The bill of lading as a document of title

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Introduction

The Bill of Lading is a traditional maritime transport document. With its long-standing practice, it has been developed into a valuable tool to certainty in shipping. It has also penetrated into all other transactions related to carriage by sea, such as marine insurance, the international sale of goods and the bank transactions: therefore, the bill of lading has been linked to many groups of interests. One of the reasons has been its function as a document of title[1,2].

Functions

The words "bill of lading" normally define a document that evidences the loading of the goods on a ship[3]. The modern form of the bill of lading may be described as a receipt issued by the carrier acknowledging that goods have been shipped in a particular vessel or have been received in the shipowner's custody for shipment[4]; in addition, it is a memorandum of the terms and conditions of the contract of carriage, and, a document of title that enables the consignee to take delivery of the goods at the port of destination or dispose them while they are at sea. These three functions have been developed gradually[5,6,7,8].

1. *"Αξιογραφική λειτουργία της φορτωτικής"*, (translation of the title in Greek).
2. *R. Aikens, R. Lord* and *M. Bools*, Bills of Lading, 2nd ed., 2016, p. 145, *"...(B) ...6.2. The ocean bill of lading is the only document of title to goods at common law presently recognized under the English common law. As such, the transfer of a bill of lading is capable of transferring to the transferee the symbolic possession of the goods. It is this ability that distinguishes the symbolic possession of the goods. It is the ability that distinguishes the bill of lading from the other documents that contain or evidence contracts of carriage and other documents that operate as a receipt of the goods..."*.
3. The corresponding expressions in many languages such as Spanish (*conocimiento de embarque*) and Italian (*polizza di carico*) mean a document that evidences the loading of goods on a ship. The corresponding expressions in other languages such as *connaissement* (French), *cognossement* (Dutch), *Konnossement* (German) mean a receipt without implying the placing of the goods on board. The Scandinavians speak of *utericks* (or foreing going) konnossement, which conveys the idea of transportation.
4. The "Tai Prize" [2021] EWCA Civ 87: An invitation to the Master? Reported by Reed Smith on 17 February 2021, *"The words "CLEAN ON BOARD" and "SHIPPED" in apparent good order and condition" in a draft bill of lading presented to the Master for signature, were merely an invitation by the shipper to the Master to make those representations in accordance with his own assessment"*.
5. The bills of lading are not always suitable where an individual bulk cargo is sold to a number of buyers; in that case delivery orders are used, (meaning directions to the carrier to deliver to the holder the amount of cargo mentioned); delivery orders are distinguished to merchant's delivery orders and ship's delivery orders (which are issued by the carrier or his agent). The bill of lading differs from a waybill; the waybill is issued where a negotiable document of title is not required, (e.g. in-house movements of goods between different branches of a multi-national firm), thus the waybill lacks the negotiability; the waybill is sometimes called "straight" bill of lading because it makes the goods deliverable to a named consignee and it is marked as "not transferable" or "not negotiable". Finally, reference should be made to the "received for shipment" bills of lading. The traditional bill of lading was made out as a "shipped" bill, in other words the carrier acknowledged that the goods have been "shipped on board" the carrying vessel; however, modern trading practices have meant that goods are generally no longer delivered by the shipper to the ship's side, but instead delivered to the carrier at an inland depot; increasingly, therefore bills are issued in a received for shipment, rather than in a shipped form.
6. *J. Wilson*, Carriage of Goods by Sea, sixth edition, p. 131 *"...The development of the bill of lading as a document of title has been so successful that, over the years, it has come to exercise a tripartite function in relation to the contract of carriage, to the sale of goods in transit, and to the raising of a financial credit. There is a general feeling that this multiplicity of roles is not always compatible and that the present form of the bill of lading is somewhat of an anachronism. The feeling is particularly strong among shipowners who believe that the three roles should be separated in order to prevent the carrier being burdened by the incidents of transaction which are none of his concern..."*.
7. *Michiel Spanjaart*, The Carriage of Goods Convention, in Research Handbook on Maritime Law and Regulation, 2019, pp. 48-66, at p. 49 *"... Besides the bill of lading has seen some serious competition over the last 50 years. The bill of lading has already given way to the (non-negotiable) sea waybill in some trades, and its traditional paper form will undoubtedly be substituted for an electronic equivalent in due course..."*.
8. *Prof. A. Tettenborn*, Lending on waybills and other documents-banker's dream or financier's nightmare? International Trade and Carriage of Goods, edited by *Prof. B. Soyer, Prof. A. Tettenborn*, 2017, p.p. 208-222. *"13.1 The traditional position... While the bill of lading may be fading in popularity, this is not an argument for abolishing it, but rather for limiting its use to where it is truly indispensable...Now, one such case is said to arise precisely where it is envisaged that the goods are to be used as security while in transit, by way of the buyer executing a pledge in favour of the bank*

History

The materials for the origins of the bill of lading are scanty, owing to the customary nature of the rules of the Law Merchant; the Law Merchant of Europe[9],[10] was created by the merchants in the feudal epoch, as the cities increased their powers. In the 11th century, the bill of lading was unknown. It was at this time that trade between the ports of the Mediterranean began to grow significantly. The merchants did not at first need a "custody-of cargo" receipt from carrier, while the business arrangements remained part of the customary arrangements for dividing the expenses and profits in the venture. For so long as the merchants travelled with the goods, particulars were merely entered in a "book" or "register", which was part of the ship's papers. The use of such register began informally but soon its accuracy became paramount[11]. By the 14th century, what was later to be accomplished by the receipt function of the bill of lading was being accomplished by an "on board record". The ship's clerk kept this "record of the goods shipped" with the consequence that the managing owner or master was not responsible for goods, which were not entered in the "Register", "Book", or "Writing". The *Customs of the Sea*, drawn up at Barcelona in that century, provided that the "register" was stronger evidence than the private writing; it seems that the ship's "register" replaced the oral evidence of shipment. This "Writing" was a rudimentary bill of lading.

Bills of lading came into common use in the 16th century, and at the beginning most of these merely recited the quantity of the goods shipped[12].

In the second quarter of the 16th century, the majority of the bills contained provisions importing some degree of transferability. They were of two kinds: those providing for delivery to the shipper (or his agent), or his assigns, and those for delivery to a third person (presumably a buyer of the goods), or his assigns. This change in the form of the bill of lading reflects a change in the trading practice: cargoes were often dispatched before the shipper knew for whom they were finally destined.

The earliest bills did not perform a contractual function at all. Whilst the number of cargoes per ship remained small, the bill did not need to perform a contractual function; all the undertakings in the bills made reference to the existing charterparty. However, with the increasing number of cargoes per vessel, entering into a charterparty with all shippers became impracticable and in these cases, the contract of carriage was embodied in the bill of lading. The bill of lading adopted the contractual function in the course of the 16th century.

As time progressed, the terms incorporated in the bill of lading by the carriers became more diverse[13]. The result was a lack of uniformity, which damaged the value of the bill of lading in international trade, particularly as security for bankers and others who provided finance for the transactions. Consignees, underwriters and others became interested in the standardisation of its terms. The negligence clauses inserted by the carriers in their attempt to exclude their liability, also raised problems: in some countries courts held that they were null and void, while in others maintained their validity.

Therefore, a movement started for the unification of the shipping law, which ended in the adoption of the Hague Rules in 1924 by the International Law Association (ILA); these were revised twice: in 1968 by the Hague-Visby Rules, and in 1978 by the Hamburg Rules.

financing the purchase... 13.2 The traditional view: a closer look... Nobody says that a seaway bill can be used in the same way as a bill of lading when it comes to creating a pledge over goods. The reason is simple: as a sea waybill is by definition not transferable at all.... First, ... Unlike the 1992 Act, however, the provisions of the Hague-Visby Rules do not apply to a sea waybill unless expressly incorporated in its wording... Second, where a bill of lading is issued, the goods must be, and may only be, delivered, against surrender of it... Third, a bill of lading is a true document of title, such that its transfer is equiparated to that of the goods themselves: from which it follows that no issues can arise as to whether the lender has the necessary degree of control or possession to amount in law to a valid pledge. This is not true of other documents...".

9. *W.P. Bennet*, The history and present position of the bill of lading as a document of title to goods, Cambridge, 1914, p. 2 et seq.
10. *Prof. A. Tettenborn*, Bills of Lading, Multimodal Transport Documents, and other things, in Carriage of Goods by Sea, Land and Air, edited by *Prof. B. Soyer* and *A. Tettenborn*, p.p. 126-144, p. 138, *"Documents of title and the claim to delivery, ... footnote 97. "Indeed, it has on occasion been suggested that a right of a bill of lading holder himself is simply a special instance of this principle, on the basis that a bill of lading is a sort of irrevocable but inchoate attornment arising through the custom of merchants, and completed by its endorsement to a consignee. See The Berge Sisar [2002]...".*
11. *M.D. Bools*, The Bill of Lading, (a document of title to goods, An Anglo-American comparison), 1997.
12. For example, in 1544 a bill of lading was issued in Cadiz in Spain, which contained a statement that the master of a ship had received *"112 bags of allam whiche goyth for tone pype markyd with the marke in the margent to by delyveryd well condyshioned in the river of Themys". D.E. Murray*, "History and development of the bill of lading", University of Miami Law Review v.37, 1983, p. 691.
13. *S. Manckabady*, The Hamburg Rules on the Carriage of Goods by Sea, 1978, p. 29.

