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Summary

This thesis covers the subject of delivery clauses in negotiable and non-negotiable Bills of Lading. The use of such clauses raises legal issues relating to transport law, letter of credit (L/C) law and sale's law. Legal issues involving different legal areas are often difficult to solve, since there are no clear-cut solutions.

The document of title function, which is a fundamental quality of most Bills of Lading, requires surrender of the document for delivery. This function of the Bill of Lading causes expensive delays for parties involved in transports when the goods arrive at the port of discharge before the documents of title. The sea waybill is a transport document that lacks this document of title function. Hence, carriers prefer to use sea waybills instead of Bills of Lading.

However, customers of the carrier often consider the Bill of Lading the best security-providing document and agree upon its use already in the underlying sales contract. Furthermore, following the Hague/Visby Rules, a shipper has a right to demand the issuance of a Bill of Lading from the carrier. For these reasons, the Bill of Lading rather than the sea waybill, is the document used in the majority of transportations by sea. In addition, the Bill of Lading is often used when there is no need to use such a document. One way to decrease this "misuse" of Bills of Lading is to inform commercial parties of the possibility of using specific provisions in the sea waybill so that equal security to that offered by the Bill of Lading is achieved. Commercial parties also need to be informed of the possible advantages of using sea waybills. This is the purpose of different recommendations on international level. Delivery clauses, on the other hand, are the carrier's own solution to the extra liabilities caused by the document of title function in Bills of Lading.

This legal subject is controversial since delivery clauses aim at exempting the carriers from liability for delivery of the goods without surrender of the Bills of Lading. Hence, the delivery clause practically aims at depriving the Bill of Lading of its document of title character. Deprived of this function, the document will have the characteristics of a sea waybill. For this reason, the first relevant question is whether a Bill of Lading changes character when a delivery clause is inserted into the document.

The prevailing view seems to be that a delivery clause printed in large letters on the "front" side of a Bill of Lading will give the document the same character as a sea waybill. There are, however, strong arguments supporting the view that delivery clauses are invalid. Furthermore, the validity of the clause seems to depend on how it is construed and where in the document it is inserted.

This possible change in character has been causing confusion for banks working with documentary credits. Banks are faced with the question; should a Bill of Lading that incorporates a delivery clause be accepted under

the documentary credit when the instructions of the credit call for a Bill of Lading with the document of title character?

One limitation to the bank's duty of examination is that it does not need to take into consideration the "terms and conditions" of the Bill of Lading. The first opinion of the ICC stated that delivery clauses in Bills of Lading were such terms and conditions that the bank is entitled to ignore. This opinion of the ICC was much criticised, since accepting delivery clauses in documents of title may have several adverse implications. Taking account of the criticism, the ICC modified its statement and concluded that delivery clauses relating to **negotiable Bills of Lading** are not accepted under the documentary credit in contrast to delivery clauses in **non-negotiable Bills of Lading** that are. Hence, the ICC chose to make a distinction between negotiable and non-negotiable Bills of Lading.

It seems that most banks have chosen to comply with these statements, while certain banks are refusing to accept non-negotiable Bills of Lading if they incorporate delivery clauses.

A buyer that requests negotiable Bills of Lading, which is the case in the great majority of documentary credits, need not fear that their banks will accept Bills of Lading with delivery clauses printed in large letters on the "front" side. If the documentary credit allows the acceptance of non-negotiable Bills of Lading, on the other hand, there is a risk that these documents will contain delivery clauses. The acceptance of non-negotiable Bills of Lading with delivery clauses will often involve more risks for both banks and buyers, particularly considering that a sea waybill without express protective provisions offers less security.

The documentary credit as a service safeguarding the rights of the buyer will consequently lose some of its value if the bank accepts a sea waybill when the buyer expects a document of title. For this reason, if a bank follows the ICC's statement relating to non-negotiable Bills of Lading, then the buyer may consider adding specific language to the instructions of the credit in order to prohibit the acceptance of non-negotiable Bills of Lading with delivery clauses.

Seen from another perspective, a seller risks being in breach of contract in connection with the underlying sale's agreement if he/she tenders a sea waybill when a document of title is required. Commercial parties need to have the possibility of demanding the document called for in the underlying sale's contract. The failure to fully condemn delivery clauses in all documents of title facilitates their continued use by some carriers. The obligation to issue Bills of Lading should not be circumvented by inserting delivery clauses.

Since delivery clauses printed in large letters on the front side of Bills of Lading seem to convert the documents into sea waybills, the customer of the carrier has a legal right to demand the issuance of a Bill of Lading in which there is no delivery clause. The Hague/Visby rules entitle the shipper to demand the issuance of a "real" document of title.

Preface

This master thesis marks the end of my legal education here at the University of Lund. Considering the good times I have experienced here at the Faculty of Law and my curiosity regarding what the future has in store for me, it is with both grief and joy that I close this chapter of my life by handing in this essay.

It was my supervisor of this thesis, professor Lars Gorton that first drew my attention to the problems caused by delivery clauses in negotiable and non-negotiable Bills of Lading. As the legal issues relating to this problem are interesting, controversial and covers both banking law and transportation law, I chose this as the subject of my thesis. With great enthusiasm I started reading literature regarding Bills of Lading and sea waybills, and I soon realised why this area of the law is often considered both difficult and confusing. Nevertheless, having rejected several hypotheses I at first believed to be true, I now feel that I have covered the relevant legal issues in this thesis both appropriately and correctly.

I am grateful to professor Lars Gorton for having had the patience to answer all my questions and for guiding me in the right directions. Without his help I would never have had the opportunity to meet the legal professionals and bankers without whose help my understanding of this legal area would not have evolved.

Furthermore, I would like to thank Fredrik Lundberg -senior financial advisor at NORDEA- for his help with legal questions concerning banking practice. His help has been essential for my understanding of the subject, especially in issues where the literature has been inadequate.

Finally, I would like to thank my mother and my father, my girlfriend and my friends for positively encouraging and supporting me during my work on this thesis.

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Patrik Andersson

Abbreviations

ICC	International Chamber of Commerce
UNCITRAL	UN Commission on International Trade Law
C.I.F. contracts	“Cost, Insurance, Freight” contracts. The cost of freight and insurance is included in the price for the buyer.
The Pomerene Act	The American Federal Bill of Lading Act of 1916
COGSA 92	The Carriage Of Goods by Sea Act from 1992
CMI	Committee Maritime International
UN/CEFACT	United Nations Centre for Trade Facilitation and Electronic Business
UNCTAD	United Nations Conference on Trade and Development
UCP	The Uniform Customs and Practise for Documentary Credits
P&I Clubs	Protection and Indemnity Clubs (insurance companies)

1 Introduction

1.1 Background

The Bill of Lading is a document that, historically, has been of great significance for the development of international trade. The importance of the Bill of Lading for modern trade lies in its characteristics. These characteristics have evolved during centuries of trade by sea and fill a necessary function by providing a comparatively safe way of doing international business for merchants. It is especially one quality of the Bill of Lading that gives the document an independent value.

This quality is the “document of title” function, which could be said to mirror the physical delivery of the goods. The document of title is needed, theoretically, for delivery of the goods from the carrier. By giving the document this “key” function the document can be said to represent the goods being shipped. By linking the delivery of the goods to the document of title, the document enables both the sale of the goods in transit and the use of the document as security under a documentary credit operation.

The documentary security offered by the Bill of Lading is the most important reason for why buyers and sellers involve the document in their sale’s contract. The sale’s contract involving a document of title will require the seller to tender such a document in exchange for payment or he/she will be in breach of contract. The documentary credit is an operation in which this exchange of performances can be achieved even though the buyer and the seller are in different countries.

For this reason, documentary credits are very important for international commerce. This mechanism provides a means of payment by substituting a bank for the buyer, as payor. The bank then conditions its payment to the seller against certain documents specifically stated in the documentary credit. The credit should be seen as a service to the buyer in which the bank must examine all documents received from the seller with reasonable care to ascertain that they appear to be in accordance with the terms and conditions of the credit.

In this context the Bill of Lading gives the shipper, then the holder, thus the bank, a security in case of failure from the buyer to fulfil its obligations towards the bank. The Bill of Lading has therefore traditionally been the document normally required in documentary credits. However, the “key” function of the Bill of Lading also involves some distinct problems, especially for the carriers.

Modern trade has seen quicker transports, especially transports by sea. This, combined with the lengthy documentary procedures associated with the use of the Bill of Lading, has caused serious “bottle-neck” problems for carriers. This problem of the Bill of Lading arriving later than the cargo, causes

expensive delays since delivery of the goods is hindered. It is especially the carrier that is placed in tricky situations, as storage room may be limited.

As a solution to this problem, the sea waybill was developed in the 1960's. The sea waybill does not have the document of title character. Consequently, this document offers less security than the Bill of Lading¹. Nevertheless, the use of the sea waybill has steadily been increasing in world trade. This is a change in practice that banks have been compelled to take into consideration.

Banking practice with respect to documentary credits is one area of law where unification has been successful through the standardized rules of the *Uniform Customs and Practise for Documentary Credits* (the UCP is published by ICC). Today, the UCP has almost universal coverage and most discussions involving documentary credits should be made with reference to the UCP. The UCP regulates, among other things, which documents should be accepted in the documentary credit transaction. Article 24 of the 1993 revision of the UCP (the *UCP No. 500*) enables non-negotiable sea waybills to be used in documentary credit operations. This article of the UCP is important since the acceptance of the non-negotiable Bill of Lading under the documentary credit operation is helping to increase the use of the document, especially where there is no need to use the Bill of Lading.

The Bill of Lading is still used in the majority of transports by sea, even when there is no substantive reason for its use. This “misuse”² of the Bill of Lading is something that the carriers would prefer to avoid considering the adverse effects of delayed arrival of documents required for delivery. However, the shipper has a right to demand the issuance of a Bill of Lading. In addition, the use of the sea waybill would lessen the liabilities of the carrier in relations to the parties with interest in the goods. This is a consequence of certain international conventions only being applicable to Bills of Lading or similar documents of title. From a liability point of view, the mandatory nature of these conventions establishes the minimum obligations and the maximum immunities of the carriers.³

For these reasons, recently, certain carriers introduced clauses printed in large letters on the front side of their Bills of Lading, exempting them from liability for incorrect delivery of the goods. According to these contractual provisions the carrier may either;

1. “ *release goods without necessarily requiring surrender of an original Bill of Lading; and /or (Category 1)*”

¹ However, through different express provisions and by designating the bank as consignee, the document offers better security. This is discussed under section 8.1.1.

² Discussed under section 8.

³ Discussed under section 2.3.1-2.3.4

2. *deliver goods to the named consignee upon reasonable proof of identity without surrender of an original Bill of Lading.* (Category 2)⁴

These clauses are controversial because they conflict with the document of title function of the Bill of Lading. Hence, the “delivery clauses” are considered by some as attempts at converting the Bills of Lading into sea waybills. Transportations involving sea waybills would lessen liabilities and costs of doing business for carriers in certain respects.

In modern trade export, the existence of a transport document that gives the holder control over the goods is a commercial necessity, particularly when there is an intention to sell the goods while in transit. Furthermore, the seller needs to tender documents that meet the requirements of the underlying sale’s contract. For this reason, the practice of using delivery clauses has been very controversial, especially where paying banks under documentary credits are involved. Within the banking community, the effects of the delivery clauses are apart from being controversial also guilty of causing much confusion.

One circumstance that contributes to this confusion is that there is no single international convention that all countries have ratified. This has led to national regulations that are everything but uniform, seen in an international perspective. The question of which transport documents that qualify to be a Bill of Lading, with its specific qualities, therefore depends on legal jurisdictions and applicable laws. An example of this is the difference between non-negotiable Bills of Lading. According to Scandinavian, German and English law this document is a Bill of Lading in the sense of having the “key” function, while American law sees the document as a sea waybill.⁵

The bank examining the documents tendered in connection with the documentary credit has to decide if the documents tendered are in accordance with the terms of the credit. This issue relating to the duty of examining the documents has, considering the uncertain legal quality of documents incorporating these “delivery” clauses and the differences between national laws regulating Bills of Lading, caused great confusion within the banking community.

This thesis deals with the legal issues relating to these “delivery” clauses in negotiable and non-negotiable Bills of Lading.

⁴ <http://www.forwarderlaw.com/Feature/blclause.htm>, my italics

⁵ In America and England, non-negotiable Bills of Lading are called straight Bills of Lading, while these documents are referred to as recta Bills of Lading in Scandinavia and Germany. Furthermore, in English law the Bill of Lading is often referred to as being “quasi-negotiable”. Using the same terminology, the Swedish Bill of Lading is not “quasi-negotiable” but “negotiable” (discussed in more detail under section 2.3.1).

1.2 Purpose

The purpose of this thesis is to describe and analyse the effects of delivery clauses on the character of negotiable and non-negotiable Bills of Lading and to study what implications these effects have on the documentary credit operation and the parties involved.

For a comprehensive understanding of the subject it is also important to cover the reasons for carriers introducing delivery clauses in their Bills of Lading and to explore alternative solutions to the root of the problem.

1.3 Method and Material

I have used the traditional legal dogmatic method. This has involved consultation with, and analysis of, legal sources such as; international conventions, national laws, case law, literature and articles from legal scholars, legal records and opinions from relevant institutions or affected parties.

My main source has been legal doctrine from England and Sweden. Nevertheless, the literature selected has foremost been works offering the necessary international scope required for my research in this subject.

Kurt Grönfors covers the subject of Bills of Lading and sea waybills comprehensively and his work has been especially useful for examining the Nordic view on the matter. His book, *Sjölagens bestämmelser om godsbefordran* is from 1982, but remains one of the best Nordic textbooks covering this legal area.

When investigating the English view, the book *Carriage of Goods by Sea* (1998) by John F Wilson was utilised to a great extent. This work has been useful as far as English law is concerned. Schmitthoff's book, *The Law and Practice of International Trade*, has also proven useful in my research and has been a good complement to Wilson's literature. However, considering recent changes in English law, recent case law has been used to complement these books.

Professor Hugo Tiberg's article, *Legal Qualities of Transport Documents* (1998), covers the subject of the conceptual differences, which exists between the civil law countries (i.e. Scandinavia and Germany) and common law countries (i.e. England and America), in relation to transport documents. This article has been very helpful in creating an understanding of the similarities and differences between American, English, German and Nordic laws regarding relevant transport documents.

One of my main sources used in relation to documentary credits is the book, *Rembursrätt* (1980) written by Professor Lars Gorton. This book remains one of Sweden's most comprehensive texts relating to letters of credit. This book has been especially good at giving different perspectives, where other

books have been more “single-tracked”. Where it has been necessary to work with more up-to-date literature, other sources, such as the works by Paul Todd and Raymond Jack, have been used.

Swedish case law is very limited compared to the numerous English cases that may be found. For this reason, most court decisions referred to are English court decisions. However, considering the international scope of this thesis and the role of English law in the international legal arena, this seems, where referred to, appropriate.

The use of transport documents in international trade, a report by the UNCTAD secretariat, has also proven useful since it offers valuable information concerning the use of, and the attitudes towards, the transport documents relevant for this thesis.

Furthermore, documents from the ICC have been important for my research. The documents offer an inside view of discussions, between the interested parties (i.e. carriers and banks) and experts of the ICC, relating to the delivery clauses in Bills of Lading.

Through these documents, and my attendance of the *trade finance day 2004* held by the Swedish ICC, where I had the privilege of discussing the problems caused by delivery clauses with banking experts, new aspects and viewpoints have been added to the analysis of this thesis.

Finally, it must be pointed out that the most important source for my analysis has been the many discussions I have had with Professor Lars Gorton.

1.4 Limitations and Disposition

The problematic situation caused by delivery clauses affects all the legal areas in the intersection of transport law, letter of credit (L/C) law and sale’s law.

As an understanding of the legal issues relating to L/C law requires some basic understanding of transport law, it seems natural to start this thesis by discussing the issues relating to transport law.

This part of the thesis will first involve discussions concerning the qualities and characteristics of different transport documents.

Furthermore, since the subject of this thesis is international in its character, possible differences in international and national regulations relating to relevant transport documents will also be covered in this part of the thesis.

Thereafter, the main legal issue relating to transport law is approached. The question is if these “delivery clauses”, when incorporated on the front side of the documents, change the character of the transport documents and if so, in what way the character is changed. The question is also extended, as to analyse how the situation would change, if the clauses were to be

incorporated differently in the Bills of Lading, for instance on the “reverse” side of the document.

After having discussed these issues relating to transport law, the thesis moves on to discuss the legal questions relating to L/C law.

In order to give a basic understanding of the subject, the first issues to be examined in this part of the thesis is the documentary credit operation itself and the UCP. Hereafter, it is possible to approach the main legal question relating to L/C law.

The main question is if banks have to accept Bills of Lading with delivery clauses as conforming to the documentary credit or if these documents should be rejected. Here it is the banks duty of examining the documents that is of significance and needs to be studied in more detail. This involves a discussion concerning the possible effects of accepting the delivery clause.

The final part of this thesis involves an analysis of alternative solutions to the root of the problem, namely the document of title function of the Bill of Lading.

As mentioned above, some aspects of sale’s law are also affected by the use of “delivery” clauses in transport documents. This thesis deals mainly with the legal questions relating to transport law and letter of credit law.

However, since documentary credits and transportations of goods are usual downstream activities of the actual sale’s agreement between the exporter and the importer, I have been compelled to take sale’s law into consideration where necessary for the wider understanding of the legal issues at hand. Sale’s law is for this reason inserted in the text where relevant. However, legal issues relating to the right of stoppage will not be discussed in this thesis apart from it being mentioned in one context, where I have felt obliged to take the right of stoppage into consideration. This is done in footnote nr.213.

Furthermore, this thesis is limited to the study of clauses allowing delivery without requiring surrender of the document. This thesis excludes clauses that allow delivery of the goods against an original Bill of Lading, which the carrier reasonably believes to be genuine. This is another problem linked to the use of delivery clauses. Hence, the effects of fraud in connection with the Bill of Lading will not be discussed.

Concerning regulations in relation to transport documents, this thesis is restricted to the laws of Scandinavia, Germany, England and the USA. When discussing Scandinavian law, this is often done with reference to Swedish law. Swedish law relating to carriage of goods by sea is in most aspects similar to those in other Scandinavian countries since the Nordic countries share the same Nordic Maritime Code.

