary credits in which the bill of lading is used as a pledge. Only a reform of the law might permit a full use of computerised techniques. It is indeed difficult to imagine how the law would be framed and one can understand why the drafters of the 1980 Convention on multimodal transport, who as we have seen accepted computerised documentation in the case of non-negotiable documents, did not extend their approval to negotiable documents. In the absence of such a reform of the law it seems hardly possible to envisage anything other than systems for replacement such as those already used in certain trades (see the study by Professor K. Grönfors). Of these systems, we will only say that if they do on occasion involve carriers by sea as the central pivot of the operation, they also have their origins very

much more in the techniques of bank credits than in those of maritime transport. For this reason, we shall not analyse them any further here.

Let us come to a conclusion. The bill of lading is still today one of the most important and remarkable legal documents used in international trade. It is possible that the importance of its role will become progressively reduced and that the bill of lading will be replaced by documents of a new type or by new techniques. But the evolution of which the first signs can be seen raises so many problems, and problems of such complexity, that lawyers specialising in maritime law will be able to take a professional interest in the bill of lading for a long time to come.

BILLS OF LADING
and
FRAUD

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Although as far back as records go one can find instances of the fraudulent misuse of bills of lading by those engaged in commerce, these instances have in general been rare. However in the last 8 to 10 years, fraud in relation to bills of lading has become a serious problem for the maritime community; it is difficult to determine why this has become so, but it is possibly because the very high values of cargo now carried in such volume offer so many opportunities, particularly when many transactions are carried out between parties who do not know each other or who are inexperienced in commerce. Whatever the causes, the problem is now a very serious one.

At the beginning of this century, there were serious problems in the American cotton trade, arising out of widespread misuse of bills of lading; in part, this was due to the practice of ocean carriers sending signed ocean bills of lading in *blank* to banks in the interior of the U.S.A., authorising such banks to fill out such bills and release them when the cotton was received at the inland shipping point; often goods were lost or arrived too late to be loaded on board the vessel in respect of which the bill had been issued. There were also several fraudulent conspiracies between cotton dealers and railway agents who issued bills of lading for cargo never received.

The problems in the cotton trade were so serious that a conference of European bankers, ship-owners and merchants was held in Liverpool in 1907 and a Committee established to lay down rules for the issue of negotiable bills of lading. This led to agreements in 1911 with American Railway Companies and with shipowners regulating the issue of bills of lading in the cotton trade; these agreements were followed by State and Federal legislation. This action was successful and few problems of the kind recurred.[1]

In our view, as a result of the frauds of the last ten years, maritime trade today faces such serious problems, that further action must now be taken by all concerned to improve existing practices or possibly even to introduce new systems.[2]

The bill of lading retains a key function in relations between purchasers and sellers, for example by providing security and a means of checking the existence and nature of the cargo, particularly where the parties do not regularly do business with one another. We consider it necessary to examine whether it is right for such reliance to be placed on bills of lading (with the consequent risk of liability for the carrier) or, whether changes should be made with the object of placing greater responsibility on others (with the consequent reduction in the carrier's responsibilities) or, of possibly eliminating the bill of lading altogether where it is not actually required.

Our paper will attempt to describe the most common ways in which the present system (in relation to bills of lading) facilitates fraud and will attempt to highlight the areas where we feel some change in existing practices is urgently required. We also have put forward some

(1) The history of these events is set out in an account written in 1939 by Mr. A. H. Cleaver (a Chairman of the Liverpool Cotton Bills of Lading Conference) and reproduced in *Knauth.* The American Law of Bills of Lading. 4th edition. 1953 at p.394–402.

(2) Initiatives have been taken by other bodies: in 1981, the ICC established the International Maritime Bureau and the subject of maritime fraud in general is being studied by UNCTAD (see Report of UNCTAD Secretariat dated 1st April 1982 (TD/B/C4/244).

suggestions for change and these will, we hope, provoke a lively reaction from the shipping community. In putting forward suggestions, we have tried to strike a balance between what is in fact desirable on the one hand and cost and commercial practicability on the other; we look forward to detailed comments on the best way of achieving an acceptable balance.

We shall deal first with bills of lading which are issued with the actual or apparent authority of the carrier; this will cover four main topics:

I Bills of lading for cargo not shipped. (p.16 to p.18)

II Bills of lading misdescribing the facts relating to shipment—mis-description of the nature and condition of the cargo and ante-dating. (p.18 to p.21)

III Use of one original bill of lading in a set of three to procure delivery. (p.21 to p.25)

IV Delivery without production of bills of lading. (p.25 to p.26)

We shall then consider the type of frauds perpetrated through bills of lading and other documents that are forgeries. This is a separate topic, as the carrier is in no way involved in their issue and can do little to prevent such issue, but this is not to say that carrier, banks and others cannot do much to make such fraud more difficult.

V Forged Documents (p.27)

I BILLS OF LADING FOR CARGO NOT SHIPPED

In recent years, there have been a number of cases where large scale fraud has been perpetrated by the issue and subsequent negotiation of bills of lading under which, in fact, no goods were shipped; a brief summary of two of these cases illustrates the problems:

(1) "The Peramataris"

In December 1968, the "Peramataris" sailed from Thailand to Europe. A number of bills of lading were issued purporting to evidence the shipment of jute, and these were negotiated under a number of string contracts. When the vessel arrived at Antwerp and Bremen, no jute was found aboard in respect of some of the bills of lading as, in fact, none had been shipped under such bills of lading. These bills of lading had been fraudulently issued by the vessel's time charterers who had been given authority to issue bills of lading. Proceedings were successfully brought against the Owners in Germany and a small recovery made by the consignees from them. A number of claims were also settled in Antwerp. The balance of the loss fell on the initial purchasers under the string contracts.

(2) "The Lord Byron"

In the Spring of 1974, a Somali Government organisation entered into a contract to buy 10,000 tons of suguar for $5.9 million, with payment under a letter of credit against usual shipping documents. In June, the buyer presented the shipping documents, including a bill of lading headed "C.C. Line, Consolidated Cosmopolitan Line", purporting to evidence the shipment of 10,000 m.t. of sugar on the "Delwind" at Koh-Si-Cheng, a small island near Bangkok on 20th June 1974. The Bank paid. The "Delwind" did not load the sugar and by 20th June had in fact been sold and her name changed. In August, another vessel, the "Lord Byron" was sub-chartered by Consolidated Cosmopolitan Line and in September, loaded 687 tons of sugar at Bangkok; no bill of lading was presented for signature to the Master who said he accepted the excuse that it was Sunday and late. The vessel loaded other cargo at Singapore and sailed for Somalia. In the meantime, Consolidated Cosmopolitan Line had informed the Somali Government that the "Lord Byron" was carrying the sugar that had allegedly been shipped on the "Delwind". When the Somalis discovered that only a small proportion of the cargo they had bought was aboard the "Lord Byron", the vessel was arrested and detained for a very long period. The vessel's war risk insurers paid a substantial claim.[3]

In this type of fraud, the loss will in the first instance, fall on the first purchaser or, if it is a string contract, on the first purchaser in the string;[4] provided the Bill of Lading and other documents are regular on their face and conform to the letter or credit, the purchaser will have no recourse against the banks which have paid under the letter of credit;[5] the purchaser

(3) A detailed account of this incident is set out in: *Ellen & Campbell,* International Maritime Fraud, London 1981 at p. 36–45.

(4) In English law: see *The Peramataris* [1973] 2 Lloyd's Rep. 515.

(5) In English law: see *United City Merchants* v. *Royal Bank of Canada* [1982] 2 WLR 1039; [1982] 2 Lloyd's Rep. 1.

may well also have difficulties in making a successful claim against the carrier, though the position varies from jurisdiction to jurisdiction.[6] The loss will therefore ultimately fall either on the carrier or on the initial purchaser or, in part, on both.

In looking at means by which such fraud can be prevented, it is convenient to consider the position of each of these three parties.

(1) The carrier

We consider that these frauds are most easily facilitated by, and arise from, the widespread practice of delegating authority to charterers and agents to sign bills of lading on behalf of the Master; for example, it was held in England that the NYPE form (Asbatime) (the most commonly used time charterparty) by implication, allowed the charterer to sign bills of lading on behalf of the shipowner[7] and the 1981 revision to this form contains an express provision[8] permitting the charterers or their agents to sign bills of lading on behalf of the Master.[9]

Delegation to reputable and reliable charterers or their agents is without doubt a commercial necessity and cannot be criticised. The vice which facilitates these frauds (as it appears to us) is, however, the practice of indiscriminate and far-reaching delegation of the authority. It is to this vice that, we consider, carriers must pay much greater regard and it is in their interest to do so.[10]

We appreciate that there is often considerable commercial pressure to give wide delegated authority, but we would suggest that carriers should be discouraged from such delegation, save where they know of the reputation and reliability of the charterer or agent and, any delegation of authority should prohibit sub-delegation without the express authority of the carrier.

The existence of the widespread practice (confirmed by 1981 revision to the NYPE form) does, however, cause a further problem; it has been argued, that carriers who let their ships on time charter and put them onto charterers' berths will be taken to have held out the charterers and their agents as having general authority to sign bills of lading unless they have taken positive steps to indicate to the contrary, for example, by making it widely known that the charterer has no such authority.[11] We doubt whether the widespread practice has had the effect contended for, but if there is to be a general change in practice, it would be essential to give as much publicity as possible to such a change, particularly to banks and traders.

(2) The purchaser

The purchaser is not, in our view, in an advantageous position to check this type of fraud which generally arises from the abuse of delegated authority. However, the purchaser is able to assist in the prevention of this fraud by taking proper steps to ensure that any survey carried out is independent and reliable; we shall discuss the purchaser's responsibility in more detail in the next section.

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(6) (i) In English law, there will be no recovery: either because of the much criticised decision in *Grant* v. *Norway* (1851) 10 C.B. 665, (see *F. M. B. Reynolds:* Warranty of Authority (1967) 83 Law Quarterly Review 189) or, where the carrier or his agents are not parties to the fraud, because the bills of lading may be nullities if issued by the carrier under the mistaken belief (known to the shipper) that cargo had been shipped (see *Smith* v. *Hughes* (1871) LR 6 Q.B. 597.
(ii) In the U.S., prior to 1909, many Courts had declared the act of a carrier in issuing a bill of lading where goods were not shipped was ultra vires and not binding (e.g. *Pollard* v. *Vinson* 105 U.S. 7 (1881) *Prentice* v. *Northern Pacific R.R.* 154 U.S. 155 (1893).). This impaired the value of U.S. bills of lading in the cotton trade; action to reverse this was first taken by the Liverpool Cotton Bill of Lading Conference in 1907 and then by the State Uniform Bills of Lading Act and the Federal Bills of Lading Act, 1916.
(iii) See also the Indian decision given by a Court in the State of Kerala, *Syndicate Bank* v. *Africana Co. Ltd.* 1977 K.L.T. 246 where the carrier was held not liable to an endorsee of a bill of lading issued by the office manager of the ship's agents when no goods had been shipped.

(7) *The Berkshire* [1974] 1 LL Rep. 185.

(8) The new clause, clause 8, provides:
"However, at charterers' option, the charterers or their agents may sign bills of lading on behalf of the Captain always in conformity with mate's or tally clerk's receipts."

(9) See also the proposal (to make the vessel liable even where the bill of lading is not signed by the Master) by *H. Schadee* in Zeerecht in het licht van Boek 8 Nieuw Burgerlijk Wetboek (edited F. A. van Bakelen) Zwolle 1983.

(10) In the *Nea Tyhi* [1982] 1 LL Rep. 606, one of the considerations which influenced Sheen J. in deciding whether an "innocent" Carrier or purchaser should suffer as a result of the signature by agents of incorrect bills of lading, was that the Carrier had placed his trust in the charterer to the extent of authorising him and his agents to sign bills of lading.

(11) *Wilford, Coghlin, Healey and Kimbell:* Time Charters 2nd edition (1982), p. 216.

(3) The banks

The bank's duty is to see that the documents are regular on their face; on one or two relatively recent occasions, we understand that a bank has gone beyond this and checked whether the vessel in question was at the loading port at the date indicated; such checks led to the uncovering of the fraud. However these are isolated instances and banks have taken the view that it is not their function to make any checks. We question whether this attitude is right when modern methods of communication and the availability of information make it relatively easy to carry out a few simple checks.

We return to the role of banks and the suggestions we put forward as to what they might do in Section V when we discuss forged bills of lading.

II BILLS OF LADING WRONGLY DESCRIBING THE FACTS RELATING TO SHIPMENT

Bills of lading misdescribe the facts most commonly in three respects—(1) the nature of the cargo, (2) the condition of the cargo and (3) the fact and date of shipment. The first of these—misdescription of the nature of the cargo—is perhaps seen as the most obvious example of fraud, but an incorrect date of shipment, the issue of a shipped on-board bill when the goods have only been received for shipment, or a failure to clause the bill when goods are damaged, should fall within the scope of the discussion. As each gives rise to separate problems, we will deal with each separately.

(1) Misdescription of the nature of the cargo.

Again, in recent years, there have been a number of cases where very large frauds have been carried out by shipping worthless cargo under bills of lading containing the description of a valuable cargo; one of the most widely publicised frauds was the shipment on board two Greek ships—the "Pistis" and the "Saronicos Gulf"—of peanut husks and the procurement of payment under a letter of credit from the Angolan Government by bills of lading, describing the cargo as shelled peanuts.[12] The loss in such a case can, depending on the reservations to the bill of lading, fall on the carrier or on the purchaser.

Because of the enormous variety of consignments shipped, it is, we believe, not practicable to set detailed guidelines as to what carriers, sellers, purchasers, surveyors and others ought to do.[13] We do, however, consider it worth-while making some tentative suggestions.[14]

(i) Packed goods: checks by the carrier

Where the cargo is shipped in bags, casks or other packing, or the goods are already loaded into containers, the check which it is reasonable for the Master or crew themselves to carry out is unlikely to reveal that the cargo is other than the one they have been told it is.[15] Simple checks, such as checking the weight of the cargo or container should, however, be carried out.[16] For example, a recent fraud where empty drums were shipped in a sealed container said to contain chemicals in drums would have been discovered if the weight of the container had been checked.

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(12) A more detailed account of this incident is set out in *Ellen & Campbell* (supra) at p. 45.

(13) cf the provisions of s.20, 21 of U.S. Federal Bills of Lading Act 1916, (the Pomerene Act) (49 U.S.C.A. 100, 101). s.11 of the U.S. Carriage of Goods by Sea Act 1936 and Article 7–301 of the Uniform Commercial Code: see also *Chicago & N.W. Ry* v. *Bewsher* 6 F2d 947 (1925); *Leigh Ellis & Co* v. *Payne* 274 F. 443, 276 F. 400. (1921).

(14) cf suggestions of *Professor Tiberg* in *Carrier's Liability for Misstatements in Bills of Lading,* Hasselby Colloquium 1982. (not yet published); he suggests that there should be a definite minimum standard of checking or control by the carrier so that a purchaser can determine whether to have his own further check or control. The difficulty is, however, in setting minimum standards for such a variety of different situations; Professor Tiberg's suggestion for checks on quantity are relatively easy to apply, but much more difficult are minimum standards for checking the nature of the cargo.

(15) For example, in *Fuerst Day* v. *Orion Insurance Co. Ltd.* [1980] 1 Lloyd's Rep. 656, (an unsuccessful claim by a purchaser against underwriters) drums which should have contained essential oils used in the manufacture of soap were filled with water; a small trace of oil was added so that in the event of a cursory examination or leakage sufficient odour would have been given off to satisfy a customs officer or ships officer.

(16) cf *Ellerman and Bucknall SS Co.* v. *Bhagajeh Sonmull* 1961 AIR 443 (Madras) where drums which should have contained polystyrene powder contained coal dust and factory shavings. The carrier was held liable to the receiver because the bills of lading wrongly described the cargo (at the request of the shipper and against a letter of indemnity) as packed in "drums" whereas the cargo (as the mate's receipt had acknowledged) was packed in "re-used" drums.

(ii) Checks by an independent surveyor

The responsibility for ascertaining the nature of the goods shipped in bags, casks or other packaging, or a more specialised check of any goods must generally, therefore, rest on an independent inspector or surveyor. There is clearly the risk that the surveyor will not carry out his duty carefully or, in exceptional circumstances, that he may conspire with the shipper. It is important, in our view, that there be a clear responsibility on the parties to the transaction to ensure that a reputable surveyor is employed. We see no reason why the carrier should be under any such responsibility to check or supervise his inspection. Some carriers do appoint surveyors to check the cargo as it is loaded, but this is usually to check the condition of the cargo and not carry out what is sometimes the more specialised task of ascertaining the nature of the cargo. It should, in our view, be the responsibility of the purchaser to ensure that he makes proper enquiries into the standing of the surveyors at the loading port; if, however, there is no purchaser when the cargo is shipped, then the seller should arrange for an independent survey and the purchaser check the standing of that surveyor prior to making the contract. The purchaser should then, by the terms of his purchase contract, ensure the survey is, or was carried out by a surveyor of proper standing. This high standard in practice can no doubt only be applied in larger contracts, but the principle that it is the purchaser's responsibility should place on the purchaser the duty to take whatever steps he can.[17]

There are, however, many cargoes carried today (particularly chemical cargoes) where few surveyors have the expertise to survey the cargo and ascertain whether the cargo is what the shipper says it is. In such cases, the purchaser has to trust to the integrity of his seller; neither a surveyor nor the Master can be expected to assist.