Meaning of document of title in English law

There appears to be little agreement among the writers about the precise definition of a document of title in English law; a possible explanation is that the word "title" does not have an agreed meaning in the legal jargon; its significance depends on the context in which it is used[14],[15].

The nature of the bill of lading as a document of title is described in the judgment of Bowen L.J. in *Sanders v. Maclean*[16] *"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognized as its symbol and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be".*

The above passage focuses on the nature of control over the goods, which the bill of lading provides to the holder, while the goods are at sea, operating as a document of title, and, representing the goods, (so that possession of the bill is equivalent to possession of the goods); the goods, while in transit, may be sold, or pledged, or otherwise dispose of; when the vessel arrives at its destination, the bill of lading entitles its holder to claim physical delivery of the goods from the carrier, (thus, the bill of lading is the "key" to the warehouse)[17].

14. *C. Debattista*, The Sale of Goods Carried by Sea, 1990, p. 15 et seq.
15. The plurality of meanings hiding the notion of a document of title is mentioned in *Sassoon* on CIF and FOB contracts, 1984, para. 131. *"The bill of lading enables the buyer or his agent to obtain actual delivery of the goods on their arrival at the port of destination. But the bill of lading has greater significance than that. Possession of the bill of lading to the buyer or to a third party may (if so intended) be effected to pass the property in the goods to such person. The bill of lading is a document of title [as defined in s. 1(4) of the Factors Act 1889] enabling the holder to obtain credit from banks before arrival of the goods for the transfer of a bill of lading can operate as a pledge of the goods themselves. In addition, it is by virtue of the bill of lading that the buyer or his assignee can obtain redress against the carrier for any breach its terms and of the contract of carriage that it evidences. In other words the bill of lading creates a privity between its holder and the carrier as if the contract was made between them".*

    In *Benjamin*, Sale of Goods, 1997, at para. 18-005, while it is admitted that there is no authoritative definition of a "document of title to goods", finally, a definition has been constructed: *"... it means a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods and may operate as a transfer of the property in them..."*.

    The discussion in *Carver*, Carriage by Sea, vol.2, at para. 1596, focuses on the right of the holder of a bill of lading to demand possession of the goods: *"The right to have possession of the goods passes to the transferee of the bill of lading; that is the symbol of the goods, and a transfer of it is, symbolically, a transfer of the possession of the goods themselves"*.

    On the other hand, for the editors of *Scrutton*, a document of title can transfer property, general or special: *"...the bill of lading serves also as a document of title, by the indorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged as a security for an advance"*.
16. *Sanders v. Maclean* [1883] 11 Q.B.D. 327.
17. The bill of lading has been treated as a document of title, as a symbol of the goods by mercantile custom. This custom was recognized in the old case of *Lickbarrow v. Mason* [1794] 5 Term Reports 683. The jury on a special verdict found that: *" ... by the custom of merchant, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are at any time after such goods have been shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons by such shipper or shippers endorsing such bills with his, her, or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons..."*. Therefore the court recognized a custom of merchants that the bill of lading enable its holder by transferring the bill to transfer the property in the goods to the transferee.

    See also *S. Baughen*, Shipping Law, 6th ed. p. 8, *"Document of title. Since Lickbarrow v Mason in 1791, the courts have recognized the custom of merchants that the endorsement of a bill of lading could transfer not only possessory rights, but also rights of ownership in the goods described therein, if that was the intention of the parties when indorsing the bill of lading..."*.

    The traditional view about the particular nature of a bill of lading had been explained by Mustill L.J. in the *Delfini* [1990] 1 Lloyd's Rep. 252, p. 268. He stated that when the expression "document of title" is applied to a bill of lading: *"it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between the shipper and the shipowner, fulfils two distinct functions. 1. It is a symbol of constructive possession of the goods, which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable "key" to warehouse". 2. It is a document which, although not itself capable of directly transferring the property in the goods, which it represents, merely, by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed"*.

    It should be mentioned, though that the common law has recognized only the "shipped" bill of lading as a document of title. However, there is some authority that "received for shipment"

In order for a bill of lading to be a document of title it has to be negotiable in the sense that it has to transferable. The bill of lading achieves the characteristic of transferability only if it is expressed to be transferable and by mercantile custom this is inferred from the designation of the consigned in the appropriate box on the front page as *"Mr Buyer or order"* or simply as *"Order"* or equivalent[18].

Furthermore, to be negotiable a document must 1) be transferable (in the above sense), 2) be able to represent the goods so that delivery of the document is equivalent to physical delivery of the goods under e.g. contract or pledge, and 3) oblige the carrier or other bailee to deliver only against presentation of the document. It follows that a document may be transferable without being negotiable, but not vice versa. Therefore, the requirements of negotiability are more demanding[19].

It is possible to find contrary suggestions to the above according to which negotiability and transferability are synonymous[20].

On the other hand, there are suggestions that the term "negotiability" should be reserved for that feature of documents of title to money[21] whereby certain transferees obtained a better title than their predecessors[22].

Thus, a transferee of a bill of lading usually takes, subject to any defects in title of prior parties, (for this reason, bills of lading have been referred to as "quasi-negotiable"[23]).

The significance of the characteristic of transferability is the obligation to transfer the constructive possession of the

bills of lading are to be generally regarded as documents of title. In *Marlborough Hill* [1921] 1 A.C. 444, [1920] 5 Lloyd's Rep. 362, Lord Phillipmore was not disposed to distinguish in any regard between shipped and received for shipment bills of lading: *"It is a matter of commercial notoriety, and their Lordships have been furnished with several instances of it, that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form "received for shipment" instead of "shipped on board" ... There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allocated portion or quay, or his storehouse awaiting shipment, and his acknowledging that the goods have actually been put over the ship's rail. The two forms of bill of lading may well stand, as their Lordships understand that they stand together..".*

This decision was criticised in *Diamond Alkali Export Corp. v. Fl. Bourgeois*,[1921] 3 K.B. 443, where Mc Cardie J took the view that only a shipped bill of lading is a document of title. The actual decision was that a received for shipment bill of lading was not a good tender under a c.i.f. contract. In fact, Mc Cardie J's reasoning in part was that a c.i.f. buyer required a document which came within s.1 of the Bills of Lading Act 1855, that a received for shipment bill of lading was not by custom of merchants a document of title at the time when the 1855 Act was passed, and that since that Act covered only mercantile practice at the time it followed that s.1 could not apply to received for shipment bill.

See also *D.R. Thomas*, International Sale Contracts and Multimodal Transport Documents: Two issues of significance, in Carriage of Goods by Sea, Land and Air, edited by *Prof. B. Soyer* and *A. Tettenborn*, Informa, 2014, p.p. 145-160, see at p. 151, *"...Subsequently, Lloyd J in Ishag v Allied Bank International [1981] 1 Lloyd's Rep. 92 at 98] held that a received for shipment bill of lading which had been deposited as security was a document of title "within the custom proved in The Marlborough Hill. This conclusion the judge reasserted in the Lycaon [1983] 2 Lloyd's Rep. 548, at 550], a sequel to the Ishaq case. The difficulty with this reasoning is that the decision in The Marlborough Hill does not appear to have been founded on proof of a supporting commercial custom...".*

18. *Yates*, Contracts for the Carriage of Goods, 1997, at para. 1.6.5.1.6.

In *Hederson v. Comptoir d' Escompte de Paris*, Sir Robert P. Collier said on the facts: *"... it appears that a bill of lading was made out, which is in the usual form, with this difference, that the words "or order or assigns" are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at nisi prius for that proposition; but undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as "or order or assigns" ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument".*

19. *Prof. A. Tettenborn*, "Transferable and negotiable documents of title- a redefinition?" [1991] LMCLQ 538.

20. *Kum v. Wah Tat Bank* [1971] 1 Lloyd's Rep. 439, Lord Devlin in the Privy Council said *"...It is well settled that "negotiable", when use in relation to a bill of lading means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title...".*

21. Personal property divides broadly into two groups, namely tangible movables (goods and money) and intangibles, usually termed "choses in action". A document of title is a documentary intangible, meaning a document that represents a chose in action. A chose in action does not exist in the physical world and consequently it is not susceptible to physical possession; it is a right than can be enforced by legal action. Choses in action are of two types: rights to goods and rights to the payment of money. There are two species of document each symbolizing each of those two types of right: documents of title to goods and documents of title to money ("instruments"). The bill of lading is a document of title to goods; the right to goods is locked up in the document to the extent that the document is considered to represent the right, which thus becomes transferable by transfer of the document itself. R. Goode, Commercial Law, 1995, p. 32.

