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To my grandfather Iliya Guev (1926 – 2015)
who has always inspired me

Preface

This book addresses the legal and contractual obligations of sea carriers relating to the care for the cargo under a contract of carriage. While the general framework employed is the leading international liability regime on the carriage of goods by sea—the Hague-Visby Rules—the discussions in each chapter also account for the possible future adoption of a new regime, the Rotterdam Rules, with the latter being adequately referred to in each of the chapters.

The subject matter is related to the standard for the duty of care for the goods as codified in the Hague-Visby Rules, but the work touches also upon a wide range of related topics found both in law and in practice and provides valuable commercial, technical and historical links as well as various solutions that have been found at the national and international levels to address the challenges arising in this specialized area of law.

The book is divided into six chapters, which gradually reveal the complexity of the topic. Chapter 1 provides a thorough introduction to the two main transport documents in use and to the basic logic behind shipping, seagoing trade, and related national and international legislation in that area. In turn, Chap. 2 presents an overview of the relevant provisions of the Hague-Visby Rules (most prominently Article III rule 2). The focus shifts from a critical analysis of the respective articles in the context of the current commercial practices to adding to the current debate on whether the rather fragmentized framework of sea carriage liability regimes could be updated and modernized. Chapter 3 examines the problems arising out of the insertion of a FIOS(T) clause in the contract of carriage and addresses the tension between this contractual arrangement and the provisions of the Rules. Chapter 4 focuses on the problems associated with the carriage of cargo on deck and, in particular, the obligations of the carrier over such cargo. The discussions comprise various technical, legislative and judicial issues related to deck cargo in the context of the Hague-Visby Rules. Chapter 5 is dedicated to the idiosyncrasies of containerized transport in the context of the carrier's cargo-related obligations. The contents of this chapter encompasses also the entire process of containerization

because of its unparalleled impact not only on the shipping business but, more generally, on international trade and even the social and economic development due to the irreversible changes that the shipping container brought to the modern world. Lastly, Chap. 6 summarizes the observations and implications derived from the various discussions in the previous chapters, which generally aim at ascertaining whether the current law corresponds to the commercial practice and the shipping industry's needs of today. This final chapter provides an overall conclusion on the current status of the law and practice in the area of the carrier's cargo-related obligations as well as on the prospects in the future.

Overall, this book points in a clear fashion to the gaps between statutory law and commercial practice and traces their development, as well as the various ingenious methods of jurisprudence to link those two shores. Furthermore, the noticeable lack of uniformity between the various legal systems currently in force is also illustrated. Given the historical underpinnings and the evolution of the national and international codification of maritime law, the book is quite naturally centered around English law and English jurisprudence. However, the discussions are not constrained to English law only as there are numerous references made to other common law and civil law jurisdictions as well. This comparative element adds to the quality of the legal discussions and contributes to the international character of the book.

The book was written with a number of potential readers in mind, and it is intended to open up the topic to a broader audience. It may be a valuable read both for readers who wish to advance their learning (e.g., professionals, practitioners and postgraduates) and for readers with little or almost no prior knowledge of the topic (e.g., students and researchers). This is because each chapter is provided also with sufficient background information, which allows even a less experienced reader to digest the more intricate problems discussed in the book without having to resort to external materials.

Groningen, The Netherlands Ilian Djadjev

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Contents

Abbreviations

ADHGB	Allgemeine Deutsche Handelsgesetzbuch (General German Commercial Code)
AIMU	American Institute of Marine Underwriters
AMD	Association Mondiale de Dispacheurs
ANSI	American National Standards Institute
ASA	American Standards Association
BCCI	Bulgarian Chamber of Commerce and Industry
BIMCO	Baltic and International Maritime Council
BOL (B/L)	Bill of Lading
BTS	Bureau of Transportation Statistics
C&F/CFR	Cost and Freight
CFS	Container freight station
CIAIM	Standing Commission for Maritime Accident and Incident Investigations [Comisión Permanente de Investigación de Accidentes e Incidentes Marítimos]
CIF	Cost, insurance, and freight
CMI	Comité Maritime International
COA	Contract of affreightment
COGSA	Carriage of Goods by Sea
CSC	Container Safety Convention
CSCL	China Shipping Container Line
CY	Container yard
D&D	Demurrage and Detention
DWT	Deadweight tonnage
EGHB	Einführungsgesetz zum HGB (Introductory Law to the Commercial Code)
FAS	Free alongside ship
FCA	Free carrier

FCL	Full container load
FEU	Forty-foot equivalent
FI	Free in
FILO	Free in liner out
FILTD	Free in liner terms discharge
FIO	Free in and out
FIOS	Free in and out stowed
FIOSLSD	Free in and out stowed, lashed, secured, and dunnaged
FIOST	Free in and out stowed and trimmed
FIOT	Free in and out trimmed
FIS	Free in and stowed
FISLO	Free in stowed liner out
FLO/FLO	Float-on/Float-off
FO	Free out
FOB	Free on board
HBG	Handelsgesetzbuch (Commercial Code)
HR	Hague Rules
HVR	Hague-Visby Rules
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
ILA	International Law Association
IMDG	International Maritime Dangerous Goods Code
IMF	International Monetary Fund
IMO	International Maritime Organization
IMSBC	International Maritime Solid Bulk Cargoes Code
ISM	International Safety Management
ISO	International Organization for Standardization
JIML	Journal of International Maritime Law
LCL	Less than container load, less-than-carload
LIFO	Liner in free out
LO/LO	Lift-on/Lift-off
LTL	Less-than-truckload
LOI	Letter of indemnity
MAIB	UK Maritime Accident Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships
MOPOG	Russian Regulations for Carriage of Dangerous Goods by Sea
MSC	(1) Maritime Safety Committee (IMO); (2) Mediterranean Shipping Company
NOR	Notice of Readiness
NVOC	Nonvessel owning carrier
NVOCC	Nonvessel operating common carrier
NYPE	New York Produce Exchange
OOG	Out of gauge cargo
P&I	Protection and indemnity