If this analysis of the respective responsibilities were to be accepted, then the carrier should be entitled to clause bills of lading to the effect that, the carrier was not responsible for the nature of the goods, as the carrier had not carried out any survey or check.

(iii) Goods stuffed into containers by forwarding agents.

A difficult problem arises, however, where goods are stuffed into containers by a forwarding agent and the Master is required to issue a bill of lading in respect of containers sealed on arrival at the vessel. It seems, to us, to be the forwarding agent's duty in such circumstances to use the same degree of care as a Master in checking the nature of what he loads and, if not satisfied, to qualify the documentation accordingly. But there is again the risk that he will carry out his work negligently or will act dishonestly. In many cases neither the carrier nor the purchaser will have any control over the appointment of the forwarding agent and the purchaser may well not know one has been employed. We would suggest, however, that if a carrier is prepared to accept a container with its contents listed without any proper check,[18] the carrier ought to do so only if satisfied as to the fowarding agent's reputation, though we appreciate that this may not always be an easy commercial decision. We say this because, although the carrier is not at present usually under any responsibility to the consignee or purchaser, as the bill of lading will use the words ". . . said to contain . . .", we nonetheless consider that the carrier is, in effect, delegating such responsibility as he may have for checking what is loaded to another and, it seems to us, he should only do so where he is satisfied of the forwarding agent's trustworthiness.

The importance of ascertaining the freight forwarder's trustworthiness is illustrated by the practice of "cube-cutting". This fraudulent practice enables freight forwarders to make secret profits by using their knowledge of a carrier's tariffs to charge one price to their customer and account for a lesser sum to the carrier; this is achieved by misdescribing goods or understating the cubic capacity to the carrier and so obtaining a lower tariff whilst charging the shipper the correct tariff based on the true description of the goods or their correct cubic capacity.[19]

(iv) Checks by a second carrier.

Where, however, the second carrier of goods under a through bill of lading, accepts a consignment, it seems clear to us that the second Carrier should not be under a responsibility

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(17) It has been suggested that the purchaser also should (i) if practicable appoint a supercargo to look after the loading, carriage and discharging operations and (ii) obtain a performance bond from the seller's bank: see *Ellen:* A Profile on Maritime Fraud (I.C.C. International Maritime Bureau, August 1982).

(18) However cf. *Chicago & N.W. Ry Co.* v. *Stephens Nat. Bank of Fremont* 75 F2d 398 (1935 8th Cir.) where a U.S. Federal Court of Appeals observed that it would not have held the railway liable under s.21 of the Pomerene Act (supra note 13) in respect of a bill of lading issued by the railway if a sealed rail car had been delivered empty to the railway, because to do so, would impose on the railway the responsibility of inspecting all rail cars loaded and sealed by shippers.

(19) See for example a United Kingdom Department of Trade Inspectors' Report in 1978.

to check the nature of the cargo. That check should have been carried out prior to the first carriage under the bill of lading, in the manner we have already described and it would be wholly impracticable for this to be done again.

(v) The need for a common approach.

We consider it is important that there be some common approach to the responsibility for ensuring that reputable surveyors and forwarding agents areused; it is too easy at present, for any one of the various interested parties to say that it is the responsbility of one or more or the others. Furthermore,one area of probable controversy under the Hamburg Rules will relate to the carriers' responsibility for checking the nature of the cargo and the circumstances in which he can make reservations about this. It seems probable that the general reservations now made[20] in the printed wording of bills of lading would not be effective under the Hamburg Rules and reservations would have to be inserted as the occasion arose; reliance on "ad hoc" reservations is never effective in practice and it seems to us desirable to develop a more uniform policy as to responsibility for checking along the lines we have suggested.

(2) Misdescription of the condition of the cargo

Where the cargo is already packed or the condition of the cargo is not apparent on inspection by a Master or Chief Officer, the observations we have already made in relation to the role of the surveyors and inspectors obviously apply. Yet what arises in this connection is the question when a carrier is entitled to accept a letter of indemnity[21] rather than clause a bill of lading.

It is the common approach of most jurisdictions that letters of indemnity are permissible where there is no fraud intended on the consignee or receiver; this approach is embodied in Article 17 of the Hamburg Rules. The difficulty which arises is as to the circumstances in which an intention to defraud will be found.

(i) Disputed minor damage or minor discrepancies

Where there is a bona fide dispute between the carrier and the shipper as to whether the condition of the goods is affected by some minor damage or some minor damage to the packaging, or there is a minor discrepancy between ship and shore figures, then it cannot be said that a Master acts fraudulently if he issues a clean bill of lading against a letter of indemnity.[22]

(ii) Minor damage not materially affecting the goods

More difficult is the case where there is clearly some minor damage which probably does not materially affect the condition of the goods. As a shipper will almost certainly require a clean bill of lading to present under his letter of credit, the Master is put under considerable pressure to accept a letter of indemnity. In this case, although a failure to clause the bill will amount to a misdescription of the goods, if the Master believes that the condition of the goods is not materially affected, there is probably no intention to defraud.

(iii) Damage materially affecting the goods

However, if the damage does materially affect the condition of the goods, then, it seems to us, that there is a risk that an intention to defraud will be found. Although it can be argued that all the Master is doing is extending the carrier's liability for pre-shipment damage and that the practice of issuing letters of indemnity in such circumstances is not uncommon, nonetheless the Master is deliberately issuing a document which he knows to be untrue and which he knows will cause loss to the consignee and his insurers. In such circumstances the Master is, without doubt, in a very difficult position. The commercial pressure from his shipper to issue clean bills will be considerable. If he bows to that pressure then, on the wording of many P&I Club rules, the carrier may not be covered for any claim and there is a serious risk that the letter

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(20) Most systems of law permit such reservations and the carrier does not have to justify the fact that he has no reasonable means of checking: see for example, the decision of the Belgian Cour de Cassation of 1st April 1966 in *Skibs Victoria* v. *British and Foreign Jurisprudence du Port d'Anvers* 1966 p. 206. cf U.S.A. decisions in *Spanish American Skin Co.* v. The Ferngulf 242 F2d 551 (1957). *Baby Togs Inc.* v. *S.S. American Ming* 1974 A.M.C. 2012.

(21) See further: Mitchelhill: Bills of Lading, Law & Practice, 1982, Ch. 8.

(22) If a shipper insists on a clean bill of lading and refuses to provide a letter of indemnity, the shipper may only recover nominal damages if the carrier refuses to issue a clean bill of lading: see (for example) the Nigerian case of *Alan Bojor* v. *Greek W.A. Line* (1970) Nigerian Commercial Law Reports 136, (1971) Nigerian Commercial Law Reports 136.

of indemnity may be worthless.[23] There is no easy answer. The Master or the carrier must balance the commercial risks, but we would hope that bills of lading would be claused in such circumstances.

Although we have said that there is a real risk that in the third example we have just given the Master's conduct would be held to be fraudulent, this situation does not present the serious problems of huge and widespread losses that other fraudulent conduct causes.

(3) Misdescription of the date of shipment; issue of shipped on board bills when goods not on board.

Two other widespread practices are the antedating of bills of lading and the issuing of 'shipped on board' bills of lading, when the cargo has only been received for shipment. These practices [24] have been encouraged by the requirement in many contracts and in most letters of credit that a cargo be shipped by a fixed date and by the considerable difficulty of changing that date. Delay often occurs unexpectedly and it either takes too long to get the contract or letter of credit amended, or there is a risk that the purchaser may refuse an amendment as the market may have moved against him.

Although in many cases the antedating of a bill of lading is merely a convenient method whereby the shipper does not need to procure a change in the terms of the letter of credit, a change to which the purchaser would agree, it is a practice which should obviously not be condoned. Under the wording of many P&I Club rules, the carrier may not be covered for any claims which may arise as a result of this action and as it will usually be obvious that the shipper is seeking to avoid the need to alter a date in a letter of credit, there is a real risk that the Master's conduct in antedating a bill will be found to be fraudulent;[25] thus any letter of indemnity he obtains may again be worthless.

It seems to us, that carriers should not be required to sanction the issuing of a document with an untrue statement, merely because the documentary credit system is too rigid. If, as it seems to us, there should be greater flexibility with regard to a shipment date, then the remedy lies in amending the practice in relation to documentary credits and not in requiring Masters to issue documents they know to be untrue.

Exactly the same observations apply to the issuing of 'shipped on board' bills of lading when received for shipment bills should have been issued. We understand this practice is widespread in the container trade, where 'shipped on board' bills of lading are issued 3 or 4 days before the container is placed on board. This imposes obvious risks on the carrier. For example, if after issuing a 'shipped on board' bill, there is a strike at the port, shipment of the goods can be seriously delayed and the carrier will be under a clear liability to the receiver for this.

(4) Indiscriminate delegation

In discussing these three aspects of incorrect statements in bills of lading, we have dealt with the matter on the assumption that it is the Master or carrier's agents who issue the bill of lading. However, the problems are exacerbated by the widespread practice of indiscriminate delegation and we reiterate here what we have already suggested about the need for a general tightening of that practice.

III USE OF ONE ORIGINAL BILL OF LADING IN A SET OF THREE TO PROCURE DELIVERY.

(1) Historical background

The practice of issuing bills of lading in sets of three originals is very ancient. Certainly by the sixteenth century, bills of lading were being drawn up in sets of three. In the record of the case of *"The Brandaris"* in 1546,[26] a bill of lading is preserved on the record translated from the Spanish original. It ends:

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(23) A mis-statement in a bill of lading where an intention to defraud can be inferred may enable a consignee to avoid an exclusive jurisdiction clause: (cf. decision of *Oberlandesgericht Hamburg, February 2nd 1981*, Versicherungsrecht 1982, p.341).

(24) The practice of persuading carriers or their agents to antedate bills of lading is already to be found in the nineteenth century: see *Stumore, Weston and Co.* v. *Breen* (1886) 12 App. Cas. 698 and *Tiberg:* Carrier's Liability for Misstatements in Bills of Lading, (supra, note (14).

(25) See for example *United City Merchants* (supra) before Mocatta J. [1979*] 1 Lloyd's Rep 267 at 273.

(26) On the history of the bill of lading see generally: *Bennett,* The History and Present Position of the Bill of Lading as a document of Title to Goods (Cambridge, 1914); at p.6 he suggests that the practice of issuing a bill of lading in triplicate was part of the development of the bill of lading as a separate document distinct from the register of the bill of lading carried on the vessel necessitated by the requirements of commerce when merchants ceased to travel with their goods.

"In witness whereof I have given you three cognossements all of one tenor marked with myn owne marke, the one performed, the other to be of none effect".

The reason for having bills in sets of three is not entirely clear, but Malynes in 1686 in the Lex Mercatoria gives the following account: [27]

"Of these Bills of Lading, there are commonly three Bills of one tenor made of the whole ship's lading, or of many particular parcels of goods, if there be many laders; and the marks of the goods must therein be expressed, and of whom received and to whom to be delivered. These Bills of Lading are commonly to be had in print in all places and several languages. One of them is inclosed in the letters written by the same ship, another Bill is sent overland to the Factor or Party to whom the goods are consigned, the third remaineth with the merchant for his testimony against the master, if there were any occasion or loose dealing: but especially is it kept for to serve in the case of loss to recover the value of the goods of the Assurors that have undertaken to bear the adventure with you."

As the purpose of having bills in sets of three seems to have been a convenience to the shipper, the condition in the bill that "one being accomplished, the other to stand void" was clearly necessary for the protection of the carrier and this condition seems to date back to the earliest times. It is accepted in some jurisdictions that, provided the Master has no notice of any other claim to the goods or knowledge of circumstances raising a suspicion that the person presenting a bill of lading is not entitled to the goods, then he is entitled to deliver against the production of any one original.[28] In other jurisdictions, however the Master must deliver the cargo to the holder of the bill of lading, even if he has notice that another person claims to be the true owner of the cargo.[29]

(2) Few cases of fraud

The opportunity for fraud is obvious and it is, therefore, perhaps very surprising that there are very few reported cases where fraud has been perpetrated by the misuse of one of the originals. Furthermore, we understand that even in recent times, there are very few instances of fraud effected in this way.

(3) Carriage on board of original and delivery against that original

However, despite the fact that there is little evidence of fraud being effected in this way, the risk of fraud has been increased by new practices in some trades, particularly the oil trade,[30] in dealing with bills of lading. An increasingly common practice is where the shipper or charterer gives one original bill of lading to the Master and instructs the Master to deliver this at the port of discharge, and, on receiving that original bill of lading back, to deliver the cargo against it. A variant of this practice is where no bill of lading is issued to the shipper, but the Master, on the instructions of the shipper or charterer, fills out and signs bills of lading during the voyage in accordance with those instructions. The Master then hands over the bills of lading to the consignee and then, on receiving an original back, delivers the cargo against this.

Whereas a carrier will normally not be exposed if the Master delivers cargo against a single original bill of lading duly presented by a person at the port of discharge (for his knowledge as to the existence of two other originals cannot per se amount to notice of another claim), we consider that a Master's conduct in carrying a bill of lading, delivering it to a person at the port of discharge and delivering the cargo against that bill of lading, can put the carrier at grave risk if the Master delivers the bill of lading to a party who is not entitled to it. This risk is most serious when there is fraud being perpetrated or when one of the parties in the transaction becomes insolvent.

In our view the legal risks in this practice are best analysed by looking at the reality of this type of arrangement where the problem is most acute—the handing to the Master of one of

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(27) The first edition of *Abbott* (1802) similarly states (as p. 175):
". . . The Master . . . delivers to the merchants sometimes two and sometimes three parts of a bill of lading of which the merchant commonly sends one or two to his agent, factor or other person to whom the goods are to be delivered at the place of destination that is, one on board the ship with the goods, another by the post or other conveyance; and one he retains for his own security."

(28) In English law see, *Glyn Mills and Co.* v. *East and West India Dock Co.* (1882) 7 App. Cas. 591; the position is, we understand, the same in some other jurisdictions.

(29) For example, Italian law so provides:

(30) The practice is we understand unusual in the grain trade.

the original bills of lading made out to "Order" and indorsed in blank. The Master will no doubt know, or be taken to know, that the other two originals may pass through one or a string of purchase contracts probably involving letters of credit and that he will be delivering the cargo to a person other than the shipper. The original bill of lading held by him (if it is to entitle him to deliver against it) must be treated as a document having the full attributes of a bill of lading; thus under those systems of law where transfer of the bill of lading can operate to transfer title, the Master will be playing an active part in the transfer of the title to the cargo by delivering at the port of discharge the document by which title to the goods may be transferred. It seems to us that this is outside the normal functions of a carrier by sea whose duty it is to carry the goods and deliver them to the person presenting a bill of lading.

Under English law, the position seems to us to be as follows: the Master is being made a bailee of the bill of lading; this is probably not a gratuitious bailment, but whether it is or not would seem to make little difference; if the Master does not deliver the bill of lading to the person entitled to it, there is then a serious risk that he will be under strict liability for the tort of conversion. There is high authority for the view that a carrier might not be under this strict liability where he receives goods from A and delivers them to B on A's instructions where there is a mere transfer of custody;[31] but this would not avail a Master as he must know he is taking part in the transfer of title.

Under Dutch, French and Italian law, the position is different; the Master will in these circumstances be acting as the "mandataire" or agent of the shipper and his liability for delivering the bill of lading or the cargo to the wrong person will only arise if he is negligent. Furthermore, since in performing this function, the Master is the agent of the shipper, the shipowner or carrier will not be liable for the Master's negligence.

An alternative legal analysis is this. By issuing two original bills of lading which are to be used in the usual way to transfer title or possession or be presented under letters of credit, and another original which is to be taken on the voyage and against which delivery will in fact be made on the shipper's or charterer's instructions, the Master is, in effect, creating two different sets of bills of lading—the one set in two originals being 'order bills' and the other set in one original being, in effect, a bill with a consignee to be nominated. If this analysis is correct, it places the carrier in obvious difficulties.

Quite apart from the risk of delivering the bill of lading (and consequently the cargo) to a person not entitled to it, there must also be a risk (though a small one because the Master will usually be acting as agent for the shipper according to the circumstances of the practice) that the Master is representing to the person to whom he hands the bill of lading that he has the right to transfer it (and it would seem a right to transfer the goods). If the other two originals have been acquired by another person prior to this, then that other person has, in some jurisdictions, a better title to the goods than a person subsequently acquiring another bill in the same set. If so, then the person to whom the Master delivers the bill may, in some jurisdictions, have a claim against the carrier for breach of the representation as to title.