22. *The Future Express* [1992] 2 Lloyd's Rep. 79, [1993] 2 Lloyd's Rep. 542 C.A. Lloyd LJ said that *"... A bill of lading is not negotiable document in the sense in which a bill of exchange is negotiable. It is a document which is transferable by delivery. Since it is not negotiable, the transferee of the bill can only acquire such interest as the transferor is capable of transferring...".*

23. *Schmitthoff's* Export Trade, 1990, p. 573.

goods to the holder of the document of title[24]. By issuing a document of title e.g. the carrier acknowledges that he is holding the goods on behalf of the holder of the document and that he will deliver the goods only to that party. The acknowledgement to the holder is the essence of the document; each time the document is transferred, there is no need for the carrier to make a separate acknowledgement to each individual transferee for constructive possession[25] to pass. Instead constructive possession passes automatically with the transfer (physical delivery) and indorsement[26] of the document.

It is also accepted that once the carrier has delivered the goods to the person entitled to possession of them under the bill of lading, the bill of lading ceases to be a document of title. This means that the right to possession of the goods cannot any longer be transferred by delivery and indorsement of the bill as the carrier has completed performance of its obligations under the bill and given up physical possession of, and the right to control the goods. The control function comes to an end once the carrier has delivered the goods and not merely upon discharge of goods. This is because when the carrier discharges the goods, they may still be in its control e.g. where the goods are discharged to the carrier's agent, such as a warehouse keeper. In such circumstances the holder of the bill of lading still has the right to obtain possession of the goods from the carrier and until such delivery takes place may transfer that right to a third party[27],[28].

Contractual effects of the transfer of the bill of lading

Being a document of title, the bill of lading has the ability to transfer constructive possession in the goods merely by the transfer of the document itself, as mentioned. This means that the carrier must deliver the goods to the holder of the bill of lading who will be usually a buyer and to no one else. The buyer will require more than just the right to receive the goods. A recurring theme in the history of bills of lading, concerns the efforts of the buyer to sue the carrier who delivers the goods in a way that causes loss to the buyer. Two principles in English law preclude the end buyer from suing on the coat tails of the shipper's contract with the shipowner. The first is the doctrine of privity of contract, whereby only the parties to a contract may sue on it. The second is that damages for breach of contract are assessed in relation only to the loss suffered by a party to that contract. [28]

24. Possession is defined as control of property without regard to ownership. It may be actual or constructive. When the goods are in transit on board a vessel for example, the carrier has the actual or physical possession of the goods but not necessarily the legal possession on them. A party is said to have constructive possession when it has legal possession but another party has the actual possession. A particularly common example of a situation in which constructive possession will arise is where the party in actual possession "attorns" to another, in other words, indicates that it holds the goods on behalf of the other party. An attornment creates a bailment relationship between the parties; the party bailor-in constructive possession will not have actual physical possession of the goods but will nonetheless have legal possession. *Op.Cit* note 10, para. 1.1.1.

25. For constructive possession to pass with the transfer of a document of title, two important requirements should be met in addition: a) constructive possession will be transferred by a transfer of the document of title only if this was the intention of the parties, and b) the subject matter of the transfer must be identifiable (where goods are shipped as part of a bulk cargo). *Op.Cit.* note 10.

26. As far as an order bill of lading is concerned, an indorsement is needed for the transfer of the right of constructive possession of the goods. An indorsement is normally effected by a signature being made on the reverse of the bill by the shipper (in case of first indorsement, or an indorsee, in case of a bill, which has been indorsed to it).The indorsement may be an indorsement "in blank" when there is simply a signature and no more, or a "special" indorsement (indorsement "in full"), when the signature is followed by a discretion to deliver the cargo to a named person. *Op.Cit.* note 24, para. 1.6.5.1.41.

27. In *Barclays Bank Ltd v. Customs and Excise* [1963] 1 Lloyd's Rep. p. 81, a bill of lading was issued in respect of a consignment "to order or assigns". The goods were landed and warehoused to the order of the shipowners. The holder of the bill pledged it to the plaintiffs (bank) as security. The plaintiffs subsequently presented the bill of lading to the carriers and received a delivery order addressed to the warehouse, but before delivery order could be obtained, the goods were seized on behalf of the defendants who were judgment creditors of B. The question for the court was whether on the date of the pledge, the bills were still documents of title to the goods, by indorsement and delivery of which the rights and property in the goods would be transferred. Diplock LJ giving judgment for the plaintiffs said [at p. 88-89] *"...The contract for the carriage of goods by sea, which is evidenced by a bill of lading is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to the person who, under the terms of the contract is entitled to obtain possession of them from the shipowners. Such a contact is not discharged by performance until the shipowner has actually surrendered possession (that is has divested himself of all powers to control any physical delivery in the goods) to the person entitled under the terms of the contract to obtain possession of them. So long as the contract is not discharged, the bill of lading, in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred...".*

28. For using digital B/Ls see: The Comité Maritime International (CMI), CMI Rules for electronic Bills of Lading, 1990. Also, the private system the Bolero (www.bolero.net), with its own rules, subject to English law.

    See also *A. Antapassis-L. Athanassiou*, Maritime Law, Nomiki Bibliothiki 2020, para. *"Γ.8. Ηλεκτρονική Φορτωτική"* p. 622-628.

The first legislative attempt to circumvent the problems arising from the doctrine of privity of contract was the Bills of Lading Act 1855. The Act effected a statutory assignment of the contract contained in the bill of lading. If the requirements of section 1 were fulfilled, the indorsee was entitled to sue or be sued on all the terms, express or implied, as though he had been an original party to the contract of carriage[29].

The Carriage of the Goods by Sea Act 1992, which came into force to resolve the problems created by the Bills of Lading Act 1855, applies to bills of lading, sea waybills and ship's delivery orders [s.1(1)][30],

29. According to the Bills of Lading Act 1855, section 1: *"Every consignee of goods named in a bill of lading and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself"*. The essential problem with s.1 was that it gave rights to indorses and consignees only where property in the goods passed "upon or by reason of" the consignment or indorsement. This property link had the effect of excluding certain categories of claimants who needed to establish a contractual means of recovering loss from the shipowner: a) Banks, which financed sales through letters of credit to whom the bill was indorsed by way of pledge, had "special property" (i.e. security interest) and not "general property" (i.e. ownership itself) to satisfy the property link in the Act. b) Where part of bulk cargo was sold, property passed by reason of appropriation, which typically occurred on breaking bulk on discharge (s.16 of the Sale of Goods Act 1979). Therefore, multiple buyers of an unascertained bulk cargo were prevented from obtaining ownership in the goods from the mere transfer of the bill of lading. That could be effected only when the goods became separated on delivery. (The position of such purchasers improved substantially by the Sale of Goods Act 1995. The Act added s. 20A to the Sale of Goods Act 1979, under which a buyer of goods from part of an identified bulk becomes tenant in common of that bulk after payment of the purchase price. The buyer is thereby protected in the event the seller becoming insolvent in the interval between payment and delivery. See the Current Law Statutes, 1995, vol.3, 1995 c.28). c) Buyers under the sale contracts where the indorsement of the bill of lading was not critical to the passing of property. Thus, in the *Delfini* a bill of lading was indorsed some time after the goods had been delivered to the buyer. The Court of Appeal held that as property had passed to the buyer at the very latest by the time the goods were delivered to him, the subsequent indorsement of the bill of lading failed to satisfy the property link required by the Act. The bill of lading had become "spent" bill of lading, thus incapable of transferring constructive possession to goods it referred to. It seems that the court favoured an interpretation that required the indorsement of the bill of lading to play an essential causative role in the passing of the property. d) Buyers under sale contracts where delivery orders or waybills were used. The Act applied only to bills of lading and there was even doubt as to whether its application extended beyond "shipped" bills to "received for shipment" bills.