PSL	Practical storage life
RORO	Roll-on/Roll-off (RORO or ro-ro)
RR	Rotterdam Rules
SCN	Supreme Court of the Netherlands
SDR	Special drawing rights
SIDS	Small Island Developing States
SLAC	Shippers load, stow, and count
SOLAS	International Convention for the Safety of Life at Sea
STC	Said to contain
STO-RO	Stow and row
TEU	Twenty-foot equivalent
TNPA	Transnet National Port Authority (South Africa)
UCP	Uniform Customs and Practice for Documentary Credits
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VGM	Verified Gross Mass
WO/WO	Walk-on/Walk-off

Chapter 1
Shipping and the Law on Bills of Lading and Charter Parties

Abstract The opening chapter of this book functions as a theoretical background and serves also as a reference point in clarifying the various areas of shipping law related to the carrier's obligations over the cargo as addressed in the subsequent chapters. In essence, this chapter is a source of general shipping knowledge, and it deals particularly with the contract of carriage and the related transportation documents, as well as with the contractual parties involved. This is the gist of everyday maritime commercial activities, and thus the chapter alone may well function as a handbook on bills of lading law and charter party law. The concise but skillful account of the basic logic behind shipping and seagoing trade helps the readers in limiting the instances when they need to resort to external materials in order to clarify essential notions and positions regarding the carriage of goods by sea. This area of shipping law is commonly referred to as "dry shipping," and clear understanding thereof is essential for digesting the legal, contractual, and commercial matters discussed further in this book.

1.1 Parties to a Contract of Carriage

Before embarking on the main question and starting ascertaining the law on the specific problems laid down in the current work, some explanatory work is needed to ensure that any discrepancies and ambiguity are avoided in the discussions that are to follow. First of all, since it is essential that one employs consistent terminology, the following remarks and comments should be made concerning the contract of carriage and the parties thereto.[1]

Regardless of from what perspective one looks into the carriage of goods by sea, it is always paramount to distinguish between the main parties that are involved in that process. This is so because different parties have different rights and obligations and may be subject to a different liability regime. For example, the Hague-Visby Rules, which are in the center of attention in the present work, have application not to any other parties but to those that are a party to the respective

[1] An official definition of these terms is listed in the "Transportation Expression" dictionary provided by the Bureau of Transportation Statistics (BTS) on http://www.bts.gov/dictionary/index.xml.

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bill of lading contract, either where it was originally generated or where the contract subsequently came into existence by means of the transfer of the bill.[2]

First of all, when referring to a sea carrier, a distinction should be made between the following:

- a *common carrier*[3] is a business or agency that is available to the general public for transportation of people, goods, or messages at reasonable rates and without discrimination. That is, a common carrier can render transportation services to any person and company provided that the carrier has been licensed or authorized by the respective regulatory body.[4] This is the first general category of sea carriage, which is known as liner shipping. Liner services operate within strict schedules and have a fixed rotation of ports, where they call at preliminarily published dates. This type of services may include carriage of containers, bulk and break bulk,[5] as well as RORO[6] service. Voyages in the liner trade usually provide transportation to many different parties, meaning that there are numerous shippers.
- a *contract carrier*[7] is a transport line that carries people or goods under a contract of carriage with one shipper or limited number of shippers as the carrier may refuse to transport goods for anyone else. This type of transportation does not serve the general public and is called tramp shipping or tramper. This is the other general category of sea transportation, and it is more flexible than liner shipping as it need not adhere to a particular schedule. As the tramp service does not offer a fixed itinerary, it can in principle be available on short notice, and it can load, generally, any cargo from any port to any other port subject to the agreement between the parties. Tramp services mainly include transportation of cargo on bulk and break bulk carriers. Typical for tramp shipping arrangements

[2]Bugden, Paul M. and Lamont-Black, Simone (1999) *Goods in Transit and Freight Forwarding* (2nd ed), Thomson Reuters, p. 340.

[3]This is a common law term, and its functional equivalent in civil law is a *"public carrier."*

[4]For instance, a US common carrier must secure a certificate of public convenience and necessity from the Interstate Commerce Commission (ICC) and the Federal Maritime Commission (FMC) in order to operate and render services.

[5]Bulk cargo is homogeneous cargo—such as grains, ores, oil and coal—which is loaded and stowed unpackaged in the vessel's holds. Break bulk cargo, on the other hand, represents noncontainerized cargo that is packaged and shipped as individual pieces in a unit (may that be boxes, barrels, drums, pallets). Such cargos often include items that are too big to be carried on a container, and they vary from construction equipment to yachts and windmills.

[6]RORO (Roll-on/roll-off) vessels carry wheeled cargo, such as trucks, buses, automobiles and tractors, which are driven on and off the vessel on their own.