American law is mainly discussed for the purpose of illustrating the difference in the views relating to non-negotiable Bills of Lading. For this reason, American law is not widely covered in this thesis.

The same applies to German law. German law is mainly incorporated in this thesis for the purpose of illustrating the similarity between Scandinavian laws and the laws in other continental civil law countries.

2 The Bill of Lading

2.1 The Origin of the Bill of Lading

Historically, the Bill of Lading can be traced back to Marseille in the thirteenth century⁶, where the document was issued as a non-negotiable receipt for received cargo.⁷ In the document the shipowner would declare that he had received the goods and state his obligations of caring for the cargo during transit and of delivering the goods to the cargo owner, or his people, at the port of discharge. These documents were *prima facie* evidence and contained the *acknowledgement of having received the goods* and the *promise of delivery*. These are two characteristics of the Bill of Lading. The third characteristic of the modern Bill of Lading, the document of title character, had not yet been acquired.⁸

This document was adequate for simple commercial relationships, as the shipped goods were sold only after having reached the port of discharge. The development towards modern trade with credits and sales over long distances made a reform of the Bill of Lading unavoidable. Merchants now wanted to be able to sell the goods before the ship reached its port of discharge and for this reason, it became especially important to meet the needs of third parties that were not original parties to the contract of affreightment.⁹

By the 18th century the Bill of Lading had acquired its third characteristic, the document of title character. Now, the document's most distinguishing feature was that the carrier could only make delivery against presentation of an original Bill of Lading. For this reason, the document could be used both in credit transactions and for the purpose of sales.¹⁰ Today, all negotiable Bills of Lading are documents of title, while non-negotiable Bills of Lading do not have this same international uniformity.¹¹ During the 19th and the 20th century, the Bill of Lading developed into the most complex and regulated transport document in modern international trade.

⁶ Actually, the Bill of Lading may be traced even further back.

⁷ Grönfors, Sjölagens bestämmelser om gods befordran, p.275

⁸ John F Wilson, Carriage of Goods by Sea, p.117

⁹ Schmidt mm, Huvudlinjer i svensk frakträtt, p.113

¹⁰ Grönfors, Sjölagens bestämmelser om gods befordran, p.276

¹¹ Differences in regulations relating to non-negotiable Bills of Lading are discussed under section 4.

2.2 International Conventions Regulating the Bill of Lading

2.2.1 The Hague Rules

The carrier's mandatory liability has for a long time been the subject of international regulation. As stated above, the rules regulating the Bill of Lading were developed in the course of several centuries through international trade practice. As this international trade practice greatly influenced national maritime laws, the negotiable Bill of Lading has an internationally relatively uniform character, at least in its core qualities.¹²

These national laws placed a strict liability on the carrier under a Bill of Lading shipment. With the development of the freedom of contract concept in the 19th century, the carriers frequently tried to exempt themselves from this liability through different provision in the Bill of Lading. Some carriers even attempted to exempt themselves from their own negligence, which is a basic responsibility for the carrier in maritime law. Most often the carriers had more bargaining power than their counterparts, and with the increased use of exemption clauses, this was a significant threat to the Bill of Lading's usefulness as an instrument in trade. Countries trying to solve this problem often introduced solutions that differed from one country to another. Eventually, it came to be recognised that if this problem was to be solved, an international convention was the right "tool". This led to the creation of the "Hague Rules" an international convention that was signed in Brussels in 1924.¹³ The assigning nations then introduced national laws to give effect to the Hague Rules.

The Hague Rules aimed at achieving two objectives. The first was to protect parties with vested interest in the cargo from far reaching exemption clauses, excluding liability for loss or damage of cargo, in the Bill of Lading. The second was the aim to further strengthen the "document of title" character of the Bill of Lading. These objectives were mainly achieved through the creation of mandatory liabilities for the carrier, and it thereby increased the practical value of holding the Bill of Lading.¹⁴

2.2.2 The Hague/Visby Rules

As time went by, cargo owners and many "new technique" countries grew dissatisfied with the Hague Rules and the rules were in need of a reform. With inflation, the limitation in liability that worked as a ceiling for the carriers, had become unreasonably low and needed to be raised. The Hague Rules also contained some gaps that were much criticised. For instance, the rules only applied to outward Bills of Lading. This limited nature of the Hague Rules finally led to a legal-technical reform, through the Brussels

¹² Grönfors, Sjölagens bestämmelser om gods befördran, p.274,

¹³ John F Wilson, Carriage of Goods by Sea, p.117-118

¹⁴ Grönfors, Sjölagens bestämmelser om gods befördran, p.274

Protocol in 1968.¹⁵ These rules, that were a first step towards the thinking of “fairness” within the shipping industry, are known as the Hague/Visby Rules. The idea was to create a new mandatory framework of provisions that were to be incorporated in the contract of carriage. Outside of this mandatory framework, parties are free to negotiate terms and conditions.¹⁶

One important amendment of the Hague Rules is the added text in relation to the evidential value of the Bill of Lading. Article 3 rule 4 states the following:

*“Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). **However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.**”¹⁷*

This rule illustrates that the Hague/Visby Rules is concerned with the content of a contract of carriage, where it may come to affect third parties. The added text is motivated by the idea that third parties acting in good faith, thus relying on the document, need protection in the form of enforceable rights against the carrier under the contract of carriage.¹⁸

While the Hague Rules applied only to outwards Bills of Lading, the Hague/Visby rules have the ambition of applying to “*every bill of lading relating to the carriage of goods between ports in two different states if:*

*“ a) the bill of lading is issued in a contracting State, or
b) the carriage is from a port in a contracting State, or
c) the contract contained in or evidenced by the bill of lading provides that these Rules, or legislation of any State giving effect to them , are to govern the contract.*

Whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.”¹⁹

The Hague/Visby rules, as well as the Hague rules, require a Bill of Lading or any similar document of title for application. According to Article I(b) The Hague/Visby rules are applicable “*only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea.*”²⁰

¹⁵ Hannu Honka, *New Carriage of Goods by Sea*, p.5

¹⁶ John F Wilson, *Carriage of Goods by Sea*, p.186

¹⁷ My italics, *The Hague/Visby Rules Art.3, rule.4*

¹⁸ This rule is relevant for the discussion under section 4.2, where the legal qualities of a straight Bill of Lading are studied.

¹⁹ John F Wilson, *Carriage of Goods by Sea*, p.174, *The Hague/Visby rules Art X*

²⁰ *Ibid.* p.173

Furthermore, the Hague/Visby rules may also apply to a contract of carriage, in situations where they otherwise would not, if they are incorporated in the document. Charterparties are not covered by the rules.²¹

2.2.3 The Hamburg Rules

The Hague Rules had been the more moderate approach chosen by the major shipowning nations with regard to the problem of the unfair balance between the carriers and the cargo owners. While many of these countries thought that the not so far-reaching adjustments, in the form of the Hague/Visby Rules, were a sufficient solution to the shortcomings of the Hague Rules, many cargo-owning countries thought differently. Since the major cargo providing nations thought that the legal situation was still in favour of the carrier, they intended to create a more fair balance through a more radical reform. This time, the ambition was to create a comprehensive code regulating all aspects of the carriage of goods by sea.²²

The preparatory work was done by UNCITRAL. The result, the United Nations Convention on the Carriage of Goods by Sea, known as the “Hamburg Rules”, was adopted in 1978 at a United Nations conference in Hamburg. This new code came into force in 1992.²³ The differences between the Hamburg Rules and the earlier Hague and Hague/Visby Rules are several. One of the main differences is that the Hamburg rules may apply to contracts of carriage performed under other documents than the Bill of Lading.

Furthermore, the liability limit for the carrier has been increased quite substantially in the Hamburg Rules.

Finally, it can also be pointed out that the Hamburg rules, compared to the Hague- and the Hague/Visby Rules, contain more detailed regulations concerning the Bill of Lading itself.²⁴

2.2.4 Consequences of the International Regulations

When a shipper delivers the cargo and in exchange receives a signed Bill of Lading, the provisions stated in the Bill of Lading usually represents the terms and conditions of the agreement reached between the shipper and the carrier. Due to the greater bargaining power of the carriers these terms are usually fixed in advance. The shipper may have little influence over these

²¹ Schmitthoff, *The Law and Practice of International Trade*, p.269

²² John F Wilson, *Carriage of Goods by Sea*, p.119

²³ Only then had it been ratified by 20 states. The Hamburg rules have not been ratified by the Nordic countries, they were however taken into consideration during the 1994 reform of the Nordic Maritime Code. The Nordic Countries agreed to follow the Hamburg Rules as far as possible, while remaining with the Hague/Visby Rules. Hence, in Scandinavia there is no requirement to use a Bill of Lading for the mandatory application of provisions relating to the loss or damage of shipped goods. Nevertheless, a sea waybill is still only prima facie evidence (see section 2). Hannu Honka, *New Carriage of Goods by Sea*, p.29 and p.226

²⁴ Hannu Honka, *New Carriage of Goods by Sea*, p.5-7

terms.²⁵ The international conventions are, as mentioned, seen as a way in which balance can be created in the relationship between the carrier and the shipper.

In Schmitthoff's book, *The Law and Practice of International Trade*, the shipper's situation is compared with that of a railway passenger;

*"The terms of the contract which he concludes are fixed in advance, and his position is not unlike that of a railway passenger who, when buying a ticket, concludes an elaborate standard contract with the railway authority for the carriage of his person from one location to another."*²⁶

Unfortunately, what the terms of the contract will be is not always clear. The attempt to create unity through legal harmonisation, in the law relating to the Bill of Lading, has resulted in a legal situation of quite a complex nature with different international conventions.

The reason for this is that different states have chosen to ratify different conventions. The U.S., for instance, has chosen to ratify neither the Hague/Visby Rules nor the Hamburg Rules, and still adhere to the original Hague Rules. The U.K. on the other hand has chosen only to ratify the Hague/Visby Rules and not the Hamburg Rules. The same applies to most Scandinavian countries.²⁷ Actually, only 5 % of maritime trade is covered by the Hamburg Rules, since none of the major shipowning countries have acceded to these rules.²⁸

The situation is made even more complicated through conflicting laws, as the conventions applicability may depend on, in which country the legal question is raised.²⁹

2.3 The Legal Qualities of the Negotiable Bill of Lading

Irrespective of these differences in the rules relating to the Bill of Lading, there are some core legal qualities that apply to all negotiable Bills of Lading.

As mentioned above, the main original purpose of the Bill of Lading was to create an efficient legal instrument that enabled the owner to sell the goods while in transit. The document is also intended to work as any other transport document in the sense of constituting evidence of the contract of carriage.

²⁵ John F Wilson, *Carriage of Goods by Sea*, p.172

²⁶ Schmitthoff, *The Law and Practice of International Trade*, p.268

²⁷ *Ibid.* p.269, Hannu Honka, *New Carriage of Goods by Sea*, p.12, John F Wilson, *Carriage of Goods by Sea*, p.119

²⁸ the homepage of OECD,

http://www.oecd.org/document/13/0,2340,en_2649_34367_1866253_1_1_1_1,00.html

²⁹ John F Wilson, *Carriage of Goods by Sea*, p.119

The legal qualities and functions of the negotiable Bill of Lading can therefore be summarized as being;

- **a receipt** acknowledging that the carrier has received the goods covered by the contract of carriage,
- **an evidence of the contract of carriage** containing the contractual terms and obligations under which the transport is performed,
- **a document of title**, enabling the sale of goods in transit and the raising of financial credit.³⁰

But before considering these functions in more detail, the term negotiability needs to be looked at.

2.3.1 Negotiability

One difficulty in connection with this thesis is the conceptual differences between different legal systems. The legal terminology used in one jurisdiction may be different from that in another jurisdiction. One example of this is the term “negotiability”.

Negotiability in the English and American sense seems to have a somewhat wider notion than it’s meaning in Scandinavia and Germany. The English and American term refers to both the transferability of the document and the Scandinavian and German meaning of negotiability (described below).³¹

Negotiability in the English and American sense enables the transfer of those rights that the parties intend to pass through the transfer of the document itself. The extent of this negotiability, however, depends on legal jurisdiction. In English law, the Bill of Lading is not quite as “negotiable” as a bill of exchange. The Bill of Lading differs from the bill of exchange in the sense that it does not transfer better title to the acquirer than that of his/her predecessor. For this reason, the Bill of Lading is often referred to as a “quasi-negotiable” document.³²

Due to the interest of circulation of documents, there is no such “tracing” in Swedish law. This means that the rights of the predecessor are of no importance when a person acquires a Bill of Lading in good faith (just as with a bill of exchange in English law). In Swedish law the Bill of Lading is “negotiable” and not “quasi-negotiable” following the English and American terminology.

Hence, when a Bill of Lading is said to be “non-negotiable” this usually refers to the transferability of the document and means that rights are passed

³⁰ Schmitthoff, *The Law and Practice of International Trade*, p.268-269

³¹ Hugo Tiberg, *Legal qualities of transport documents*, p.4

³² Schmitthoff, *The Law and Practice of International Trade*, p.276

by other means than through the transfer of the document itself (following applicable jurisdiction's rules of assignment).

The Scandinavian and German notion of "negotiability" refers to the quality of the claim that can be made against the carrier. More specifically, this means *the carrier's loss of defence against the terms and statements in the Bill of Lading when acquired by a person in good faith*. The carrier is liable towards a bona fide acquirer for the statements in the Bill of Lading.

Following this Scandinavian and German terminology there is a conceptual difference between negotiable and transferable, as they refer to two distinct qualities. In English and American law, as mentioned above, the term negotiable is seen as also meaning transferable. Although there is a conceptual difference following the Scandinavian and German view, it should be kept in mind that the terms negotiable and transferable are intertwined. It is for this reason that "negotiability", following the English and American terminology refers to both the transferability of the document and the Scandinavian and German meaning of negotiability.

According to Hugo Tiberg:

"Matters of importance to the consignee or other holder, concerning which defences relating to the carrier's relationship to previous holders would prejudice the document's viability for negotiation, include the following:

- *Statements regarding the cargo received by the carrier. Therefore the carrier is obliged to a certain extent to examine the cargo and to warrant the manner in which they are stated in the document of carriage even if the statements are derived from the consignor.*
- *Terms of carriage expressed in the cargo document. The carrier is bound by conditions determining what the consignee will be liable in case of damage or loss of the goods.*
- *The carrier's having already performed the contract in relation to someone else. If the cargo has been delivered according to the ostensible title rules, to be considered presently, the carrier is excused, but if in violation of those rules, he will be liable for damages."*³³

Hence, for a document to be transferable it needs to be negotiable. This is so since there need to exist some sort of reliance on the document itself in order for the document to be able to transfer rights. This reliance is offered through its negotiable quality. But a negotiable document, on the other hand, need not always be transferable (as will be shown under section 4).

Knowing that the carrier's loss of defence occurs when the Bill of Lading is acquired by a person in good faith, who is not the original consignor and has

³³ Hugo Tiberg, Legal qualities of transport documents, p.4

reasons to rely on the document, the functions of the Bill of Lading can be looked at in more detail.

2.3.2 The Bill of Lading as a Receipt

It is in the nature of the Bill of Lading to function as an acknowledgment from the carrier stating that certain goods have been received for shipment. Through this function, evidence is offered of what is really shipped.³⁴ This is vital for third parties, for instance a buyer or a bank, who rarely has the possibility to examine the goods while in transit. It is in reliance on this description that the buyer, or the bank, is willing to take part in a financial transaction with the shipper. It is for this reason that the shipper has a right to receive a Bill of Lading (this right will be looked at in more detail below) specifying and individualising the goods by:

“showing among other things –

- a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.*
- b) Either the number of packages or pieces, or the quantity, or weight, as the case may be as furnished in writing by the shipper.*
- c) The apparent order and condition of the goods. “³⁵*

Statements made in the Bill of Lading by the issuing carrier are *prima facie* evidence for received goods. This evidential value is strengthened when transferred to a third party in good faith. Due to the negotiability quality, the document is *conclusive evidence* for third parties relying on the Bill of Lading and the carrier is “estopped” (prevented) from using evidence other than what is stated in the Bill of Lading.³⁶

As an overseas buyer has little opportunity of examining the goods when handed over to the carrier, this strict responsibility plays an important role in modern commerce. The frequently used c.i.f. contracts may call for a Bill of Lading that affirms that the goods are in “apparent good order and condition”. A Bill of Lading issued in accordance with this requirement is called a “clean” Bill of Lading. The UCP 500 (1993 Revision), Art.32, defines a “clean” Bill of Lading in the following way:

³⁴ Grönfors, Sjölagens bestämmelser om gods befordran, p.277

³⁵ The Hague/Visby Rules Art.3, rule.3.

³⁶ John F Wilson, Carriage of Goods by Sea, p.121

*“ A clean transport document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.”*³⁷

Hence, if the Bill of Lading is “clean”, stating that the goods have been shipped in apparent good order and condition, the carrier is deemed to have guaranteed the accuracy of this information to the bona fide holder of the bill.³⁸ Consequently, a Bill of Lading declaring a defective condition of the goods and/or the packaging is **not** “clean”.

A Bill of Lading that is not “clean” to begin with, does not become “clean” when acquired by a person in good faith.

2.3.3 The Bill of Lading as Evidence of the Contract of Carriage

The receipt of the cargo and the delivery of the same to an entitled person at the port of discharge, constitute principal parts of the carrier’s promise of transportation. These obligations make out the core of the carriers undertaking. The promise of transportation arises through both express and implied promises in the contract of carriage. According to Kurt Grönfors a sentence constituting a promise of transportation may state:

*“Shipped on board in (or Received for shipment) in apparent good order and condition unless otherwise stated and to be discharged at the aforesaid port of discharge...”*³⁹

The principal elements of the promise being the acknowledgement of receipt and the promise of delivery to authorized consignee, whether this be against presentation of the Bill of Lading or through the consignee’s identification, presupposes a promise of transportation. In this promise there is an implied duty of care and a responsibility for statements in the Bill of Lading as to the particulars of the shipped goods.

The Bill of Lading serves as the bearer of these obligations and responsibilities, and constitutes the individualized promise of transportation through its terms and conditions, which are all part of the contract of carriage.⁴⁰

The original parties to a contract of carriage are usually the shipper and the carrier. Their agreement is often concluded before a Bill of Lading is issued, and therefore it is more appropriate to talk about the Bill of Lading as being evidence of the contract of carriage than it being the contract itself.

Nevertheless, in relation to third parties it seems correct to call the Bill of Lading, the contract of carriage.