   Various methods of circumventing the above problems were canvassed (see the Law Commission and the Scotish Law Commission No 130 (1991), "Rights of Suit in respect of Carriage of Goods by Sea"): 1.The implied contract approach. In the appropriate circumstances and when s.1 of the Bills of Lading Act 1855 was not applicable, the courts were prepared to imply a contract between the indorsee or consignee and his carrier. An example of the application of this principle is provided in *Brandt v. Liverpool Brazil and River Plate SN Co*, a bank, which financed the purchase of goods under a letter of credit, took delivery of the goods, which were discharged in a damaged condition. The Court of Appeal held that the bank obtained title to sue the carrier under the bill of lading by virtue of an implied contract arising out of the conduct of the parties on discharge. The presentation of the bill of lading was an offer to the shipowner to contract on the terms of that document, which was accepted when the shipowner agreed to deliver the goods. But the utility of this doctrine was restricted by the Court of Appeal decisions in the *Aramis* [1989] 1 Lloyd's Rep. 213, and the *Gudermes* [1993] 1 Lloyd's Rep. 311. Mere delivery of the goods without some payment from the party taking delivery, will be insufficient to justify the implication of such contract. (Otherwise a degree of cooperation between the parties is necessary to imply such contract between the parties, as it was decided in *The Captain Gregos No 2*, [1990] 2 Lloyd's Rep. 395). 2.Liability in negligence. Where the indorsee's claim for damage is based on the negligence of the carrier or his servants, an alternative solution might be to sue the party responsible in tort. But in *Margarine Union v. Cambay Prince S.S. Co* it was held that an action in negligence could not succeed unless the plaintiff was, at the time of the commission of the tort, the owner of the goods in question, or the person entitled to immediate possession of them. The decision was met with criticism and attempts were made to circumvent it, but the House of Lords affirmed the principle in *The Aliakmon* [1986] 2 Lloyd's Rep. 1. So if the indorsee could not invoke s.1 of the Bills of Lading Act 1855 because property in the goods remained with the indorser after the indorsement of the bill, this meant that the indorser rather than the indorsee retained the right to sue the carrier for negligent damage to the goods. 3.The special contract. In 1839 in *Dunlop v. Lambert* [1839] 6 Cl & F 600, the House of Lords recognized a limited exception to the general principle of contract law that damages cannot be recovered in respect of a loss suffered by a third party. It was held that a consignor could claim substantial damages under a bill of lading contract in respect of damage sustained by the consignee of the goods, if it was the contemplation of the parties that the ownership of the goods might change during performance of the carriage. Such damages would be held on trust for the consignee who had suffered the loss. (An attempt to revive this remedy ended in failure; in The Albazero [1976] 2 Lloyd's Rep. 467, the House of Lords refused to apply the Dunlop v. Lambert and infer the existence of a "special contract"; they recognized it as still a good law, but it should be invoked where there was no contract between the carrier and the person who had sustained the actual loss.

30. Under English Law, the Hague-Visby Rules apply if the contract of carriage provided for the issue of the bill of lading, even if the bill of lading was not finally issued. *Pyrene v. Scindia Navigation Co Ltd.* [1954] 1 Lloyd's Rep. 321. *Kyokuyo Co Ltd v. AP Moller-Maersk* (The Maersk Tangier) [2018] EWCA Civ 778, JIML 2018, 178. *A. Antapassis-L. Athanassiou*, Maritime Law, 2020, p. 558-559.

   See also, *S. Baughen*, Shipping Law, 6th edition, p. 21, *"...Unlike the position with a charterparty, the terms of the initial contract concluded before loading will either expressly, as in Armour & Co v Walford, or impliedly, as in Pyrene Co Ltd v Scindia Navigation Co Ltd. be subject to terms of the bill of lading that will be issued once the goods have been loaded onto the carrying ship. Moreover, in the*

[31]; it abolishes the property link required by the Bills of Lading Act and provides for a separate statutory transfer of rights and duties under the contracts of carriage that governs; it is also immaterial if it is a "shipped" or "received for shipment" bill of lading. As far as the statutory transfer of rights under the bill of lading contract is concerned, it now depends on the plaintiff establishing that he is the "lawful holder" of the bill of lading when he commences suit [s.2(1)(a)]. A person can be the "holder" of a bill of lading in the following situations [s.5(2)]: if a) he has possession of it and is the consignee identified in the bill, or b) he has possession of it "as a result of the completion, by delivery of any indorsement of the bill", or c) he has possession of a "spent bill"[32], [33]. Furthermore, once it is established that a person is the

later case, the terms of the anticipated bill of lading were held to govern the contract from its inception, even though a bill of lading was never actually issued...".

31. *D.R. Thomas,* International Sale Contracts and Multimodal Transport Documents: Two issues of significance, in Carriage of Goods by Sea, Land and Air, edited by *Prof. B. Soyer* and *A. Tettenborn*, p.p. 158-159 *"...The Perspective of the Rotterdam Rules... Under the Rules transport documents are recognized as being capable of being issued in "negotiable" and "non-negotiable" forms. A negotiable transport document is defined as meaning "a transport document that indicates, by wording such as 'to order' or 'negotiable' or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, or to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'. A non-negotiable transport document is defined as meaning "a transport document that is not a negotiable transport document...".*

32. Carver on Bills of Lading, 4th edition, para. 5-065, page 255 *"(iv)* Spent bill of lading. *...It was not necessary in the Erin Schulte further to explore this line of reasoning; but it may respectfully be pointed out that Moore-Bick L.J.'s observations (here quoted) are consistent with the common law rules which determined when a bill of lading was "spent", though admittedly in the different context of the question in what circumstances delivery of the goods deprived a bill of lading of its status as a document of title. It had this effect only where delivery was to a person who was, and not to a person who was not, so entitled (as was the position in The Erin Schulte). It was this rule which formed the starting point of the Law Commission's Report which led to the provisions now contained in s.2(2) of the Carriage of Goods by Sea Act 1992...".* Page 256, *"A bill of lading can also cease to give "a right (as against the carrier) to possession of the goods" by reason of an agreement between the parties to this effect. This was the position in The David Agmashenebeli where difficulties had arisen by reason of the carrier's refusal (which was held to be wrongful) to issue "clean" bill of lading. To resolve these difficulties, the parties agreed on a procedure by which three claused bills (probably in a set) were issued to shippers who accepted them under protest and returned them to carrier who marked two of them "accomplished", retained the third and began to deliver the goods" into the possession of" the shippers. The two bills which had been marked "accomplished" were later transferred to the ultimate buyers' bank (the Bank of China) and it was held that the "right to possession of the cargo as against the ship ceased to attach to the bills... when the bills were represented to the shipowners' representatives, were indorsed "Accomplished" and the shipowners' had agreed to instruct the master to deliver in accordance with the instructions of [the shippers'] representative...".* Page 257, *"... Where a case falls within s.2(2), the subsection provides that the lawful holder of the "spent" bill "shall not have any rights transferred to him by virtue of [s.2(1)] unless he becomes the holder of the bill" in the circumstances specified in s.2(2)...".* Para. 6-035, page 355, *"...* Whether spent bills are documents of title. *A bill of lading is "spent" or "exhausted" or "accomplished" when the goods covered by it have been delivered to the person entitled to delivery under the bill... The concept of a "spent" bill of lading is used in law for two distinct, though related, purposes. The first such purpose is to determine whether a "spent" bill is a document of title to the goods... The second purpose for which the concept is used is that of determining whether a person other than the original shipper can acquire rights against, or incur liabilities to, the carrier under the contract of carriage...".*

33. Allen & Glendhill, "Singapore High Court discusses bank's right to enforce security over bills of lading under Bills of Lading Act", 29 August 2019. *The "Yue You 902" and another matter [2019] SGHC 106. "...Facts. ... ("FGV"), the seller of the cargo, entered into a voyage charterparty with the defendant shipowner...("defendant") to charter the vessel "Yue You 902". The cargo was sold to Aavanti Industries Pte Ltd ("Aavanti") who then on-sold it to ...("Ruchi"). Ruchi issued a letter of indemnity ("LOI") to Aavanti who in turn issued a back-to-back LOI to FGV, who also issued a LOI to the defendant, all requesting the defendant to deliver the cargo to Ruchi without production of the original bills of lading. In the meantime, the plaintiff bank, ... ("plaintiff"), received 14 bills of lading from FGV through its bank ("Maybank") under cover of a document against payment collection schedule. All 14 bills of lading were blank endorsed by FGV. When the plaintiff informed Aavanti of the arrival of the documents, Aavanti requested financing for the entire purchase price of the cargo by way of a trust receipt loan. This request was granted by the plaintiff. The cargo was completely discharged before the plaintiff remitted the purchase price to Maybank. Aavanti defaulted on the loan and the plaintiff proceeded to enforce its security over the bills of lading by demanding delivery of the cargo from the defendant, which the defendant failed to do. The plaintiff then commenced proceedings against the defendant pursuant to the bills of lading for breach of contract of carriage, breach of contract of bailment, conversion ... Did the plaintiff acquire a right of sue? The defendant argued that the plaintiff had not acquired a right of suit ... Because the bills of lading had become "spent", the cargo having been delivered to Ruchi before the plaintiff became the holder of the bills of lading... Was the plaintiff a holder of the bills of lading in good faith?... Did the plaintiff consent to the discharge of cargo without production of bills of lading? The defendant also submitted that, by granting the trust receipt loan to Aavanti with the knowledge that the cargo would be or had been delivered against LOI without presentation of originals bills of lading, the plaintiff had consented to the discharge of the cargo without production of the original bills of lading... The Court found that the plaintiff's decision to grant a trust receipt loan (as opposed to other types of loan) and take the bills of lading as security was clearly inconsistent with any intention to waive its contractual rights of suit against the defendant under the bills of lading. There was nothing said or done by the plaintiff after the grant of the loan which could be construed as ratification of the misdelivery or waiver of the plaintiff's rights of suit. Comment. The decision in The "Yue You 902" should be welcomed by trade finance banks. It provides comfort that in a typical or conventional trade finance structure, the courts will likely endorse the bank's right to call on and enforce the bank's security by way of a pledge over original bills of lading, even if it is industry practice in that particu-*