[7]This type of a carrier is also called a *"private carrier"* in UK English. A stipulation should be made that this common law distinction between contract/private and common/public carriers does not apply in civil law, and it is not known in the Hague-Visby Rules either. That is why the distinction does not play an important role in nowadays international laws regulating modern carriage of goods by sea. The Hague-Visby Rules may apply not only to common carriage, but also to tramp carriage as well when a bill of lading is issued under a charter party or when the charter party contains a Clause Paramount. See Chap. 2, Sect. 2.4.4 below.

is the issuance of a charter party, through which a shipowner and a charterer arrange for the hire of the vessel for a particular journey or a period of time, although a liner ship can also be chartered.[8]

– a *private carrier* is a company rendering transport services for its own goods, usually on an irregular or *ad hoc* route. Thus, while common carriers and contract carriers provide transportation service to others, private carriers own the goods that they are transporting. One important feature is that the primary business of private carriers is actually not transportation, and the private carriage is merely intended to support other legitimate businesses of the operator. Private carriage is more common for road transportation, and it is less used for water carriage.
– a *freight forwarder*[9] is an individual or a company that operates as an intermediary between shippers and carriers in the transportation chain, providing a wide range of important services[10] in order to facilitate the movement of goods. Freight forwarders usually receive small shipments—referred to as less-than-carload (LCL) or less-than-truckload (LTL)—from shippers, after which they consolidate them and contract with a sea carrier for the transportation of the goods. A freight forwarder can, depending on the specific case, act as an agent of the shipper,[11] as an agent of the carrier, as an agent of a nonvessel operating common carrier (NVOCC),[12] and it may well contract for a carriage of goods as a principal, i.e., the freight forwarder being the contractual carrier vis-à-vis the shipper.[13]
– a *nonvessel operating common carrier (NVOCC)*, also referred to as a nonvessel owning carrier (NVOC), performs essentially almost the same activities as a freight forwarder as it is also an intermediary that acts as a freight consolidator for smaller shipments. The NVOCC can, too, issue its own documents of title (e.g., a house bill of lading or a sea waybill) and thus works in the same way as a shipping line, but, unlike a freight forwarder, the NVOCC can be liable for loss, damage, or shortage of the goods during the sea carriage. The NVOCC appears as a "carrier to shippers" (in the house bill of lading) and as a "shipper to

[8]Schoenbaum, Thomas J. (2011) *Admiralty and Maritime Law* (5th ed), Thomson Reuters, Vol. 1, Chapter 10, p. 777, § 10-3.

[9]This party is also called a *"forwarding agent"* or *"forwarder."*

[10]Freight forwarders can, *inter alia*, give advice on exporting costs and charges (freight costs, port charges, insurance costs); prepare and file the relevant documents accompanying the contract of carriage or the contract of sale between a seller and a buyer; arrange the processes of packing, loading and discharging the cargo; book the necessary space on board a sea vessel; ensure that cargo and transport documentation comply with customs regulation.

[11]*Brennan International Transport Ltd and Anr v Blue Q Corporation and Anr* [2009] 761 Ll. Mar. L. N., p. 3.

[12]*Owners of cargo formerly laden on board the "Bunga Mas Tiga" v Confreight Cargo Management Centre (Pty) Ltd* [2002] 582 Ll. Mar. L.N., p. 4.

[13]*Vastfame Camera Ltd v Birkart Globistics Ltd (The "Hyundai Federal")* [2005] 677 Ll. Mar. L.N., p. 4.

carriers" (in the master's bill of lading). Depending on the facts of the case, an NVOCC may be deemed an agent of the shipper[14] or an agent of the carrier.

As seen above, the terminology differs depending on the specific jurisdiction[15] and also on the facts of the case. For instance, a contractual carrier under a bill of lading contract of carriage may not always be the actual carrier that performs the voyage.[16] That is why when the term *carrier* is employed in the present work, reference will be made, unless explicitly stated otherwise, to the definitions laid down in the international instruments governing the international carriage of goods by sea. In that regard, Article I(a) of the Hague-Visby Rules provides:

> "Carrier" includes the owner or the charterer [of the vessel] who enters into a contract of carriage with a shipper.

Evidently, the definition envisages not only the shipowner of the vessel but also other parties, including a charterer. For comparison, the definition laid down in Article 1.5 of the Rotterdam Rules is even more straightforward:

> "Carrier" means a person that enters into a contract of carriage with a shipper.

Next, the *shipper* is generally the party that enters into a contract of carriage with the carrier and is named as such in the bill of lading.[17] The shipper may well be a voyage or time charterer of the ship, and at the same time it may be the seller or the buyer of the goods in accordance with the underlying contract of sale. The shipper is the party that prepares the bill of lading, and it is obliged to provide accurate information in it. It subsequently hands the bill of lading to the master of the ship for signature.

The *consignee* is the party that is entitled to delivery, that is, the person to whom the cargo is to be delivered under the contract of carriage.[18] The consignee is named as such in the bill of lading, electronic transport record, or another transport document, but it is not always the case that a specific name is entered in the consignee box in the bill of lading. Depending on the nature of the underlying sales transaction, the bill of lading may provide for various possibilities as regards the party that has the right to receive or to control the receipt of the cargo.

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[14] *Hartford Fire Insurance Co v Novocargo USA Inc and Others (The "Pacific Senator")* [2002] 1 Ll. L. Rep. 485; [2004] 632 Ll. Mar. L.N., p. 2(2).

[15] For example, carriers in the US are required to treat freight forwarders and NVOCCs as shippers (the Ocean Shipping Reform Act 1998, amending the Shipping Act of 1984).

[16] For example, German maritime law distinguishes between a contractual carrier and an actual carrier. Whereas the former will enter into a contract of carriage with a shipper, the actual carriage may be carried out through charterers (disponent owners) or subcarriers employed by the contractual carrier, who are generally referred to as actual carriers. Under German maritime law, contractual and actual carriers are jointly and severally liable. See Ramming, K. (1999) *German Transport Law and its Effects on Maritime Law* 27 International Business Law (July/August), p. 323 at p. 325.

[17] See Article $I_{(8)}$ of the Rotterdam Rules.

[18] See Article $I_{(11)}$ of the Rotterdam Rules.