³⁷ Schmitthoff, *The Law and Practice of International Trade*, p.285

³⁸ Paul Todd, *Bills of Lading and bankers’ documentary credits*, p.15

³⁹ Grönfors, *Sjölagens bestämmelser om gods befördran*, p. 280

⁴⁰ *Ibid.* p.280

It should, however, be pointed out that the Bill of Lading is only signed by the carrier, or someone authorized by the carrier.

The terms on the Bill of Lading are often placed on the reverse side of the document and are almost always printed standard clauses.⁴¹ These clauses are to be seen as the terms and conditions of the contract of carriage as long as they comply with mandatory provisions.⁴²

As the terms and conditions may be quite numerous different types of Bills of Lading have developed. By printing the terms on the reverse side of the document, *the long forms* comply with the traditional English contractual principle stating that the terms of the contract should be *within the four corners of the contract*⁴³

In America, a document easier to handle was developed, called *the short forms*. This document contains a summary of the most essential terms and conditions.

To even further simplify the use of the document, some Bills of Lading contain incorporation clauses referring to complete standard terms that are easily accessed by the customer. This procedure has allowed the development of *blank back documents*.⁴⁴

The practice of incorporating general terms and conditions by reference only, raises issues regarding the contents of the contract of carriage. While some countries accept such clauses, some other countries have laws prohibiting general terms from being incorporated into the agreements by reference only.⁴⁵ Irrespective of the method used, one of the main functions of the Bill of Lading is to serve as evidence of the contract of carriage.

Just as stated under heading 2.3.2, the Bill of Lading is *prima facie* evidence between the carrier and the shipper. The evidential value of the document is strengthened when transferred to a third party in good faith. Due to this **negotiability** (using the Scandinavian and German terminology), the Bill of Lading is *conclusive evidence* of the terms and conditions between the carrier and the third party in good faith.⁴⁶

This is natural as the Bill of Lading will usually be the only evidence of the contract of carriage available to the third party. Since the Bill of Lading, for this reason, will be assumed to incorporate all the terms and conditions of the contract of carriage, it will most often contain “ *detailed terms on*

⁴¹ It may be mentioned that in American case law it was said that page 2 of the Bill of Lading does not need to be examined. In response to this the shipping industry marked the pages with the terms and conditions page 1 and the side with the description of the goods as page 2.

⁴² Schmitthoff, *The Law and Practice of International Trade*, p.289

⁴³ also complying, to some extent, to the *parol evidence* rule stating “*that verbal or other extrinsic evidence is usually not admissible to vary or qualify the written agreement*”, *Ibid.* p.61

⁴⁴ Grönfors, *Sjölagens bestämmelser om gods befordran*, p. 281

⁴⁵ Schmitthoff, *The Law and Practice of International Trade*, p.63

⁴⁶ John F Wilson, *Carriage of Goods by Sea*, p.133

matters such as the scope of the duties accepted by the carrier in relation to the carriage and discharge of the cargo, the duties of the person entitled to the cargo in relation to the payment of freight and the rights and duties of the person entitled to the cargo in relation to the discharge and delivery of the cargo."⁴⁷

The "delivery" clause, allowing the release of goods without necessarily requiring surrender of an original Bill of Lading, form a part of the contract of carriage just as any other term in the document. However, the difference in relation to other terms lies in its contradiction of the third function of the Bill of Lading, namely the "document of title" function.

2.3.4 The Bill of Lading as a Document of Title

The Bill of Lading is referred to as a document of title due to its "key function".⁴⁸ Only a person presenting an original Bill of Lading can claim delivery of the goods. This is sometimes referred to as constructive possession of the goods.⁴⁹

This is the reason for which the Bill of Lading can be used to transfer ownership and serve as a security. For obvious reasons, a purchaser of goods in transit will require some assurance that no one else be given the right of disposition over the goods while the Bill of Lading is in his/her possession. Similarly, a bank advancing money in a documentary credit transaction will often require some assurance that the goods cannot be delivered to other parties before the bank has been reimbursed.

Furthermore, under normal circumstances, delivery and transfer of possession of the goods passes property, when this is the intention of the parties. However, while goods are in transit, physical delivery of the goods is impossible for obvious reasons.

In order to make the goods transferable the Bill of Lading is recognised as a symbol of the goods and delivery of the Bill of Lading is seen as delivery of the goods. In other words, the possession of the Bill of Lading is seen as possession of the specific goods that the document refers to.⁵⁰ According to John F Wilson:

"The bill merely "represents" the goods and possession of the bill of lading is treated as equivalent to possession of the goods covered by it – no more, no less."⁵¹

This means that a transfer of the Bill of Lading should only be seen as a transfer of possession and not as a transfer of property. For transfer of

⁴⁷ Karen Troy-Davies, An introduction to Bills of Lading, p.5

⁴⁸ Schmitthoff, The Law and Practice of International Trade, p.289

⁴⁹ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3 p.12

⁵⁰ John F Wilson, Carriage of Goods by Sea, p.136

⁵¹ Ibid. p.136

ownership some further requirements have to be met. The delivery of the Bill of Lading only passes those rights that the parties intend to transfer and the document works as the “key” to the goods.⁵²

Nevertheless, if there is an intention of transferring property this is made possible through this constructive possession. It is this transferability, the documents transfer marking the intended transfer of property, to third parties that makes a document a “*document of title*”⁵³

Since presentation⁵⁴ of the Bill of Lading is required for delivery of the goods, the Bill of Lading can also be said to be a “presentation document” (the term used in Scandinavia and Germany). It seems correct to say that documents that are “presentation” documents can be referred to as “documents of title”. Conversely, a document that is not to a “presentation” document is not a document that “represents” the goods.

The negotiability quality (using Scandinavian and German terminology) is as matter of principle not necessary for the transfer of the goods by the transfer of the document. In other words, the “document of title” function does not depend on, and is distinct from, its **negotiability** quality.⁵⁵ However, adding the quality of negotiability to a document can additionally protect third parties. It is when the document of title function is combined with the negotiability function that the document becomes truly transferable and suitable as security.⁵⁶ In Scandinavia and Germany such documents, representing value, are referred to as “documents of value” (Värdepapper, Wertpapiere).⁵⁷ All negotiable Bills of Lading can be said to possess this quality. However, when looking at non-negotiable Bills of Lading, this quality differs strongly depending on applicable law. This will be discussed under section 4 were non-negotiable Bills of Lading are discussed.

2.3.5 Distinct Features of the Negotiable Bill of Lading

For obvious reasons, the transferability of a negotiable Bill of Lading is wider than that of the non-negotiable Bill of Lading. Non-negotiable Bills of Lading can only transfer title once and this to the named consignee, while negotiable Bills of Lading have no such restrictions.

The Bills of Lading that are transferable to others than the named consignee, namely negotiable Bills of Lading, are “blank”, “bearer”, “to order” or “to assign” Bills of Lading.

“Blank” and “bearer” Bills of Lading need only be delivered, for transfer of rights and liabilities.

⁵² Schmitthoff, *The Law and Practice of International Trade*, p.289-290

⁵³ This is my conclusion after having read the ruling of Rix LJ, *J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (the "Rafaela S")*, [2003] EWCA Civ. 556

⁵⁴ In practice the document needs to be surrendered. This is discussed on page 25.

⁵⁵ Schmitthoff, *The Law and Practice of International Trade*, p.292

⁵⁶ *Ibid.*

⁵⁷ Hugo Tiberg, *Legal qualities of transport documents*, p.5-6

“To order” and “to assign” Bills of Lading are made out to a named consignee. Consequently, these Bills of Lading need both indorsement and delivery for transfer of rights and liabilities.

The holder of an original negotiable Bill of Lading, with, if required, the necessary indorsement, is presumed to be the true title holder and possession of the document gives him/her the right (title) to claim delivery of the goods. For this reason, if a Bill of Lading has been issued and the carrier does not have knowledge of circumstances that should raise suspicions that the presenter of the Bill of Lading is not the true title holder, the carrier is obliged to deliver the goods against the surrender of the Bill of Lading.

In this case, the Bill of Lading identifies the holder presenting the document at the port of discharge as legitimate receiver of the cargo and gives him/her an ostensible title⁵⁸. Through this ostensible title the carrier is protected even if only one Bill of Lading in a set is presented. The carrier is discharged from further obligations and responsibilities when delivering to a person presenting one original Bill of Lading (unless, as mentioned, the carrier has knowledge of a defective title).

In Scandinavia and Germany a document offering this function is referred to as a “legitimation document”.⁵⁹

Normally, presentation would be sufficient to relieve the carrier from further obligations, but the **negotiability** (using Scandinavian and German terminology) of the Bill of Lading makes *surrender* (the words *presentation* and *tender* are terminologies often used with this meaning) of the document necessary. This is a consequence of the strengthened position of a later good faith holder, which prevents the carrier to use the defence of effected delivery.⁶⁰

Furthermore, the fact that Bills of Lading are often issued in sets of several originals complicates the matter since it is sufficient for the right to delivery, to present (surrender) only **one** original at the port of discharge.⁶¹ As there is no requirement to surrender all of the originals, an original not surrendered to the carrier may be transferred to a person in good faith, triggering the **negotiability** quality.

This risk for the carriers is often avoided by a clause in the Bill of Lading stating that “*one being accomplished, the others stand void*”⁶².

⁵⁸ A person with ostensible title is presumed to be the true title holder and is for this reason treated as the real substantive title holder in certain respects. In Nordic and German Law ostensible title is referred to as “legitimation”. Ibid. p.5-6

⁵⁹ Ibid. p.6

⁶⁰ Ibid. p.6

⁶¹ Nevertheless, for control (the right of disposition) over the shipped cargo while in transit, the full set needs to be presented. Banks almost always prescribe the full set of Bills of Lading in documentary credits. Grönfors, Sjölagens bestämmelser om gods befordran, p.276 and p.314

⁶² John F Wilson, Carriage of Goods by Sea, p.158-159

English courts have recognised it as being unreasonable that a carrier acting in good faith when fulfilling its obligation of delivering the goods against the surrender of one original is not discharged from further obligations and responsibilities.⁶³ Hence, it seems that if the carrier acts in good faith when delivering against the surrender of one original, it is not liable for misdelivery.

Following the above-mentioned, the negotiable Bill of Lading is both a “presentation” and a “legitimation” document. In this aspect it is different from the non-negotiable Bill of Lading and the sea waybill.

The delivery clauses that are the subject of this thesis are also incorporated in non-negotiable Bills of Lading and for this reason these documents will also be examined. However, in order to fully understand the characteristics of the non-negotiable Bill of Lading, especially considering the differences in national regulations in connection with the document, it is first necessary to have knowledge of the sea waybill. The sea waybill is a document that has been developed to solve some of the problems associated with the use of Bills of Lading.

⁶³ Ibid. p.159, *Glyn Mills v East & West India Dock Co (1882)*

3 The Sea Waybill

3.1 Historical Introduction to the Sea Waybill

As mentioned above, the document of title function of the Bill of Lading was developed for the purpose of having an instrument that enabled the sale of the goods while in transit. Historically, transport by sea has been relatively time consuming with much opportunity and need for the sale of the goods while in transit.

The documents used in land transport have always lacked the document of title function, basically emanating from the fact that the time used for land transports is, and has been, shorter. Shorter transportation times decrease the need for sale of the goods while in transit, hence a transport document with the document of title function has not been necessary for land transports.⁶⁴

The last couple of decades has seen the speeding up of transports, especially transports by sea. This is a consequence of the “container revolution” in the 1960’s, faster ships, more developed logistics and better communications. These faster sea transports started causing serious “bottle-neck” problems in the ports as goods often arrived before the Bills of Lading, which in turn hindered delivery of the goods and caused expensive delays for the parties involved.

It was especially the carriers that found themselves in tricky situations. As the presentation of the Bill of Lading is required for delivery, the goods had to be stored. Occasionally there was no place to store the cargo except onboard the ship, in which case a cargo owner risked liability for demurrage or damages for detention. Shipowners and carriers also had to keep a schedule and risked losing customers or face liabilities for breach of contract. If the carrier risked delivering without presentation of the Bill of Lading he faced liability for misdelivery. In this case the carrier also risked losing the insurance protection offered by its P&I Club, which could result in a very expensive affair.⁶⁵ The document of title function of the Bill of Lading was obviously causing major problems within the shipping industry.

Furthermore, modern transports are most often of a character not needing the document of title function in the transport document. These transports could for instance be;

“in-house movements of goods between different branches of a multinational firm, the shipment of household or personal effects, and open account trading with long standing and trusted overseas buyers where security is not needed. It must also be remembered that general cargo is rarely sold in transit, while cargo of mixed ownership in containers packed by freight forwarders is never so sold.”⁶⁶

⁶⁴ Grönfors, Sjölagens bestämmelser om gods befördran, p.285

⁶⁵ John F Wilson, Carriage of Goods by Sea, p.161

⁶⁶ Ibid. p.164

Hence, modern shipping had created the need for a transport document that did not have the document of title function. A document lacking the document of title function, the waybill, a document historically used for land transports, offered a solution to the problematic delivery procedure. Hence, the sea waybill was introduced in the middle of the 1970's and it became an attractive alternative to the Bill of Lading⁶⁷. The attractiveness of the document as an alternative was to be found in its legal features.⁶⁸

3.2 The Legal Qualities of the Sea Waybill

The sea waybill, in its present form, can best be described as functioning as a receipt and providing evidence of the contract of carriage. These two characteristics are shared with the Bill of Lading. The difference lies in that the sea waybill lacks the third characteristic of the Bill of Lading, the document of title function.

Hence, the difference between the sea waybill and the Bill of Lading is that the sea waybill does not require presentation of the document as a condition for delivery of the goods. For this reason, it is non-transferable (non-negotiable) in the sense that the document itself does not transfer title.⁶⁹

Instead, the delivery mechanism is construed in the open way. Whoever can identify himself/herself as being the consignee named in the sea waybill, is entitled to delivery of the goods as soon as these have reached the port of discharge. Consequently a sea waybill is neither a "legitimation" nor a "presentation" document.

Taking the discussion under the "document of title" section into consideration (section 2.3.4), it can be said that when a document lacks the "against surrender of the document" element (when it is not a "presentation" document) it consequently lacks the "document of title" function. A document that is not a "document of title" is, in essence, a sea waybill. In other words, as the delivery mechanism is the main difference between the Bill of Lading and the sea waybill, a document lacking the "against surrender of the document" element is usually to be seen as a sea waybill.⁷⁰ For this reason, the question in connection to this thesis is if delivery clauses, construed as the above mentioned, are sufficient requisites for a document's change in character. The "change in character" refers to the change from being a "document of title" when no delivery clause is incorporated, and turning into a sea waybill when such a clause is inserted.

⁶⁷ Other alternative solutions were also developed, some more successful than others. Some proposals aimed at speeding up the transmission of the documentation involved, while others saw specific provisions in the documents dealing with the problems as a more suited solution. Ibid. p.164

⁶⁸ Grönfors, Sjölagens bestämmelser om gods befördran, p.285

⁶⁹ ownership could, however, still be passed through notification to the possessor of the goods. Ibid. p.285

⁷⁰ Ibid. p.285

This question will, however, be discussed a later stage in this thesis (section 5.2).

The construction of the sea waybill makes it no longer necessary to forward the document to the port of discharge, something that often takes longer time than the actual transport. Since the document does not need to be presented at the port of discharge, it is sufficient to telex the contents of the sea waybill between the interested parties.⁷¹

This illustrates one important point, namely that there is no reliance on the document itself. For instance, unlike the Bill of Lading, the right of disposition is not connected to the holding of the document. The person with the right of disposition of the goods in the sea waybill, is the shipper.⁷² This right of disposal lasts until the consignee is notified that the cargo has arrived at the port of discharge, at which point the right of disposal, naturally, passes to the consignee.⁷³

Furthermore, with no reliance on the document there was no need to give the document the quality of negotiability. For this reason, the evidence offered by the document is only *prima facie* and does not strengthen the position of an acquirer in good faith.⁷⁴ The sea waybill is not conclusive evidence of the contract of carriage or its statements as a receipt.

Finally, since the Sea Waybill does not need to be presented for delivery, there is no need to give the document any effect in connection to delivery claims against the carrier. This in turn means that the carrier can use effected delivery as a defence against a holder of a Sea Waybill, while also having the option of using other non-maritime defences.⁷⁵

These above-mentioned legal qualities of the sea waybill do not apply to all non-negotiable documents. The non-negotiable Bill of Lading is often, depending on applicable law, a third type of document with distinct legal qualities.

⁷¹ Schmitthoff, *The Law and Practice of International Trade*, p.282

⁷² In the waybill used in transports by land the right of disposition is tied to the “duplicate”, which is the first copy of the waybill. The shipper retains this copy and the shipper loses his right of disposition when this copy is handed over to someone else. Jan Ramberg, *International Commercial Transactions*, p.70-71

⁷³ Hugo Tiberg, *Legal qualities of transport documents*, p.40

⁷⁴ In Sweden this regulation is found in Sjölagen (1994:1009) 13:59

⁷⁵ *Ibid.* p.40

4 The Non-Negotiable Bill of Lading

“Non-negotiable” Bills of Lading are documents intended for transports not connected with any sale. These documents lacking the “transferability” of negotiable Bills of Lading are called “**Recta**” Bills of Lading (Recta meaning “not to order”) in Scandinavian/German law and in American/English law these documents are referred to as “**Straight**” Bills of Lading.⁷⁶ Both the recta Bill of Lading and the straight Bill of Lading are similar in the sense of designating a named consignee, while also being non-negotiable.

These similarities aside, these documents may have very different legal characteristics. Regulations in connection with these documents vary between different jurisdictions.

Consequently, this gives different criteria for when a Bill of Lading qualifies as a negotiable Bill of Lading or as a recta/straight Bill of Lading. English, American and German law does not require a Bill of Lading that designates a named person as consignee, to expressly state that it is “not to order” or “non-negotiable” for it to become a straight/recta Bill of Lading. Consequently, Bills of Lading made out to named persons only, are “recta” (German law) or “straight” (English and American law) when not qualified by order clauses. In America a straight Bill of Lading has to state that it is non-negotiable⁷⁷. However, the absence of this statement does not affect the character of the document.