"holder" the next requirement for the acquisition of rights under s.2(1) is that he must be the "lawful" holder; and s.5 (2), again, provides that "a person shall be regarded for the purposes of this Act as having become the lawful of a bill of lading whenever he has become the holder of the bill in good faith"[34]. Also, although the Act does not define the "bill of lading" it does give two pieces of information about its meaning: First, according to s.1(2)(a) references to bills of lading *"do not include references to a document, which is incapable of transfer, either by indorsement or as a bearer bill, by delivery without indorsement"*. The purpose of this provision apparently is to restrict the meaning of "bill of lading" to order and bearer bills[35]. Secondly, s.1(2)(b) provides that references in the Act to a bill of lading do "subject to that [i.e. to the requirement of transferability stated in s.1(2)(a)] ... include references to a received for shipment bill of lading". The section would be satisfied if, as between the original parties, the document indicated that the goods had been received by the carrier and that the carrier had undertaken a contractual obligation to carry them. Finally, the transfer of contractual liabilities is dealt separately under s.3. These will not automatically pass to those who obtain rights of suit under s.2(1). But *"the person in whom rights are vested by virtue of that subsection, a) takes or demands delivery from the carrier of any of the goods to which the document relates, b) makes a claim under the contract of carriage against the carrier in respect of any of those goods, or c) is a person who, at the time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall... become subject to the same liabilities under that contract as if he had been a party to that contract"*[36].

The presentation rule. When a bill of lading is issued, only the holder of the original document can demand delivery of the goods at the port of discharge. This is the reason why a bill of lading can be used as a document of title: transferring the document transfers constructive possession of the goods and also the right to demand the cargo from the ship[37]. If the shipowner delivers the goods, without the production of the bill, he does at his own peril[38]. Should the carrier, or his agent, disregard the basic obligation to make delivery of the cargo only against presentation of the bill, he will be guilty of breach of contract of carriage and could lose the protection of all exceptions and limitation of liability clauses[39]. The shipowner will often deliver the cargo

lar trade for cargoes to be discharged against letters of indemnity. Care should however be taken. The outcome in that case could have been very different if the court had found that the plaintiff had actual knowledge that the particular cargo covered by the bills of lading in its possession had been discharged against LOIs, or if the bank had consented or authorized to the same".

34. The concept of good faith is not defined, but it is obvious that good faith would be negative where the holder had acquired possession of the bill by means of some fraud or by actually stealing it.
35. The terminology of s.1(2)(a) is somewhat misleading insofar as the contrast in it between the phrases «by endorsement" and "by delivery" suggests that an order bill can be transferred by indorsement alone, while transfer of such bill is effected by indorsement and delivery. Elsewhere, in the Act makes it clear that a person can only be the holder of an order bill of lading if he has possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill. It is possible for an order bill to be indorsed in blank and after such an indorsement to be delivered to an original transferee; any further transfers of the bill by that transferee can then be effected by delivery alone, without the need for further indorsements. *Op.Cit.* note 16, para. 18-060.
36. *S. Baughen*, Shipping Law, 6th ed., p. 99, *"Use of documents other than bills of lading... The definition of "contract of carriage" in Art. I(b) leads to the conclusion that the Rules apply only to bills of lading or "similar documents of title". A seaway bill, not being a document of title, would therefore, appear to be outside the ambit of the Rules. Nonetheless, there are provisions in both the Rules and the Act that suggest that the Rules might nonetheless apply to such documents... First, there is s 1(3)...Secondly, there is Art. II... Thirdly, there is Art VI..."*.

    See also, pages 167-168, *"Combined" or "multimodal" transport ... Document of title? A combined transport bill of lading will generally be a "received for shipment" bill of lading. There is no clear authority as to whether such a bill of lading can constitute a document of title- a document whereby property and possession in the goods presented by the bill can pass during the sea voyage by negotiation without any attornment from the carrier... Combined transport documents and COGSA 1992. ... COGSA 1992 provides no definition of a "bill of lading", although s1(2)(b) provides that the Act applies to received for shipment bills. However, it is likely that this requires at least an indication of the designation of the carrying ship and of receipt by the sea carrier. Carver also argues that at common law a bill of lading refers only to a document containing or evidencing a contract for the carriage of goods by sea, a fact bolstered by the title of the Act itself, the Carriage of Goods by Sea Act 1992..."*.
37. The dangers of accepting a document, which is not a common law document of title are illustrated in *Nippon Yusen Kaisha v. Ramjiban Serowgee*, [1983] A.C. 429. Shipowners issued bills of lading, against letters of indemnity, without the mate's receipts being given in exchange. The mate's receipts and bills of lading were negotiated separately and ended up in the hands of different persons. The shipowner delivered the goods against tender of the bills of lading, and the holders of the mate's receipts sued for damages. The Privy Council held that the mate's receipts were not documents of title, and the holders of the mate's receipts had neither the property in nor the possession of the goods.
38. According to the *Stettin* [1889] 14 P.D. 142, Butt J stated that *"...according to English law and the English mode of concluding business, a shipowner is not entitled to deliver the goods to the consignee without the production of the bill of lading. I hold that the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted..."*.
39. In *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd.* [1959] A.C. 576, Lord Denning said: *"...It is perfectly clear law that the shipowner who delivers without of the bill of lading does so at his own peril. The contract is to deliver on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto or-*

against production of a letter of indemnity[40]. Exceptions to the rule that in absence of an express term in the contract, the master must only deliver the cargo to the holder of the bill of lading were recognized in *The Sormovskiy*[41]. It can be concluded that the presentation rule protects the holder of the bill of lading in that it is a basic term of the contract of carriage that the carrier must only deliver the goods against presentation of the bill of lading. On the other hand, such delivery serves to discharge the carrier from further obligations under the contract of carriage[42].

The bill of lading and the sale contract

In commercial transactions, where buyer and seller are in different countries and the goods must be transported by sea by a third party carrier, payment is usually made not against the transfer of goods but against the transfer of documents, which represent the goods. In the majority of international sale contracts payment of the purchase price will be made by means of a documentary credit, which provides the seller with a promise of payment given by a bank in the seller's own country, only if the latter is able to meet the terms and conditions of the credit. That means in essence that he must be able to present the documents required by the credit within the time required. The simplest form of credit is when a buyer, "the applicant", requests a bank "the issuing bank", to open a credit which is addressed to the seller "the beneficiary". The more complicated but more usual form is when the issuing bank instructs another bank, usually in the country of the seller, to advise the credit to the seller and to pay when the documents are presented to it. The bank that performs this advising function is sometimes referred to as the "advising bank" and sometimes as "the correspondent bank". The mere fact the advising bank advises the credit to the beneficiary does not give the beneficiary rights against it, unless it adds its own beneficiary that it should do so because he then has an enforceable undertaking from the bank in his own country as well as from the issuing bank in the buyer's country. The form, which the undertaking of the advising bank then takes, is that it "confirms" the undertaking of the issuing bank; it is then called the "confirming bank". When a bank pays under a commercial credit (e.g. a letter of credit) it looks for reimbursement to the next in chain, namely to the issuing bank, if it is a confirming bank, and, to the applicant, if it is an issuing bank. In many situations the banks may not receive payment as they intend, i.e. where the paying party has become insolvent, or where the bank has erred and paid on docu-

der or his or their assigns", that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected".

(Various remedies are available in cases of wrongful interference with goods, including the tort of conversion. This tort has been defined as *"an intentional dealing with goods, which is seriously inconsistent with the possession or right to immediate possession of another person"*. In order to claim in conversion the claimant must have possession or a right to possession at the time of the conversion. Since the common law has failed to develop a process of vindication of ownership and therefore for recovery in specie, the remedy for conversion is traditionally that of damages amounting to the full value of the goods at the date of the conversion and not the return of the goods themselves. Of course, for bills of lading issued on or after 16 December 1992, lawful holders of the bill will be able to sue the carrier in contract for misdelivery, unless the carrier has excluded his liability in this respect. *Op.Cit.* note 26).