First, as stated, the consignee can be explicitly named in the bills of lading, and in this case the bill can be physically passed from the shipper to the consignee (i.e., the bill is consigned to the consignee). The consignee has no right to further consign or endorse the bill of lading to any other party.[19]

Second, the consignee box may contain the words "to order." This allows the shipper to endorse the bill of lading, which is in essence giving orders to whom the cargo is to be delivered. There can be two types of endorsement—it is either an endorsement in blank, which is the signature of the shipper on the back of the bill, thus allowing any person that holds the bill of lading to claim the cargo, or a special endorsement (endorsement in full), where the shipper puts his signature on the bill, together with the name of the intended recipient of the bill. It is important to note that "to order" bills of lading when in the hands of a party to whom they have not been endorsed, neither in blank nor in full, does not entitle that party to receive the cargo, even when that party is the notify party under the bill of lading.[20] Accordingly, should a carrier release the goods against such bills and to a party not entitled to delivery, the carrier may ultimately be held liable for misdelivery. The *dictum* of Reyes J in a case before the Hong Kong's Court of Final Appeal clearly states that "the [bill of lading] contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading."[21] That is, a sole presentation of the bill of lading might be insufficient to justify a release of the goods if the party presenting the bill is not entitled to the goods in accordance with the terms and conditions therein.

The third possibility for entitling a party to receive the goods in a bill of lading is a mixture of the first two—i.e., the consignee box contains the words "to order" and also the name of a specific consignee. In this scenario, the bill can be physically passed to the named consignee as described in the first example. However, here the words "to order" allow the consignee to further endorse the bill of lading either by an endorsement in blank or by a special endorsement to a third party. That third party then cannot anymore endorse the bill of lading.[22]

Fourth, the consignee box may contain the words "bearer" or "holder," or it can be simply left blank. In this case, the holder of the bill of lading is the party entitled to the delivery of the cargo. The bill of lading can simply be consigned (that is, physically passed) from one party to another.

The *cargo owner* is the party whose interest in the cargo entitles it to sue under the contract of carriage for goods that have been lost, damaged, or misdelivered. Since the cargo may be sold and resold several times during the contractual voyage,

[19]That is why such bills of lading are called a "straight" bill of lading or a "non-negotiable" bill of lading.

[20]*Charmax Trading Ltd v WT Sea Air Asia Ltd and Another* [2010] 787 Ll. Mar. L.N. 1.

[21]*Charmax Trading Ltd v WT Sea Air Asia Ltd and Another* [2010] 787 Ll. Mar. L.N. 1.

[22]An exceptional case is when the consignee further endorses the bill of lading to a third party by way of a special endorsement which consists of the words "to order" coupled with the name of the third party. Only in this particular case the third party, having become the legitimate holder of the bill of lading, can further endorse it.

the cargo owner prior to and at the beginning of the voyage may well not be the same party as at the end of the voyage.

Having ascertained the status of the main parties involved in the carriage of goods by sea, it is worth having a look at the essence of the underlying contract. The contract for the international carriage of goods by sea requires the presence of an international element—that is, the transportation should commence in one country and end in another.[23] This process involves implications of a private international law as well as of a public international law character.[24]

1.2 Types of Contracts of Carriage

A contract of carriage is a contract for the carriage of goods between two parties—a carrier and a shipper (the latter being a consignor and sometimes also a consignee). The definition of a contract of carriage varies depending on the international liability regime in which it is found. For example, the Hague-Visby Rules state that "[a] 'contract of carriage' applies only 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 water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party 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."[25] This definition refers to the document that is issued under a contract of carriage, and for this reason the Rules are said to have adopted a documentary approach to contracts of carriage.[26] On the other hand, the Rotterdam Rules provide a definition that describes the obligation of the carrier to carry goods from one place to another, which may include carriage by more than one mode: "[a] 'contract of carriage' means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The

[23]For the definition of "*international carriage*", see Article 1.9 of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002: *"any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State."*

[24]On the one hand, the legal relationship between carriers and their clients (cargo owners, shippers, charterers, freight forwarders) is contained in the contract of carriage and is also addressed by related legal institutes such as marine insurance and general average; on the other hand, international conventions, treaties and customs on sea carriage of goods delineate the legal framework governing the relationship between the parties.

[25]The Hague-Visby Rules, Article I(b).

[26]Berlingieri, F. (2009) *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, a paper delivered at the General Assembly of the AMD in Marrakesh on November 5–6, 2009, p. 2.

contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."[27]

There are two main types of a contract of carriage, which regulate the rights and liabilities of the shipowner, cargo owner, charterer, shipper, and receiver (consignee), as the case may be. Depending on how the ship is employed, the contract may be evidenced by and contained in the bill of lading, or it may be contained in a charter party. Because of the negotiable character of the bill of lading, third parties' rights and liabilities may also be affected, although these third parties do not take part in negotiating and drafting the maritime bill.

1.2.1 Bill of Lading Contract of Carriage

1.2.1.1 General

The contract contained in and evidenced by the bill of lading (often abbreviated as B/L, Bs/L, or BoL) is a real contract. This means that, unlike consensual contracts, there should be something more than mere consent between the parties in order to trigger the contract. Thus, when the shipper delivers the cargo to the carrier and the latter accepts it, the contract starts operating. Yet the contract of carriage is always concluded before the issue of the bill of lading.[28]

It has become increasingly common for shippers to draft their own bills of lading and present them to the carrier for signature. The bills are usually signed by the master of the ship or the carrier's agents. A bill of lading is issued and dated only after the entire cargo covered thereby has been loaded on board the vessel.[29] If a mate's receipt or a tally clerk's receipt has been issued beforehand to the shipper, then the carrier delivers the bill of lading to the shipper in exchange for that receipt. In general, once the bill of lading has been duly signed by the master and thus issued by the carrier to the shipper, the bill is then transferred by the shipper to the receiver of the goods either by endorsement or by a simple consignment. When the vessel carrying the cargo reaches the port of discharge, the receiver of the goods, which is either a consignee or the shipper itself, must present the bill to the carrier, which will entitle the former to receive the goods stated therein.