In Scandinavia, on the other hand, the Bill of Lading made out to a named person is considered an order Bill of Lading as long as it doesn’t bear an express statement that it is “not to order”. Such a clause (“not to order”) is called a “recta” clause and corresponds to the “straight” term in English and American law.⁷⁸

4.1 The Legal Qualities of the Recta Bills of Lading

When talking about recta Bills of Lading, this thesis concentrates on German and Scandinavian law. Germany and the Scandinavian countries are all subject to the Hague/Visby rules. The application of the Hague/Visby rules is conditioned on the transport document being “*a bill of lading or any similar document of title*”. Conversely, the application can be said to depend on what is required for the transport document to be a Bill of Lading.

In Germany and Scandinavia a Bill of Lading is always a Bill of Lading and the Hague/Visby rules apply irrespective of it being negotiable or recta. These rules include the negotiability quality and are designed to protect

⁷⁶ Hugo Tiberg, Legal qualities of transport documents, p.12-13, p.23-24

⁷⁷ The Pomerene Act, U.S. Code, Title 49, section.86

⁷⁸ Hugo Tiberg, Legal qualities of transport documents, p.13, p.25

third parties.⁷⁹ This protection is also given to the named consignee, as he/she “*is as much a third party as a named consignee under a ‘classic’ bill.*”⁸⁰

Hence, recta Bills of Lading hold the carrier liable for cargo statements in the document and the good-faith consignee is protected in the same way as under a negotiable Bill of Lading. As with the negotiable Bill of Lading and unlike the sea waybill, the recta Bill of Lading, in the hands of a good-faith consignee, is conclusive evidence.⁸¹

A further similarity with the negotiable Bill of Lading is that the recta Bill of Lading requires surrender of the document for delivery of the goods. The document of title function is, hence, present in the recta Bill of Lading and since the document also has the quality of “negotiability” (the Scandinavian and German terminology, giving third parties in good faith a strengthened position) it can be referred to as a “document of value” (Värdepapper, Wertpapiere).⁸²

Nevertheless, in one important aspect the non-negotiable Bill of Lading is different from the negotiable Bill of Lading. Simply presenting the recta Bill of Lading and claiming delivery is not enough. The person claiming delivery needs to identify himself as the named consignee in the document as result of it being “non-negotiable”. The non-negotiable Bill of Lading is not a “legitimation” document.

For passing of title **to the consignee** the transfer of the document is sufficient since it is a document of title. However, since the carrier is not entitled to deliver to a person other than the named consignee, simply handing over the document with the intention of passing property is not enough for transfer to parties other than the named consignee. Regarding other parties that wish to acquire the recta Bill of Lading, only the named consignee can transfer the rights connected with the document. Should the consignee transfer the rights connected with the document, the general rules of assignment apply. Such assignment requires the consignee to be legally entitled to transfer title in the goods and the carrier needs to be notified by the consignee of the passing of property. This notification is required for protection against the seller’s creditors and for priority in a case with competing claims.

Furthermore, all the defences that the carrier could have raised against the previous holder remain effective against the new acquirer. Performed delivery, for instance, remains a valid defence should a recta Bill of Lading already performed upon get into circulation.⁸³

⁷⁹ Ibid. p.27

⁸⁰ *J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (the "Rafaela S")*, [2003] EWCA Civ. 556

⁸¹ Hugo Tiberg, Legal qualities of transport documents, p.28

⁸² Ibid. p.32

⁸³ Ibid. p.30-31, 34

Concluding the above mentioned, the recta Bill of Lading can be referred to as a “presentation” document, but not a “legitimation” document.⁸⁴ This is the main difference compared to the negotiable Bill of Lading, which is both a “presentation” and a “legitimation” document, and the sea waybill, which is neither and also lacks the quality of “negotiability” that strengthens the rights of third parties in good faith.

With knowledge of these legal functions of the recta Bill of Lading, the understanding of possible legal differences between the “recta” and the “straight” Bill of Lading are facilitated. The legal qualities attached to the straight Bill of Lading depend on legal jurisdiction. The American and English view relating to the straight Bill of Lading will now be examined.

4.2 The Legal Qualities of the Straight Bills of Lading

In America, following the legal provision of the Pomerene Act, the “straight” Bill of Lading could be seen as a sea waybill. The fact that the document is marked “Bill of Lading” is without importance. As a result of this, the American “straight” Bill of Lading is not a document of title (consequences hereof, see section 3.2). Just as under a sea waybill delivery can be made to the named consignee upon identification and presentation of the “straight” Bill of Lading is not necessary for delivery.⁸⁵

This view seems to be motivated by the argument that the document is non-negotiable and that the mandatory rules relating to the Bill of Lading, are only needed in order to uphold the Bill of Lading as an negotiable instrument necessary in trade. As a non-negotiable document, it is by its nature a document not intended to be transferred and hence, there is no reason to restrict the doctrine of “private carriage”.⁸⁶ In other words, there is no point in giving the document qualities protecting third parties when it is not to be transferred. It seems that it is only in documents that are intended for sale while the goods are in transit that American law recognizes the need of the “document of title” function.

The English view on the matter of “straight” Bills of Lading has until recently been more obscure. Historically, the dominating view was that a “straight” Bill of Lading was in fact a sea waybill, just as in American law. The English COGSA 92⁸⁷ followed the traditional view by expressly excluding documents that are “incapable of transfer”. It was considered that the “straight” Bill of Lading did not qualify as a Bill of Lading under COGSA 92, due to this legal provision. Instead the document was seen as a

⁸⁴ Schmidt, Huvudlinjer i svensk frakträtt, p.142

⁸⁵ The Pomerene Act, U.S.Code, Title 49, section 89 (b)

⁸⁶ Arnold W Knauth, *The American Law of Ocean Bills of Lading*, p.179. With “private carriage”, carriage without the interference of mandatory regulations is meant. The doctrine of private stipulates that parties freely enter into agreements and that there is no need to list their duties and obligations through different mandatory rules.

⁸⁷ The 1855 Bills of Lading Act was replaced by the COGSA 92

sea waybill functioning as a receipt of goods received and evidence of the contract of carriage.

This regulation was in turn a consequence of the English reluctance to accept that the straight Bill of Lading qualified as a “bill of lading or any similar document of title” under the Hague/Visby rules. By not seeing the straight Bill of Lading as a document of title the mandatory provisions of the Hague/Visby rules could be avoided.⁸⁸

The last couple of years this view has gradually changed and following a recent ruling by the House of Lords in the case *J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (the “Rafaela S”)* it now seems clear that English law considers a straight Bill of Lading a “document of title”.

The House of Lords concluded that Rix LJ in the Court of Appeal had reached the correct conclusion and therefore dismissed the appeal. The ruling follows a trend favouring clarity and uniformity in the regulations relating to international trade. The question in the case was if a straight Bill of Lading was a “document of title” even in the absence of an express provision requiring its production to obtain delivery.⁸⁹

Rix LJ, started by saying that it was the ability to transfer rights, by delivery or endorsement, to third parties that made a document a “document of title”. Although the straight Bill of Lading cannot be transferred several times it has the capability of transferring rights to a third party at least once. This person is the named consignee. A named consignee in a straight Bill of Lading is as much a third party as a named consignee in a negotiable Bill of Lading. The named consignee under a straight Bill of Lading should therefore enjoy the protection of the Hague/Visby rules.

Furthermore he argued, that the original Hague Rules were intended to include “straight” Bills of Lading and that the English COGSA 92 has no effect on this. The COGSA 92, he continued, may even have been construed upon a mistake and English law should not follow domestic concepts, but instead follow international trade regulations. Hence, a straight Bill of Lading is a document of title, offering to the named consignee the same protection as a negotiable Bill of Lading.⁹⁰

Today, presentation of the English straight Bill of Lading is, for above mentioned reasons, a requirement for delivery of the goods and just as in Scandinavian and German law, the Hague/Visby rules apply to all Bills of Lading, straight or negotiable.

Consequently, the English straight Bill of Lading is a document of title just like the recta Bill of Lading and can be referred to as a “presentation”

⁸⁸ Hugo Tiberg, Legal qualities of transport documents, p.24-25, p.27

⁸⁹ *J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (the “Rafaela S”)*, [2005] UKHL 11

⁹⁰ Ibid.

document, but not a “legitimation” document. The American straight Bill of Lading, on the other hand, is neither a “presentation” nor “legitimation” document since it functions as a sea waybill. Unlike the English straight Bill of Lading it is therefore neither a document of title nor a “document of value”.

Hence, the straight Bill of Lading has different legal qualities in North America and in Europe, a fact that has confused legal experts on each side of the Atlantic Ocean. This difference in the legal view relating to non-negotiable Bills of Lading is also one of the contributing reasons, as will be explained below, for the use of delivery clauses in non-negotiable Bills of Lading.⁹¹

While most commonwealth countries are likely to follow the opinion of the House of Lords in *J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (the “Rafaela S”)* there seems to be no change in the American view on straight Bills of Lading.⁹²

Following the discussion above, it has been established that there are three main types of documents with distinctive features in law relating to carriage of goods by sea. The first is the negotiable Bill of Lading. The second document is the recta Bill of Lading and the English straight Bill of Lading, while the third document is the sea waybill and the American straight Bill of Lading.

This confusing situation, as mentioned above, with various views relating to non-negotiable Bills of Lading, is further complicated when delivery clauses are introduced in these documents. The delivery clauses contradict the “document of title” function of the straight Bill of Lading in some legal jurisdictions (England, Germany and Scandinavia) while they are in accordance with the qualities of the straight Bill of Lading in other legal jurisdictions (America).

Understanding why these various views cause confusion and possibly unnecessary litigation, the disposition of the remaining part of this thesis will now be explained in short.

The next section of this thesis will discuss why certain carrier might want to introduce such clauses in their Bills of Lading and how this might affect the character of the documents. This will involve a discussion concerning the significance of using and receiving certain documents for parties involved.

⁹¹ Grönfors, *Sjölagens bestämmelser om godsbefordran*, p.294

⁹² Discussion with Professor Hugo Tiberg. Courts in commonwealth countries with common law legal systems often follow the opinions of the House of Lords.

5 The Effects of Delivery Clauses in Bills of Lading on the Character of the Documents

5.1 The Practice of Using Delivery Clauses in Bills of Lading

Seen from the carrier's point of view, the ideal situation is when carriage is performed using a sea waybill. Both liabilities and delays can be avoided through the use of a document in which the document of title function is absent. However, customers of the carrier will often insist on using certain documents, such as the Bill of Lading.

The shipper or the consignee might intend to resell the cargo while in transit and will for this reason want to use a negotiable Bill of Lading.

Also, the Bill of Lading is often considered the document that provides best security⁹³ for commercial parties. It is usually the purchasing agreement between the buyer and the seller that lays the contractual foundation for which document that is to be employed in the transportation of the goods. For this reason, the Bill of Lading with the document of title function is the document that will be used most frequently in documentary credit Operations.

If a buyer and a seller have agreed upon the use of a certain document, then the documentary credit operation will have to reflect this and, hence, it will be crucial for the seller/shipper that such a document is issued by the carrier. The most frequently used term in sea-borne export trade is the c.i.f. contract. The contract of sale will contain a c.i.f. term ("cost, insurance, freight") indicating that the cost of freight and insurance is included in the price for the buyer. The seller under a c.i.f. contract, normally⁹⁴, needs to tender a document of title that transfers rights and gives evidence of the seller's performance (shipping goods that are in accordance with the contract of sale), in order to fulfil his/her obligations towards the buyer. Consequently, the seller will need a Bill of Lading with the document of title character since this document performs these functions.

As shown, there might be several reasons why a customer of the carrier might insist on using a Bill of Lading instead of a sea waybill. However, compared to the sea waybill, the Bill of Lading involves greater risks for the carrier. It is the delivery mechanism of the document of title, possibly causing expensive delays, and it's triggering of the mandatory provisions in the Hague/Visby rules that involves extra liabilities for the carrier.

⁹³ This commercial thinking will be discussed under section 8.1.1

⁹⁴ " *The strict form of c.i.f. contract may, however, be modified. A provision that a delivery order may be substituted for a bill of lading or a certificate of insurance for policy would not, I think, make the contract be concluded on something other than c.i.f. terms*" Lord Porter in *Comptoir d'Achat v. Luis de Ridder; The Julia [1949]*, Schmitthoff, *The Law and Practice of International Trade*, p.29,

Should the carrier disregard the delivery mechanism of the Bill of Lading and deliver without presentation of the Bill of Lading, the carrier is guilty of a fundamental breach of contract. This will consequently lead to loss of all protection offered by exception and limitation of liability clauses.

Alternatively, by transporting cargo using documents that are not documents of title, risks can be minimized.

One way of achieving this could be by refusing to ship cargo using a Bill of Lading. This, however, is not an option for the carrier. Lex Mercatoria and the rules (conventions and national legislation) construed on these principles imposes an obligation on the carriers to issue a Bill of Lading on shipper's demand, after receiving the goods. In the Hague/Visby rules the issue is provided for in Art 3 rule 3:

*"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading..."*⁹⁵

This is, nevertheless, only an obligation if the Hague/Visby rules are applicable. On page 11-12 above, the requirements for application of the Hague/Visby rules (Art X) are described. The wording of alternative b) (*"the carriage is from a port in a contracting State"*) is, however, ambiguous. If it is *"the carriage"* and not the *outward shipment* that triggers the application of the Hague/Visby rules, then the carrier could simply refuse to issue a Bill of Lading and instead choose to issue a document that is not a document of title. This, since the Hague/Visby rules would not apply before actual carriage.

Nevertheless, the interpretation that seems most rational is that the mandatory obligation for the carriers to issue a Bill of Lading is in respect of *outward shipments*, since this appears to be the objective of the Hague/Visby rules.⁹⁶

Taken the ingenuity of the carriers into consideration, there might still be ways in which the carrier might evade this obligation, for instance by refusing to receive the cargo from customers that the carrier suspects will insist on Bills of Lading.⁹⁷

Another more reasonable option is to simply charge extra for the issue of a Bill of Lading. This compensates the carrier for the greater risks involved in a shipment using a Bill of Lading.

However, both above mentioned alternatives could consequently deter customers, sending them to competing carriers.

Another more shrewd way of achieving this risk-reallocation is by depriving a document of its document of title function. In this way both liabilities and litigations can be avoided, while pleasing customer's demands. The idea is that the document will appear to be a Bill of Lading yet it will function as a

⁹⁵ John F Wilson, Carriage of Goods by Sea, p.192-193

⁹⁶ Ibid, p.174

⁹⁷ This might interfere with competition law.

sea waybill since the carrier will have a contractual right to deliver to whomever he/she reasonably thinks is entitled to the goods, or if it is a non-negotiable Bill of Lading to the named consignee, without requiring presentation of the Bill of Lading.

A document that is not a “presentation” document is not a document of title and, hence, it is a sea waybill.

It is probably for this reason that Maersk, one of the largest shipping companies in the world, introduced clauses in their Bills of Lading allowing the carrier to give delivery of the goods without necessarily requiring surrender of an original Bill of Lading.⁹⁸ It seems that the purpose of these clauses are to deprive Bills of Lading of their document of title function and thereby limit delivery liabilities. By issuing a document that is not a document of title the mandatory regulations of the Hague/Visby rules are also avoided.

As was the case in the years before the introduction of the Hague rules, the carriers are trying to limit their liabilities and reallocate certain risks to other parties through their greater bargaining power. The Hague rules, however, only aimed at dealing with liability clauses that were connected with the loss of, or damage to, the goods. Consequently the mandatory rules of the Hague rules do not apply to these “delivery” clauses. This is a fact which Maersk took advantage of.

According to Maersk representatives, however, the practice of delivery clauses in **straight** Bills of Lading was for the purpose of avoiding liability resulting from the legal difference in the view on straight Bills of Lading.⁹⁹ A straight Bill of Lading may require delivery without presentation in America, while presentation is a condition for delivery in Scandinavia, Germany and the United Kingdom. The process, in which the English view relating to straight Bills of Lading was changed, brought uncertainty to carriers. This uncertainty related to whether a straight Bill of Lading was a document of title. It is only very recently that the judgement from the House of Lords (in the case “Rafaela S” as mentioned under section 4.2) established that a straight Bill of Lading is a document of title within the meaning of the Hague/Visby rules.

This uncertainty and the extra liabilities involved when delivering without presentation, resulted in the use of delivery clauses in non-negotiable Bills of Lading. Even P&I Clubs encouraged carriers to use such clauses so that their club cover would not be prejudiced.¹⁰⁰ The reason for including delivery clauses is that these may protect the carrier from misdelivery liability when the non-negotiable Bill of Lading is considered a document of title.

⁹⁸ ICC, Summary of discussions, Document 470/1038, 5 October 2004, p.3

⁹⁹ Discussion over the phone with representatives from the legal department of Maersk

¹⁰⁰ The homepage of the P&I Club, SKULD,
http://www.skuld.com/templates/page_957.aspx

Interestingly enough, delivery clauses have also been incorporated in the negotiable Bills of Lading without any such need. For this reason, it seems that carriers intended to use these delivery clauses as their own solution to the extra risks and liabilities associated with the document of title function. Furthermore, this argument relating to non-negotiable Bills of Lading does not deprive the customer of his/her right to receive a document of title. For this reason, the following section of this thesis examines in what delivery clauses affect Bills of Lading that have the document of title character.

5.2 The Effects of Delivery Clauses on Bills of Lading

5.2.1 Interpreting/Construing the Contract of Carriage

The documents that are the subject of this thesis are ambiguous since the inserted delivery clauses contradict the document of title character that the documents have under normal circumstances, i.e. when the documents do not incorporate such clauses. For this reason, there needs to be an interpretation of their characteristics, more precisely if they are Bills of Lading or sea waybills. The legal question will be what significance that should be given to delivery clauses when the documents also indicate that they are Bills of Lading.

The effect of the discussed delivery clauses on the character of the Bill of Lading needs to be looked at in the same way as other contracts, since courts construe/interpret¹⁰¹ the contract of carriage just as any other contract. It should be kept in mind that this thesis gives no definite answers to this legal question. It merely aims at throwing light at arguments that support different legal views.

Courts, when deciding on issues like this usually try to find the *common intention* of the parties to the contract. The common intention is determined subjectively¹⁰² in civil law countries, while this is done objectively¹⁰³ in common law countries. Both legal systems have in common that when deciding on the common intention, the wording of the contract is examined in connection to its object and context. Individual clauses and circumstance between the parties construing the contract are examined as to give the document its most rational meaning.¹⁰⁴

The delivery clauses discussed in this thesis were printed in large letters on the “front” side of the documents. Nevertheless, delivery clauses can also be stamped on the document or incorporated in the small print on the “reverse”

¹⁰¹ Construed in common law terminology and interpreted in civil law terminology, Professor William Tetley, *Seven Rules of Interpretation (Construction) of Bills of Lading*, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/>

¹⁰² What the parties really intended.