These are, in our view, serious risks which cannot be ignored. It is therefore necessary to see how the carrier can protect himself if he agrees to his Master becoming involved in this practice.

Although it is no doubt convenient to those in the oil and other trades where this practice prevails to deal with bills of lading in this way, we doubt whether the practice is so prevalent and universal, even in the oil trade, that it could be said to be customary. In any event, it is always difficult to establish that a custom exists until the practice is tested, and thus we consider that, in assessing the risks, carriers must look to the ordinary principles of law to which we have referred.

In an attempt to protect the carrier and in order to warn persons not familiar with the practice of its existence, it has been suggested that the two original bills given to the shipper be claused with words such as:

> "One original left on board the vessel against which delivery may be made on instructions received from shippers/charterers."

We understand that shippers would not accept such bills because they would probably cause difficulties in sale contracts or under letters of credit. To meet this objection, it has been suggested that the Master's or Mate's receipt be claused with similar words. We do not know whether this is acceptable to shippers. However, there is always the risk that such a document might not accompany the two original bills and we would not consider this alone to be sufficient.

The reluctance of those in the oil trade to accept clausing of the two original bills of lading in our view points to the real vice in this practice. Shippers and others in the trade are, in every sense, trying to have the best of both worlds—original unclaused bills of lading with all their

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(31) *Hollins* v. *Fowler* (1873) LR H.L. 757 at 766–7 per Blackburn J: see also *Palmer.* Bailment (1979) at p. 148.

usual attributes for presentation under letters of credit, and a convenient method of speeding up delivery which puts the risk of misdelivery (in our analysis) on the carrier.

It seems to us that a short term solution must be for the shippers to send the bills of lading by courier to the port of discharge. The Master should not have the responsibility of performing this task for the shippers. If the Master is to perform this task, he should do so as agent of the shipper and be given an enforceable indemnity. An alternative solution in the oil trade would be for the trade to devise suitable contractual provisions in standard form which would deal with the question of delivery if the shipping documents are delayed. We will develop this suggestion in the next section. These proposals will cause extra expense to the shipper, but with the very high values involved in oil cargoes, and the real risks involved, such costs are not unreasonable and should be borne by the interests for whose benefit the practice developed.

Since the risks inherent in having multiple original bills of lading have been increased by the practice with which we have just dealt at some length, we consider that it must now be opportune to review whether it is still necessary to have multiple original bills of lading at all.

(4) Tender of bills by different persons

Before doing so, we will briefly mention another difficulty created by having at least two originals. What happens when two different parties present original bills to the carrier. Under most old Continental Codes, save where the goods were perishable, the carrier was obliged to put the goods into "consignation" and the decision of the Court then had to be awaited. This is hardly practicable in modern times. Certain revisions of these Codes have allowed greater flexibility, since they have empowered the Court to sanction other methods of disposal by the carrier, pending resolution of a dispute. However, it seems to us that this sort of problem should not be allowed to arise at all and that more than one original should not be allowed into commercial circulation.

(5) Only one original should be issued

We can find no real justification[32] for the practice of having multiple original bills of lading today. Lord Blackburn doubted the need for the practice in 1882[33] and that against the background of the methods of communication which existed in those times. Similar criticisms were made in 1912 in the Netherlands by Sanders [34], who recommended an end to the practice. More than 100 years after Lord Blackburn's remarks, it is surely high time to take positive steps to end the practice in international trade. In 1911, the issuing of more than one original bill of lading was prohibited for all inland trade in the United States by some states and in 1916 by a Federal Act.[35] It is time, we suggest, that this example was followed universally. The New Netherlands Civil Code[36], however, provides for the issue of bills of lading in two originals. The official commentary on the Code justifies this decision by pointing to the need to meet the practice of banks under letters of credit, which require bills of lading in two or more originals. It seems to us however, that the only reason why banks require two or more originals is to ensure that they have all the originals, so that they have full security over the goods. If there were but one original, the bank would only require that original. In short, we believe that reference to the practice whereby banks require two originals as an argument for defending the rule that bills of lading must be issued in two originals is circular, and does not amount to a true justification.

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(32) *ARENA.* The Bill of Lading and other Documents of Title, Milan, 1951, p.169 n.10 sets out the different purposes which make it desirable to issue duplicates:
   (1) security in the dispatch of the bill to its destination in that the shipper can send the various originals by different means.
   (2) The shipper may wish to send an original not endorsed to the purchaser of the goods to prove that loading has occurred and an original which is endorsed to his agent for the collection of the goods.
   (3) In cases where the sending occurs before the sale, the shipper can send the originals to different agents so that they may offer the goods for sale in different markets.
   (4) The shipper can, if he discovers after having sent the bill of lading that the receiver is insolvent, send an original to his own agent in order that the latter can hasten to recover the goods.
   (cited by Professor Bonelli, Il Diritto Marittimo 1978 at 265). We do not find any of these reasons justifiable in present times.

(33) In *Glyn Mills & Co.* v. *East & West India Dock Co.*, supra, at p.605.

(34) *H. Sanders*, Het Cognossement (1912) Ch. 5.

(35) The Uniform Bills of Lading Act was adopted by the conference of Commissioners on Uniform State Laws of the American Bar Association in 1909. It was enacted as state legislation in New York and elsewhere from 1911. In 1916, a Federal Act (the Pomerane Act) was passed, based on the Uniform State Acts. The principal purpose of the Acts was to make order bills of lading negotiable as U.S. case law prior to 1909 denied the negotiability of bills of lading (see *Knauth:* Law of Ocean Bills of Lading 4th edit. 1953 p.385) s.4 prohibited the issue of a bill of lading in more than one part: see also now Article 7-304 of U.C.C.

(36) New Netherlands Civil Code, Book 8, Article 8.5.2.32.

IV DELIVERY WITHOUT PRODUCTION OF BILLS OF LADING

This topic will only briefly be touched on by us as others have dealt with it in detail.

(i) A recent example

Obviously, the practice of delivery of cargo without bills of lading can give rise to opportunities for fraud. A case in 1975 illustrates the risks. The Master of a tanker containing a full cargo of crude which he had carried on a short voyage to a port with one refinery, was persuaded to deliver the cargo without production of bills of lading. The Master did not consider that a letter of indemnity was necessary, as the cargo was consigned to the port and there was only one possible receiver. In fact, the refinery was acting on account of a sub-sub-buyer and when the sub-sub-buyer acquired the cargo, he paid his sub-buyer (a company with no assets) who then took advantage of minor discrepancies in the documents and was able to avoid payment under a letter of credit to his seller. The seller, who had all the original bills of lading was however, able to recover from the carrier.

(ii) Need for a new approach

In the case to which we have referred, the Master was clearly wrong in failing to take an indemnity.[37] However, indemnities are only as good as the financial strength of the guarantor[38] and, given the cost of securing indemnities (or their equivalent) from banks on high value cargoes, we feel that in transactions where it is likely, given present practices, that the vessel will arrive before the bill of lading and where the trade has not developed its own system for dealing with this eventuality, a new approach is necessary. The trades which we have particularly in mind, are the short voyage trades with bulk commodities, such as oil and gas where the value of the cargo is often high and the cost of providing a bank indemnity is consequently also high. There is often nowhere to store the cargo pending the arrival of the bills of lading, save on board the ship or by delivering it to the receiver.

(iii) Grain trade

We have not referred to the bulk trade in grain, as we understand that, although there are often long string contracts to the common European destinations, there are few practical problems. This is perhaps because the grain trade is better organised, in as much as standard form contracts such as GAFTA 100 make express provision for what is to happen if the vessel arrives at the port of discharge before the bills of lading and these provisions work well in practice.[39] We would welcome comments and more information on this.

(iv) Other bulk trades

In the other bulk trades to which we have referred, we consider that the shipper should decide what he requires. If he needs a document of title to present to his buyer in order to provide the requisite security for payment or finance, then a bill of lading in one original should be issued and this document moved rapidly through the banking system. We have both seen that this can be done very rapidly when circumstances require it. However, where the cargo is being shipped directly to the receiver's terminal, or to a nominated processing or storage

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(37) The question of whether the Carrier can insist on a bill of lading being presented and refuse to deliver against an indemnity is an open one: see for example the observations of the East Africa Court of Appeal in the *Despina Ponkitos* [1975] E.A. 38 at 58. Delivery without production of a bill of lading can also disentitle the Carrier from relying on a jurisdiction clause: *The Barada*, (Court of Appeal, The Hague, 7th April 1982, Schip & Schade 1982, 82).

(38) In some cases, Carriers have been forced to accept clauses in charterparties obliging the Master to deliver without a bill of lading against a charterer's indemnity not countersigned by a Bank: see further *G. J. Van der Ziel:* Delivery without bill of lading published in Zeerecht in het licht van Boek 8 Nieuw Burgerlijk Wetboek (edited F. A. van Bakelen), Zwolle, 1983.

(39) GAFTA 100 provides:

Line 100: "In the event of the shipping documents not being available on arrival of the vessel at destination, sellers may provide other documents or an indemnity entitling Buyers to obtain delivery of the goods and payment shall be made by Buyers in exchange for same."

Line 102: "Should Sellers fail to present shipping documents or other documents or an indemnity entitling Buyers to take delivery, buyers shall take delivery under an indemnity provided by themselves and shall pay for the documents when presented. Any reasonable extra expenses, including the costs of such indemnity or extra landing charges incurred by reason of the failure of Sellers to provide such documents shall be borne by the Sellers and allowed for in the final invoice . . .

Line 122: "Should shipping documents be missing, payment shall be made provided that the delivery of such missing documents be guaranteed, such guarantee to be signed, if required by buyers, by a recognized bank."

see also: *Ina H. Wildeboer:* Towards the abolition of the Bill of Lading published in Zeerecht in het licht van Boek 8 Nieuw Burgerlijk Wetboek (edited F. A. van Bakelen Zwolle 1983.

facility, the ship should not be required[40] to issue anything other than a non-negotiable document or waybill[41] and the carrier should be given orders to deliver the cargo to the terminal or facility, or to follow the instructions of the shipper. Since no negotiable document will have been issued, in the event of insolvency or non payment, the shipper will have to make appropriate arrangements with the terminal or facility pending resolution of the problem. Furthermore, where the sale contract or letter of credit provides for payment against documents 30 or 60 days after the bill of lading date, then, as the voyage will usually be much shorter than this period, the issue of a bill of lading is again inappropriate. If the seller wishes to give the buyer credit for such a period, he should use some form of security other than the retention of the bill of lading, since it is a misuse of the bill of lading to use it as an attempted means of security after discharge of the cargo.

(v) Transshipment

Problems similar to those encountered at the port of discharge also arise, particularly in the oil trade, when bulk cargoes are transshipped from smaller vessels into one large vessel, or from one large vessel into smaller vessels. Parties often do not ensure that the documentary arrangements required under the terms of their letters of credit correspond with the shipping arrangements. There has been at least one recent instance where serious delay occurred when the Master of a large tanker would not give delivery to the smaller tankers until the original bill of lading (which was on its way through the banks) was obtained and produced. As far as we are aware, there are no recorded cases of fraud on such transshipments.

(iv) North Sea short haul of oil

In the short haul of oil emanating from an oil platform in the North Sea, the tanker may, at the time of loading, be at a distance of a few hundred meters from the platform. As no member of the crew is allowed onto the platform and there is no other means of communication, the Master is unable to sign a receipt. The tankers in question are dedicated tankers equipped with special connection apparatus; they perform a sort of shuttle service. In some circumstances an original bill of lading in blank signed by the Master is provided to the platform. On this the platform states the quantity of oil which according to the platform has been loaded. Later the Master delivers the tanker's own figures to the shipper. Sometimes he is only able to do this after the tanker has arrived in quieter waters, and some fuel oil has been used in the meantime. By comparing the shore figures, the bill of lading figures and the discharge figures, it is possible to determine with sufficient certainty, what amount has actually been loaded. The bill of lading, (which is often a named bill of lading) arrives much later and therefore has no real function. There are no cases of fraud reported.

Another way of organising the documents in this trade is as follows. The Master retains the original bill or bills of lading on board. He is informed by the platform by telex what quantity, according to the platform, has been loaded. The Master then inserts that amount in the bill of lading which he then keeps on board and delivers at discharge port to the person mentioned in the instructions. Here, again, there may be differences of opinion as to the quantity which was actually loaded, but these are normally resolved by, for example, comparing the ship's loading figures for previous or later voyages. Again, there are no known cases of fraud, probably because the circle of interested parties is restricted.

(vii) Conclusion

We consider therefore, it important that the shipper decides what he wants, so that the most suitable documentary arrangements can be made. We would expect bills of lading only to be issued when actually needed and a carrier will know that, in such circumstances, he must not deliver the cargo without either a bill of lading or proper security. In the large number of cases where bills of lading are not thought to be necessary, they should not be used. This will remove from the carrier, the risks inherent in following current commercial practices.[41]

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(40) The extent to which a carrier is required to issue a bill of lading varies from jurisdiction to jurisdiction: in English law, there is probably no requirement (see *Diamond:* The Hague-Visby Rules. Lloyd's Maritime and Commercial Quarterly, 1978, 225 at 261) whereas under French law a carrier must issue a Bill if required; the Hamburg Rules will however compel the carrier on demand of the shipper to issue a bill of lading (Article 14).).

(41) For a useful discussion of waybills in carriage by sea, see *Williams:* Waybills and Short Form Documents: Lloyd's Maritime and Commercial Quarterly August 1979, p.297 at 307–12 and *G. J. Van der Ziel:* Delivery without bill of lading (supra, note 38); for a general discussion see *Rowe* "Bills of lading must move fast". International Financial Law Review, April 1983 p.32.

V FORGED DOCUMENTS

An equally serious problem is the use of completely forged bills of lading. Forged bills are occasionally used by sellers to obtain payment under letters of credit, without supplying the goods and by purchasers, under letters of credit, to obtain the goods without making payment. Three examples will illustrate the problems:

(a) A seller who has procured a contract requiring payment under a letter of credit buys a blank bill of lading, completes it by inserting the name of a vessel and a port and arranges the other documentation. This is presented under the letter of credit and payment obtained.

(b) A seller ships goods on board a vessel that does not go to the final destination required under the letter of credit. Although he obtains a bill of lading for the goods shipped, it will not enable him to obtain payment, so he forges an original bill covering the entire journey.

(c) A purchaser receives a copy bill of lading from a seller who has sold him goods which are actually on board a vessel. The original bills of lading are held by the bank pending payment by the purchaser. The purchaser forges an original bill of lading (using the copy he has to ensure its accuracy) and procures delivery of the goods without paying the bank. Alternatively he may forge a letter of indemnity.

It seems to us that there is little that either carriers or banks can do to prevent the issue of such documents. It might be possible to restrict the availability of blank bills of lading in some way (though we doubt this), but even if they were restricted, they would be easy documents to forge. It has also been suggested that specimen signatures of persons signing bills of lading should be obtained. Given the very large number of different persons who might sign bills of lading, we doubt whether this is a practicable suggestion.

It seems to us that the best way to try to combat this type of fraud, would be to ensure that there is communication between banks and carriers or their agents in all transactions where cargoes of substantial values are involved and, where the person seeking payment or delivery of the goods is unknown to the bank or carrier. There may be other methods—for example more sophisticated stamping of bills of lading and providing notice of such stamps to banks or by employing agencies such as International Maritime Bureau—and we would welcome comments on these methods.

We have singled out communication between banks and carriers for comment, because we consider that modern methods of communication permit this to be done quickly and at relatively little cost and because we understand that those who forge bills of lading to obtain payment under letters of credit frequently either select a non-existent vessel or give a loading date when the vessel was not at that port. Thus a simple check by the bank on whether the vessel was at the port of loading on a given date might, in many cases, prevent fraud. The banks rightly contend that this would impose a burden on them. Such a burden might be intolerable if insisted upon for all transactions, but where high value cargoes are involved and the bank does not know the beneficiary under the letter of credit, we think that bank should check with the carrier (or the vessel) whether the cargo stated was loaded on the vessel at the port on the date in question.[42] We should emphasise that we are not suggesting that the bank should check on the nature or the quality of the cargo. This is, as we have already suggested, a task for an independent surveyor and not for a bank (which does not have the facilities for this). Our suggestion is much more limited—a check only with the carrier or vessel—and the cost of this should not be significant.

Conversely, where a carrier or the agent is being asked to deliver a high value cargo to a receiver unknown to him and where the bill of lading shows it has been negotiated through a bank, the carrier or the ship's agent could check with the bank that it has in fact released the original bills of lading.

Whereas carriers have a vital interest in making such a check, (for they could be liable to the holder of the genuine bill of lading), it might be thought that a bank would not have a similar interest. But as has often been pointed out, the bank can ultimately suffer if its customer is defrauded where a high value shipment is involved.