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[27]The Rotterdam Rules, Article 1.1.

[28]*Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* [1954] 1 Ll. L. Rep. 321, p. 329: *"The use of the word "covered" [in Art. I (b) of the Hague(Visby) Rules] recognizes the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain."*

[29]Scrutton, Th. Ed. (1996) *Scrutton on Charterparties and Bills of Lading* (20th ed), Sweet & Maxwell.

1.2.1.2 Three Main Functions of the Bill of Lading

When discussing the bill of lading as an evidence of the contract of carriage, it should be underlined that this shipping document serves and combines three separate and essential functions. They developed gradually throughout time, which resulted in the bill of lading becoming today one of the most complex and regulated document in modern seagoing transport and in international trade in general.

Firstly, the bill of lading serves as a receipt that evidences that the cargo has been received by the carrier and also provides information about the goods loaded on board such as their nature, leading marks, number of packages or pieces, quantity, weight, and apparent order and condition.[30] This function is codified in Article III rule 3 and rule 4, which are generally discussed in Chap. 2, Sect. 2.4.1 below. The evidentiary value of a bill of lading, being a receipt, represents a very important characteristic to the carriers and plays a vital role when they attempt to reject liability for allegedly damaged or lost cargo. For the purpose of the current chapter, however, it is noteworthy mainly to distinguish the evidentiary role of the bill of lading as a receipt as opposed to that of a bill of lading as a contract of carriage. The facts in the bill of lading in its function as a receipt may be altered and corrected by extrinsic evidence if, for example, there is a clerical error. This is not the case, however, with the terms of the bill of lading in its role of a contract of carriage because it is considered the final written agreement between the parties. This difference is exemplified further in Chap. 4 below on the carriage of goods on deck.[31]

Secondly, the bill of lading represents a document of title to the cargo being shipped. This is an important function as it allows the bill to be sold and resold by its holder while the goods are in transit on board the ship. Although there is no universal definition of a document of title, this phrase characterizes the bill of lading as a document being capable of transferring constructive possession over the goods while they are in the temporary physical possession of a bailee (in the case of maritime shipping, the carrier). The transfer of constructive possession takes place upon endorsing or consigning the bill to a third party, which stems from the document's feature to be negotiable, i.e., transferable.[32] After the pivotal case

[30]Historically, the bill of lading originates as a receipt and the earliest bills of lading did not have contractual functions. The other two functions developed later on throughout the years.

[31]For example, under a clean bill of lading it is not admissible to prove a preceding agreement between the carrier and the cargo interests that the goods may be carried on deck regardless of other evidence. However, a clean bill of lading does not preclude a party from evidencing that there is an accepted custom to carry on-deck in a particular trade. See Chapter IV, Section 4.3.

[32]The term "transferrable", as opposed to "negotiable", may be considered to be the technically more correct term. Yet, "negotiable" has been established as an international term when it comes to bills of lading. This was recognized also in the *travaux préparatoires* of the Rotterdam Rules. See UNCITRAL Document A/CN.9/WG.III/WP.21 – Working Group III (Transport Law), 9th session (New York, 15–26 April 2002) Transport Law – Preliminary draft instrument on the

The "Rafaela S,"[33] even nonnegotiable bills of lading, also known as straight bills of lading in the sense that they are not endorsed to third parties but are consigned to a specified person, are considered a document of title, too. And since the document of title function requires a bill of lading to be surrendered by its holder to the carrier for the delivery of the goods, it logically follows that straight bills of lading, or nonnegotiable bills of lading, also need to be surrendered in order for delivery to be effectuated.

Thirdly, the bill of lading evidences and contains the contract of carriage. The bill of lading is not *the* contract of carriage as most often bills are issued after the contract has been made, but it is said to be the best evidence of the contract of carriage.[34] When the contract contained in the bill of lading or evidenced thereby is accomplished, the bill becomes a spent bill of lading. It is necessary, however, not solely the bill to be surrendered by the consignee to the carrier in order for the bill to become a spent bill of lading, but also the contract should be fully discharged by both sides, and no obligations should be left pending.[35] A typical bill of lading contains a significant number of contractual terms and conditions of carriage, which are traditionally situated on the front of the bill of lading. This first page, containing the Terms and Conditions of the Carrier, is actually commonly referred to as the "back of the bill of lading." On the other hand, the reverse page of the bill is often perceived as the front of the bill due to the fact that it contains particulars such as the name of the shipper, the consignee, and the notify party; the name of the vessel, the carrier, the master, as well as the ports of loading and discharge; description of

carriage of gods by sea, Annex, para 13: *"The use of the word "negotiable" has been much discussed, and it is undoubtedly true that in some countries the use of the word is not technically correct when applied to a bill of lading. One may consider to use the word "transferable" as being more neutral. The draft instrument uses the expression "negotiable" on the grounds that even if in some legal systems inaccurate, it is well understood internationally (as is evidenced by the use of the word "non-negotiable" in article VI of the Hague Rules), and that a change of nomenclature might encourage a belief that a change of substance was intended."* Under the Rotterdam Rules, however, the problem of negotiability (i.e. whether the transferee gets better title over the goods than the transferor) is not addressed and this issue is left to national law. In that regard, whereas under English law the transferee of the bill cannot obtain better title over the goods than the title that the transferor had (therefore the term transferable is more appropriate than negotiable), under German law, for example, the term negotiable is not that misleading as the parties can indeed negotiate so that the transferee may receive a better title over the goods than the transferor had. See Sparka, F. (2009) *Jurisdiction and Arbitration Clauses in Maritime Transport Documents*, Springer, pp. 47–48.