¹⁰³ What a reasonable person would have intended had he been in the position of the parties to the contract.

¹⁰⁴ William Tetley, *Seven Rules of Interpretation (Construction) of Bills of Lading*

side of the document. Furthermore, the wording of the delivery clause is sometimes less clear.

In order to give a comprehensive coverage of the subject of delivery clauses, these three alternative situations will also be included in the analysis.

5.2.2 The Common Intention

Interpreting a contract is only necessary when the contract is ambiguous and the document gives no clear guidance as to the common intention of parties. When this is the case, “the parol evidence rule” in Anglo-American law can be departed from. This principle states that no extrinsic evidence is admissible to alter the meaning of a contract¹⁰⁵.

In Scandinavian law we do not have the “parol evidence rule”, however, the expressed contractual content has very strong evidential value.¹⁰⁶

Hence, the ambiguity of contract means that attention can be given to what the parties reasonably intended and perceived when entering into agreement. This takes into consideration how they acted before, after and in connection with the issuance of the document. Professor William Tetley refers to this as the fifth rule of interpretation, the rule regarding *surrounding circumstances*. In his article, *seven rules of interpretation (construction) of Bills of Lading*, Tetley refers to the case *Francosteel Corporation v. M.V. Pal Marinos* where Carter D.J. stated:

*"To resolve the ambiguity in the bill of lading, the court must first turn to the extrinsic evidence offered by the parties regarding their intent in signing it."*¹⁰⁷

Since the carrier itself has chosen to classify the document as a Bill of Lading by giving it the heading “Bill of Lading”, following the instructions of the shipper, it could be argued that the common intention was that a Bill of Lading would be used. Consequently, the document should be given the significance of triggering the rules connected to such a document. In other words, if it can be shown that the commercial purpose of the document was that the transport should be covered by a Bill of Lading and that this was the common intention of the parties, seen in the context of all surrounding circumstances, then such a document was in fact issued, with all inconsistent clauses being invalid. In the case *Sze Hai Tong Bank Ltd. v. Rambler Cycle. Ltd*, Lord Denning stated in connection with a “before and after”¹⁰⁸ delivery clause that;

¹⁰⁵ Schmitthoff, *The Law and Practice of International Trade*, p.61

¹⁰⁶ Bert Lehrberg, *Avtalstolkning*, p.28

¹⁰⁷ William Tetley, *Seven Rules of Interpretation (Construction) of Bills of Lading*, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/> *Francosteel Corporation v. M.V. Pal Marinos*, 885 F.Supp. 86 at p. 88, 1995 AMC 2327 at p. 2331 (S.D.N.Y. 1995)

¹⁰⁸ This clause aims at exempting the carrier from all liabilities after the goods have been discharged from the custody of the carrier. The court considered this clause as having an extreme width for which it would be unreasonable to give effect to the clause. It should be

“if such an extreme width were given to the exemption clause it would run counter to the main object and **intent** of the contract. For the contract..., has, as one of its main objects, the proper delivery of goods by the shipping company, “unto order or his or their assigns,” against production of the bill of lading... No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause...”¹⁰⁹

Also, in Swedish law any provision in a contract of carriage, which is inconsistent with the mandatory provisions of the law relating to Bills of Lading and sea waybills, is considered invalid¹¹⁰. A clause that diverges from the delivery mechanism of the Bill of Lading is consequently invalid. This, however, presupposes that the document is a Bill of Lading to begin with¹¹¹, or that there are considerations that trigger the rules connected to such a document, including the delivery mechanism. The question analysed here is whether the document is a Bill of Lading or a sea waybill. If the document is a Bill of Lading then just as Lord Denning states no court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause.

The train of thought, namely that rules can be triggered by the common intention, coincides with the case of *Pyrene Co LTD v Scindia Navigation Co*¹¹² where the Hague/Visby Rules were found applicable even though no Bill of Lading had been issued. The common intention of parties of the contract of carriage was that the transport be covered by a Bill of Lading and for this reason the Hague/Visby rules took effect.¹¹³ Nevertheless, following this legal view there is no reason why the document should only make the Hague/Visby rules applicable. The distinct delivery mechanism of the Bill of Lading should also apply to non-negotiable Bills of Lading (not the American straight Bill of Lading) if this was the common intention of parties. Hence, any clause purposely incorporated by the carrier, contradicting the intended commercial purpose of the document, should be given no effect.

Alternatively, should it be proven through extrinsic evidence that the parties agreed upon the use of a sea waybill, then the delivery clause should be considered valid.

Furthermore, if the shipper has received the Bill of Lading without making any remarks concerning the delivery clause it seems as if he/she has

pointed that not even under a sea waybill is such a clause reasonable. The carrier needs at least be liable for delivering to someone else than the consignee.

¹⁰⁹ My italics, *Sze Hai Tong Bank Ltd. v Rambler Cycle. Ltd.*, [1959] 2 Lloyd's Rep. 144; [1959] A.C. 576

¹¹⁰ Sjölagén (1994:1009) 13 kap 4 § in relation to 13 kap 54 §

¹¹¹ This will be explained in more detail under section 5.2.5. The prevailing view is that the classification of a contract depends on the contract read as a whole.

¹¹² *Pyrene Co LTD v Scindia Navigation Co*, [1954] 2 Q.B. 198

¹¹³ John F Wilson, *Carriage of Goods by Sea*, p.173

accepted its presence on the document. It will be difficult to argue that this delivery clause is not part of the contract of carriage.¹¹⁴

Finding the common intention by showing what the parties reasonably intended is difficult and often parties claim to have perceived the agreement differently.

For this reason, it is considered that the **objective rules** of interpretation relating to **content** of the contract of carriage, gives the holder of the document a safer position. This view relies on the idea that as long as nothing else can be shown, the expressed content of the document is presumed to be the intention of the parties.

Courts following this view when interpreting a contract use rules and principles that do not always relate to the common intention of the parties. This is for the purpose of having some unity and predictability in the legal system.¹¹⁵

Also, the distinct features of a contract of carriage have to be taken into consideration when deciding on how to interpret Bills of Lading incorporating delivery clauses.

The traditional contract involves two persons, while the contract of carriage usually involves three persons. In carriage of goods by sea this is the shipper, the carrier and the consignee.¹¹⁶ The rules making Bills of Lading conclusive evidence in the hands of third parties in good faith build on the idea that the consignee needs to be protected from unwanted surprises. In other words, the consignee needs to know what is binding for him/her and it is for this reason that the Bill of Lading **is** the contract of carriage between him/her and the carrier. In his/her case, the relationship between the shipper and carrier will be of less importance.

Hence, when the common intention of the original parties cannot be shown, or when it is of less or no significance, the contents of the document needs to be looked at objectively when deciding on its classification.

Such an interpretation will take into account the wording of the document and examine what a reasonable man (“bonus pater familias”) in the position of the parties to the contract would have perceived to be the correct meaning of the contract. An objective analysis of this legal issue will involve an examination of the relevance of using the term “Bill of Lading” as heading in the contract of carriage.

5.2.3 The Term “Bill of Lading” as Heading

What separates a Bill of Lading in relation to a sea waybill is its delivery mechanism. According to Kurt Grönfors¹¹⁷ a reference to the distinct delivery mechanism of the Bill of Lading is a *necessary condition* for the

¹¹⁴ *NJA 1919 s.35, NJA 1980 s.46*, Bert Lehrberg, *Avtalstolkning*, p.53 and 56

¹¹⁵ Bert Lehrberg, *Avtalstolkning*, p.49

¹¹⁶ Grönfors, *Sjölagens bestämmelser om gods befordran*, p.302-303

¹¹⁷ Grönfors, *Sjölagens bestämmelser om godsbefordran*, p.278

document to be classified as a Bill of Lading. If this reference is made, the regulations in respect of the Bill of Lading are applied, making the surrender of the document necessary for delivery. According to Swedish law¹¹⁸, incorporating in the document either the term "Bill of Lading" or the undertaking to deliver only against surrender of the document, can make this reference. It is, hence, sufficient that the document's headline states "Bill of Lading" or that it in the document is stated that it is a "Bill of Lading". Should the term "Bill of Lading" be absent in the document, it will still be seen as a Bill of Lading as long as there is an undertaking to deliver only against surrender of the document.

In the following analysis, the results of the analysis in this thesis will partly depend on the significance that is given to the term "Bill of Lading" when used as heading in a contract of carriage. If much significance is given to the heading, then a clause contradicting the heading will be given less significance in the interpretation of the contract of carriage. Conversely, if the heading "Bill of Lading" is given less significance, then the delivery clause will play a more important role.

5.2.4 Contradicting Components of the Contract

One objective legal angle from which the issue of delivery clauses can be discussed is that these express provisions are anomalies in the Bill of Lading, since they expressly contradict the normally intended effect of using the term "Bill of Lading". In other words, Bills of Lading incorporating delivery clauses could be seen as having two clauses that contradict each other, one stating that delivery is conditioned on the surrender of the document (the term "Bill of Lading"), while the other states that delivery is allowed without surrender of the document (the delivery clause). The contract could alternatively be said to contain contradicting components.

When this is the case, and the contract does not contain a priority clause stipulating which of the two components that should be prioritised in the case of an interpretation of the agreement, both components cannot be applied and one of the components have to be disregarded. One of the clauses has to be prioritised. For this reason, there has developed "rules of priority", giving guidance for which components of the contract that should be prioritised.

One rule of interpretation (rule of priority) is that handwritten words are given precedence over printed words.¹¹⁹ Bills of Lading are usually standardized agreements that are construed by the carrier in advance. The probability of the court considering the delivery clause valid is increased if the clause is stamped on the "front" side of the document. Stamped clauses could be said to take precedence over printed clauses since

¹¹⁸ Sjölagen (1994:1009) 13:42 p.2

¹¹⁹ William Tetley, Seven Rules of Interpretation (Construction) of Bills of Lading, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/>

they are incorporated in the document at a later stage than the printed clauses.

Furthermore, if one the components is printed and the other component is stamped on the document, then it could be argued that the stamped component is a special component of the contract. For this reason, stamped delivery clauses are possibly not considered part of the standard contract in general. An analogy can here be made to the principle of *lex specialis*, which gives priority to more special regulations in relations to more generally construed rules.¹²⁰ Hence, the stamped delivery clause can be seen as a special clause that supersedes any printed term indicating that the document is a Bill of Lading. Such a document will be classified as a sea waybill.

However, if both components are printed on the document, the "*contra proferentem*" rule¹²¹ seems relevant. Following this rule, a contract is interpreted against the interest of its author (drafter) when there is doubt concerning the common intention of the parties and more than one meaning can be given to it.

If two clauses are inconsistent with each other, then the interpretation will be against the interest of the carrier since the Bill of Lading is a form of standard contract issued by the carrier. The carrier is, hence, responsible for the ambiguity and could have avoided the situation by issuing a document that is more clear in its meaning.

Seen from the view that a document with the heading "Bill of Lading" incorporating a delivery clause on its front side has two inconsistent clauses, it seems that following this rule, the document should be seen as a Bill of Lading since it is against the interest of its drafter, the carrier. In other words, the carrier gains from the document being a sea waybill and for this reason it will be considered a Bill of Lading. Consequently, where the Bill of Lading classification is not against the interest of the carrier, a different interpretation could be made.

This view gives significance to the heading "Bill of Lading" in the sense of it being equivalent to a clause stating that delivery is conditioned on the surrender of the document. Since both, the heading "Bill of Lading" and a clause expressly stating the distinct delivery obligation, can be used to perform the same function, namely triggering the rules relating to Bills of Lading, this seems as a logical argument.

The court could also take into account the character of the delivery clause. In Swedish law exemption clauses are considered as "surprising and burdening" clauses. For this reason it is considered that there are specific reasons for prioritising the component of the contract that is not surprising or burdening.

¹²⁰ Bert Lehrberg, *Avtalstolkning*, p.142

¹²¹ William Tetley, *Seven Rules of Interpretation (Construction) of Bills of Lading*, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/>

Also, one argument that is held out is that nobody can commit himself/herself to an obligation and thereafter try to exempt himself/herself from the same.¹²² This principle that responsibility for a promise or undertaking cannot be avoided by an exemption clause is illustrated in the Swedish case, *NJA 1971 s.36*. In this case, the court gave no effect to an exemption clause on the “reverse” side of a receipt from a parking place since it was inconsistent with a clause on the “front” side stating that the vehicle would only be released against the receipt, after parking fees had been paid.

One final argument following this line is that exemption clauses have to give way if they collide with specific legal regulations that have been incorporated into the contract.¹²³ If the regulations regarding the Bill of Lading have been incorporated into the document by using the term “Bill of Lading” as heading, which according to Swedish law is sufficient for triggering the specific legal characteristics of the Bill of Lading, any clause that is inconsistent with these rules is ineffective.

ICC Deutschland seems to have considered this as one of the possible effects. In a document commenting the effects of delivery clauses Hanfried Poensgen (ICC Deutschland) states:

*“This document of title character would, however, be abolished, if the carrier by whom or on whose behalf such bill of lading is issued reserves the right to deliver the goods without surrender of an original bill of lading. **Therefore any clause to that effect is invalid where local law requires the surrender of an original bill of lading, or may be, in other jurisdictions, leading to the interpretation that a so claused transport document is no bill of lading.**”¹²⁴*

Following this legal argument the document that incorporates a delivery clause and is referred to as a Bill of Lading, is in fact a Bill of Lading and functions as a document of title.

5.2.5 “Bill of Lading”- a Presumption of its Classification

An alternative legal view is if the heading “Bill of Lading” is given a lesser significance when interpreting the document. That is to say that the term “Bill of Lading” as heading does not play a definite role and it only functions as a presumption of its classification, a presumption that can be departed from should it be correct with respect to the document in its entirety. This view does not see the term “Bill of Lading” as a clause requiring surrender of the document for delivery.

¹²² Bert Lehrberg, *Avtalstolkning*, p.143

¹²³ *Ibid.* p.143-144

¹²⁴ My italics, Comments of ICC Deutschland on the two ICC statements on” Terms and Conditions on Bills of Lading” of 19th Jan. and 19th Feb.2004, Document 470/1023

In the absence of an express clause making the document a document of title, assuming that it is the content of the document read as a whole that gives it a certain character, then following Tetley's second rule of interpretation, a strictly construed exemption rule¹²⁵, such as the discussed delivery clauses, could be given effect, making the document a sea waybill.

The second rule states that exemption clauses in contracts of carriage should be interpreted restrictively. In Swedish law this rule is referred to as the "rule of unclarity" (oklarhetsregeln) and means that, when a clause is unclear or vague in its wording, the interpretation is made against the interest of the draftsmen (*in dubio contra proferentem*, as mentioned above) of the contract¹²⁶. Since exemption clauses are considered "surprising and burdening", particularly high requirements of clarity are expected of them. This is why they are interpreted restrictively.¹²⁷

If, however, the meaning of the exemption clause is clear and not ambiguous in its wording, then the clause should be given effect since this "must have been within the reasonable contemplation of the parties when they included the clause in their contract"¹²⁸. That this is the effect of the delivery clauses seems to be the prevailing view. A document that allows delivery without presentation of the document, is not a document of title. Such a document is a sea waybill.

Delivery clauses are, nevertheless, not always strictly construed. One example of this is the "if required" delivery clause. This clause states:

*"If required by Carrier, this Bill of Lading duly endorsed must be surrendered in exchange for Goods, or If required by the Carrier, one of the original Bills of Lading must be surrendered duly endorsed in exchange for Goods or Delivery Order."*¹²⁹

This clause could, just as the more strictly construed delivery clauses, be read as stating that the carrier may release the goods without necessarily requiring surrender of the document. The effect of this clause is, however, more dubious.

Since exemption clauses are read restrictively and it is not expressly stated that the goods can be released without necessarily requiring surrender of an original Bill of Lading, this clause could, especially considering the presumption emanating from the heading "Bill of Lading", be considered as a Bill of Lading, in which case the carrier will be liable for misdelivery.

¹²⁵ In English law the Unfair Contract Terms Act 1997 prohibits many exemption clauses from being effective, mostly in consumer contracts.

¹²⁶ Ibid. p.115

¹²⁷ Ibid. p.125

¹²⁸ William Tetley, Seven Rules of Interpretation (Construction) of Bills of Lading, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/>

¹²⁹ <http://www.forwarderlaw.com/Feature/blclaus2.htm>

Yet, there is still the possibility that a court would consider such a clause valid. One should not disregard this possibility. In that case the document should be classified as a sea waybill.

A delivery clause can also be inserted in the small print on the reverse side of the document. When the discussed delivery clauses first appeared on the “front” side of Bills of Lading the carriers pointed out that these clauses had traditionally appeared on the “reverse” side of the documents, in the small print. Because the clause had simply been reallocated from one side of the document to another, it was argued that the clause should not be considered controversial. Whether or not this is true, will not be examined in this thesis. Nevertheless, it seems relevant to discuss the effects of delivery clauses in the small print on the “reverse” side of the Bill of Lading.