The Court also held that the shipowner could not rely on any clauses in the carriage contract to protect him. The exemption clauses should not be construed so as to defeat the main object of the contract, which is the proper delivery of the goods against production of the bill of lading. *The Ines* [1995] 2 Lloyd's Rep. 145, 151-154.

40. In *Brown Jenkinson and Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 Q.B. 621 C.A., the shipper requested the carrier to issue a clean bill of lading for cargo of orange juice where the casks were clearly leaking, and the carriers only agreed if the shipper indemnified them against any action by the consignee. The Court of Appeal held the indemnity unenforceable, because it was a fraud on the buyer. It was an illegal agreement because it had as its object the making by the shipowner of a fraudulent misrepresentation.

In the *Houda* [1992] 2 Lloyd's Rep. 541 C.A., Neil LJ stated that: *"[carriers] do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course if such delivery is made and the person to whom the cargo is delivered proves to be the true owner no damages would be recoverable... It is of course open to a shipowner to decide that he is adequately protected by a letter of indemnity and delivery in the absence of the bill of lading, but in my judgment the rights of a time charterer to give orders do not entitle him to insist that cargo should be discharged without production of the bill of lading".*

41. *The Sormovskiy* [1994] 2 Lloyd's Rep. 266, Delivery without the production of the bill of lading is justified when the law of the country of discharge requires that the cargo must be discharged without the bill of lading, or there is a binding custom at the port of discharge to that effect; also, when the bill of lading is lost or stolen and the master has proof of both what happened to the bill of lading and of the identity of the person demanding delivery, i.e. that he is entitled to delivery.

42. Glyn Mills and Co. v. East and West India Dock Co. [1882] 7 A.C. 591. The House of Lords held that the shipowner's duties extend no further than to deliver the goods to the first person to present the original bill of lading; he need not require all originals to be tendered, nor need he take further steps to ensure that the presenter of the document is in fact the consignee; a justification for this rule advanced by Earl Cairns was that the practice of issuing bills in sets of three was for the benefit of either the shipper or consignee and was not for the benefit of the shipowner.

ments, which are found not to comply with the credit. Nevertheless the banks are prepared to take such risks because they can secure their interest over the goods by means of the bill of lading[43]. It depends on the arrangements of the parties what securities the bank will have. Frequently this will take the form of a pledge of the bill of lading. A pledge is based on the creditor taking possession of the debtor's asset until payment of the debt. As already mentioned, the holder of a bill of lading acquires constructive possession over the goods it represents so delivery of the bill effects constructive delivery of the goods themselves[44]. Furthermore the pledge is effected by delivery of the bill of lading to the bank, indorsed either to the bank or in blank. It is said that "special property" passes to the pledge upon the creation of a pledge, while the pledgor retains the "general property": while there will be no intention on the part of the parties that property in the goods will pass to the bank at the time that the bill of lading is transferred to the bank and the pledge is created[45], there will be the intention to transfer constructive possession; also a term is implied into pledge agreements giving the pledge the right to sale in the event of default in payment. Of course, the bank holding the bill of lading as security has always the right to obtain delivery of the goods and to sue in the tort of conversion in the event of misdelivery. Also, by virtue of COGSA 92, it has the right to sue the carrier under the carriage contract if the goods fail to reach the discharge port or reach it in a damaged condition, (s.2(1)(a), 5(2)(b) GOGSA). In conclusion, it should be mentioned that the bill of lading developed as a document of title in response to the particular problems associated with the international sale of goods. This enables the parties to use them not merely in re-sales, but also as security for the goods[46,47,48].

43. *P. Todd,* Bills of Lading and Banker's Documentary Credits, 1990. *P. Todd,* Bills of Lading as documents of title, 2005 JBL, 762. *T. Schmitz,* The bill of lading as a document of title, 2011, 10, JITL & P 255. (See page 215, *Prof. A. Tettenborn,* Lending on waybills and other documents-banker's dream or financier's nightmare? International Trade and Carriage of Goods, edited by *Prof. B. Soyer, Prof. A. Tettenborn*).

44. *Official Assignee of Madras v. Mercantile Bank of India,* [1935] A.C. 53. Lord Wright stated at pp. 58-59: *"But where goods were represented by documents the transfer of the documents did not transfer the possession of the goods, save one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated a transfer of the possession of, as well as the property in the goods".*

45. The transfer of the bill of lading does not of itself transfer the property in the goods; it is the terms of the sale contract and the parties subsequent conduct, which determine when the property is transferred. See the statement of Mustill L.J. in *The Delfini,* Op.Cit. note 21, *"[The bill of lading] is a document, which although not of itself capable of directly transferring the property in the goods, which it represents, merely by endorsement and delivery, is capable of being part of the mechanism by which property is passed".* Thus it will be the parties' intention that property will pass upon payment of the price, in which case it is the payment and not the transfer of the parties, which transfers the property. As an example in a classic c.i.f. contract, on terms cash against documents with the seller taking an order bill of lading, the property will pass upon the transfer of the shipping documents, including the indorsed bill of lading, in return for payment of the price.

46. *J. Wilson,* Carriage of Goods by Sea, sixth edition, pages 130-132, *"...5.2.3. As a document of title. ... (I) Function in contract of sale. ... 1. The bill must be transferable on its face... 2.The goods must be in transit at the time of the indorsement... 3. The bill must be initiated by a person with good title... 4. The indorsement must be accompanied by an intention to transfer the ownership in the goods covered by it... II) Function in financing contract of sale... The credit will normally call for a shipped bill of lading rather than one merely acknowledging that the goods have been "received" by the carrier, while banks are usually reluctant to accept clauses in a bill incorporating terms from any charterparty that may be operative in relation to the carrying vessel... III) Function in carriage contract...".*

47. *Sassoon,* C.I.F. and F.O.B. Contracts, *F. Lorenzon, Y. Baatz,* 2017, Sweet & Maxwell, p. 109, *".The seller under a c.i.f. contract must ship goods of the contract description and procure the shipping documents as agreed in the sale contract for tender to the buyer. Unless the contract provides otherwise, tender of an order bill of lading is always required for three reasons: first, such a bill of lading enables the buyer or its agent to obtain physical delivery of the goods on their arrival at the port of discharge; secondly, possession of the bill of lading amounts to constructive possession of the goods, and transfer of the bill of lading to the buyer or to a third party may (if so intended), have the effect of passing title in the goods to such person. This characteristic has the added benefit of enabling the lawful holder of the document to obtain credit from finance institutions before the actual arrival of the goods, as the bill can be given in pledge as security. Thirdly, it is by virtue of the bill of lading that the buyer or its assignee can obtain redress against the carrier for any breach of its terms and of the contract of carriage evidenced therein. In other words, possession of the bill of lading creates privity between its holder and the contractual carrier, as if the contract were originally made between them... In the absence of express stipulations to the contrary however, documents such as straight bills of lading, delivery orders and mate's receipt will not be acceptable under a c.i.f. sale...".*

48. *Schmitthoff,* The Law and Practice of International Trade, twelfth edition, page 333-336, *"The bill of Lading as a document of title... Where the consignee or indorsee is a banker who advances money on the security of the goods represented by the bill, the parties are likely to intend, by the transfer of the bill, the creation of a charge or pledge on the goods in favour of the banker, but not the transfer of the property in them to him, although the pledgee can demand delivery of the goods and then sell them. In the seller and buyer relationship, the rules relating to the passing of property apply... Secondly, only a person holding a bill of lading is entitled to claim delivery of the goods from the carrier... The bill of lading retains its character of document of title until the contract of carriage by sea is discharged by delivery of the goods against the bill...".*

The Greek Law

In Greece, the bill of lading is mainly governed by the Hague-Visby Rules and the Code of Private Maritime Law (CPML), where CPML is not contradictory and for matters not regulated by the Convention[49].

In particular, CPML (the relevant articles to the bills of lading are 168-173 CPML) provides the content of the bill of lading which is determined in the article 125 paragraph 2 CPML, and reads as follows/the usual bill of lading issued in Greece contains the following elements: a) the contracting parties, the consignee, the ship and the master, b) the names of the ports of loading and destination, c) stipulations as to freight, d) the marks identifying the goods loaded... e) the number of packages, or pieces or the quantity by weight... f) the apparent good order and condition of the goods on loading, g) the date of issue. The bill of lading has multiple functions, which are stipulated in the CPML. Thus, according to the article 168, the Master is authorized to issue the bill of lading after the loading of the goods. A copy of the bill of lading signed by the shipper is handed in to the shipowner; article 169 says that the bill of lading is issued to the name of a certain person (straight bill of lading[50]) or "to the order" at the shipper's choice[51]; also, according to the article 170, the duly issued bill of lading is evidence of the shipment of goods for all those who are interested in the cargo as also between the latter and the insurers; regarding the relationship between the shipowner and the charterer, this is governed by the charterparty; on a bill of lading issued "to the order" the provisions on bills of exchange apply by analogy regarding the defenses, which may be asserted against the holder. Furthermore, article 171 declares that the persons entitled to delivery of the cargo are the named consignee on a straight bill of lading or the named person on an order bill of lading; article 172, also, says that the delivery of an order bill to the person entitled, produces the same consequences as he delivery of the cargo itself would have. Finally, according to the article 173 the carrier is bound to deliver the cargo only upon return to him of the bill of lading and return of a written receipt statement from the consignee, even when the carrier rescinded the contract.