[33] *J. I. MacWilliam Company Inc v. Mediterranean Shipping Company S.A. (The "Rafaela S")* [2002] 2 Ll. L. Rep. 403; [2003] 2 Ll. L. Rep. 113; [2005] 1 Ll. L. Rep. 347.

[34] See, for example, *The "Kapitan Petko Voivoda"* [2003] 2 Ll. L. Rep. 1, where the contract of carriage was contained in and evidenced by six bills of lading but it was also partly evidenced by a fax.

[35] *P&O Nedlloyd B.V. v Arab Metals Co and Others (The "UB Tiger")* [2006] 1 Ll. L. Rep. 111.

the cargo and payable or paid freight.[36] Whereas between a carrier and a shipper the bill of lading itself provides a *prima facie* evidence of the terms of the contract of carriage, along with other sources of evidence such as the booking notes and the correspondence between the parties, the bill becomes conclusive evidence of the contract as between the carrier and a *bona fide* endorsee of the bill.[37]

In other words, a bill of lading represents (1) evidence that the goods have been shipped; (2) evidence that its holder has the right to claim possession of the goods and, in certain circumstances, have the property in them; and (3) evidence of the terms and conditions of the contract of carriage.

1.2.1.3 Essence of the Bill of Lading

Since the bargaining power between the parties to a bill of lading is unequal, bill of lading contracts are statutorily regulated. The natural result is that freedom of contract is restricted, and this is achieved on a worldwide level through international conventions. The Hague-Visby Rules[38] is the most widespread legal regime as it is in force in most of the world shipping nations. These Rules apply in three instances: firstly, when the bill of lading is issued in a contracting state; secondly, when the carriage is from a port in a contracting state; and, thirdly, when the particular bill of lading contract contains a Clause Paramount, specifying that the contract will be governed by these Rules or by a national legislation implementing them.[39] In the first two instances, the Rules apply mandatorily, namely by force of law, whereas in the third instance the Rules apply voluntarily. The division between instances where the Rules apply *ex proprio vigore* and instances where they are incorporated is explained by the different effect that will be derived on the operation of the Rules, or on the legislation giving effect to them. Courts often apply the *contract approach* toward the Rules when the latter are incorporated in the contract of carriage and, thus, render them merely equal to contractual provisions.[40] In this

[36]However, it should be noted that nowadays many bills of lading forms contain the conditions of carriage on the reverse of the bill of lading, whereas the front page consists of the particulars of the contract.

[37]Sparka, F. (2009) *Jurisdiction and Arbitration Clauses in Maritime Transport Documents*, Springer, p. 43.

[38]The International Convention for the Unification of Certain Rules relating to Bills of Lading (the Hague Rules) was signed on 25 August 1924 and subsequently amended by a Protocol signed on 23 February 1968 (the Hague-Visby Rules), and then further amended on 21 December 1979 by the SDR Protocol. All three were signed in Brussels.

[39]The Hague-Visby Rules, Article X.

[40]A good example of the tangible effect of the application of the Rules by force of law, as opposed to their application as contractual terms, is one of the issues that arose in *The "Antares" (Nos. 1 and 2)* [1987] 1 Ll. L. Rep. 424. In this case, the on-deck cargo claim was time barred by Article III rule 6 and the plaintiffs attempted, unsuccessfully, to rely on section 27 of the Arbitration Act 1950, which allows in certain circumstances the extension of a contractually negotiated time-bar period in an arbitration agreement, but *"without prejudice to the provisions of any enactment*

case, it will be the construction of the contract of carriage on the whole that will be decisive of whether the incorporated Rules will prevail over the inconsistent contract terms.[41] In other words, when the Hague-Visby Rules are incorporated in a bill of lading or in a charter party, they will represent just an additional term of the bill (or the charter party, respectively), that is, the Rules will not operate as statutory provisions and will not have an overriding character in relation to the other terms and clauses in the contract of carriage, which will otherwise be the case with bills of lading if the Rules apply mandatorily by force of law.[42] As outlined, however, when it comes to the incorporation of the Rules in a bill of lading, English law expressly gives them the force of law in all three instances.[43]

1.2.1.4 Other Transport Documents

Further characteristics of the bill of lading as a shipping document may be derived by comparing it to other instruments. Depending on the type of trade, the parties to a contract of carriage may issue similar shipping documents, such as receipts, sea waybills, delivery orders, and booking notes, whose functions correspond better to the relevant commercial needs than the bill of lading. Some of the functions of these documents are duplicated, while others differ. In practice, trading parties normally select the document corresponding most to their kind of trade.

The *mate's receipt*, as the name indicates, is a mere receipt. As such, it neither evidences the contract, nor is it a document of title. Historically, mate's receipts used to be issued by the chief mate, but nowadays they can be issued by other officers on board the vessel as well. The mate's receipt evidences that the carrier has taken possession of the goods. That is why the information it contains about the cargo is based on a ship's tally or measurement and not on the shipping note that

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limiting the time for the commencement of arbitration proceedings." This meant that if the Rules had applied merely as a contractual provision, the 1-year time bar would have been considered as a contractual time bar and, hence, it could have been extended following s.27; whereas if the Rules had applied by force of law, the plaintiffs could not have relied on s. 27 because its operation would have been excluded by Article III rule 6. However, the COGSA 1971, as opposed to COGSA 1924, expressly applies the Hague-Visby Rules, giving them the force of law, to every bill of lading, which falls within the three instances laid down in Article X of the Rules. Thus, at least under English law, the Clause Paramount technicality is no longer an issue when it comes to the application of the Rules.

[41]Bugden, Paul M. and Lamont-Black, Simone (1999) *Goods in Transit and Freight Forwarding* (2nd ed), Thomson Reuters, p. 339.