Courts are generally hesitant to give such small print clauses effect, since they often fail to give reasonable notice of their terms under the contract of carriage. Tetley illustrates the significance of the carrier using a clause that gives the shipper adequate notice of its terms, by referring to the case *Crooks v. Allan*¹³⁰. In this ruling it was held that:

*"The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. If a shipowner wishes to introduce in his bill of lading so novel a clause as one exempting him from general average contribution-... he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it."*¹³¹

Also, in German law, the Bundesgerichtshof “has ruled that bill of lading clauses which can only be read with the aid of a magnifying glass do not form part of the bill of lading contract even if they are standard clauses in the trade”.¹³²

Nevertheless, the legal situation is that some courts give validity to such clauses while others do not. For this reason, it is hard to make predictions concerning the validity of clauses in the small prints of documents. English law considers a signed contract as binding whether or not the parties involved have read the terms. However, if the clause is unusual the “red hand” rule seems to apply. This rule states that “*the more unusual a clause is, the greater the notice which must be given of it*”.¹³³ A delivery clause, depriving the Bill of Lading of its document of title function could be considered highly unusual.¹³⁴

¹³⁰ *Crooks v. Allen* (1879) 5 QBD 38

¹³¹ William Tetley, *Seven Rules of Interpretation (Construction) of Bills of Lading*, <http://www.mcgill.ca/maritimelaw/maritime-admiralty/sevenrules/>

¹³² *Ibid.*

¹³³ *J Spurling Ltd v Bradshaw*, [1956] 1 W.L.R. 461, Schmitthoff, *The Law and Practice of International Trade*, p.63

¹³⁴ The report by the UNCTAD secretariat, *The use of transport documents in international trade*, states that because the delivery clause is highly unusual it is unclear whether or not

Similar reasoning seems to apply in Swedish law. Since the delivery clauses are exemption clauses they may, at least in Swedish law, be considered surprising and burdening clauses. Consequently, for its validity, it can be expected of the clause that it gives especially good notice of its content to the parties affected by it. If the clause is hidden on the “reverse” side and not easily seen, it is most likely invalid. In the Swedish case, *NJA 1975 s.545*, the court stated that a clause in a standardised agreement, placed among several others in the fine prints, could possibly be disregarded if it was burdening for the party affected by it and the author of the agreement had failed to call the other party’s attention to it.¹³⁵

For this reason, considering that the term “Bill of Lading” is used as heading and, consequently, that there is a presumption of the document being a Bill of Lading, it seems most rational to consider an exemption clause such as the delivery clause in the small prints on the “reverse” side of the document, as being ineffective. Thus, the document remains a Bill of Lading.

5.3 Conclusion- Change in Character?

Concluding the discussion concerning the effects of delivery clauses on the character of negotiable and non-negotiable Bills of Lading, such a clause could be said to have one of two effects. Either the clause is considered invalid, the document being a Bill of Lading, or the carrier has issued a document that has the character of a sea waybill.

It should be kept in mind that if the delivery clause changes the character of the document into a sea waybill, then the shipper has a right to demand a Bill of Lading that does not incorporate such a character changing delivery clause, following Art 3 rule 3 of the Hague/Visby rules.

The common intention of the parties is often not easily found and is generally only relevant for the relationship between the shipper and the carrier.

Nevertheless, should it be shown that the common intention of the shipper and the carrier was the use of a certain type of document, then this should generally be applied between these parties. Most often, however, the character of the document will be interpreted objectively, only taking into consideration the content of the document.

When this is the case, the prevailing view seems to be that a Bill of Lading is deprived of its document of title character, whether negotiable or non-negotiable, if a strictly constructed delivery clause is inserted on the “front” side of the document. This gives adequate notice and any person examining

courts will give the clause effect. This statement seems to refer to clauses on the “front” side of Bills of Lading, as well as clauses on the “reverse” side. p.33

¹³⁵ Bert Lehrberg, *Avtalstolkning*, p.54

the document will not fail to see that the term states that delivery is allowed without the surrender of the document. Such a “visible” term will break the presumption of it being a Bill of Lading.

If, on the other hand, a delivery clause is more vague in its formulation (the “if required” clause) it does not necessarily change the character of the document, since exemption clauses are interpreted restrictively. The document containing a vaguely formulated delivery clause may, hence, remain a Bill of Lading.

This applies, even more so, if the delivery clause is inserted in the small print on the “reverse” side of the document. Such a clause does not seem to break the presumption of the document being a Bill of Lading.

There is also the possibility that the heading “Bill of Lading” is seen as a clause that contradicts the discussed delivery clause. Following this view, the *"contra proferentem"* rule seems to prevent the Bill of Lading from changing in character.

There are also other reasons for not giving effect to the delivery clause if the document is considered as having contradicting components. One is the idea that an exemption from a specific promise cannot be made and another is that local law requiring presentation for delivery is triggered, making the delivery clause invalid.

Nevertheless, should this delivery clause be stamped on the document it is most likely to be considered a special clause. This delivery clause will then override any printed clause, making the document a sea waybill.

Hopefully the reader will at this point have an understanding of how a delivery clause in a Bill of Lading could come to affect the character of the document. As explained above, such a change in character is desirable for the carriers.

The American straight Bill of Lading will not be affected by a delivery clause since it functions as a sea waybill. The English straight Bill of Lading, on the other hand, will possibly be deprived of its document of title function and, consequently, change character if it incorporates a delivery clause. The same applies to recta Bills of Lading and negotiable Bills of Lading.

However, as the carriers stand to gain from such a practice, the banks are placed in quite a problematic situation. Delivery clauses in Bills of Lading cause uncertainty regarding the question of how banks should relate to documents that incorporating such clauses. In order to fully understand the reasons for, and the effects of, this uncertainty, the procedure and the rules behind documentary credits, need to be discussed in more detail. Hence, the next section of this thesis is focused on documentary credits.

6 Documentary Credits

6.1 Basic Understanding of the Documentary Credit Operation

6.1.1 The Development of Modern Long Distance Sales

Historically, before the nineteenth century, international trade was practiced by the buyer travelling to the country of the seller. The sellers then brought their goods to the buyer who used to stay in proximity of the ships. By the buyer and the seller actually meeting in person, the buyer could inspect the goods while the seller could receive payment.

Just as in domestic sale of goods the *Zug um Zug* principle could be upheld. It was then the buyer that arranged for the transport of the goods. This was natural as property and possession had already passed to the buyer.¹³⁶

With the introduction of modern communications (radio, telegraph and efficient postal services) and, modern financial and insurance establishments, the buyer was enabled to complete his transactions from a distance. Consequently, it became more convenient for the seller to make the arrangements for the transport of the goods involved in the sale. Accordingly, it became common practice for the seller to be the shipper of the goods.¹³⁷

However, this modern and efficient international trade also created some conflicting issues. The reason for this was the deviation from the *Zug um Zug* principle.¹³⁸ In modern international trade it was no longer a practical necessity for the buyer and the seller to actually meet and exchange performances. This, although convenient, created some conflicting issues between the seller and the buyer.

6.1.2 Conflicting Issues Between the Buyer and the Seller

One obvious difficulty of long distance transactions is that the physical inspection of the goods bought is not possible since the buyer is not present when the goods are shipped. A buyer paying before inspection of the goods, takes a risk. The risk is the uncertainty of not knowing in what condition the goods are shipped, if shipped at all. For this reason the buyer will be in a better position if he/she pays at a later stage.¹³⁹ This needs not be just for this above-mentioned risk, but may also be due to cash flow issues. This unwillingness from the buyer to make early payments remains until he/she is given an assurance that the seller has satisfactorily performed his part of their agreement.

¹³⁶ Paul Todd, Bills of Lading and bankers' documentary credits, p.6

¹³⁷ Ibid. p.7

¹³⁸ Lars Gorton, Rembursrätt, p.1

¹³⁹ Ibid. p.12

If the buyer is unable to avoid early payment he/she might still wish to use the goods to raise credit to finance the transaction. Raising this credit through security in the shipped goods is an ideal solution for the buyer.¹⁴⁰

The seller's interests, on the other hand, are the opposite of the buyer's. A seller shipping the goods to a buyer before obtaining payment takes a great risk and he/she will consequently request payment as early as possible. The risk is the possibility of the buyer's bankruptcy, or non-payment due to any other reason.¹⁴¹ In reality, it might prove to be very difficult for the seller to recover the goods shipped, after a buyer's default on payment. The seller also wants to avoid the possibility for the buyer to reject the goods, when already shipped to the port of dispatch. It is far from desirable for a seller to litigate in a jurisdiction other than his/her own.¹⁴²

Should there be a mutual trust between the parties, these issues discussed will of course be irrelevant. But this is not often the case since many transactions in international sales are of a one-time nature. These single transactions give no more reason for the seller to trust the buyer, than it gives the buyer to trust the seller.

For these reasons, it is obvious that the seller will want to be paid in advance. But, the buyer will most likely be unwilling to do this. Most often, the best a seller can expect in a situation like this is an assurance that payment will be made. Such a guarantee is also important for cash-flow reasons as the guarantee itself might be used to raise capital.¹⁴³

For this payment to function as it is intended, the seller will often want a financially stable institution, like a bank, to issue the guarantee. Furthermore, as mentioned, the buyer will want an assurance that he/she will receive the goods corresponding to his/her agreement with the seller. Finally, the bank, will want some sort of security for the issuing of the letter of credit to the seller. It is in this respect that the Bill of Lading, through the practice of documentary credits, enables these international transactions to take place.¹⁴⁴

Before examining the structure and function of documentary credits, it seems significant to look closer at one of the rare successful attempts of legal international unification, the *Uniform Customs and Practice for Documentary Credits*, most often referred to as the UCP. These rules issued by the *International Chamber of Commerce (ICC)* constitute a necessity for contemporary international trade and there is little point in discussing documentary credits without including the UCP in the discussion.¹⁴⁵

¹⁴⁰ Paul Todd, Bills of Lading and bankers' documentary credits, p.9-12

¹⁴¹ Lars Gorton, Rembursrätt, p.12

¹⁴² Paul Todd, Bills of Lading and bankers' documentary credits, p.22

¹⁴³ Ibid. p.9-11

¹⁴⁴ Ibid. p.9-13

¹⁴⁵ Raymond Jack, Documentary credits, p.8,

6.1.3 The Uniform Customs and Practice for Documentary Credits

National regulations contributing to international discrepancies in the rules relating to letters of credit would create great uncertainty for banks checking the documents for compliance with the credits. For this reason, statutes relating to documentary credits have only been introduced in handful countries¹⁴⁶.

Furthermore, there are no international conventions covering documentary credits. Practices and rules relating to letters of credits have consequently, to a great extent, been allowed to develop without the involvement of legislators. Instead, this development has been left mainly to the ICC through its publications of the UCP. Today the UCP stands out as the most important legal source in relation to documentary credits and has been adopted in about 150 countries. The present edition of the UCP (UCP No. 500 from 1993) is the result of more than 70 years of effort.

The UCP was first published in 1933 by the ICC and has thereafter been periodically revised. Through the revisions, taking place about once a decade, account is taken to the changes in banking practice and trade customs. Behind the successful implementation of the UCP lies the fact that it is the different national banking organisation's cooperation that has contributed to its development.¹⁴⁷

The UCP is not intended to function as a legal code nor is it intended to have a comprehensive coverage. Instead one could say that the UCP is an agreement that contains international standardised terms based on international banking customs.¹⁴⁸ For application it is often held that the UCP needs to be incorporated into the documentary credit contracts. According to Article 1 of UCP:

*“The Uniform Customs and Practice for Documentary Credits, 1994 Revision, Publication No. 500, shall apply to all documentary credits (including to the extent to which they may be applicable standby letters of credit), where they are incorporated into the text of the credit. They are binding on all parties thereto unless otherwise expressly stipulated in the credit.”*¹⁴⁹

There are, however, other views as to how the UCP's character should be understood.

One usual opinion is that the UCP should be seen as a form of *commercial custom*. Following this view, the UCP can become applicable even without specific incorporation as long as nothing otherwise is expressly agreed upon. This opinion renders the UCP a part of the legal system. One problem

¹⁴⁶ in USA the Uniform Commercial Code (section 5) contains rules relating to the documentary credit. Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.957

¹⁴⁷ Ibid. s.8, Lars Gorton, Rembursrätt, s.38-39, Paul Todd, Bills of Lading and bankers' documentary credits, p.29-30

¹⁴⁸ Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.957

¹⁴⁹ Paul Todd, Bills of Lading and bankers' documentary credits, p.30-31

with this view is the possibility of a revision of the UCP being accepted in one country, while being rejected in another.

Another view is that the UCP should be seen as international law, with only mandatory national law and some “public policy” having stronger force.

This view, although documentary credits are international in their character, does not seem to correspond to the actual legal situation.

Furthermore, the rules of the UCP can be viewed as being of different character and force.¹⁵⁰

Nevertheless, due to the obscurity regarding this legal issue, the UCP is usually incorporated into the documentary credit, making its rules applicable.¹⁵¹

Should these rules contradict earlier court decisions, this problem is most often solved by changes in the credit itself. It is for this reason that it is said that the purpose of the UCP is “*for the most part to clarify, rather than alter, the law*”.¹⁵²

Furthermore, should any provision of the UCP contradict any previous mercantile custom and the UCP has been expressly incorporated, the provision of the UCP prevails.¹⁵³ These changes are acceptable as long as they do not contradict any mandatory law.

Still, the rules regarding the documentary credit can be seen as a type of *ius speciale*, but it should be kept in mind that the UCP does not replace national regulations relating to, for instance, rules of contract interpretation.¹⁵⁴ Hence, the UCP cannot affect the character of the documents that are tender to it under the documentary credit operation.

As to the question of why the UCP is not intended to cover all the questions associated with documentary credits, there are mainly two reasons for this. First of all, it is thought best that some questions be left for the courts to decide in. Raymond Jack mentions the effect of fraud and forgery as an example of this.

The second reason is that in some questions it is best not to try to resolve the difficult question at hand. As an example of this, Raymond Jack mentions the provisions regarding the time within which the bank should have fulfilled its duty of examination.¹⁵⁵ Although not attempting to solve all questions, one area that the provisions of the UCP have shown special attention, is the transport documents used in the documentary credit.

Determining whether the documents tendered by the seller conforms to the credit is a duty for the banks that may raise many issues regarding what can be required of the documents. In these circumstances the banks can turn to

¹⁵⁰ Lars Gorton, Rembursrätt, p.43-45

¹⁵¹ Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.957

¹⁵² Paul Todd, Bills of Lading and bankers' documentary credits, p.30-31

¹⁵³ Lars Gorton, Rembursrätt, p.43-45

¹⁵⁴ Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.958

¹⁵⁵ Raymond Jack, Documentary credits, p.9-10

the provisions of the UCP for guidance and detailed descriptions of what is required concerning the transport documents. The transport documents most often required under documentary credits are Bills of Lading (Marine/Ocean Bills of Lading Art. 23, and Charterparty Bills of Lading Art. 25) and multimodal transport documents (Art.26). A letter of credit may however also call for other transport documents such as; non-negotiable sea waybills (Art.24); air transport documents (Art.27); road, rail or inland waterway transports (Art.28); courier and post receipts (Art.29); and transport documents issued by freight forwarders (Art.30).¹⁵⁶

As this thesis concerns itself with a subject relating to Bills of Lading and non-negotiable sea waybills, articles 23 and 24 are most relevant. When a letter of credit calls for a traditional Bill of Lading it is the requirements of Article 23 (Marine or Ocean Bill of Lading) that apply. It could be said that this requirement calls for shipped bills of lading that comply with the requirements of a normal cif-sale.¹⁵⁷ Hence, non-negotiable Bills of Lading are accepted under Art 23 as long as they are documents of title. This is the main difference in relation to Art 24 that calls for a non-negotiable sea waybill.

When delivery clauses are introduced into Bills of Lading their presence creates uncertainty concerning the character of the document, as explained above. If the letter of credit calls for a Bill of Lading that is in accordance with Article 23, a document incorporating a delivery clause, such as the one mentioned above, will raise the question whether such Bill of Lading may be considered to be in accordance with the rule.

In order to solve issues of uncertainty, the ICC's banking commission has developed the practice of giving "opinions" on issues relating to the documentary credit operation.¹⁵⁸ Opinions/statements could for instance be given in connection with legal issues relating to the documents and their examination, as is the subject of this thesis.

This "opinion" will then aim at clarifying the legal issue for the parties involved by giving guidance to the question of how documents, or certain clauses in the documents, should be considered. These opinions are not legally binding upon the courts, but may be important also in a court perspective.

When the delivery clauses first appeared on the "front" side of the Bills of Lading, the question of what opinion/statement that should be given, was discussed within the ICC. However, before examining the statements made

¹⁵⁶ Schmitthoff, *The law and practice of international trade*, p.179-182

¹⁵⁷ Paul Todd, *Bills of Lading and bankers' documentary credits*, p.173, The obligations under a normal cif agreement is that the purchaser must **tender** a Bill of Lading with the document of title function in exchange for payment. This implies that what is important is that the document tendered is a document of title where presented. Hence, if the underlying sale's contract requires a Bill of Lading without specifying the "negotiable" or "non-negotiable" character of the document, then the buyer may have to accept a non-negotiable Bill of Lading under the documentary credit in order to avoid being in breach of contract.

¹⁵⁸ Lars Gorton, *Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse*, Svjt, 2003, p.958

by the ICC and their reasonability, the structure and the function of the documentary credit operation will be looked at closer.

This is highly relevant for the understanding of the legal issue at hand, since some banks could consider the discussed delivery clauses as a legal question that is not within the scope and sphere of the UCP, and consequently refuse to follow the statements.

They would argue that a statement is not going to solve the problem by itself. In other words, the “opinion” of the ICC will not be able to change the character of the document and it will be the court that decides in a dispute, whether or not the documents are in compliance with the credit. It is not certain that courts will agree with the statements made by the ICC and in order to see the premises on which the court could come to base its decision, it is important to have a deeper understanding of the documentary credit operation.