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(42) (i) *Documentary Fraud—a Banker's view:* Bernard S. Wheble (Chairman of the Banking Commission of the ICC), IUMI Cargo Committee Workshop, 13th September 1982.
(ii) Report of UNCTAD Secretariat, 1 April 1982 (TD/B/C.4/244) to Committee on Shipping, Paragraphs 19–22.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

1. Carriers should only delegate the right to sign bills of lading to reputable and reliable charterers or agents; indiscriminate delegation and sub delegation should be avoided.

2. A clear definition should be achieved of the responsibilities for checking the nature of cargo loaded.

3. Clean bills of lading should only be issued against letters of indemnity where there is a bona fide dispute as to damage, or there is minor damage not materially affecting the goods.

4. Ante dated bills of lading, and "shipped on-board" bills for goods only received for shipment, should not be issued.

5. Bills of Lading should only be issued in one original. The practice of employing the Master to carry an original on board and delivering cargo against the bill of lading should be ended.

6. Bills of lading should not be used for voyages where it is anticipated the vessel will arrive before the documents, unless there is an agreed system for making delivery, or unless there is some commercial need for a bill of lading as opposed to a waybill.

7. Where a high value cargo is to be paid for under a letter of credit and the beneficiary is unknown to the bank, the bank should check with the carrier whether the cargo stated was loaded on the vessel at the port on the date stated in the bill of lading.

DELIVERY WITHOUT PRODUCTION OF BILLS OF LADING

LEGAL PROBLEMS IN CASES OF FRAUD

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(1) Fraud in connection with the issuing and the transfer of bills of lading.

In some cases it is easy to establish who are the persons liable and on which grounds their liability arises. This situation occurs:

(a) In cases in which the bill of lading wrongly describes the cargo, or purports to cover cargo not in fact shipped, or in cases in which the bill of lading has been fraudulently issued, the carrier is the person liable (even if the wrong or fraudulent bills of lading have been issued by his agent), and his liability (or vicarious liability) is based on fault or fraud.

(b) In cases in which different originals of the bills of lading are transferred (or pledged) to different persons,[1] the liability rests on the person (seller or pledgor) who used the different originals of the bill of lading in order to sell (or to pledge) the same goods to different persons; the liability of the seller (or of the pledgor) is based on fraud and on the implied warranty by the seller (or the pledgor) that he is entitled to sell (or to pledge).

Sometimes, on the contrary, it is not easy to establish who is liable and what is the basis of the liability. This is so in cases of delivery of goods without production of the bills of lading. In these cases, it is open to argument whether the carrier is liable towards each holder of one original from the set of bills of lading and what is the basis of his liability (see below, sections 2-4), and whether the carrier, after indemnifying the holder of the bill of lading, is entitled to claim damages from the receivers who obtained delivery of the cargo without production of the bill of lading (see below, section 5).

(2) Liability of the carrier who delivers the cargo without production of the bill of lading.

The carrier is not bound to surrender possession of the goods, except on production of the bill of lading.[2] However, the carrier may deliver the goods without production of the bill of lading,[3] but if he does so, he acts at his peril,[4] and he is liable to the holder of the bills of lading for the damages that the latter may suffer as a consequence of non delivery of the goods.[5]

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(1) The reasons why it is customary to issue many originals of the bills of lading (each of them containing the clause "one of which being accomplished, the others to stand void") are explained by ARENA, *La polizza di carico e gli altri titoli rappresentativi di trasporto*, II, Milano, 1951, p.169, note 10, and by SCORZA, *La polizza di carico*, I, Roma, 1936, p.69 (Under the Italian commercial code of 1882, which was in force up to 1942, it was also possible for the carrier to issue one or more duplicates of the bill of lading, all those duplicates being documents of title representing the goods. Under the Italian Maritime Code of 1942, it is no longer possible to issue duplicates of bills of lading. However, since it is possible to issue many originals of the bills of lading, all of them being documents of title representing the goods, the situation is virtually unchanged).

(2) *Barclays Bank* v. *Commissioners of Customs and Excise*, [1963] 1 Lloyd's Rep.81.

(3) In cases where receipt of bills of lading is delayed (due to postal delay and, more frequently, owing to the fact that cargoes are frequently sold and resold en route and bills of lading are used for documentary credits and for financing the deals), carriers are subject to pressure to deliver the cargo before the bills of lading can be presented. Since cases of fraud and/of of misdelivery very seldom occur as compared with cases of innocent delay, it is normal that carriers agree to deliver.

(4) *Barclays Bank* v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep.81; *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] 2 Lloyd's Rep. 114.

(5) F. BERLINGIERI, in *Dir.mar.*, 1958, p. 488; VOLLI, in *Riv.dir.nav.*, 1957, II, p.307; CARVER, *Carriage by Sea*, 12 Ed., 1971, Sect.1042.

It is irrelevant whether the person who obtained delivery of the cargo without production of the bill of lading was the actual owner of the cargo: the carrier does not know, nor is he interested to know, who is the actual owner of the goods, and he is bound to deliver the goods only to the holder of the bill of lading, who is the only person entitled to the delivery.[6]

It follows that if the carrier delivers the cargo without production of the bill of lading, even if he delivers to the actual owner of the cargo, he acts in disregard of the rights of the holder of the bill of lading, and he is liable to him (even if the latter is not the owner of the cargo).

(3) Guarantees for non-production of bills of lading.

Carriers are aware of the liability they may incur by delivering cargo without production of bills of lading.

Thus, they are normally prepared to deliver to receivers not (yet) in possession of bills of lading, only if they are given substantial and satisfactory guarantees for all damages that may be claimed from them.

Since the carrier may be at risk for amounts equivalent to, or even exceeding the value of the cargo at destination; together with loss of profit, loss of hire if the vessel is arrested, other potential damages, etc., the amount of these guarantees is often twice the invoice value of the goods.

In order to make sure that these guarantees are effective and satisfactory, they should be given by first class banks (or first class insurance companies), be payable on first demand and be in terms excluding the possibility that the guarantor may decline to pay by invoking exceptions. In the normal course of events, these guarantees are either unlimited in time, or provide that they come to an end when the receivers obtain possession of, and produce to the carrier, the full set of the original bills of lading.

(4) Delivery without production of bills of lading

In the great majority of cases the receivers, as a result of innocent delays, are not yet in possession of the bills of lading. It frequently happens, therefore, that receivers who have taken delivery of cargo without production of bills of lading, later come into possession of all the original bills of lading, deliver them to the carrier and thereupon obtain the release of the guarantee given to the carrier, since the carrier, when he receives the originals, no longer runs any risk of liability to a holder of the bills of lading.

The situation is the same if receivers who have taken delivery of cargo without production of bills of lading come into possession of only one original bill of lading, and give it back to the carrier before someone else produces other originals of the bills to the carrier. In this case the carrier is not exposed to the risk of being held liable, since even if he is again requested later by the holder of another original bill of lading to deliver the goods, he can then rely on the defence that he has already fulfilled his obligation. This is because he has, in his hands, one original bill of lading containing the clause, "one of which being accomplished, the others to stand void".

But what happens if, after the carrier has delivered the cargo to the receivers without production of bills of lading, someone else produces to the carrier one original of the bills of lading and claims delivery of the cargo or damages, and then later on the receivers (who took delivery of cargo without production of bills of lading) come into possession of another original bill of lading and deliver it to the carrier? This was dealt with in a recent Italian judgment in which the court held that the carrier was not liable since—according to the judgment—the production by the receivers of one original bill of lading has a retroactive effect, and must therefore be considered as if the production had occurred at the time of the delivery of the cargo.[8] This judgment is far from being convincing and is likely to be reversed, or not followed in future.[9] It should be noted in this connection that, when drafting the wording of guarantees to be given by receivers who want delivery of cargo without production of bills of lading,

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(6) Trib.Genova, 20 August 1950, in *Dir.mar.*, 1951, p.254; Trib.Genova, 31 December 1951, *ibid., 1952, p.271;* Trib.Genova, 22 October 1951, *ibid.*, 1952, p.589; Trib.Genova, 10 August 1953, *ibid.*, 1954, p.319; F. BONELLI, *Responsabilità del vettore per riconsegna della merce senza restituzione della polizza di carico*, in *Dir.mar.*, 1978, p.263 ss., at p.273 note 18.
In common law as well possession of bill of lading enables the holder to obtain possession of the goods but does not imply the passing of the property: SASSOON, *C.I.F. and F.O.B. Contracts*, 2nd. Ed., London, 1975, pp.185-200, Sect.202-216 (even though in some judgements this principle is not clearly established: see *Barber* v. *Meyerstein* (1870) L.R. 4 H.L. 317).

(7) If the guarantee is issued by the receivers, nothing is added to the liability that they have towards the carrier even if they do not issue a guarantee: see section 5. Nevertheless, considering that the liability of the consequent upon their taking delivery of the cargo without production of bills of lading has been disputed (see section 5), it is advisable for the carriers to demand an express guarantee from the receivers.

(8) App. Venezia, 31 October 1977, in *Dir.mar.*, 1978, p.263.

(9) See F. BONELLI, *Responsabilità etc.*, p.280-283.

counsel advising carriers will usually provide that the guarantee is to come to an end only when the receivers deliver back to the carrier the full set of the original bills of lading.

(5) **Does a carrier who has indemnified the holder of the bills of lading have a claim against receivers who have taken delivery of the cargo without production of the bills of lading?**

This problem was discussed at length in a recent international arbitration in which I was one of the three arbitrators. The relevant facts can be summarised as follows:

1. An oil producer sold to a foreign company (A) about 60,000 tons of oil.
   The price was paid against bills of lading and other documents at the loading port by a bank (B), which financed A and took, as security, a pledge of the full set of the bills of lading.
2. Before the cargo was loaded, A sold the oil FOB to C. C never paid A the purchase price, since another bank (D), which had opened a letter of credit against documents in favour of A, did not honour their credit because the documents did not conform with the instructions under the letter of credit.
   As a consequence of this, all the documents—including the full set of the bills of lading—were held up in bank B.
3. Before the cargo was loaded, C again sold the oil FOB to E, who
   (a) agreed to pay C 30 days after the date of loading, by means of a letter of credit against bills of lading and other documents, and
   (b) chartered a vessel for the carriage of the oil, and gave instructions to the Master to discharge the oil at a named refinery for E's account.
4. The vessel arrived at the discharging port after a voyage of four days and, in accordance with the instructions received from the charterers (E), the oil was delivered at the refinery for their account. Delivery took place without production of bills of lading, and without any guarantee or undertaking being given by the receivers/charterers (E) to the carrier.
   The oil was immediately refined and sold by E to other customers; thereafter E agreed with C, as part of a set relating to other business, to pay the purchase price against a simple invoice in lieu of the form of payment, by letter of credit against documents, which had been originally agreed: see (3a) above.
5. In the meantime A (and its bank B), arrested a vessel of the carrier and on the basis of the bills of lading held by A and B, and, began an arbitration in London against the carrier. They maintained that the carrier was in breach of his duty to deliver the cargo only to the holder of the bills of lading.[10] The carrier, under an award issued by consent, agreed to pay the damages suffered by A and B, and took over by subrogation all A's and B's rights against E.
6. At this point the carrier arrested some of E's assets, and the parties then agreed to submit to arbitration in Genoa the question of E's liability to the carrier.

   In the course of the arbitration counsel for E pointed out:

   (a) That E was not in breach of any obligation (nor was he liable in tort) since he had taken delivery of the cargo without giving any guarantee or undertaking. Counsel for E added that the carrier could have refused to deliver the goods without production of the bills of lading, but since the carrier had delivered, he had only himself to blame for his own wrongful act (i.e. for breach of the duty to deliver the cargo only to the holder of the bills of lading).
   (b) That due to the terms for payment (see 3a. above) and to the short voyage (see 4 above), it was inevitable that E should receive the cargo without production of the bills of lading;
   (c) That E was the actual owner of the goods carried, that the purchase price was paid in good faith by E to C; that if E were held to be liable to compensate the carrier, the latter would suffer no loss (notwithstanding his breach), whereas E would pay twice the purchase price without having committed any breach of contract or any tort.

   In the award (a majority award, one of the arbitrators dissenting), the arbitrators held that E was liable in damages to the carrier. The arbitrators gave the following reasons for their award:

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(10) Before claiming damages against the carrier, A and B tried to obtain payment of the sale price by C, but without success since C was a paper company without assets.

(a) A person seeking delivery of cargo without production of bills of lading makes an implied representation that he is entitled to take delivery of the cargo. Thus he impliedly undertakes to give back to the carrier the bills of lading; if he does not do this, he must hold the carrier harmless and compensate him for any damages the latter may have to pay to the holder of the biils of lading;

(b) Even if E had been the actual owner of the cargo (which he was not, according to the arbitrators; they came to this conclusion on the basis of the terms and conditions of the contract of sale between C and E), E was not entitled to take delivery of the goods carried, since only the holder of the bills of lading is entitled to the delivery. It followed that E—having obtained delivery of cargo to which he was not entitled was obliged to give back to the carrier the cargo improperly received or, if restitution was impossible, to compensate the carrier for the latter's liability in damages to the holder of the bills of lading.

(c) The circumstances under which E, without being entitled thereto, got delivery of the cargo to which he was not entitled and disposed of it, amounted to a breach of the pledge held by bank B (see 1 above). Since the carrier was, by subrogation, entitled to the rights of bank B (see 5 above), the carrier was entitled to damages from E for breach of the pledge.

(6) **Remedies against fraud.**

It seems difficult to find out workable methods of counteracting frauds in this field.

1. A radical remedy might be the elimination of the use of bills of lading, for instance by introducing a new computerised mechanism for releasing the goods (on this subject reference is made to the paper of Professor K. Grönfors, where this system is explained in detail). Even this radical remedy does not seem suitable for our purposes since:

   (a) A computerised type of document, even though it may simplify some problems in certain areas (in-house trading, etc.), cannot be used for trades where goods are sold during the voyage of the ship carrying them, where bills of lading are used for the purpose of documentary credits and as security for banks, or where there is a need for negotiable documents.[11]

   (b) Computerised systems do not prevent fraud, even if they make technical skill of a very high order a necessary ingredient in the perpetration of fraud.[12]

2. Another remedy might be the lodging of bills of lading in a registry, where a record would be made of any transfer of bills of lading, so that the registry would be in the position to instruct the carrier to deliver the cargo to the registered consignee (on this subject reference is made to the paper of Mr. P. Gram where the registration system and its rules are explained in detail). However, this remedy also does not seem suitable for our purposes since:

   (a) A remedy based on the future introduction of a new registration system does not solve today's problems of fraud;

   (b) Even if a registration system were introduced, it would not prevent frauds; it would only reduce the incidence of certain types of frauds;[13]

   (c) Registration of bills of lading is conditioned on the introduction and application (among many thousands of shipowners and traders worldwide) of a new and elaborate set of rules (the proposed "Bill of Lading Registration Rules, 1982"), and on a rather complicated and time consuming procedure which would require the mailing of bills of lading to the Registry, informing the Registry of any transfer and/or pledge relating to the bills of lading, the mailing of other documents to the buyers and/or to the banks (invoices, certificates of origin, export licenses, insurance policies, charter-parties incorporated into the bills of lading, and so on), etc.

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(11) See K. GRÖNFORS, *Cargo Key Receipt and Transport Document Replacement*, Gothenburg, 1982, p.41-42.

(12) See K. GRÖNFORS, *Cargo Key Receipt* etc., p.31; *ibid., The Legal Aspects and Practical Implications of Non-Documentary (Paperless) Cargo Movement*, BIMCO Bulletin 111, 1981, p.6180 seq., at p.6187.

(13) See P.GRAM, *Delivery of tanker cargoes without presentation of bills of lading etc.*, at p.12 of the paper.

3. In short, it seems that it will be difficult—and perhaps impossible—to eliminate the risk of frauds in this field, and that the systems so far studied with the aim of reducing such risk are complicated and can create material disadvantages to trade.[14]

It is therefore likely that we shall have to continue to live in the future with some marginal and limited cases of fraud and misdelivery following non-production of bills of lading. The problem is not that of preventing this risk completely (which seems unlikely, at least for the present), but of establishing clearly who is to bear this risk. As I mentioned above, I think that the carrier should be liable to the holder of the bills of lading (see 2 above), and that the receiver who obtained delivery of cargo without production of the bills of lading should be liable to the carrier (see 5 above).

As far as the carriers are concerned, it is a matter for discussion whether their liability is suitable for insurance (the risk is for substantial amounts, but in very limited and marginal cases, so that the premiums—or calls—could be very small). Apparently P. & I. Clubs no longer cover this risk,[15] and it has been said that the reason for this is that to deliver cargo without production of bills of lading "means taking a chance, a sort of privity. In a mutual club it is not so nice to let those who never take chances pay for those who do".[16] If we consider that the carrier always has the implied warranty of the receivers who obtained delivery of the cargo (see 5 above), it follows that the risk to be insured is only that of the insolvency of the receivers. And such a risk for the carrier seems suitable for insurance (with obvious exceptions in cases of fraud committed by the carrier himself).