[42]However, courts generally accept that the paramount clause, if expressly entitled that way, will have precedence over other contractual clauses. For further information on the paramount clause, see Selvig, E. (1961) *The Paramount Clause*, The American Journal of Comparative Law, Vol. 10, No. 3, pp. 205–226.

[43]UK COGSA (1971), section 1(6)(a): *"Without prejudice to Article X (c) of the Rules, the Rules shall have the force of law in relation to: (a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract [. . .]."*

accompanies the goods. The mate's receipt is an interim document as it serves as a basis for the preparation of the bill of lading on behalf of the shipper. When the carrier dates and signs the bill of lading, it requires that the shipper return the mate's receipt in exchange if such has been issued.

The *sea waybill* identifies the person to whom the carrier has to deliver the cargo, and as a result the consignee is not required to produce the waybill to the carrier in order to receive the goods covered thereby. All it has to do in order to obtain delivery of the goods is just present proper identification. That is why the sea waybill is normally issued for cargo that is not likely to be resold while afloat (e.g., the container trade), which suggests that the consignee remains invariable from the beginning until the end of the contractual voyage. The usage of a sea waybill also solves the problems associated with the cargo arriving at the port of discharge before the bills of lading. In this particular scenario, the carrier could not deliver the goods without the production of a bill of lading on behalf of the receiving party, and this may cause considerable delays, extra costs, and port congestion. Such a problem may occur on short-distance routes like in the North Sea or the Baltic Sea area. The sea waybill, however, solves this problem. It evidences the contract of carriage and operates as a receipt for the cargo loaded, but it is not a document of title and cannot transfer constructive possession in the goods.[44] Therefore, the issuing of a sea waybill will not trigger the application of the Hague-Visby Rules, which apply only to "a bill of lading or any similar document of title."[45] In essence, the sea waybill is broadly similar to a straight (nonnegotiable) bill of lading, in the sense that it is not transferable, with the exception that the straight bill of lading must be presented by the consignee in exchange for the goods at the port of discharge. Another difference between the sea waybill and the straight bill of lading is that the latter, being a document of title, is a bill of lading within the meaning of the Hague-Visby Rules.[46] Lastly, an important characteristic of the sea waybill is

[44]UK Carriage of Goods by Sea Act 1992, Section 1(3).

[45]The Hague Rules as amended by The Brussels Protocol 1968, Article I (b). However, most sea waybills contractually incorporate the Rules. Furthermore, note that the Australian COGSA 1991, which embodies the amended Hague-Visby Rules (the Amended Rules) in Schedule 1A, applies to contracts of carriage covered by a sea carriage document (Article 1 Rule 1(b)) as opposed to a bill of lading as it is in the original version of the Rules. Sea carriage documents are further defined as including negotiable and nonnegotiable bills of lading, negotiable documents of title that are similar to a bill of lading as well as sea waybills and delivery orders (Article 1 Rule 1(g)). Thus, the amended Hague Rules will apply with the force of law to carriage covered by a sea waybill, in the event that the carriage is governed by Australian law.

[46]*J. I. MacWilliam Company Inc v. Mediterranean Shipping Company S.A. (The "Rafaela S")*, [2002] 2 Ll. L. Rep. 403; [2003] 2 Ll. L. Rep. 113; [2005] 1 Ll. L. Rep. 347. The decision in *The "Rafaela S"* was confirmed in *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* [2008] 743 Ll. Mar. L.N. 3. Although *The "Rafaela S"* is a pivotal case, there have been earlier court decisions that came to the same conclusion that a straight bill of lading, although not negotiable, is still a document of title and should be produced against delivery of cargo. See *APL Co Pte v Voss (The "Hyundai General")* [2002] 2 Ll. L. Rep. 707; [2003] 604 Ll. Mar. L.N. 2.

that a shipper may vary the delivery instructions to the carrier at any given moment during the carriage.

The issuing of another shipping instrument, the *delivery order*, is necessitated when bulk cargo under a bill of lading has to be sold by the seller, or resold by the buyer (which would usually appear as the consignee under the bill of lading), to several buyers in different quantities or weight. In this case, the bill of lading covers the bulk cargo as a single consignment, and in order for that consignment to be divided in portions among the new buyers, the underlying contract of sale may provide for the issuance of delivery orders. The delivery order does not assume any of the three characteristics of the bill of lading—it is not a receipt, it does not have contractual and evidential character, and it is not a document of title. Instead, it contains instructions as to the delivery of the cargo.[47] These instructions may generally be of two types: instructions by the seller or consignee to its agents at the discharge port and instructions by the seller/consignee to the carrier. The first type is called a *merchant's delivery order*, while the second type is called a *ship's delivery order*. Although they are both nontransferable,[48] the latter has functions that are closer in nature to bills of lading, for ship's delivery orders contain the carrier's signature and, thus, his consent to undertake to deliver the respective portion of the cargo to the named holder of the delivery order.[49] By putting his signature on the delivery order, the carrier undertakes to fulfill the delivery order and acknowledges its new holder as a consignee, which also makes the delivery order capable of transferring constructive possession to its holder over that part of the cargo that is covered thereby.[50]

1.2.1.5 Bills of Lading Under Charter Parties

In addition, it may often be the case, in fact more often than not, that a bill of lading incorporates some or all of the contractual terms set in a charter party. This is done with the intention to prevent the bill of lading to vitiate or abrogate some or all of the shipowner's right and liabilities that are set in the charter party. Another reason is that charter parties usually contain extended contract provisions, the so-called rider clauses, and it would be impractical to include all these in the bill of lading. Instead, they can be incorporated in the bill by means of reference. The incorporation, however, must take place expressly through an incorporation clause laid down in the bill of lading so that the bill of lading holder, usually the consignee, is familiar with the terms to which it agrees when buying the negotiable instrument (i.e., the bill of lading). If this condition is met, the bill of lading functions as a

[47]Ship's delivery orders are statutorily defined in the UK Carriage of Goods by Sea Act 1992, Section 1(4).