6.1.4 The Function of Documentary Credits

The documentary credit (letter of credit) should be seen as a means of providing payment that safeguards the interests of both the seller and the buyer. In the documentary credit process, a bank “replaces” the buyer as payer. The bank then conditions its payment against certain documents. Article 2 of the UCP 500 describes the documentary credit operation in the following way:

“For the purposes of these Articles, the expressions "Documentary Credit(s)" ...mean any arrangement, however named or described, whereby a bank (the "Issuing Bank") acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf,

i. is to make a payment to or to the order of a third party (the "Beneficiary")...or,

ii. authorizes another bank to effect such payment...or,

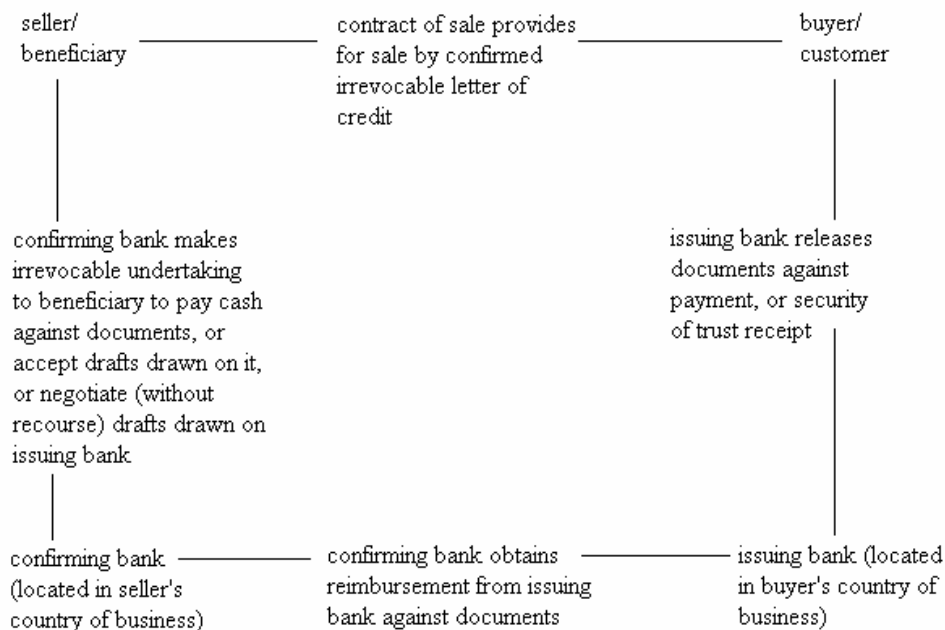
iii. authorizes another bank to negotiate, against stipulated document(s), provided that the terms and conditions of the Credit are complied with.”¹⁵⁹

This method of payment was originally made possible through the document of title function in the Bill of Lading. As mentioned, this quality ensures that the document “represents” the goods. The document of title function in the Bill of Lading gives the bank an assurance that if all the originals of the Bills of Lading are in the banks possession, the cargo won’t be delivered to a person without these “key” documents. The documents therefore function as a security for the bank.¹⁶⁰

¹⁵⁹ Article 2, UCP 500, <http://wer2031.coolfreepages.com/docs/UCP500.htm>

¹⁶⁰ Raymond Jack, Documentary credits, p.2

It is the buyer that instructs the issuing bank to open a credit assuring payment to the seller upon delivery of the documents. The question, in which form this credit is to be opened, is often regulated in the underlying sales contract between the buyer and the seller. As the bank in this case acts as an agent for the buyer, it is the buyer that specifies what documents the credit should include. This issuing bank then instructs a bank in the seller's country (either advising or confirming bank, see below) to notify the beneficiary that a credit has been opened in his/her name and that if certain conditions are met, payment will be made. As the beneficiary will want a guarantee for payment from the bank, the credit will almost always be irrevocable (Art.6). A bank's notification of the irrevocable credit in the seller's favour is done either without its own engagement, as advising bank (Art.7), or it may confirm the credit, as confirming bank (Art.9), honouring his obligation towards the seller.¹⁶¹ The seller in international sales prefers the confirmed credit, as the seller then knows that if documents conforming to the credit are presented, the bank cannot withdraw from its obligation of paying against the documents.¹⁶² This thesis deals with such confirmed credits, and as no confirming bank would ever accept a credit unless it is made irrevocable by the issuing bank, it can be said that the type of documentary credit dealt with in this thesis is the irrevocable confirmed credit. The irrevocable confirmed documentary credit can be illustrated in a figure:



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The conditions under which payment will be made against the documents provide the seller with a promise that he/she will receive payment once it is confirmed that the documents correspond to the requirements of the

¹⁶¹ Raymond Jack, Documentary credits, p.2-5

¹⁶² Ibid. p.3-4, Schmitthoff, The law and practice of international trade, p.194-197

¹⁶³ Paul Todd, Bills of Lading and bankers' documentary credits, p.23

promise. As mentioned, it is most often a bank located in the seller's country that gives this promise to the seller. This bank will condition its undertaking towards the seller (the beneficiary) according to the terms of the credit as instructed from a bank in the buyer's country (issuing bank). The reason for involving banks in two different countries is an issue of convenience for the seller. The seller will most likely want to avoid litigation abroad and will, for this reason, feel more secure in tendering documents to a local bank. This way, the seller will have an enforceable right towards both a bank in his own country and a bank in the buyer's jurisdiction.¹⁶⁴

If the credit opened in favour of the seller, does not comply with the underlying sales contract, the seller may reject the credit and refuse to ship the goods. If it can be expected that the buyer does not intend to correct the defect before the period given for the opening of the credit expires, the seller might be entitled to see this as a breach of contract. This would entitle the seller to terminate the agreement with the buyer. Should the buyer remedy the defect, the seller is obliged to accept the credit and fulfil his/her part of the sales contract. However, the non-compliance of the credit might be such that the seller chooses to accept the non-conforming credit.¹⁶⁵

This illustrates to a certain extent that through the use of documentary credits, the buyer gains some control over the seller's performance. By conditioning payment to the presentation of certain documents and their contents, the buyer can be assured that the seller needs at least be able to present the documentation as dictated by the buyer. As an agent for the buyer, the bank's duty regarding the documentation will be the job of making sure that these conform to the conditions of the credit (Art.13). Should the bank accept the documents as conforming to the credit, the confirming bank will in its turn remit the documents to the issuing bank. The issuing bank will then perform its own control of the documents. Should the issuing bank consider the documents as not being in conformity with the credit, the documents will be returned to the confirming bank with a notification of refusal. This needs not be so if the buyer is prepared to accept the documents as presented. However, if the issuing bank considers that the documents conform to the credit it will reimburse the confirming bank.¹⁶⁶

The final step is for the issuing bank to present the documents to the buyer. Although the contractual relationship between the issuing bank and the buyer may involve any of many possible solutions, the issuing bank will normally present the documents against direct payment from the buyer. As with both the confirming and the issuing bank, the buyer is entitled to refuse the documents should they not comply with the credit.¹⁶⁷

¹⁶⁴ Paul Todd, Bills of Lading and bankers' documentary credits, p.22-23

¹⁶⁵ Ibid. p.37, Schmitthoff, The law and practice of international trade, p.197

¹⁶⁶ Raymond Jack, Documentary credits, p.5-6

¹⁶⁷ Ibid. p.5-6

Most litigation in relation to documentary credits are disputes over the question of whether or not the documents comply with the credit. If a bank fails to carry out its duty of examining the documents correctly, it could be held responsible for an economic loss suffered by the buyer or, alternatively, the buyer is entitled to distance himself/herself from the act of the agent and is not obliged to reimburse the agent. On the other hand, if a bank in its assessment of the documents and their compliance with the credit makes the incorrect decision of rejecting the documents, the beneficiary might want to sue the bank for resulting economic loss.¹⁶⁸ Hence, since the credit transaction involves several relationships it is important that the bank's examination is strictly formalistic and that the same principles are applied in the different relationships. For this reason, there is no room for subjectivity. The rules relating to documentary credits need to be objective and clear, not allowing room for subjective interpretations.¹⁶⁹

Furthermore, it is important to understand that the bank never guarantees that the documents comply with the credit, it merely fulfils its duty of examining the documents with reasonable care. Hence, the bank is not obliged to investigate the real character of the document in the same way as a court is. The bank's obligation is limited to a formalistic duty of examining the content and nature of the documents tendered, in order to ensure that they objectively appear to comply with the credit.

6.2 The Bank's Duty of Formalistic Examination

Two basic principles constitute the core for the rules relating to documentary credits. Through the principles of, *the doctrine of strict compliance* and *the autonomy of the credit*, many disputes are avoided as they give objective guidelines for how the banks should proceed with their assessments of the tendered documents.¹⁷⁰

6.2.1 The Autonomy of the Credit

The principle of *the autonomy of the credit* creates clear boundaries for the bank's obligation. These boundaries are restricted to the terms of the credit alone and the underlying sales contract between the seller and the buyer is entirely irrelevant. When performing their duty of examining the presented documents the banks are unconcerned with whether or not the documents constitute a breach of contract between the seller and the buyer. The bank is only concerned with the instructions of the credit, and the question of whether the documents correspond to them. In *Midland Bank Ltd v Seymour Devlin J* stated, "*it is not for banks to reason why*". The only situation in which the documentary credit is not separate from the sales contract, and in

¹⁶⁸ Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.960

¹⁶⁹ Lars Gorton, Rembursrätt, s.248, Raymond Jack, Documentary credits, p.135

¹⁷⁰ Schmitthoff, The law and practice of international trade, p.170

which case the bank should refuse payment to the seller, is if it is proven that the seller is involved in a fraud using false documents.¹⁷¹

6.2.2 The Doctrine of Strict Compliance

While the principle of *the autonomy of the credit* establishes rules for how the document examiner should relate to facts and circumstances other than the tendered documents, the principle of *the doctrine of strict compliance* confines itself to the question of how strictly the documents most comply with the specific instructions of the credit. According to the principle, the seller must produce the exact documents as instructed by the bank and the bank must only accept such exact documents. The reason for this is that the bank acts as an agent for the buyer and an agent acting outside of its authority (the authority limited through the instructions of the credit) does this, as mentioned above, at his/her own peril.¹⁷² The principle is well explained by Viscount Sumner in *Equitable Trust Co of New York v Dawson Partners Ltd*:

*“ It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank’s branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. ”*¹⁷³

These high requirements on conformity with the documentary credit are not always as strict as in English law. It is pointed out that there is a significant amount of case law in America and Germany where courts have been less strict compared to English court rulings and that there, consequently, are differences in the application of the *doctrine of strict compliance* depending on legal jurisdictions.¹⁷⁴

Nevertheless, it can generally be argued that banks will have a right to reject documents not conforming to the credit instructions, in what might seem to be insignificant details. Stoufflet states that there are three requirements that need to be met for exact conformity with the credit instructions.

¹⁷¹ Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep 147, Ibid. p.170, p.175

¹⁷² Ibid. p.172

¹⁷³ Equitable Trust Co of New York v Dawson Partners Ltd (1926), 27 Ll. L. Rep. 49, Paul Todd, Bills of Lading and bankers' documentary credits, p.214-215, Raymond Jack, Documentary credits, p.143, Lars Gorton, Rembursrätt, p.253

¹⁷⁴ Lars Gorton, Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse, Svjt, 2003, p.961

- a) All the documents covered by the letter of credit need to be presented.
- b) The documents have to be of the same type as those prescribed by the credit. (This applies even if the presented documents give better protection.)
- c) The description of the goods as to quantity and quality must correspond to those required by the credit.¹⁷⁵

The seller might often be faced with difficulties in fulfilling all the instructions of the credit as others than himself/herself issue the documents used in the credit transaction. For this reason, a *too* strict application of the *doctrine of strict compliance* is not generally advocated. This as it might lead to unreasonable and unwanted results. Consequently, in some ambiguous situations where the instructions of the buyer are unclear or vaguely defined and these cannot be clarified with the help of the buyer, the bank is entitled to decide on how to assess the documents and the buyer will be bound by this decision. However, the cases in which the bank is entitled to this are very few.¹⁷⁶ Apart from these exceptions to the rule, banks are in most situations obliged to reject documents not complying with the instructions of the credit in even the smallest details.¹⁷⁷ Before rejection, it might often be appropriate for the bank to check with the buyer if he/she can accept the discrepancy. Should the bank reject the documents without consulting with the buyer, the seller should contact the buyer as only the buyer can instruct the bank to accept the documents under the credit.¹⁷⁸

Furthermore, concerning the duty of formalistic examination of the documents, it seems important to point out that the *doctrine of strict compliance* would have unreasonable effects if there were no limitations to the duty of examination.

6.2.3 Limits to the Duty of Examination

Reading all the terms and conditions of the documents tendered to the bank carefully to detect any defects may be quite a time consuming affair. Consequently, this is not expected of banks. As mentioned above, banks are only obliged to take *reasonable care* in examining if the documents conform to the credit. Following international banking practice this is also stated in Article 13 of the U.C.P:

¹⁷⁵ Lars Gorton, *Rembursrätt*, p.254

¹⁷⁶ *Ibid.* p.285, Paul Todd, *Bills of Lading and bankers' documentary credits*, p.218

¹⁷⁷ Banks face the risk of being sued when rejecting documents and the seller sees the documents as conforming to the credit. One possible solution for the bank in this situation is to make payment under reserve. Paul Todd, *Bills of Lading and bankers' documentary credits*, p.224

¹⁷⁸ Schmitthoff, *The law and practice of international trade*, p.172

*“Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit.”*¹⁷⁹

The requirement of reasonable care illustrates the point that exact conformity is not required. Instead the test is, as illustrated above, if there is an apparent conformity with the credit.¹⁸⁰

It is expected of competent banks that they find non-conformities that appear “on the face” of documents. In other words, banks are obliged to ascertain that the documents “appear, on their face,” to be in compliance with the instructions of the credit.

It has been questioned whether “on their face” refers to the front of the documents, implying that the reverse side of the documents are of no interest when examining the documents, or if it simply means that banks should confine their examination to solely the documents to see if they appear to conform to the credit. The theoretical answer seems to be the latter alternative following the French wording of the UCP.¹⁸¹ This meaning gives some insight into the question of what is expected of banks, but one question still remains. Does the above-mentioned definition of “on their face” mean that competent banks are bound to read through all the clauses of all the Bills of Lading presented to them?

First, a distinction has to be made between printed clauses on the Bill of Lading formula and clauses specifically added as a consequence of the transport itself. The general rule concerning the printed clauses on the Bill of Lading formula is that the banks are entitled to disregard them when checking the documents for conformity with the credit instructions.¹⁸² The terms and conditions of the carriage are most often printed text on the reverse side of the Bills of Lading. For this reason, it is often held that banks are not obliged to read the “*terms and conditions*” of the Bill of Lading. Also, article 23 A. V. states that banks will not examine the contents of terms and conditions.

Since the “terms and conditions” usually are small print clauses on the reverse side of the documents tendered, it seems to be the generally accepted opinion that banks need not examine the “reverse” side of the documents tendered, unless this is specifically asked for in the instructions of the credit.¹⁸³ Following the case, *National Bank of Egypt v Hannevig’s Bank*, it seems clear that there is no general duty to study the “small print” in detail. Scrutton LJ stated:

¹⁷⁹ My italics, Article 13, UCP 500, <http://wer2031.coolfreepages.com/docs/UCP500.htm>

¹⁸⁰ Paul Todd, *Bills of Lading and bankers’ documentary credits*, p.214-215

¹⁸¹ Raymond Jack, *Documentary credits*, p.136

¹⁸² Lars Gorton, *Rembursrätt*, p.268

¹⁸³ Lars Gorton, *Remburs, dokumentgranskning och doktrinen om strikt uppfyllelse*, Svjt, 2003, p.968

*“In some cases, the obligation of a banker, under such a credit, may need very careful examination. I only say at the present that to assume that for one-sixteenth per cent of the amount he advances, a bank is bound carefully to read through all bills of lading presented to it in ridiculously minute type and full exceptions, to read through the policies and to exercise a judgement as to whether the legal effect of the bill of lading and the policy is, on the whole, favourable to their clients, is an obligation which I should require to investigate considerably before I accepted it in that unhesitating form”*¹⁸⁴

Furthermore, a relatively recent Swedish case¹⁸⁵ illustrates well this limitation to the duty of examination. The court had to decide whether or not a document was in compliance with its credit instructions, when a clause on the “front” side referred to a term on the “reverse” side of the document and this “reverse” side was in fact blank. More specifically, the question was if the circumstance that the “reverse” side was blank meant that the document tendered was not in compliance with the requirements of the documentary credit. The court based its judgement on international banking practice as it was expressed in the provisions of the ICC (most likely the court meant the UCP 500)¹⁸⁶. It was held that the document tendered was in compliance with the instructions of the credit and that the blank “reverse” side was of no significance in the matter since the bank was only obliged to examine the document normally (see appendix). There was no obligation to examine the document in detail, more thoroughly.

For these above-mentioned reasons, “*on their face*” will in practice most often mean that only the “front” side of the documents need to be examined by banks.

Nevertheless, saying that banks may entirely ignore the “*terms and conditions*”, as implied above, seems to be a somewhat too wide generalisation. Printed terms and conditions of the Bill of Lading can also be incorporated on the “front” side of documents and although there is no general requirement for banks to read the printed “terms and conditions” on the Bills of Lading, banks, should they find a term or condition nullifying a fundamental quality of the Bill of Lading, are entitled to reject the documents. According to one view, this is not just a right but also an obligation of the bank.¹⁸⁷

From the above written it can be concluded that it is hard to generalise in the matter. It seems clear that banks are not bound to read all the clauses in the Bills of Lading in detail, neither can it be said that they are entitled to ignore all the “terms and conditions” of the Bills of Lading. Furthermore, expressions like *cursory* examination are too vague, and give no clear

¹⁸⁴ Raymond Jack, Documentary credits, p.137

¹⁸⁵ Svea Hovrätt, Mål nr T 9371-99

¹⁸⁶ Ibid.

¹⁸⁷ In the Caspiana case (Renton v Palmyra Trading Corporation of Panama [1957] AC 149) one clause was seen as being such a clause. Lars Gorton, *Rembursrätt*, s.268, Comments of ICC Deutschland on the two ICC statements on “Terms and Conditions on Bills of Lading” of 19th Jan. and 19th Feb. 2004

guidelines for the banks to follow. It might be more correct to say that the rights and obligations of the banks depend on the facts of the specific situation.¹⁸⁸

¹⁸⁸ Ibid. p.138

7 Delivery Clauses in Connection with the Documentary Credit Operation

7.1 “Terms and Conditions” of the Bill of Lading

Following the discussions above, it can be said that the duty of examination is a question of how the bank should assess the documents. What factors should be included in this judgement and what is required for a document to be considered incompliant with the documentary credit, are questions the bank needs to have answers for. Obviously, the answer will depend on the content of the documentary credit, but as is explained, it will also depend on the rules relating to documentary credits. For this reason, the first legal question is if the bank has to consider a delivery clause on the “front” side of a document tendered or if it should be considered “terms and conditions” of the contract of carriage that the bank does not have to examine.

Professor Charles Debattista, who at the request of Maersk prepared the ICC document 470/1027, argued that adding a requirement on banks to assess the Bills of Lading in relation to the document of title character would slow down the documentary credit process since the terms and conditions have to be examined. He also argued that this would make the job of the checker close to impossible.¹⁸⁹

This argument does not consider that the discussion relating to the delivery clauses is not a question of whether or not the terms and conditions are to be examined for delivery clauses. The question is if the delivery clause printed in large letters on the “front” side, possibly depriving the document of its document of title character, can be classified as terms and conditions that the document checker does not need to consider.

This would in no way slow down the documentary credit process since the question of refusing would only arise if the delivery clause is noticed. The Swedish case referred to above (on page 59), illustrates well that banks do not need to check the “reverse” side of Bills of Lading where the terms and conditions are normally situated.¹⁹⁰

A court ruling in the matter could reach either the decision that the bank is obliged to consider the delivery clause when examining the documents or that the bank is entitled to disregard the clause.