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(14) In order completely to avoid the risk of misdelivery in the cases concerned, it would suffice that carriers/shipowners always deliver cargoes *only* against production of bills of ladings. This does not occur in practice since carriers/shipowners are pressed to make delivery even without production of bills of lading, in order to avoid loss of time, detention of vessels and related costs and expenses: in other words, the needs of trade and commerce, and cooperation for the purpose of avoiding useless loss of time and expenses, prevail over the limited risk that in a very small number of cases there may be misdelivery.
If we look at the needs of commerce and trade, it is easy to realise that the market prefers to take marginal risks in very few cases, to stopping delivery in all the frequent cases of innocent delay in the availability of the bills of lading. The cost of getting insurance against the marginal risk of misdelivery is likely to be much lower than that of building up a complicated system, under which it is uncertain whether cases of misdelivery would be entirely prevented, whereas it is certain that new, complicated and time-consuming procedures would be introduced which do not suit the needs of international commerce.

(15) In the case referred to above under section 5, the P. & I. Club covered the liability of the carrier, paid the holder of the bill of lading, and then sued the receivers who had taken delivery of cargo without production of the bills of lading, obtaining full compensation for all amounts paid.

(16) P. GRAM, *Delivery of tanker cargoes etc.*, p.7.

NEW TYPES OF DOCUMENT AND DOCUMENT REPLACEMENT

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The bill of lading is characterized by a pattern of rules and responsibilities, unique of its kind and explaining its fundamental role in international trade. The very core of this pattern is the prerequisite that, the goods must not be delivered at the final place of destination otherwise than simultaneously against surrender of one original of the bill of lading. The effect of this rule is that the bill of lading can be said to represent the goods themselves ("the representative function").

This mechanism for releasing the goods served extremely well, especially during the 19th century when the time needed for the carriage of goods was long enough and public mail operated within shorter periods of time. But nowadays the situation is often quite the opposite.

Transit times gradually become shorter and the period of time needed for postal services shows a tendency to grow. It is a far too common situation that the goods have arrived but the consignee still is waiting for his original bill of lading. This phenomenon has created what is often referred to as "the bill of lading crisis".

How can this crisis be met? Are there any effective countermeasures?

If we first turn to the problem of ever-growing postal times, the transport of unique pieces of paper can be substituted by the introduction of telecommunication ("electronic mail"). With the help of teleprinter or telefax, original bills of lading can be issued directly at the place of final destination, the so-called destination bills of lading. There is nothing in the rules on bills of lading that makes it obligatory to issue the bill of lading at the port of loading or prevents its issuing at the port of destination. As a matter of fact, such a routine is used now and then and has caused no objections so far.

This technique implies that we still base ourselves on the traditional method of distributing transport data by pieces of paper. The only new part of the procedure is that the pieces of paper are not sent by mail, but are issued directly at the place of final destination with the help of modern techniques. This method has both advantages and disadvantages. One advantage is that the present legal rules are not at all affected by the change from mail to telecommunication. One disadvantage is that we keep to the old system created to match the facts of life and the technical standards of some hundred years ago, instead of trying to adapt to the standard of modern techniques available and thus using the possibilities of our time in a sensible way.

This argument leads us to the question whether the procedure of sending a unique piece of paper by mail to the place of final destination and there exchanging it for the goods can be imitated electronically? The piece of paper is the unique thing that the consignee must hold in order to get his goods delivered. Can the possession of this piece of paper be replaced by the possession of a unique electronical device? The answer is clearly in the affirmative. There exists the possibility of designing an electronic key that is unique and can be possessed only by one person at a time. This result is achieved by using encryption systems already existing. One list of numbers like the numbers in the telephone directory for finding each consignment permits all interested parties to obtain what has been recorded in the computer, but they have no access to the process for changing the name of the consignee. To be able to change this name, you must possess a secret code, a secret number, the electronic key, and this key is the unique thing to trade, the counterpart of the original bill of lading. My description is very much the layman's rough description. Anyone who wants to know more details is referred to the book by *Roger Henriksen*, "The Legal Aspects of Paper-less International Trade and Transport" (Copenhagen 1982).

Another possibility of imitating traditional paper routines and, so to say, translating them into a procedure adapted for electronic means, is to replace the original bill of lading with some form of registration system suitable for computerization. The handing over of one piece of paper finds its equivalent in the inscription in a public register of some sort; thus negotiability is created with the help not of *traditio* but of *denuntiatio* recorded in the machine. This is part of the system suggested by Intertanko, and thus I leave it to Mr. Gram to explain this line of thinking in further detail.

What a pure registration system would amount to has been discussed in depth by *Knut-Helge Reinskou,* in his paper "Bills of Lading and ADP, Description of a computerized system for carriage of goods by sea", published as ECE TRADE/WP. 4/R. 159, 12 November 1980, as well as in the Journal of Media Law and Practice, 1981.

There still remains another angle from which to attack these problems. The difficulties of today are created by the slow mail, combined with the prerequisite that the goods can be delivered only against the simultaneous surrender of the original bill of lading. If this unique mechanism for releasing the goods is changed in so far as there will no longer exist a need for awaiting the arrival of one unique piece of paper, there will no longer be a delay in delivery of the goods. The idea is to design a new mechanism for releasing the goods.

There already exists a transport document where the document itself is completely separated from the right to demand the delivery of the goods at the place of final destination. Thus, it is not necessary to produce the document. Instead, the person named as consignee is entitled to demand the immediate delivery of the goods, as soon as they have arrived at their point of final destination. Of course, I am referring to the type of document called waybill (consignment note). The waybill is non-negotiable in the sense that it does not represent the goods like the bill of lading. At least, this is a firm rule under the European concept, the American concept being somewhat wider.

The waybill has been developed in land and air traffic, just as the bill of lading is a document created for the maritime milieu only.

But time flies and administrative routines change. One of the results of the modern container transport systems has been that bills of lading have "gone ashore" and now cover also land transits, in the same way as waybills have "gone to sea" and also cover a sea transit. When maritime operators introduced sea waybills, in principle adopting the patterns of rail, road and air waybills, this was done in order to avoid the many complications inherent in traditional maritime bills of lading. The sea waybill is in the main a simple receipt, issued by the carrier and evidence that he has taken the goods into his charge for their carriage.

As long as the sender and the receiver are the same person, or at least belong to the same family ("in-house trading"), no difficulties will appear. Quite a large proportion of the flow of goods comes within this category of trading, e.g. spare parts from a Swedish factory to its daughter company in England, or deep freezers from a Swedish factory to the central warehouse in the United States of America belonging to the general agent of the manufacturer. In the North Atlantic trade, nearly 85% of the total flow of goods represents "in-house trading".

In such cases it is easy to link the waybill idea to a computerized system. In fact, this was first achieved by the Atlantic Container Line DATAFREIGHT RECEIPT SYSTEM, in operation since May, 1971. The starting point for this system was that the ACL organization already had at its disposal a well-advanced computer system with terminals in all harbours, on both sides of the Atlantic, served by the ACL. These facilities were intended primarily for steering the whole containerized transport system in the optimum way.

However, the congestion of arrived goods in the terminals was considerable, due to the fact that the original bills of lading forwarded by air mail had not yet arrived when the goods had already reached their point of final destination in this very fast and efficient container transport system. Why not try to use the computer and its terminal in relation to customers as well in order to speed up procedures? Thus the DATAFREIGHT RECEIPT SYSTEM was introduced. The computer is fed with the necessary information and the shipper gets a receipt when delivering the cargo to the carrier at the place of shipment. Some days before the vessel arrives at the other side of the Atlantic, the terminal issues notices of arrival, mails documents containing all the information contained in the computer and, in addition, tells the receiver that he can fetch his goods, for example after 12 o'clock the following Wednesday.

Computerized systems of a similar kind are serving customers of other carriers as well as of forwarding agents. Many new projects have been introduced in recent years and more are likely to come.

But complications introduce themselves as soon as you want to use the goods as security for financing purposes. Suddenly new persons with special interests enter the scene. The exporter and the importer are persons connected with the contract of sale hiding behind the contract of carriage in such cases; and, in order to assist them in solving their problems of

financing, we meet the exporter's bank and the importer's bank. The banks want "a firm grip on the goods in transit", some sort of control achieved with the help of legal rules. What can we offer them?

Here I want to remind you of the fact that banks already use rail, road and air waybills as security for letters of credit and collect mandates. In such cases the banks are accustomed to following this routine:

(1) The bank is named as consignee in the waybill and the buyer as notify address only. By this arrangement, the bank is safe in the knowledge that nobody else is entitled to ask for delivery of the goods when they have arrived at the point of final destination.

(2) After having been paid by the buyer, the bank assigns all its rights as consignee to the buyer, who is thus entitled to have the goods delivered to him as soon as he produces this assignment to the carrier. In this way the mechanism for releasing the goods has the same effect of creating a *Zug-um-Zug* operation as has the traditional pattern under bills of lading.

(3) The right to control the goods during transit is linked to the duplicate (first copy). As long as the sender still has possession of the duplicate, he is entitled to demand unloading and reloading of the goods, order a new destination or otherwise intervene in the performance of the carriage. Therefore, the bank demands the duplicate; this arrangement ensures that no person from outside can disturb the contractual performance by giving new orders.

Historically, the linking of the right of disposal to the duplicate has its origins in the rail duplicate. In the middle of the 19th century, European national rail legislation and usages followed at least five different systems of solving the problem of controlling the goods when in transit. The codification made in the European Rail Transport Convention, 1890, contains a mixture of the German principle of reserving the right of disposal for the sender as long as possible and the French system of introducing the duplicate with a right of disposal associated with it, in a way that comes close to the effect of bills of lading (*das System des Frachtbriefduplikats mit konnossementsähnlicher Wirkung,* to quote the language used by *Rosenthal* in his authoritative textbook "Internationales Eisenbahnfracht", Jena 1894, p.126). The duplicate system was then adopted for use in aviation law by the Warsaw Convention.

Exactly the same arrangements, as well as the same effects, can be achieved as far as sea waybills are concerned. Usually duplicates are not used with reference to maritime transports, but this method of assigning the right of disposal in favour of the receiver is not the only way. The handing-over of a land or air duplicate might also be described as a declaration implied in the use of a symbolic act and, traditionally, acts of disposal of the goods are in fact looked upon as declarations of intention (cf. *Rundnagel,* "Beförderungsgeschäfte," Leipzig 1915, p.144). Naturally, the same effect can be achieved by an express declaration of the shipper's intention not to retain his right to control the goods *in transitu* (of the same opinion are *Richter-Hannes & Richter,* "Möglichkeit und Notwendigkeit der Vereinheitlichung des internationalen Transportrechts," Potsdam-Babelsberg 1978, p.122, as well as *Richter-Hannes, Richter & Trotz,* "Seehandelssrecht," Berlin 1978, p.231). Such a declaration can easily be included as part of the information given to the computer and noted on the face of the receipt printed out by the terminal at the place of shipment, as well as reproduced at the place of final destination in full:

> *"The shipper has irrevocably declared that he has assigned his right to control the goods during transport to the receiver of the goods."*

This express declaration can also be shortened to a code word, like NODISP, meaning the shipper no longer has any right of disposal. This code word can be reproduced on the face of the waybill (instead of using a duplicate). A symbolic *traditio* is substituted by a *denuntiatio;* an express declaration of intention.

By following this route we have at the same time opened the door for computerization based on the waybill pattern.

These ideas constitute the basis for the electronic paper-less system called the Atlantic Container Line CARGO KEY RECEIPT system. I have explained the details briefly in the paper "The Legal Aspects and Practical Implication of Non-Documentary (Paperless) Transports," BIMCO Bulletin III–1981, pp.6180 *et seq,* annexed to this paper.

A full and in depth analysis of the problems emerging can be found in my book "Cargo Key Receipt and Transport Document Replacement," Gothenburg 1982 (Gothenburg Maritime Law Association Publication No. 63).

DELIVERY OF TANKER CARGOES WITHOUT PRESENTATION OF BILLS OF LADING

REGISTRATION OF BILLS OF LADING AS A POSSIBLE SOLUTION

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1. The presentation rule

The holder of a bill of lading should be able to rely on the fact that (1) the contract of carriage will be carefully performed, and (2) that the goods will answer the description contained in the bill. The rules governing the contract of carriage are based on the Hague (Hague-Visby) Rules and are therefore fairly uniform internationally. The holder has a prima facie claim against the carrier to obtain delivery of the goods. Possession of the bill of lading with an unbroken chain of endorsements is sufficient evidence of title to the goods. In this way the bill of lading has a function like that of a cloak-room ticket. The presentation rule protects the carrier as it protects the cloak-room: normally, the carrier can rely on the document being presented by the right person. Even so, he must act carefully. He may be liable for misdelivery if he is informed, or has reason to think, that the document is forged, or that the person claiming delivery is not the last endorsee.

The presentation rule applies all over the world, although it is not based on any international Convention. The Hague Rules do not deal with delivery to the right person. However, they do state that the shipper is entitled to demand a bill of lading from the carrier at the time when the goods are shipped (Art 3(3)).

When the carrier insists on his right to deliver against the bill of lading, the goods may be seriously delayed and interest on the value of the goods may be lost. There may also be consequential damage, such as for loss of market. If the cargo cannot be landed and stored (this is often the case with tankers) there is also the question of detention of the ship. It is in the tanker trade that this problem has become really troublesome of late. A large cargo of crude oil may be worth many times the value of the ship, and it is in this trade that the bill of lading is so often not available when the ship arrives.

When the voyage is a short one, as with a Mediterranean or North Sea crossing, the bill of lading never arrives at the destination in time. The P & I and Defence Clubs say that they receive queries nearly every day from tanker carriers asking what they should do.

The same question may arise in the case of dry cargoes, but not nearly as frequently and the sums of money involved are far less than in the tanker trade.

2. Why are tanker bills of lading so seldom available for presentation?

The delay may have various causes. The main difficulty in the case of oil cargoes is that they are so frequently sold and resold in transit. It may be that, in the future, the same will be true of other bulk cargoes such as grain, ore and coal. However, general cargo will rarely be sold during the course of the voyage, and containers packed by freight forwarders for different shippers will probably never be sold in transit. The presentation rule is not as important in the liner trade, although the bill of lading may be sent to a bank for collection of the purchase price. Banks may require the bill to be fully negotiable in order to protect their security interest. For oil, this "key to the goods" is regularly used to finance the transactions. The tanker trade is international, and a large number of banks all over the world may be involved during each voyage. Two banks may be involved for each transaction. The documents cannot pass through the hands of a number of traders and their banks in time, even if couriers are used instead of the postal system, and even if bank routines are streamlined for this purpose.

This system makes for a further difficulty, namely, that very often the carrier cannot be given any good explanation (which can be checked) why the bill of lading is not available and when it may be expected to arrive. The carrier knows the shipper, and the shipper knows the identity of his buyer who he knows to have made payment correctly. However, it is not easy to trace the bill of lading any further.

Bills of lading issued in certain oil exporting countries are delayed right from the start, probably because of the bureaucracy inherent in obtaining an export licence. It may be difficult to improve the position here. One suggested solution to avoid this and other delays in the country of shipment, is to issue the bill, not at the loading port, but somewhere more conveniently close to the place where one may expect to find the first buyer. Any person may be authorised by the carrier to issue a bill of lading. Another possibility would be to issue the bill at the place where it is most desperately needed, namely, at the port of destination. However, these "destination bills" are not as good when it comes to fulfilling their main purpose, which is to facilitate transactions involving the cargo. These transactions can take place with a number of countries involved.

If it is known where the missing bill of lading is to be found and if it not caught up in the banking system, time can be saved by not sending the bill of lading to the discharging port. The point here is that the bill must come under the carrier's control. However, a bank or other agent of the carrier can receive the bill of lading, check it and inform the carrier. Nevertheless, there are certain ports where for legal, exchange control or other reasons, physical presentation of the bill is mandatory for the full protection of the parties.

3. Liability for misdelivery

Although the rules in this field are not based on an international Convention, the main points are probably quite uniform. Delivery of cargo without presentation of the bill is regarded as wilful misconduct, even if the carrier has good reason to believe that he is delivering to the right person. He cannot be sure; he takes a risk. In English law this is treated as conversion of the goods to one's own benefit. (See note 1).

It is true that in the oil trade, forgery and fraud are still rare in comparison to the frequency of cases of non-production of bills of lading. However, disputes as to title may arise and often do. In one typical case, the bill was held up in the shipper's bank because of an alleged discrepancy between the bill and the letter of credit. Consequently, the first purchaser did not immediately pay for the cargo and all subsequent transactions took place without a bill of lading. Subsequent purchasers may not even be aware of any dispute, because the bill is so often unavilable. However, without the key to the goods they are in fact "trading in thin air". This occurs frequently and is full of risks. In the above case, one of the subsequent purchasers believed that he had paid for the cargo by means of a set-off. The seller, however, did not agree that the purchaser was entitled to do so. This is the sort of dispute which can take years to resolve. The background is perfect for double sales where two parties sell the same cargo in more or less well-founded good faith. Purchasers who purchase cargo without sighting a bill of lading do risk their investment as well, as their reputation.