[48]Aikens R., Lord, R, & Bools, M. (2006) *Bills of Lading*. Informa Law, London, p. 17.

[49]UK Carriage of Goods by Sea Act 1992, Section 1(4).

[50]Baughen, S. (2009) *Shipping Law* (4th ed), Routledge-Cavendish, p. 12.

receipt and a document of title, whereas the actual contract of carriage is contained in the charter party.

In this regard, of considerable importance are the rights of a third party in the particular case when that party becomes a holder and, thus, a party to a bill of lading that incorporates a charter party agreement whose clauses may entitle the shipowner, for example, to have a lien over the cargo as a security for the freight and other amounts due to it under the charter party. Unless the bill of lading clearly and unequivocally refers to the relevant lien provision in the charter party, the term is not considered negotiated to this third party, and therefore the shipowner cannot assert its right to detain the cargo against the bill of lading holder.[51] For a provision to be validly incorporated in the contractual relationship between a carrier and a bill of lading holder, it is decisive whether these two parties intended and agreed to be bound by such a provision found in another document.[52] Therefore, not all charter party clauses can be considered to have been incorporated in the bill of lading solely by means of a general reference to the charter party. Depending on the jurisdiction and on the specific clause, such as the law and arbitration clause or the abovementioned lien clause, general reference will usually not suffice, and a specific reference to these clauses have to be made in the bill. This discussion is also very relevant to the problems analyzed in Chap. 3 on the FIOS(T) clause.

Besides the lien clause and the FIOS(T) clause, charter party provisions relating to the payment of freight and clauses regarding law and arbitration are also among the most likely candidates to be specifically incorporated in a bill of lading. In the *dictum* of the court in *The "Mariana"* case,[53] a charter party arbitration clause is deemed incorporated in the bill of lading in either one of the two categories of cases. The first category includes cases that meet the following three conditions: the bill of lading specifically refers to the charter party arbitration clause, the arbitration clause makes sense in the context of the bill of lading, the arbitration clause does not conflict with the terms of the bill of lading. The second category of cases are related to bills of lading that incorporate the terms of the charter party generally, while there is no specific reference to the arbitration clause. In these cases, the charter party arbitration clause itself or some other provision should make it clear that the arbitration clause found in the charter party is to govern bill of lading disputes as well.

An uncertain situation arises where the vessel is subchartered and it is not specified in the bill of lading which of the charter parties along the chain is the one incorporated. The rule of thumb is that the parties intended to incorporate the head charter party rather than a subcharter party as there is a preference in the authorities to maintain the position that a general reference to a charter party should

[51] Williston, S. & Lord, R.A., (1990) *A Treatise on the Law of Contracts* (4th ed), Vol. 22, §58:28.

[52] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* [2000] 537 Ll. Mar. L.N. 2.

[53] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* [2000] 537 Ll. Mar. L.N. 2.

relate to the charter party contract, to which the shipowner, which issues the bills of lading, is a party.[54]

However, courts do not apply this rule invariably. In the case *The "Vinson,"*[55] the vessel's owners, Quark, entered into an "Eco Pool Vessel Contribution Agreement 1999" and, following the provisions of this agreement, time chartered their vessel to Eco Shipping Ltd. on an Ecotime 99 charter party, which contained a New York arbitration clause. Eco Shipping Ltd. as owners further subchartered the vessel to Sunline Shipping Ltd. on a Baltime charter party, which included a London arbitration clause. Sunline Shipping Ltd. as time charterers contracted to perform a carriage of bananas, and several bills of lading were issued by the master of the vessel on a Congenbill form. The front of the bills stated "Freight payable as per Charter-Party dated," and clause 1 on the back read: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." However, no date for the charter party was stated on any of the bills of lading, and when the bananas arrived in a damaged condition, the receivers brought arbitration proceedings against the shipowners in London, contending that clause 1 of the bills of lading referred to the Baltime charter party, namely the subcharter. Quark contended that it was the head charter party that was incorporated into the bills of lading and, accordingly, that arbitration should have taken place in New York. Quark's arguments were that the bills of lading were owners' bills and that the shipowners were a party to the Ecotime charter and not to the Baltime charter. Eventually, the court ruled in favour of the receivers, that is, the unspecified charter party incorporated in the bills of lading was the Baltime charter, which contained a London arbitration clause. Although the provisions of none of the charter parties were appropriate to be incorporated into the bills of lading, the Baltime charter was considered more closely related to the bills of lading. Decisive considerations for this ruling were a lien provision, which could be incorporated in the bills, and also a clause relating to the responsibility for delay. The court decided that these charter party provisions contributed to the bills of lading contract and, hence, that they made the Baltime charter party more appropriate to be incorporated.

This more recent approach is also found in *The "Mariana,"*[56] and it has adopted the view that was restated in *Scrutton on Charterparties and Bills of Lading* (20th

[54] *Pacific Molasses Co. and United Molasses Trading Co. Ltd. v Entre Rios Compania Naviera S.A. (The "San Nicholas")* [1976] 1 Ll. L. Rep. 8. See also Scrutton, Th.Ed., Mocatta, A.A., Mustill, M.J. & Boyd, St.Cr. (1974) *Scrutton on Charterparties and Bills of Lading* (18th ed), Sweet & Maxwell Limited, London, p. 63.

[55] *Quark Ltd v Chiquita Unifrutti Japan Ltd and Others (The "Vinson")* [2005] 677 Ll. Mar. L.N. 1.

[56] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* [2000] 537 Ll. Mar. L.N. [2000] 2.