From the above, it can be concluded that in Greek law the bill of lading: a)it is the evidence of the shipment of the goods ("receipt"), b) it is the contractual promise for the carriage and delivery of the goods to the port of destination, c) it contains the consignee's claim for delivery to him of the goods in the port of destination, d) it governs the relationship between the carrier and those who are interested in the cargo, e) it represents the possession of the shipped goods, in a way that the transfer of the bill of lading transfers the property on them.

Greece had not ratified the Hague Rules, however, Greece had introduced in substance the Hague Rules into the CPML to be applied to all forms of carriage of goods by sea.

Greece ratified by statute the Hague-Visby Rules (Law 2107/1992, published in the Government Gazette A' 203). In the article 2 of the Law 2107/1992 it is provided that: *"1. The provisions of the convention, which ratified by this law as amended by the Protocols, also being ratified, shall apply in Greece to any carriage of goods effected under the bill of lading when the port of loading and the port of discharge are located in different states, as well as to any carriage of goods by sea between Greek ports. 2. The provisions of Law 3816/1958 (CPML), which are irrelevant to the ratified texts, to be exact the provisions of arts. 168-173 CPML, shall not be affected by the application of the texts ratified by this law"*[52]. This means that

49. During the Ottoman occupation of Greece, which lasted some four centuries until 1830, it was developed a very intense maritime trade in the Mediterranean, the Black Sea and other seas of the world; the French "Marine Ordinance", enacted in 1681 under the reign of Louis XIV, acquired customary application throughout the Mediterranean, extending also to the maritime trade carried by the Greeks; the provisions of this "Ordinance" were further elaborated in the second book of the French "Code de Commerce" of 1807, which was adopted by modern Greece in 1828; this book was modified in 1911 in order to bring the maritime legislation of Greece in line with some recent international conventions and with the Belgian maritime statute of 1908; in 1958 the new Code of Private Maritime Law (CPML) was enacted by the Law 3816/1958.

    Note: The Greek legal system is based on the enacted law; the role of the court decisions (precedent) is that of the interpretation of the legislation.

    Note: As from 1st March 2021, the Greek Code of Private Maritime Law (CPML) is under repeal, by Prof. Lia Athanassiou.

50. As per the Greek Law, the Hague Visby Rules govern the straight bill of lading (article 169, 171, 173 CPML); this seems to be established in English law, as well ("The Rafaela S" [2002] EWCA Civ556); *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, page 566.

51. The Greek Law does not recognize the "bearer" bill of lading; however, such issue would be valid, if allowed under the applicable (foreign) law, *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, page 565.

52. *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, page 551, *"...First, the provisions of the 6th title of CPML continue to govern the charterparties literally; however, they become inactive in respect of the carriage of goods by sea, besides the provisions which have no relation with the Convention. Second, para.2 of the article 2 [of the Law 2107/1992] seems to maintain in force only the articles 168-173 CPML on the bills of lading; due to the fragmentary nature of the Hague Visby rules, it is more correct to accept that they remain in force and apply those provisions concerning matters not regulated by the Convention...".*

the provisions of the Convention that are different will supersede the provisions of CPML[53],[54],[55].

Thus, apart from the article 125 CPML, the article III rule 3 of the Hague-Visby Rules will determine the content of the bill of lading. Also, according to the article 168 paragraph 1 CPML, which specifies that the bill of lading shall be issued by the master after the loading, it follows that in principle the Greek law recognizes only the *"shipped"* bill of lading. The Hague-Visby Rules, of course, also recognize the *"received for shipment"* bill of lading in article III rule 3, and, because this type is well known in practice, it can be said that it has been introduced into Greek law[56].

Bills of Lading are by nature negotiable instruments[57]. They also embody the right of delivery of the goods at the port of discharge, and represent the possession of the goods, so that transfer of the bill of lading transfers the possession on the goods.

Thus, according to the article 978 of the Greek Civil Code, the transfer of the movables, (stored in the warehouse, or received for transportation by the carrier), for which the bill of lading has been issued, is effected by the transfer of the bill of lading itself. The above provision of the Civil Code is supplemented by the provision of the article 172 CPML, according to which the delivery of an "order" bill to the entitled person equals to the delivery of the goods themselves.

The consequences of the transfer of the bill of lading under the Greek property law, is that delivery of the bill of lading leads to the transfer of the possession/ownership of the goods, so that, (depending on the agreement), the ownership of the goods may be transferred, or a pledge may be constituted thereon. The provisions in the Greek Civil Code are the article 1034, (regarding the acquisition of the ownership on movables), and the article 1211 on the pledge creation.

The legal holder of the bill of lading (by way of endorsement and delivery of the bill) is entitled to provide the instructions to the master for the cargo, to receive the goods at the port

53. *I. Korotzis*, The responsibility of the carrier according to the Hague-Visby Rules, (in Greek), 1994.
54. Greek precedent on the bills of lading: the decision no. 3225/2020 of the Multi Member First Instance Court of Piraeus, the decision no. 3133/2020 of the Single Member First Instance Court of Piraeus, the decision no. 3176/2020 of the Multi Member First Instance Court of Piraeus, the decision no. 3547/2019 of the Single Member First Instance Court of Piraeus, the decision no. 55/2018 of the Court of Appeal of Patras, the decision no. 320/2013 of the Court of Appeal of Piraeus, the decision no. 112/2012 of the Court of Appeal of Piraeus, the decision no. 387/2012 of the Court of Appeal of Piraeus, the decision no. 928/2011 of the Supreme Court (Areios Pagos), the decision no. 719/2011 of the Court of Appeal of Piraeus, the decision no. 543/2010 of the Court of Appeal of Piraeus, the decision no. 792/2010 of the Court of Appeal of Piraeus, the decision no. 631/2007 of the Court of Appeal of Piraeus, the decision no. 3365/2006 of the Multi Member First Instance Court of Piraeus, the decision no. 201/2005 of the Court of Appeal of Piraeus, the decision no. 305/2005 of the Court of Appeal of Piraeus, the decision no. 447/2005 of the Court of Appeal of Piraeus, the decision no. 735/2005 of the Court of Appeal of Piraeus, the decision no. 162/2004 of the Court of Appeal of Piraeus, the decision no. 325/2004 of the Court of Appeal of Piraeus, the decision no. 121/2003 of the Court of Appeal of Piraeus, the decision no. 25/1998 of the Court of Appeal of Piraeus, the decision no 1920/1975 of the Multi Member First Instance Court of Piraeus, the decision no.1227/74 of the Multi Member First Instance Court of Piraeus.
55. See, also, *I. Markou*, The Law of the Bill of Lading (in Greek), 2004 ed. Sakkoulas. *I. Korotzis*, Maritime Law, vol. 2, 2005, ed. Sakkoulas, Greece.
56. The bill of lading, under Greek Law, is a commercial paper, (*αξιόγραφο*), namely a document, which is transferable by indorsement which embodies the right of the person under the private law (e.g. civil law, commercial law etc.), in such way that the possession of the document is necessary for the exercise of that right, (*L. Georgakopoulos*, Commercial Law, vol.2 I, Commercial Papers (in Greek), 1989). As "commercial paper", the bill of lading must bear the signature of the party, whose obligation is embodied in the title. If it bears no such signature, it is not considered to be such a "commercial paper". This is because the law of the commercial papers (i.e the documents, which are transferable by endorsement) is strongly formalistic and strict; deviations from the strict conditions (of the appearance & bearing the signature) violate the principle of formality (*γραμματοπάγεια*); (the signature is necessary, because it denotes the will of the issuer of the bill of lading to be bound by the contents); besides as a private document, the bill of lading must bear a handwritten signature to be valid and have a probative force (article 160 Greek Civil Code, article 443 Greek Code of Civil Procedure); *Aliki Kiantou-Pampouki*, "Current developments concerning the form of the bills of lading - Greece", in *A.N. Yiannopoulos*, Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems, 1995.
57. There are theories that explain the function of the bill of lading as a document of title. (See *N. Deloukas*, Maritime Law (in Greek), 1978, para. 267). a) The absolute theory (*absolute Theorie*, introduced by E. Heymann), according to which the transfer of the possessory rights/ownership on the goods, for which a bill of lading has been issued, is effected merely by the agreement and the transfer of the bill of lading. When the carrier takes the goods in the custody, and issues the bill of lading, the ownership on the goods is separated/is independent from the physical possession on them. b) The strictly relative theory (streng relative Theorie of Hellwig), according to which the function of the bill of lading as a document of title is based in the Civil Code, (the transfer of the ownership is effected by the assignment- since the bill of lading embodies the claim for the delivery of the goods at the port of destination, the transfer of the bill transfers the possession on the goods by the assignment of the right to action or of the claim). c) The representation theory, according to which the bill of lading represents of the goods received by the carrier, so that the transfer of the bill of lading transfers the possession on them. If the carrier is deprived of the possession of the goods, i.e. if they are stolen, then the bill of lading cannot transfer any possession on them. This is the prevailing theory, (as it is in accordance with the article 978 of the Greek Civil Code and the article 172 CPML).