In the case outlined above, the shipowner delivered the cargo without presentation of a bill, since he believed that the time charterer knew who the lawful receiver was. The Master very often does not take bill of lading problems seriously when the ship is on charter, but he should be more carefully instructed. Here, when problems arose, the time charterers—a large oil company—did not show any interest in the shipowner's problems. The ship was under arrest for six weeks before being released against some form of security. All the time charterer did was to place the ship off-hire. The dispute over off-hire is still continuing in Court.

It is interesting to note that the time charterers were the carriers for the voyage in question. Nonetheless, the claim for misdelivery was brought against the shipowners. There must be cases where liability for misdelivery rests solely with the time chartered carrier, for instance when a liner company delivers from its terminal long after the ship has discharged at the terminal and the ship has left. However, the question who is the carrier will not be dealt with here.

The value of this particular cargo was relatively low, only about U.S. $4 million! In the case of ultra large crude carriers, the sum of money involved may be up to $100 million. In addition there is interest. Furthermore, the legal fees in a number of countries may be considerable.

The element of privity excludes any question of limitation of liability, whether the overall limit of the ship or limit per unit. In many countries, misdelivery of this kind is regarded as comparable to conversion of the goods, and therefore the prescription period may be much longer than the customary one year for cargo damage. The Scandinavian Maritime Codes

(1) On this and many other points it is hoped that this Colloquium will produce interesting material from a comparative law point of view.

contain a special provision for a one year time limit, but in the U.K., in certain cases, claims may be made up to 6 years after the incident, and in the U.S. the period is up to 13½ years. Although the person who took delivery of the cargo could equally well be subject to proceedings for damages, experience shows that the shipowner is the preferred target. It is easier to arrest his ship or ships than it is to attach assets belonging to a merchant. Furthermore, the necessary evidence against him is simple—he did not sight a bill of lading.

4. Guarantees for non-production of bills of lading

For obvious reasons, attempts will be made to pressurise the carrier into delivering the cargo before the bill of lading is presented. The present depressed market adds to that pressure. Since cases where delivery of cargo is made without production rarely become cases of misdelivery, it is not surprising that the carrier often agrees to deliver the cargo, although he cannot be sure that he will ever see the bill of lading. However, he should never do so without taking a substantial guarantee which covers all consequences of his action.

The risk may involve a cargo value at the port of destination which far exceeds the invoice value, plus interest at to-day's high rate, delay to the ship and legal costs. Lawyer's advice to carriers is that they should demand a bank guarantee which is for 125 to 200% of the invoice value and which has an unlimited validity period.

Before the problem became so acute in the tanker trade, the carrier would regularly be given a bank guarantee, for instance in a form approved by the P & I and Defence Clubs. Traders today say that it is not realistic for them to give undertakings in the amounts demanded here.

This may well be true in the sense that, more often than not, when the trader has financed the purchase of a large cargo, he cannot easily finance it once more. However, traders cannot very well expect to obtain delivery of the cargo from the carrier and be allowed to leave the carrier to face the risk of a claim from a person presenting a bill of lading.

Receivers now demand that the carrier should deliver cargo without production of a bill and that the carrier should assume a risk which they themselves consider unrealistic. Things are turned upside down when oil people say that "presentation is an owner's problem". In fact, delivery without presentation of a bill is a problem for all those who are exposed to the risk of liability for misdelivery.

The purchaser who holds himself out to be the lawful consignee and persuades the carrier to deliver without presentation of bill, must impliedly be promising to hand over the bill as soon as it comes to hand. Similarly, if someone else should appear who has a better right, the person who obtains delivery must, by implication, be undertaking to hold the carrier harmless in respect of any claim made against him. Seen in this way, the written undertaking is merely the formalisation of an obligation which the receiver cannot avoid by refusing to sign a guarantee. The receiver cannot expect something tantamount to a gift of millions of dollars. Even when freight rates are high, the carrier cannot be expected to accept the risks inherent in delivering cargo without presentation of bills of lading.

5. Charterparty clauses

The present market has permitted charterers to dictate clauses to the carrier which oblige him to deliver, without production of a bill, in return for a personal guarantee only. When the guarantor is not a major oil company, such clauses are unreasonable. Charterers may warn the owners that, unless the owners accept the clause, the charterers will not charter any of the owners' ships in the future. This can be very effective.

One may ask whether a clause which obliges the carrier to disobey one of the main rules applying to bills of lading can be legally binding, particularly if the clause is obtained under threat of refusing any future business.

The answer to this question may vary from one legal system to another.[2] In some countries the clause may be held to be invalid, "contra bonos mores", or contrary to public policy.[3]

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(2) The CMI would welcome comments on different national laws on this point and on note (1), supra.

(3) For example, the Scandinavian countries have enacted mandatory rules under which unreasonable contract clauses may be set aside.
The Norwegian rule in this respect is quoted below. It was given in this form as recently as 4th March, 1983, as an amendment to Section 36 of the Contracts' Act 1918. However, mandatory rules of similar effect have existed for many years.
Section 36.
"A contract may be set aside or amended in so far as it would be unreasonable or contrary to good business practice to rely on it. This shall apply also to unilaterally binding promises.
When deciding the question, regard shall be had not only to the content of the contract, the position of the parties and the situation when the contract was entered into, but also to matters arising subsequently and to all other circumstances.
The provisions of the first and second paragraph hereof shall apply by analogy when it would be unreasonable to rely on any business usage or other contractual custom.

If the charterparty clause should be held to be binding between the carrier and the charterer, the result must be a breach of the bill of lading contract, since the carrier will be disobeying an important rule applicable to negotiable bills of lading, namely, that a bill should be presented before the cargo is delivered.

However, a somewhat similar charterparty clause might be valid,if it were combined with a stipulation that the shipper/charterer should accept a non-negotiable cargo document instead of a bill of lading. Under Art. 3(3) of the Hague Rules, the shipper has the right to demand a bill of lading. This is customarily a fully negotiable bill. Art 3(3) is mandatory, but the shipper need not insist on his right.(4) The charterer can arrange for his shipper to do so.

It seems that cargo interests want the best of two systems which are in conflict.

6. Waybill (seawaybill, consignment note, tankwaybill)

Documents of this type are not negotiable and this means *inter alia* that the rules of presentation and surrender do not apply. The waybill is not like a cloak-room ticket. Furthermore, some other rules governing bills of lading only apply automatically to bills of lading and not to waybills. This is true in the case of the Hague Rules in relation to the carrier's liability for the accuracy of the cargo description, and in relation to reservations.

If the parties do not need those attributes, it is better to use a waybill, thus avoiding the complications which arise if the bill is not available. For instance, when cargo is sold on long-term credit terms, or is sent as part of a foreign aid programme, the shipper and the carrier should not be burdened with the extra risks connected with the non-production of bills of lading. Intertanko has devised a "Tankway bill" for use in circumstances where a bill of lading is not required.

Some oil exporting States demand to see an original bill of lading before they will issue an export license. The bill of lading has a history over a hundred years old and waybill is not therefore always acceptable to the trade.

Thus, in the tanker trade substituting waybills for bills of lading generally does not seem practicable, since the goods are so often sold and resold while they are in transit. Waybills are more suitable for the liner trade. General cargo is rarely sold more than once, namely, by the shipper. If selling cargo in transit becomes more frequent in the case of coal, grain, ore or other dry bulk cargoes, bills of lading will be used, and we will be confronted by the same problems which we have in the tanker trade.

7. Insurance

In principle, the risk of liability for misdelivery of cargo where no bill of lading has been produced, should be a suitable one for insurance cover: the liability may be enormous in amount, but it arises in only a few cases out of all those where cargo is delivered without presentation of a bill. A cargo insurance policy could cover the bill of lading holder against delivery to the wrong person. The policy could also cover the receiver against having to pay under a guarantee,which he may have given to the carrier in order to obtain delivery of the cargo without production of the bill. It might also serve as the guarantee. The insurance company would have to waive any rights of subrogation against the carrier. However, no such cover is available today. Spread over all tanker cargoes, the risk should not demand a very high premium. The difficulty for an insurance company would be to sell enough insurance to build up a fund considered large enough to meet admittedly rare, but very heavy claims. (Compare the contributions to the International Oil Pollution Fund under the 1971 Convention. However, any form of compulsory insurance would need international legislation.)

As for the possibility of P & I insurance, the P & I Club Rules exclude any liability arising out of the delivery of cargo without production of a bill of lading. Even if the shipowner truly believes that the person claiming delivery is the person entitled to take delivery, in the absence of the bill of lading he cannot be sure. He is deliberately taking a chance, and as this is the shipowner's own decision, it becomes a matter of privity. In a mutual Club it is not equitable to allow those who never take chances to pay for those who do. This attitude of the Clubs may also be influenced by the view that it is unreasonable to allow their members to carry the burden of misdelivery, by means of increased calls, when the risk ought to be borne by those who trade in the particular cargo and do not observe the rules relating to the document they insist on receiving.

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(4) This rule was not included in the Hague Rules in order to ensure that shippers could obtain a negotiable instrument. The rule originated at a time when it was expected that carriers would look for ways to reject liability for cargo damage altogether. The Hague Rules were made to apply bills of lading only. No doubt Art. 3(3) was added in order to avoid a situation in which the carrier could side-step the Hague Rules by refusing to sign bills of lading. Nowadays carriers are happy with the Hague Rules.

Some types of liability which are excluded from P & I insurance for reasons of privity may be covered under separate S.O.L. policies, for instance, deviation cover. However, hitherto, the insurance offered in the case of non-production of bills of lading has been very limited, both in amount and in the scope of the cover provided.

8. A number of original bills of lading

It is well known that, traditionally more than one bill is issued in respect of a particular cargo, and the number issued is inserted in the bill, "one of which being accomplished, the others to stand void." This is a very strange practice; one never sees any duplicate cloak-room tickets. However, attempts (within the International Chamber of Commerce) to stop the practice have failed. The position of the holder of one of a number of originals is weakened. There is a risk that a person holding another original may succeed in taking delivery of the cargo. Therefore banks will often demand that they must hold all the originals: 4/4, 6/6 or whatever the number may be. One would have thought that one original plus as many non-negotiable copies as might be desired would suffice. In present practice, the shipper is furnished not only with one key to the goods, but with a number of additional keys which may be used or abused. There is a risk of double transactions.

9. One original on board the ship. Duplicates

The following approach has been tried in order to avoid the difficulties inherent in trying to produce the bill of lading at destination: One of the originals is sent with the ship in a sealed envelope which is given to the Master. He gives the envelope to whoever is believed to be the rightful consignee. The consignee opens the envelope and the Master is not surprised when that original bill of lading is presented to him to obtain delivery of the cargo.

If this approach were to have the desired effect of providing security for the shipowner and the carrier, one part of the problem would be solved. But it remains to be seen whether cargo owners will feel happy with it. It does not work well when the bank requires to see all original bills.

The shipowner and carrier cannot be sure that such a procedure leaves them free of liability. Since the document presented to the Master was never really issued for the purpose of negotiation, it seems unlikely that it can vest the person who wishes to take delivery of the cargo with a prima facie authority to do so. It cannot show the chain of actual endorsements. The carrier and the Master may believe that they are delivering the cargo to the right person, but their good faith is not based on proper presentation of the document. It is rather as if the cloak-room ticket had been left in the hands of the attendant. He will then deliver from memory, not because the ticket is there. It has been suggested that all original bills should be claused to the effect that one original will remain on board and that the cargo may be delivered against that bill. However, it seems unlikely that the bills would then be acceptable to buyers and banks. Of course, if the procedure cannot be openly accepted as being right, it must be wrong.

A similar trick has been tried by presenting a photostat of the original, stamped as a "duplicate", signed for receipt by the installation. Dictionaries say that a duplicate is like an original, but this one is no more than a copy, given that it is not one of the originals referred to in the bill. Only the originals are intended for negotiation.

10. Computerized systems for the carriage of goods by sea

Time, costs and paperwork can be saved by computerisation. In the liner trade ACL have introduced their "Datafreight Receipt System" for use in trades where there is no need for a negotiable document. In their new "Cargo Key Receipt System" the facsimile of a bill of lading is a print-out from the carrier's computer. The seller/shipper abrogates his right to dispose of the goods after shipment by the clause "NODISP". The carrier may declare that he does not have any reservations as to the description of the goods provided by the shipper, by inserting the "CLEAN". (See the paper presented by Professor Gränfers.)

This system is designed for the liner trade; it is not as appropriate to the carriage of oil where it is typical for the cargo to be sold many times during the voyage.

An American system for a modernized system of cargo documentation is the "Cardis System" developed within the NICTD.

11. Proposed registration of bills of lading

Another project aim at solving the problem of the non-production of bills of lading is being studied by Intertanko in close cooperation with the Chase Manhattan Bank and the P&I Clubs. The idea is not to abolish the bill of lading, but to avoid the difficulties of presentation by keeping it out of circulation and to let all transactions concerning the bill be registered in a

central clearing system set up for this purpose. The bill will be lodged with the registry and will not have physically to be handed over at destination. When the ship arrives, the registry will instruct the carrier to deliver the cargo to the recorded holder of the bill of lading. Since the bill is in the registry, the instructions from the registry to the carrier will amount to presentation of the bill (See 12.4, below). In the same way, the transactions involving the bill take place without the bill being physically handed over (see 12.3, below). Upon completion the bill will be surrendered to the carrier as his receipt.

In order to stick as closely as possible to a tradition of more than 100 years, an ordinary negotiable bill will be used, rather than a waybill or a straight bill of lading.

If registration does not begin before the bill of lading has been brought (by courier) to the registry, there will be a significant delay because some oil exporting countries will only grant an export licence on the basis of an original bill of lading. One would have thought that a verified copy of the bill would suffice for that purpose. Therefore, consideration is being given to starting of registration before the original bill has been used for licence purposes. Registration might begin on the basis of EDP messages from the carrier and the shipper as soon as the bill has been issued. Every oil exporting terminal must have ready access to data communication.

In theory it is possible to start transactions involving the bill of lading in the traditional way and to register the bill later ("open beginning"). The bill may also be removed from the registry and sent into traditional circulation, provided that all parties (including the carrier) agree ("open end").

If so directed by the parties (the carrier and the recorded holder of the bill of lading), the bill may be amended, for instance, the port of destination may be changed. Every tanker charter-party gives the charterers the option of varying the voyage itinerary. It must also be made possible, if the parties agree, to "split" the bill, for instance when part of the cargo is to be lightened for discharge at a separate destination.

As far as possible all communications with the registry will be by EDP. Every message to and from the registry must be encoded in order to safeguard business secrecy. For each new recorded holder of the bill, there must be a new test key to allow him, and nobody else, to take part in subsequent communications.

Every important message must be checked for correctness by calling back. In order to safeguard against forgery and against fraudulent intrusions into the system, there must be a routine of "calling back" a known person. A similar practice is followed in the computerized SWIFT system of interbank remittances.

The registry must be neutral—not controlled by carriers nor by shippers. It might be sponsored by a group of banks. It was originally suggested that any bank involved in the oil trade could be chosen by the parties to undertake the services needed. The plan is now for one central registry open 7 days a week, 24 hours per day. This will also ensure professional service. Agents around the world may be appointed to receive and send documents. It would be preferable for the bill of lading to be standardized for easy competition and computerization. The notices will also follow a pattern.

This should also lead to a reduction in the amount of paperwork which bedevils the trade.

The scheme has the effect of a contract which may be adhered to by a signal to the registry. Carrier and charterer may agree, by a clause in their charterparty, that they are bound to take part in the scheme (either for one voyage or for a specific period of time). The parties must undertake that their successors will join the registration agreement. If a sale outside the registration scheme were attempted, the buyer would experience the difficulty that there was no original bill available. It would be in the registry, and, if there were more than one original, they would all be there.

This system should not really change the present trade patterns, but it may pave the way for a future, totally computerized, paperless system of cargo documentation.

12.1 **Validity of adherence**

The contractual basis of the system might be a set of registration rules. They might be drafted in such a way that they could be incorporated by reference in contracts by the contracting parties. The drafting of such rules has been the object of study for quite some time, but they are not yet ready for publication. The contractual basis might also be set up as the rules a "Registration Association", to be referred to in the contracts and when a bill is registered. In any event, adherence to the system should be made legally valid under any national law without it being necessary to sign a long contractual document for each shipment.

The registration rules must, of course, not be used to agree upon conditions less favourable for cargo interests than the Hague or Hague-Visby Rules. These Rules are mandatory and entitle the shipper to a contract of carriage based upon them. There is no longer a tendency to try to avoid these Rules and when they do not apply under relevant legislation, they are normally incorporated by agreement by means of a Paramount Clause.