of destination, and to claim damages for any loss, due to violation of the carrier's obligations[58]. At the same time, the carrier is obliged to deliver the goods to the person appearing as the legitimate bearer of the bill of lading at the destination. The Greek Law forbids any objections against the lawful bearer of the bill of lading, which objections relate to the agreement between the issuer of the title and the previous bearer (charterer or shipper)[59]. In particular, when the bill of lading is issued "to the order", the right embodied in the bill of lading is independent from the underlying relationship; after each endorsement, the right embodied becomes more powerful; (In the contrary, the straight bill of lading which is transferred by way of assignment, is "burdened" with any other rights or objections which already exist against the transferor)"[60]. The bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described; however, proof to the contrary shall not be admissible when the bill of lading shall not be admissible when the bill of lading has been transferred to a third party acting in good faith (article 3 para. 4 Hague-Visby Rules).

The objections which may be raised against the third party/receiver/holder of the bill of lading are as follows[61]: objections as to the "typical" contents of the bill of lading (lack of signature, defective description of the cargo); objections as to the validity/legitimacy of the bill of lading (forgery, use of violence, lack of authority to issue the bill of lading); statute objections (time-bar, immunities according to the Hague-Visby rules.

The objections, which may not be raised against the *bona fide* third party are those between the issuer of the bill of lading/carrier and the shipper or any prior endorsee, (unless the third party was in bad faith or provoked the damage)[62],[63]

The Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and the bill of lading (as a document of title).

The Regulation applies, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters (article 1 Material Scope)[64],[65]. The Regulation excludes the obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character (article 1 para.2 d)[66]. Furthermore, Recital 9 of the Regulation states that *"obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cov-*

58. *Aliki Kiantou-Pampouki,* Shipping Law, (in Greek), 1993. P. 311 et seq.
59. Article 170 paragraph 3 CPML in combination with the article 17 of the law on bills of exchange (Law 5325/1932) and article 78 paragraph 2, article 80 of the Decree 1923, article 3 para.4 Hague-Visby Rules.
60. *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, page 569.
61. *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, pages 570-571.
62. For the delivery of the cargo without the production of the bill of lading and against LOIs, see *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, pages 572-580. See also *Schmitthoff,* The Law and Practice of International Trade, twelfth edition, page 189 et seq.
63. As per Greek law, the meaning of the bill of lading as a document of title is clear: it is a commercial paper issued "to the order" according to the law, which is transferred by endorsement and delivery. In the English law, the function of the bill of lading as a document of title was recognized in case law, meaning a document, which is a symbol of the goods; however, for a bill of lading to be a document of title it has to be negotiable in the sense that it has to be transferable, and this characteristic is inferred by the mercantile custom of the designing the consignee in the bill. In both systems the transfer of the bill of lading transfers the possession of the goods. Under the Greek law the notion of "possession" declares the exercise of the physical control over the goods; however, absent of the intention to ownership, there is only (a temporary) "detention" of the goods. On the other hand, in English law, the constructive possession is transferred. Furthermore, in both systems the transferee does not acquire (by the mere transfer of the bill) a better title than the one of the transferor.
64. The Regulation (EC) No 593/2008 replaced the International Convention of Rome on the Law Applicable to Contractual Obligations which was concluded by the Member States of the European Economic Community in 1980; the objective was to create uniform choice of law rules in relation to contracts for achieving the free movement of goods, services and capital among the EU states, and because such uniformity was corollary of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (replaced now by the Regulation EC 1215/2012, Brussels I).
65. *Sassoon,* C.I.F. and F.O.B. Contracts, 2017, p.p. 449-450, *"...Which Convention or Regulation determines the law? The purpose of this chapter is to consider the law applicable to obligations in a contract of sale. If the obligation can be characterized as contractual the English court will apply the rules of European legislation to determine which law applies. If the contract was concluded before 17 December 2009, the Convention on the Law Applicable to Contractual Obligations of 1980 (The Rome Convention) will apply, provided no exception applies. If, however, the contract was concludd as from 17 December 2009, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) will apply, provided no exception applies. Where the obligation in question is non-contractual, for example for misrepresentation prior to the conclusion of the contract, neither the Rome Convention nor Rome I will apply but Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) may. If Rome II does not apply yet, ss9-15 of the Private International Law (Miscellaneous Provisions Act) 1995 may".*
66. For the previous Rome Convention see *M. Giulliano-P. Lagarde,* Report on the Convention on the Law Applicable to Contractual Obligations, O.J. 1980 No C282/1.

er bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character". The most basic provision is contained in article 3 according to which *"a contact shall be governed by the law chosen by the parties"*; also, article 9(2) states that *"nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum"*; the *"overriding mandatory provisions"* are the provisions in respect for which is regarded as crucial by a country for safeguarding its public interests to such an extent that they are applicable to any situation falling within the scope, irrespective of the law applicable to the contract under the Regulation. Recital 12 provides that *"an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has clearly been demonstrated"*[67,68].

Furthermore, article 5 for the contracts of carriage, provides (para.1) that *"To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply".*

Finally, *"the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum"* (article 21)[69,70].

Conclusion

The bill of lading, especially when negotiable, is a document of great value for the contract of carriage of goods by sea; its function as a document of title makes it acceptable to the banks not only for documentary credits but also for financing maritime business. The advantages are confirmed by the wide use and the uniformity in the applicable law, (by the Hague-Visby Rules and the use of similar bill of lading forms internationally). However, the speeding up of transport through containerization and high speed vessels, promoted the use of non-negotiable documents, such as the waybills (for shippers or consignees who do not plan to sell the goods while in transit), or short forms of bills of lading (by removing the printed terms of the contract of carriage from the reverse of the bill, or by clauses incorporating the carriers standard terms and conditions, or by processing electronic data/dispensing the need for traditional documentation). Possible amendments in the traditional form of the bill of lading may create new problems e.g. it is difficult to imagine banks accepting to finance commercial transactions without any documents or with non-negotiable documents; therefore these amendments should not deprive the bill of lading of its function as a document of title.

67. *R. Aikens, R. Lord* and *M. Bools,* Bills of Lading, 2nd ed., 2016, p. 478, *"...However, in English Law the obligations of the parties to a bill of lading, whether they be the original parties or subsequent ones, do not "arise out of" the negotiable character of the bill of lading, so that it is submitted that Rome I must be used in an English court to determine the applicable law of a bill of lading contract, even when the contractual relations between a carrier and a person to whom the bill of lading has been lawfully transferred pursuant to the provisions of COGSA 1992...".*
68. Under the Greek Law, it is also inadvisable to include the bills of lading in the exception.
69. *A. Antapassis-L. Athanassiou,* Maritime Law (in Greek), Nomiki Bibliothiki, 2020, p. 606 et seq., on the applicable law on the bills of lading, on the choice of jurisdiction clauses (arbitration clauses etc.), on the jurisdiction clauses on charterparty bills etc.
70. *Sassoon,* C.I.F. and F.O.B. Contracts, 2017, p.p. 410-411, *"...3. Court Jurisdiction... (a) The Recast Regulation and International Conventions. ... The first issue is whether the 2005 Hague Convention on Choice of Court Agreements; Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (the Recast Regulation); Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Jurisdiction Regulation); or the revised 2007 Lugano Convention applies. The Jurisdiction Regulation replaced the latest Accession Convention to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the EC Jurisdiction Convention). The rules under the Jurisdiction Regulation, the Lugano Convention and the EC Jurisdiction Convention shall be treated as if they are identical unless specifically stated otherwise. If none of those Conventions or Regulations are applicable, the English court will apply its national law to determine whether it has jurisdiction to determine an international dispute... Possible effect of Brexit. If the United Kingdom is no longer an EU Member State in the future it will need to become a party to the Choice of Court Convention as this was ratified by the European Union and not the United Kingdom... The Recast Regulation would no longer apply to the United Kingdom if it was not an EU Member State and the United Kingdom is not a party to the Lugano Convention...".*