12.2 Choice of law and forum

This question is of overriding importance since the legal effects of the scheme may vary from one national law to another. I believe, however, that the rules governing the negotiability of bills of lading are fairly uniform. The choice of law must, if necessary, be used to avoid those national laws which do not facilitate the use of registration of bills of lading. Among the points to be considered will be the immunity from disclosure of business secrets and from arrests or injunctions affecting the bills of lading.

The choice of forum might follow the choice of law, but it must, in any event, permit disputes to be dealt with in a central location where rules of procedure are satisfactory and competent lawyers are available.

The choice of law and forum for the registration agreement should not necessarily follow those contained in the charterparty. An express clause in the bill of lading may be necessary.

12.3 Liability for description of the cargo

The rules must show that the intention is that the registration of a new consignee should have the same effect as if the bill of lading, properly endorsed, had been physically handed over.

This must be true both as to the carrier's mandatory liability for correct description of the cargo and as to the carrier's reservations concerning the information provided by the shipper for insertion in the bill. This is not so easily achieved if a non-negotiable document is used. It is possible that it may be useful, and even necessary, to produce printouts of the computerized bill of lading for use in the transactions. Probably the main reason behind the practice of having a number of original bills was the need to be able to show it in different market-places. In order to have a description of the cargo available to allow the cargo to be sold, copies of the bill could be used.

The registry could also verify the identity of the present holder of the bill from the record in the register.

12.4 Presentation before delivery

The scheme is not predicated on the concept of an abolition of the presentation rule. On the contrary, the simple idea is to effect a presentation of the bill without physically doing so at the port of destination.

The point of the rule is to ensure that delivery is made to the person who has authority to take delivery. The "key to the goods" must come under the control of the carrier. This will be achieved when the shipper and the holder deposit the bill of lading with the registry, and the registry subsequently instructs the carrier to deliver the cargo in accordance with the registration and the endorsements on the bill. There will be no risk of delivery without the proper evidence of title.

13. Conclusions

The idea behind registering transactions as a condition for their effect is, of course, derived from land registers and registers concerning title to and charges on ships. Those transactions are not paperless ones. However, an unregistered bill of sale has little effect against the seller's creditors or against a title registered in good faith. That system is based on legislation. Bill of lading problems are too burning to await international legislation. The present project is based on the belief that a similar effect can be achieved by contract.

In some countries, legislation has been prepared for bonds and stock to be registered, and for all transactions concerning them to be entered in the register. There will be no need to pass the documents from hand to hand when registration gives title. No cutting of coupons.

It is interesting to note that registration of the transfer of some negotiable instruments has been found necessary and practical. This would suggest that the advantages of such a system are expected to outweigh the costs involved. We hope this will also be the case for the bill of lading registration system. The present system is costly enough for those who are exposed to the risk of liability for delivery without production of bill of lading. Expensive measures are taken to avoid such disasters. If the problem could be solved in some other way, for instance by insurance, the cover would have to be paid for.

It is true that registration of title to land, ships and so on can be done at the national level. However, our problem must be dealt with internatioally and the trade may therefore require a central registry as proposed above.

It is not suggested that such a novel scheme will be perfect, or that changing over to it will be every easy, but I do feel that the present mess is intolerable and I suggest that the registration scheme could offer a better solution.

14. **Summary**

The Chase Manhattan Bank has given the following summary of the scheme:

FUNCTIONS OF THE REGISTRY

Take possession of documents upon their issue.

Store these documents.

Record the original ownership and changes of ownership of the documents and endorse the bills of lading as agent for successive owners of record.

Act as agent both for the recorded owner and the carrier to effect presentation of the bill of lading and receipt for the cargo, without the necessity for the bill of lading to be physically delivered at the port of discharge.

ADVANTAGES

The registry will not undertake to prevent frauds, but it will provide a screening process which should reduce the incidence of certain types of fraud. In addition, the registry will be insured against its own mistakes so it does not substitute new problems for old ones.

The registry will be protected against breach of confidential information and here again will be insured in the highly unlikely event that a breach does occur.

The registry will allow financiers to hold claims against title as they do at the moment.

Use of existing documents and procedures. The parties to a transaction will continue to know where they stand by reference to the existing body of law. (They will not need to change their business practice or the ways in which their staff process documents; the system electronically mirrors existing business flows).

The registry allows full negotiability of the bill of lading.

The registry will undertake to identify the last recorded purchaser in a chain of recorded purchasers. As the bill will be endorsed by the registry as agent of this purchaser, no other claimant will be able to claim title to the goods by means of the bill of lading.

REPORT OF GROUP 1

Chairman: *Prof. J. Schultsz*

(Rapporteur: Mr. C.W.H. Goldie)

(A) **The practice of issuing more than one original bill of lading—whether it is necessary to have more than one original—implications for letter of credit requirements.**

The group agreed unanimously that the practice of issuing bills of lading in sets of two or more originals should be discontinued. The only possible reasons for having more than one original are:

1. The requirements of customs and other governmental bodies that an original should be lodged with or be available to them. In such cases non-negotiable copies should be sufficient.
2. The problems caused by the loss, or disappearance, of a bill of lading. If one of a set of originals is lost, delivery may still be made against one of the other originals. In the rare event of loss of a single original bill of lading, it should be possible for the person claiming a right to the cargo to obtain delivery by providing evidence of his right.

(B) **Delivery against one original bill of lading—position where the Master has knowledge of a competing claim.**

The group agreed unanimously that wherever the right of the carrier to deliver cargo to the holder of an original bill of lading is challenged by a person with a competing claim to those goods, the carrier should be entitled to deliver to the holder of the original bill of lading unless the competing claimant applies for and obtains a Court injunction or order preventing that delivery.

(C) **The practice of carriage of a bill of lading on board and delivery of cargo against that bill of lading**

The group agreed that there were very serious risks for the carrier in this practice. The carrier might be held to have knowledge that the other originals in the same set would be negotiated in the normal course of business and therefore, not being in a position to know with any certainty who is the owner of the cargo at any given time, should not accept instructions from the shipper on the transfer of the bill of lading carried on board when compliance with those instructions might lead to delivery of the cargo to a person other than the owner of the cargo. It was agreed that in many if not most jurisdictions the Courts would not be slow to find methods of placing responsibility on the carrier if the cargo has in such circumstances been delivered to a person other than the owner of the goods. It was unanimously agreed that shipowners should be made aware of the dangers they run if they adopt this practice.

(D) **Delegation to charterers or their agents of the power to sign and issue bills of lading.**

Delegation to charterers or their agents of the power to sign and issue bills of lading provides an easy opportunity for fraud in that the person with authority to sign bills of lading could issue more than one set of original bills covering the same cargo and then negotiate the two or more sets separately. The group discussed this problem at length but found no solution; so long as the traditional bill of lading continues to be used there will be no solution. The group however recommended that publicity should be given to this problem, particularly through the P.&I. Clubs, to alert shipowners, at present often unaware of the risks, of the dangers of delegating to others the right to sign and issue bills of lading on their behalf.

Even without delegation, the risk that a shipowner will be held liable, under the doctrine of ostensible authority, for the unauthorised issuing of a bill of lading by the charterer or the charterer's agent, appeared to be a risk inherent in the use of bills of lading.

REPORT OF GROUP 2

Chairmen: *Prof. P. Bonassies and Prof. K. Grönfors*

(Rapporteur: Mr. E.B. Nixon)

The following topics were the subject of lively and beneficial discussion:

(A) *The different functions of the bill of lading.* Can any function be eliminated, or can the functions be split? Can the maritime community be educated and encouraged to accept new forms of document and new systems?

(B) *Passing of Title:* the function of the bill of lading in different jurisdictions and recommendations for harmonization. Meaning of negotiability.

(C) *Receipt:*
(i) Use of waybills and non-negotiable bills of lading.
(ii) Computerized documents and new techniques.

(D) *Contract of Carriage*
(i) Identity of carrier and demise clauses.
(ii) Delegation of right to sign bills of lading.

(A) The different functions of the Bill of Lading

The first question addressed was whether, in order to reduce the possibility of fraud, shippers could be encouraged to request that carriers issue a document, such as a waybill or the American "straight" bill of lading, which would not have to be delivered to the ocean carrier at destination in order to obtain possession of the goods. It was pointed out that, under many legal systems, as long as the transportation document is designated as a "Bill of Lading", it must be surrendered by the named consignee even though its terms do not provide for delivery of the cargo to any other party. The group concluded that from a strictly legal standpoint there are many situations in which there is no need for the goods to travel under a negotiable bill of lading, i.e. where the bill does not serve any function in the financing of the original sale of the goods or in making possible their resale during transit. However, while use of the waybill is desirable in such cases, it would be necessary to attempt to persuade both merchants and financial institutions that the traditional requirement of a "clean negotiable Bill of Lading" is not necessary or desirable in every instance. At the same time efforts should be made to harmonize differing juridical systems so as to permit delivery of the goods without surrender of the waybill.

(B) Passing of title

In any discussion of the "passing of title" one must first define the meaning of the term in respect of a bill of lading.

It is suggested that it is preferable to use the term "transfer" or "quasi-negotiation" of the bill of lading rather than "negotiation", which latter suggests that "ownership" passes.

The transfer or negotiation of a bill of lading usually means that the right to delivery has been transferred while questions of ownership and risk are left to sale of goods Statutes and to the contract of sale itself.

The group felt that the C.M.I. must also consider the parallel question of passing of title in respect of waybills ("lettres de voiture"). The waybill (straight bill of lading under the U.S. Pomerene Act, 1916 46 U.S. Code Sections 81 to 1 24) provides the name of the person who must identify himself at delivery of the goods.

In respect of "fraud", it is clear that the waybill may avoid some fraud because the consignee of the goods is always the person named in the waybill and the person who must identify himself.

As for "negotiability", one must look at banking practice and in particular at the *Uniform Customs and Practice for Documentary Credits* of the I.C.C. 1974, which in Art.24 recognizes

only an *air* waybill (along with bills of lading) as an acceptable document of credit. The group note with pleasure than an amendment had been recently proposed to the *Uniform Customs and Practice for Documentary Credits* so that all documents of transport will be acceptable.

The group also discussed the evidentiary value of a bill of lading in respect of the condition of the goods. It was felt that in most jurisdictions the carrier is estopped by the bill of lading vis-à-vis a consignee or endorsee for value in good faith. However, in principle this estoppel does not apply to waybills.

(C) Receipt

1. After a general discussion of the historical evolution and text of the Hague Rules, it was generally agreed that they mandatorily apply to every document evidencing a contract for sea transport (except where ordinary commercial shipments are *not* involved) even if the document is not formally described as a bill of lading. Mention was made that both the Hamburg Rules and Multimodal Convention do specifically apply to waybills.

Although acknowledging the usefulness, and even the necessity of the traditional negotiable bill of lading in many situations, there was felt to be a need for the C.M.I. in the future to prepare, *not* a draft international Convention, but rather a set of recommended principles which could be included by reference into waybills. This could incorporate many of the rules already applicable to rail and air carriers. These principles could also serve as guidelines to persons unfamiliar with the advantages and disadvantages of waybills as a form of international maritime contract.

2. There was a thorough discussion of computerized bills of lading and other documents of carriage. It was generally agreed that nothing in any of the carriage by sea Conventions creates any obstacle to the use of computers to replace the present paper documentation.

(D) Contract of carriage

1. The group found that different rules are applied to "identity of carrier" and "demise" clauses in the various legal systems, such clauses being valid in some jurisdictions but unenforceable in others. The majority of the group felt that clauses of this type should be eliminated from bills of lading although the majority recognized that this may cause problems for carriers in certain jurisdictions.

The group also found that fraud would be greatly reduced by elimination of "anonymous" bills of lading, i.e. those making no reference to a named carrier.

2. As to the delegation of the right to sign bills of lading, the group felt that carriers should continue to exercise extreme care in the selection of their agents.

Finally, the group agreed that prompt dissemination to the commercial world of information about instances of fraud generally would provide one of the best safeguards against recurrence.

REPORT OF GROUP 3.

Chairman: *Prof. F. Bonelli and Mr. P. Gram*

(Rapporteur: Mr. J. Honour)

A number of important topics were discussed. The most important was the plan for a registration scheme, but the group also discussed specific problems of importance relating to the consequences of delivering cargo without production of bills of lading.

1. As regards the registration scheme, it was agreed that even though the main object was to avoid the current difficulties encountered in the oil trade arising from unavailability of bills of lading in time for discharge at the discharge port, the scheme should also reduce the incidence of certain kinds of fraud. The group concluded that the scheme would not conflict with existing international Conventions, rules or regulations, particularly since bills of lading will remain in existence and continue to have their full force and effect. The Registry would in all cases be acting only as an agent for the parties concerned. Questions were raised however regarding the location of the Registry, the liabilities of the Registry (and insurance cover of such liabilities, which might be considerable), and the possibility that wrong-doers might take advantage of the scheme.
2. It was agreed that whenever a carrier delivers cargo without production of the bill of lading, he is liable towards the holder of the bill. This liability is normally contractual but in some countries may also arise in tort. Thus time limits will vary. Accordingly the group recommended that an attempt should be made to achieve greater harmonisation. (General adoption of the Hague-Visby Rules would achieve this object).
3. The group agreed that the carrier can always refuse to deliver cargo if a bill of lading is not produced even if a satisfactory guarantee is provided covering the carrier's potential liabilities.
4. The validity or otherwise of clauses in charter-parties requiring the shipowner to deliver cargo without production of a bill of lading was also discussed. No final conclusion was arrived at on this point. The validity of such clauses depends on whether in any given case a Court would hold the clauses to be contrary to public policy.
5. It was agreed that where a carrier has indemnified the holder of a bill of lading, he has a valid claim against the receiver who took delivery of the cargo without producing the bill of lading. Such a claim would be based either on an implied undertaking of the receiver subsequently to surrender the bills of lading or an implied indemnity to the carrier holding him harmless from all consequences.
6. The group discussed the question whether a receiver who has received cargo without producing a bill of lading has a claim against the carrier for loss of or damage to the cargo. One view was that provided the receiver could prove title to the goods he would have a contractual claim and possibly a claim in tort; another view was that no claim could be made without the bill of lading.
7. The question of storage of cargo on board at the request of the charterer prior to discharge was also discussed. No problem would arise where the charterparty specifically provides for such storage and the terms regulating such storage, and the bills of lading incorporate the terms of the charterparty. In other cases, even where the agreement of the bill of lading holders has been obtained, difficulties would arise about whether the rights and liabilities of the parties are to be governed by the law governing carriage by sea or by the law relating to bailment. The answer might lie in whether or not "constructive delivery" has taken place.
8. Finally, two types of transhipment of oil cargoes were considered. In the traditional type of transhipment, the ocean carrier will remain responsible until final discharge and the bill of lading will be presented at that time. In the other kind of transhipment, where the receiver arranges for the oncarriage, the discharge and delivery of the cargo takes place on transhipment and the bills of lading must be produced at that time.

REPORT OF GROUP 4

Chairman: Mr. R.J. Thomas

(Rapporteur: Mr. H.M. Hill)

1. Prevalence of fraud

(a) The prevalence of fraud in transactions involving bills of lading must not be exaggerated. It was impossible to say how widespread fraud was, but it was felt that there has been the tendency to exaggerate the problem. It was important to keep matters in perspective and not to introduce measures which would increase costs or delay the speed of mercantile transactions unless these measures were absolutely necessary.

(b) Frauds were probably more commonly perpetrated under charterparties than under bills of lading.

2. Responsibility for checking what was loaded

(a) It was important for the purchaser to accept proper responsibility for ensuring that he obtained what he had purchased. The purchaser should not rely on the carrier or the banks.

(b) There was a need to advise purchasers as to what they could do to protect themselves; for example by:

(i) Requiring more documents or a proper authentication of documents in letters of credit and sale contracts.

(ii) Insisting on independent surveys by reputable organisations.

(iii) Giving more discretion to bankers in their instructions and amending letters of credit more readily.

(c) Banks should undertake the primary role in advising their customers and should publish booklets giving such guidance.

(d) In bulk trades there was generally an efficient and reputable system for checking the cargo loaded. Those trades or countries which did not have such a system for checking bulk cargoes should introduce such systems based upon those trades or countries which did.

(e) In the container trade, the problems were not sufficiently serious for any recommendations to be made. It might, however, be desirable for cargo underwriters to consider whether standardised procedures could be introduced.

(f) It was not possible to define more precisely the carrier's role in checking cargo.

3. Methods for reducing fraud

(a) The following suggested methods were considered:

(i) restrictions on the availability of bills of lading (by the use of e.g. serial numbers, special paper).

(ii) Use of sophisticated stamping.

(iii) Signature cards or signature books retained in banks.

(iv) Supercargoes travelling with the cargo.

(b) These methods were all considered to be wholly impractical.

(c) The only effective method was to recommend buyers to take greater care.

4. Letters of indemnity and clean bills of lading

(a) It was considered that the CMI should reaffirm its view that clean bills of lading should never be issued against letters of indmenity.

(b) The commercial problem that arises where there is damage so superficial that it would not be regarded in the particular trade as being damage materially affecting the condition of the goods should be dealt with by:

(i) An annotation being made on the bill of lading.
(ii) Banks accepting that such a bill of lading was a clean bill.

This would require the banks to define a "clean" bill of lading more broadly and it was considered that the CMI should support the work of the ICC (with the offer of assistance) in defining the circumstances in which annotated bills of lading should be treated as "clean".

5. Ante and post dated bills of lading

Ante and post dated bills of lading should never be issued.

6. Use of negotiable bills of lading

(a) Much less use should be made of negotiable bills of lading.

(b) Negotiable bills should only be used where goods were to be sold during the voyage or where there was some other real commercial need for a negotiable document. Even in these circumstances negotiable bills of lading should not be used if it was expected that the ship would arrive at the discharge port before the documents, unless some clear system for making delivery was set out on the face of the bill of lading.

(c) Carriers should discourage wherever possible the use of negotiable bills of lading.

(d) Banks should encourage the use of non-negotiable documents as these would adequately protect their interests.

7. Role of banks in reducing fraud

(a) Banks should not have imposed on them greater responsibilities than their current responsibility to check that the documents are regular on their face and conform to the credit. To impose a responsibility for checking whether cargo had in fact been loaded would be expensive, would delay transactions and was not justified by the scale of current problems.

(b) The bank's duty was to advise customers to take proper precautions.

(c) Further consideration should be given to the rights and obligations of banks where fraud was suspected.

8. Review of documentary procedures in the oil trade

Under the sponsorship of the CMI a review should be undertaken of documentary procedures and the respective rights and obligations of parties in relation to documents in the oil trade. The review should be carried out by all interested parties:- the oil producers, traders, downstream oil companies, banks and carriers—with the object of clarifying rights, obligations and procedures and making any required revisions.

Concluding Address by Sir Anthony Lloyd

Mr. Chairman, there is one thing that must be said at the outset is that this colloquium has been a success. I feel great humility and a great sense of responsibility in trying to sum up what has been said so well by so many. As I have been going from group to group I have been immensely impressed with the quality of the discussion and also, if I may say so, with the all-pervading sense of good humour in which the discussions have been conducted. If only it were so at all conferences. So often one finds that people say their say and what they say has nothing whatever to do with what has been said before or what is to be said thereafter. They may, one sometimes thinks, feel better for having said their say, but little other purpose is served by such a conference. That, it seems to me, is not what has happened here. From the very start and certainly throughout yesterday the groups were getting down to business, were dealing with the questions which they had been asked to consider and were doing so with a real sense of direction and purpose. That is not to say that there were not many fascinating problems which were considered by the wayside. But the general direction of the discussion has never been lost; and never far from the foreground has been the main theme of our colloquium, the prevention of fraud.

Now I would like to think that the reason for all this is that we are all highly intelligent, reasonable people. But there is, I think, a second reason which is perhaps even more significant, that we all actually want to reach sensible solutions to the problems which face us. Seven years ago, when Lord Diplock was summing up the colloquium at Aix-en-Provence, he said that he had been surprised at the resistance to change. He said he had expected some resistance to change but he had under-estimated it. I must say that I found the reverse. I have been astonished at the willingness of members here to consider and accept what might seem quite radical changes if such changes should be needed to serve the general purpose of keeping the wheels of commerce oiled, which is after all one of the main functions for which the C.M.I. was founded nearly 90 years ago.

As I said when making my opening remarks on Monday, I always expected to learn a great deal from this colloquium. I have found as yesterday went on that, in the event, I have learnt more, much more than I had expected. I must confess that in doing so I have not ceased to enjoy myself greatly. The two are not necessarily inconsistent. Since I ventured on a little Italian in my opening remarks on Monday I will now be even bolder. This is after all the land of Virgil, of Horace and of Lucretius. So I will venture if I may on a little Latin which seems not inappropriate "Fortunatus et ille qui miscuit utile dulci". I mention Virgil, Horace and Lucretius, because I am not quite sure which of the three it was who wrote that. Indeed I have a sneaking feeling that it may have been more than one of them, for what I have said does not seem to scan as it should. But then, in England, we have a saying that a gentleman always misquotes so as to give his hearers the pleasure of correcting him.*

I have mentioned two reasons why these discussions have gone so well. But I should I think mention a third, and this is our friends who have served as the chairmen of the four groups. I know from hard experience how difficult it is to do that job at all, let alone to do it well. It seems to me that they have done it very well indeed and we owe them and their rapporteurs a great debt of gratitude. May I also mention in that connection our typists who have produced these reports for us today.

I come now to the conclusions, proposals, suggestions, call them what you will, of the various groups, which if accepted could become recommendations of the C.M.I. All I can do at this stage is to give a bird's eye view. But two things, I think, must be said. The first thing that has struck me is that nearly all our proposals bear some relationship to our underlying theme of fraud. In the case of some proposals the sole object is the reduction of fraud or the elimination of the opportunities for fraud. In other cases the elimination of fraud is as it were a spin-off or bonus from a proposal for which the reasons lie elsewhere. Then of course there are cases in between. That is the first general observation.

The second is this; that we are, of course, right to take the question of fraud very seriously, particularly as there seems to be no doubt that it is on the increase. But at the same time, and this is a point which is, I think, well made by the fourth group, we must not go overboard altogether on the subject. The number of transactions affected by fraud, even if it be a number which is increasing is still minute compared to the total number of all international maritime transactions. We must face the fact that we shall never be able to eliminate fraud altogether. So, in all our proposals, it seems to me, we must keep, if we can, a balance

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*"Omne tulit punctum qui miscuit utile dulci". Horace: "Ars poetica" 343.
"Fortunatus et ille deos qui novit agrestis."
Virgil: Georgics Book 2. 493

between the advantage to be gained in reducing fraud in the one case out of a million or whatever it may be, in which it may occur and the disadvantages, if there be disadvantages, in the case of the other nine hundred and ninety nine thousand nine hundred and ninety nine transactions. There is no point in solving one problem if we just create another, and above all, of course, there is no point in change for the sake of change.

A good example of what I have in mind is the very first proposal of Group 1, that we should discontinue the practice of issuing bills of lading in triplicate. As you have already heard from Professor Schultsz, nobody could think of any serious reason why the practice should continue. It may be that the practice is one which has not been abused in the past as often as one would have expected; but that is not the point. The potentiality for fraud is there. I often say that there are two sorts of nonsense in every legal system: the sort of nonsense that you cannot avoid and the sort of nonsense that you can. Issuing bills of lading in triplicate seems to me to be a fine example of the sort of nonsense we could easily avoid. Discontinuing the practice can do no harm, no foreseeable harm, to anyone. As Niall McGovern said in the course of the discussion, the only people who would regret the passing away of the bill of lading in triplicate after three hundred and fifty years would be those who are themselves hell-bent on fraud.

I was interested in that connection in John Moore's suggestion this morning that one of two original bills of lading might be marked for customs purposes only. But if, for that reason, it ceased to be a fully negotiable bill of lading one wonders why a non-negotiable copy would not suffice. I hope we shall adopt a recommendation along the lines proposed by Group 1. But I hope we will not leave it at that. It must be up to us in our various ways to see that that recommendation becomes effective through pressure on the Chamber of Shipping, the P & I Clubs or wherever it may be.

Now if we abolish the bill of lading in triplicate it seems to me that many of our other proposals will then begin to fall into place. Thus it will follow that the shipowner will always be safe in delivering against presentation of the sole bill of lading. But Group 1 go a little further than that in their recommendation in paragraph B. They say that the Master should be entitled to deliver against the sole bill of lading even if he is aware of a competing claim, for example, when it is alleged that the bill of lading has been stolen. In such a case they say that the burden should be on the person making the claim to obtain an appropriate Order from the local court. It should not be for the Master or his owners to evaluate the competing claims or to take the initiative in applying to the local court, although of course they could do so if they wished, and if the means were available as I understand to be the case in France. Now speaking for myself, I regard proposal B of group 1 as being rather important and it certainly would have solved the commercial problem which lay behind the case which I decided last term and which I mentioned in my opening remarks.

Then there is the case of the bill of lading carried on board. In paragraph C of their report they draw attention to the risks involved in that practice. Now if there is only a sole bill of lading those risks would be largely eliminated. I do not know whether the practice of carrying the bill of lading on board, if it were the sole bill of lading, would continue. I, myself, would hope not, for I can see no point in having a bill of lading at all as opposed to some other document if it is destined to spend its whole life on board the carrying ship. Whoever heard of a cloakroom attendant who keeps all the cloakroom tickets in his pocket?

That leads on directly to the whole question what should be the function of the bill of lading today, a question which was considered in great depth by Group 2, but was also touched on by Group 4. Both groups were unanimous in agreeing that negotiable bills of lading should not be used except where they serve some commercial purpose; for example where they are needed for the purpose of reselling the goods during the voyage or for raising money on the security of the bill. In all other cases, in other words where the bill of lading as such serves no commercial purpose, then a non-negotiable waybill should suffice.

There would be many advantages in that course which have been pointed out. In the first place, it would solve the problem of non-presentation of the bill of lading at the port of destination, which can be the cause of serious delay and disruption to the course of business. Secondly, it would reduce the opportunity for fraud. Third, the waybill is a more amenable document for the purpose of computer techniques which are bound to become more and more sophisticated as the years go by and are bound therefore in the end to save costs. Merchants are like the rest of us; we all prefer the devil we know to the devil we don't. But if I were a merchant and if I were offered the choice of a cheap and efficient waybill or a slow and expensive bill of lading then I know which way I would choose.

There are, of course, probelms. When does the property pass? Who can sue the carrier and so on. But Group 2 consider that all these problems can be solved, and in that connection they have come up with what seems to me to be an interesting and important suggestion that a new set of uniform rules should be prepared for incorporation in a standard sea-waybill,

corresponding to those which already exist in the case of carriage by land and carriage by air; this could be achieved without the necessity for an international convention. I regard that, as I say, as a most important proposal which should do much to make the sea waybill better known and more acceptable to those who ought to be using it.

The problem of non-presentation of the bill of lading is, of course, particularly severe in the oil trade and it was to meet that specific problem and, incidentally, also to reduce the incidence of fraud, that Intertanko have put forward their scheme for bill of lading register, in which the original bill of lading would be deposited and all subsequent transactions and dealings with the bill recorded. From the carriers' point of view the scheme would have the obvious advantage of enabling them to know to whom they can safely deliver the goods the moment the vessel arrives at its destination, simply by finding out who is the last named buyer on the register. From the traders' point of view there are also many advantages. The scheme was discussed at length in Group 3 and as you can see their conclusion is that the scheme would not conflict with any existing international convention, rules or regulations. Speaking now for myself and not merely recording the views of others, I find myself increasingly attracted by the scheme as an effective solution to a real problem. No longer do I think that an international convention would be necessary, certainly if the scheme were confined in the first instance, as it would be, to a particular trade. It could be based on contract, not dissimilar from the sort of contract that exists between persons who trade in a given market or on a particular exchange and who agree to be bound by the rules of that market or that exchange. However, I was aware of considerable resistance to the scheme for reasons which I am bound to say I could not fully understand; in those circumstances it seems to me that if the scheme is to go forward at all the impetus must now come from the trade itself. If they want it, it can be done; and I note in that connection the interesting recommendation of Group 4, (it is their last recommendation in paragraph 8), that the oil trade should now get together and consider what can be done to solve their problems. I hope that they will then give very serious consideration to this scheme.

Returning to the traditional role of the bill of lading, Group 3 had a most interesting discussion of the various problems that can arise where the bill of lading is not produced and their conclusions are all set out in paragraphs 2 to 6 of their paper, and you can see from those paragraphs how comprehensive their discussion was. I would like simply to highlight just one of their conclusions—that an attempt should be made to harmonise the time limits in the case of mis-delivery where the action can be brought in tort as well as in contract. This could, it seems, be achieved by the general adoption of the Hague-Visby rules. That particular suggestion, of course, has nothing that I can see to do with fraud. But it is nonetheless a very valuable suggestion.

And now, turning to Group 4, there was a unanimous proposal from the Group that the C.M.I. should reaffirm its old position, that clean bills of lading should *never* be issued against letters of indemnity and should never be ante-dated or post-dated. But there is a real problem here, where there is superficial damage to the goods or the packing. The Master wishes to clause the bill of lading. Why should he be asked to sign a document which is untrue? In any event, he has a duty to protect his owners. At the same time the sellers must have their clean bill of lading if they are to be paid under their letter of credit. There is thus an impasse.

Now Group 4 has come up with what seems a most happy solution to that problem, although it is one which has been forseen in the past. Let the bill of lading be claused, let the Master's conscience be salved, but let the bill of lading be treated as a clean bill of lading for the purposes of the credit. There already exists guidance to the banks in the uniform customs issued by the I.C.C. as to what, by custom, may be regarded as a clean bill of lading. And the courts would, I am sure, uphold such a custom on satisfactory proof. John Honour's experience in the case of the steel shipments from Belgium was very interesting in that connection as was Mr. Vanhoutte's reply. No doubt there will always be borderline cases. No doubt there will be difficulties of definition. But where the damage does not affect the commercial value of the goods there should be no difficulty. It has now been suggested by Group 4 that the C.M.I. should be willing to get together with the I.C.C., and give it what assistance it can in arriving at suitable definitions, which would then, I hope, be accepted by the banks.

Which brings me to the question of documentary credits in general. This was the central question discussed by Group 4 and discussed at length. I found that discussion one of absorbing interest. It is sometimes said that the system of documentary credits is too rigid and too inflexible. The banks very reasonably reply that they will do whatever they are asked for a price. The real problem, I think, is really one of inertia. As at present operated the system can work unfairly in two equal and opposite directions. It can work unfairly on the sellers because the buyer can get out of his contract on a falling market or if he does not want the goods, by relying on some superficial damage which results in the bill of lading being claused. It

is unfair on the buyers because in the absence of fraud by the seller he is compelled to pay for goods even though there may be good reason to think that the goods do not comply with the contract and even that they do not exist at all, provided only the documents are in order. Now the proposal which I have already mentioned, that bills of lading should be treated as clean in certain circumstances despite being claused, deals to some extent with the unfairness at one end, the unfairness on the seller. As to the unfairness on the buyer, in theory the remedy lies in their own hands. They could insist on a certificate of inspection by an independent surveyor before shipment and so on. But I hope Mr. Wallace-Turner will forgive me here, if I say that that is very much an answer in theory. In practice, the remedy lies with the banks. Nobody suggests for one moment that banks can themselves do anything other than check the documents. But they do have an important role in advising and in warning their customers of the risks which they run, particularly the risk of fraud; and they do have an important role in advising them as to the measures which can be taken to reduce that risk and other measures they can take for their own self protection. The problem of inertia is only going to be solved if the banks themselves take the initiative. I therefore welcome the idea suggested by Mr. Wallace-Turner that we should draw to the attention of the Institute of Bankers what we regard as their role in this connection. It seems to me that it would be in the bankers' own long term interests to act in this way, for no banker wants a bankrupt customer. That is the very important point which seems to me is made well by Group 4 in paragraph 2 (b) and also again in paragraph 7.

Mr. Chairman, I return, last of all, to Lord Justice Bowen, where I started on Monday. If I may remind you, once again, of two or three sentences from his judgment: "The object of mercantile usages is to prevent the risk of insolvency, not fraud, and anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings. Mercantile genius consists principally in knowing whom to trust and with whom to deal and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery."

At this colloquium we have not assumed that merchants should conduct their business on the basis of attempting to protect themselves against fraud. We are not suggesting that distrust should be the basis of commercial dealing. It will always be for the shipowner to decide whether he can trust his charterer and vice versa. Credit will remain the basis of trading. All we have been doing at this colloquium is to make some modest but, I think, useful suggestions whereby the incidence of fraud may be reduced. I hope and believe that Lord Justice Bowen would himself have approved of what we have been doing. Thank you very much.

COMITÉ MARITIME INTERNATIONAL

Resolutions Agreed at the Final Session of the C.M.I. Colloquium

Venice, 2nd June, 1983

1. The practice of issuing Bills of Lading in sets of two or more originals should cease.
2. The practice of carriage of a negotiable Bill of Lading on board and delivery of cargo against that Bill of Lading involves serious risks.
3. The practice of issuing a Bill of Lading when a negotiable document is not required should be discouraged.
4. Uniform rules for incorporation in sea waybills should be prepared and their adoption encouraged.
5. It is re-affirmed that clean Bill of Lading should never be issued against letters of indemnity and Bills of Lading should never be incorrectly dated.
6. An agreement should be reached with ICC as to clauses in Bills of Lading which will not prevent the Bills so claused being accepted by banks as clean.
7. Banks should be encouraged to warn their customers of the risk of fraud under documentary letters of credit and advise them on suitable precautions.
8. The name of the person under whose authority the Bill of Lading is issued should appear in the Bill of Lading.