As explained above, the duty of examination depends on the specific situation. Furthermore, the answer to the question of what banks must take into consideration will be based on what banks *reasonably* need to consider

¹⁸⁹ <http://www.forwarderlaw.com/Feature/blelaus3.htm> , During the 1983 revision of the UCP a “super” examination was discussed. Cost and time aspects lead to no changes in this respect. Discussion with Professor Lars Gorton.

¹⁹⁰ Also, a delivery clause situated on the reverse side is unlikely to change the character of the Bill of Lading (see section 5.3).

when examining documents “*on their face*” for conformity with the instructions of the credit. For this reason, as mention above, the test is if there is an apparent conformity with the instructions of the credit.

On the one hand, a court possibly could argue that the delivery clause should be considered a term just as any other term in the contract of carriage. Banks are not bound to examine the terms and conditions of the Bill of Lading and, consequently, banks are not obliged to take the clause into consideration. They are entitled to accept the document as complying with the credit. Hence, banks are only liable for not checking the document for compliance in the parts that are excluded from the definition “terms and conditions”. The boundaries of the duty of examination are relatively strictly defined according to this view. Nevertheless, the rules relating documentary credits need to be formalistic and objective in order to function efficiently.

On the other hand, a court could also argue that the clause is not just any clause. It is a clause indicating that the tendered document is a sea waybill, i.e. the wrong type of document.

Furthermore, it might be true that banks are not bound to examine the terms and conditions of the Bill of Lading, but in this specific situation the bank will most likely not fail to read the clause, taking into consideration its placement and the fact that it is printed in large letters. Hence, if the bank has noticed the clause, it is no longer a question of what the bank is bound to read. The question is now whether it can be ignored.

Furthermore, a bank may not ignore a term once it is noticed since when it is noticed the document will no longer be in apparent conformity. Hence, the question is; will the bank notice the delivery clause when examining the documents normally?

It is very unlikely that a bank would miss a delivery clause printed in large letters on the “front” side of a Bill of Lading since banks are required to examine the “front” side to ascertain whether it is a “received” or “shipped” Bill of Lading. The bank also needs to examine that details of goods, parties, dates, etc correspond to the instructions of the credit (see appendix). For this reason a court might argue that a delivery clause printed in large letters on the front must be considered by bank when examining a Bill of Lading for conformity with the credit. Assuming that the bank has to take the delivery clause into consideration, should it materially assess the Bill of Lading and the document of title character in the same way as a court would?

The answer is no, a bank does not need to assess the document in the same way as a court does. A bank does not perform a material examination of the documents.¹⁹¹ Its duty is limited to a formal examination. If there in the formal examination is doubt as to the material content of a document, it is to be rejected. A delivery clause, contradicting the fundamental character of a Bill of Lading is sufficient to raise such doubts concerning the “document of title” character of the document. Hence, according to the doctrine of strict compliance such a document must be rejected.

¹⁹¹ Lars Gorton, Rembursrätt, p.288

Furthermore, a court could also argue that the documentary credit needs to be formalistic in order to function effectively and, for this reason, there is a requirement that the document tendered should be “ordinary”. In *National Bank of South Africa v Banca Italiana Di Sconto* it was ruled that Bills of Lading presented to the bank needed to be in usual form and the bank should reject documents that deviate from what is normal.¹⁹² A delivery clause in a Bill of Lading should, unless it is an American straight Bill of Lading, under no circumstances be considered normal. This is all the more so if the issuing bank has opened the documentary credit for the purpose of financing a cif-purchase where a Bill of Lading with the document of title character is required. This of course presupposes that the clause is noticed.

Evidently, there are different ways of arguing in this question. The confusion within the banking community emanates from this uncertainty relating to the delivery clauses. Considering the above-mentioned, it seems clear that a delivery clause printed in large letters on the “front” side, cannot easily be disregarded. This is all the more so since Article 23 of the UCP only provides for Bills of Lading with the document of title function and the delivery clause calls this document of title character into question. However, since there is no clear answer to the question and the uncertainty needed to be resolved, banks looked to the ICC’s Banking Commission to make a statement in the matter.

7.2 Statements from the ICC Banking Commission

At first, the Banking Commission chose to consider the delivery clauses as “terms and conditions” of the Bills of Lading that banks did not have to consider when examining the tendered documents. In other words, the Banking Commission said that the delivery clauses were acceptable and documents incorporating such clauses should not be rejected under the documentary credit operation. This statement of the Banking Commission was much criticised, especially by trade organisations and by national ICC committees. The reasons for this were that this is not only an issue concerning the scope of the “on its face” principle. An acceptance of the delivery clause has far reaching implications, implication that cannot be disregarded by simply classifying the delivery clause as “terms and conditions”.

7.2.1 Implications of Accepting the Delivery Clause

The adverse effects are connected with the possible loss of the document of title function. First of all, accepting delivery clauses in Bills of Lading could turn negotiable Bills of Lading into “non-transferable” documents since the holding of such a document would no longer be equivalent to possession of the goods. Hence, the document would no longer pass title by its mere

¹⁹² Ibid, p.191, *National Bank of South Africa v Banca Italiana Di Sconto*[1922] 10 L1 L Rep 531, CA

transfer. This is harmful to trade since the existence of negotiable Bills of Lading with the document of title character is almost a necessity in modern trade. Furthermore, the non-negotiable Bill of Lading would also fail to transfer title to the consignee since the document of title function would be absent.

Also, Article 23 of the UCP is focused on Bills of Lading that are documents of title. An acceptance of these clauses would deprive Article 23 of its function, since documents other than documents of title would be considered compliant to the documentary credit. Consequently, Article 24 of the UCP would also lose its effect. In its turn, this would have the effect of banks having to expressly state within each documentary credit, what type of documents that are accepted under the credit and also that delivery clauses are to be considered as noncompliant with the credit.

Furthermore, if the Bill of Lading no longer can be relied upon to “represent” the goods, importers and exporters in international trade may be adversely affected. A possible change in the character of the Bill of Lading is likely to affect a bank’s willingness to extend credit under a documentary credit operation, and for this reason, exporters may find it more difficult to obtain financing. It is foremost the small and medium sized borrowers that will be adversely affected, since larger borrowers usually have better credit ratings.¹⁹³

However, independent documentary security, where the security and value of the goods play a significant role, is often of less importance than is usually believed. Banks today tend to open documentary credits solely based on customer’s credit ratings and the security offered in the goods seems only to play a more important role in trade with countries financially less developed. For this reason, the negotiable Bill of Lading plays an important role in trade with development countries. If the negotiable Bill of Lading no longer can be relied upon to “represent” the goods, this will have a negative impact on trade with these developing countries, as financing the goods may become more difficult.¹⁹⁴

Another implication of accepting delivery clauses that possibly change the character of Bills of Lading is that regulatory authorities may consider the security value of Bills of Lading as lower, and consequently raise capital adequacy requirements for banks.¹⁹⁵

Since the critics of the original statement from the Banking Commission held out that banks would decline to follow this statement, for the above-mentioned reasons, discussions concerning possible solutions to the problems relating to delivery clauses in Bills of Lading, were continued within the Banking Commission.

¹⁹³ Terms and conditions on Bills of Lading – the views of the US Council for International Business. Document 470/1024, p.2

¹⁹⁴ Discussions with banks,

¹⁹⁵ Terms and conditions on Bills of Lading – the views of the US Council for International Business. Document 470/1024, p.2

7.2.2 The Modified Statement from the ICC

These continued discussions resulted in a modified statement that concludes that delivery clauses relating to negotiable Bills of Lading (type 1) are harmful to trade and should be removed. The documentary security afforded by negotiable Bills of Lading was considered necessary for international trade, especially in trade towards developing countries. A different opinion was given in relation to delivery clauses in non-negotiable Bills of Lading. The delivery clauses in non-negotiable Bills of Lading are accepted as conforming to the credit and should, following the statement, not be considered as cause for rejecting documents under the documentary credit. The statement does, nevertheless, point out that the use of these delivery clauses (type 2) is causing confusion and therefore it is *recommended* that the clause be removed from the documents.¹⁹⁶

Hence, the ICC chose to make a distinction between negotiable and non-negotiable Bills of Lading. It seems that most banks have chosen to comply with these statements, while certain banks are refusing to accept **non-negotiable** Bills of Lading with the document of title character, if they incorporate delivery clauses.

This statement solves the larger part of the confusion relating to delivery clauses, since in the great majority of cases the instructions of documentary credits specifically call for negotiable Bills of Lading¹⁹⁷.

The bank's refusal to accept these documents may, nevertheless, place the seller in a tricky situation since he/she will have to tender conforming documents in order to receive payment from the bank and the carrier may insist on using delivery clauses in its Bills of Lading. Nevertheless, it seems that the seller is entitled to a Bill of Lading in which there is no delivery clause. As explained above, the Hague/Visby rules oblige the carrier to issue such documents. Since a seller risks being in breach of contract in connection with the underlying sales contract if the wrong document is tendered, a shipper should always have the right to choose the document of his/her liking.

Regarding the statement in connection with delivery clauses in non-negotiable Bills of Lading it was pointed out that the reason for accepting the delivery clause in straight- and recta Bills of Lading is that the document is non-negotiable (non-transferable) by nature. Since, it is not intended to be transferred an acceptance of the clause will not affect trade in the same adverse way as a delivery clause in a negotiable Bill of Lading would and because banks have been dealing with non-negotiable Bills of Lading for some time now, "*this should not pose a problem*".¹⁹⁸

¹⁹⁶ <http://www.ciffa.com/downloads/newsletters/december2004/CIFFA-NewsletterDec.pdf>
p.4

¹⁹⁷ Discussions with banks.

¹⁹⁸ Document from ICC, Clauses on bills of Lading, Document 470/1038 p.2

There are situations in which banks and buyers are obliged to accept non-negotiable Bills of Lading. The acceptance of delivery clauses in these situations could possibly pose a risk when the customer of the bank expects a document of title, or when the bank itself requires the documentary security afforded by the document of title. This is the reason for why some banks refuse to accept non-negotiable Bills of Lading with delivery clauses.

The delivery clause is a contractual provision that reallocates certain risks. A document of title that incorporates a delivery clause on its “front” is most likely a sea waybill and, hence, certain risks have been reallocated from the carrier. Depending on the situation these risks will fall on either the bank or on the customer of the bank. For this reason, before accepting such documents banks need at least consider the following possible risks.

The main risk for the bank is if it is not designated as consignee in the Bill of Lading and this incorporates a delivery clause. If the bank in this situation pays against the document, which has the characteristics of a sea waybill, it will have no security in the goods¹⁹⁹. A buyer’s bankruptcy in this situation could become a costly affair.

Furthermore, even if the bank is designated as consignee, a sea waybill without express security provisions (will be discussed below under section 8.1.1) will offer less protection. This lower protection partly relates to the carrier’s liability for documentary information. The security value of a document that is conclusive evidence is higher than that of a document that is only prima facie evidence. This application of the Hague/Visby rules is an important reason for why parties of a business settlement agree upon the use of a document of title.

Another risk for both the buyer and the bank is that the right of disposition remains with the shipper if the document is in fact a sea waybill.

Banks also need to consider the possibility that courts may, irrespective of the statement made by the ICC, for reasons mentioned above, regard the delivery clause as a clause that the bank needs to consider when fulfilling its duty of examining the documents “on their face”. If this is so, the bank may face liability for economic loss suffered by the customer of the bank as a consequence of the delivery clause having converted the document into a sea waybill. Alternatively, the customer could refuse to reimburse the bank if it accepts a document, which the customer of the bank considers as incompliant with the instruction of the documentary credit.

Banks today may very well have elaborate contracts with their customers protecting them from risks connected with the documentary credit operation. Nevertheless, avoiding responsibility for a failure to examine the tendered

¹⁹⁹ If the bank is nominated as the consignee then the carrier is only entitled to make delivery to the bank, which is obviously not the case if someone else is designated as consignee.

documents reasonably, is not always easy. These contracts are not likely to protect the bank from all liabilities.

Moreover, even if the bank is protected it should not be forgotten that the documentary credit is a service in which the bank safeguards the rights of the customer, namely the importer. The documentary credit as a service safeguarding the rights of the importer will consequently lose some of its value if it allows the wrong type of document to be accepted. A customer of the bank should not have to fear the risk of having to receive a sea waybill when giving the bank the instructions of only accepting a document of title. For this reason, if a bank follows the statement of the ICC relating to non-negotiable Bills of Lading, then the customer may consider making sure that language is incorporated into the documentary credit, which prohibits such delivery clauses from being accepted.

Since the possibility of banks refusing to accept Bills of Lading (mainly negotiable Bills of Lading) that incorporate delivery clauses constitute risks for sellers, and also considering that the awareness of the possible implications of banks accepting Bills of Lading incorporating delivery clauses has increased among commercial parties, there has been quite a significant market pressure on carriers to remove the delivery clauses from their Bills of Lading. Carriers risk being excluded from business settlements if they use delivery clauses in their Bills of Lading.²⁰⁰

Perhaps it is for this reason that Maersk has chosen to remove both of its delivery clauses (category 1 and category 2). The category 1 clause was removed at an early stage following massive criticism from the banking community. The category 2 clause was removed at a later stage. Nevertheless, there are still a few carriers that use delivery clauses. However, the problems connected with delivery clauses have significantly diminished since the ICC modified its first statement. But unfortunately the root of the problem still remains.

²⁰⁰ Discussions with banks. It had been noted that certain carriers have been excluded in business settlements.

8 Alternative Solutions

It is the document of title function with its distinct delivery mechanism that the carriers would prefer to avoid. Lengthy documentary procedures causing expensive delays and increased liability for the carrier when issuing Bills of Lading are reasons for why the carrier will want to encourage the use of sea waybills instead.

Electronic documentation using computerised systems could ultimately come to replace paper documentation, solving the problems with lengthy documentary procedures. This would speed up communications, reduce administrative costs and help to avoid liability arising from late arrival of documents. The overall effect would be higher efficiency. However, introducing a paperless system involves its own problems and this is a subject wide enough to be covered by a separate thesis.²⁰¹

Nevertheless, it should be mentioned that much progress has been made in the development of electronic alternatives in respect of the two first functions of transport documents. Creating the electronic function of a receipt and a contract is, as one respondent to a questionnaire developed by UNCTAD pointed out, “*as simple as attaching scanned copies to an e-mail*”.²⁰²

Instead, much of the problems with establishing electronic alternatives lie in the third characteristic of the Bill of Lading, the document of title function. Replicating this function electronically has proven difficult, especially since current regulations do not recognize electronic documents as documents of title.²⁰³ Hence, for the future development of an electronic alternative to the current form of the Bill of Lading, the legal frameworks of such an electronic alternative first have to be created. This could require legislative cooperation on international level.

For this reason, it seems clear that replacing the sea waybill with an electronic alternative is most likely to be easier than replacing the Bill of Lading.

In this context it is interesting to point out that the report made by the UNCTAD secretariat concluded that in the majority of transportations, the negotiable Bill of Lading is used, rather than the sea waybill. Furthermore, the Bills of Lading are often used without there being a need to use such a document. Much of the problems associated with the use of documents of title could therefore be avoided if commercial parties would consider using sea waybills when there is no need for a document of title. This would give both higher overall efficiency (avoiding the problems associated with the document of title function) and also, consequently, facilitate the transition to electronic alternatives.

²⁰¹ See article written by Paul Todd, *dematerialisation of shipping documents*, <http://ourworld.compuserve.com/homepages/pntodd/intr/publins/demat.htm>

²⁰² Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3. p.14,19

²⁰³ Ibid, p.14

The more frequent use of sea waybills would also please the carriers, since the use of delivery clauses was just one ingenious way in which the carriers attempt to deprive the Bills of Lading of their distinct delivery mechanism.

The problems in discouraging the use of the Bill of Lading is that the Hague/Visby rules prevent carriers from refusing to issue Bills of Lading if the shipper demands its employment.

An obvious solution to this problem seems to be by raising prices on transportations using Bills of Lading. This could, consequently, compensate the carrier for the increased risk. However, competition amongst carriers will always stimulate relatively low prices.²⁰⁴

8.1 Recommendations on International Level

Instead, recommendations to commercial parties, that call attention to the misuse of the Bill of Lading and thereby discourages commercial parties from its use where it is not necessary, seems to be a good complementing alternative.²⁰⁵

Attempts at encouraging the use of sea waybills as an alternative to the Bill of Lading has been made by UN/CEFACT giving official recommendations on international level. UN/CEFACT is momentarily working on a revision of its earlier recommendations²⁰⁶ This recommendation encourages the use of the sea waybill by all participants in international trade when there is no intention of selling the goods while in transit.

However, a recommendation is just a “recommendation” and for it to function its arguments must be convincing. The argument should, hence, state that there are advantages or no disadvantages of using sea waybills.

To investigate whether or not commercial parties were aware of the respective advantages and disadvantages of using sea waybills the UNCTAD secretariat sent out questionnaires to commercial parties regularly using transport documents. From the answers given by the respondents, conclusions could be drawn as to the question of why the Bill of Lading is used more frequently than the sea waybill. The main factor influencing (other factors will be discussed under section 8.1.2) the choice of the Bill of Lading is banking and finance requirements while sale of goods in transit plays a somewhat less significant role²⁰⁷.

²⁰⁴ risk aversion will also lead to an acceptance of higher prices by customers.

²⁰⁵ Also, UNCITRAL has been working for 7-8 years on a new convention that deals with the problem.

²⁰⁶ Recommendation No.12, momentarily under revision,
http://www.unece.org/cefact/recommendations/rec_index.htm,

²⁰⁷ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3 p.30

8.1.1 The Security Factor

Respondents emphasised the significance of the documentary security offered by the Bill of Lading and its document of title character. Conversely, since the document of title function is absent in the sea waybill, banking requirements and security considerations were held out as the main reasons for not choosing the document.²⁰⁸

Hence, the results of the survey indicate that commercial parties use Bills of Lading when documentary security is vital and/or when there is an intention of selling the goods while in transit. This result seems to reveal a discrepancy between what commercial parties consider as important reasons for choosing the Bill of Lading and what is recommended by UN/CEFACT since the recommendation urges parties not to use the Bill of Lading as long as no sale of the goods while in transit, is envisaged.

The documentary security aspect is not mentioned in the recommendation as a reason for choosing the Bill of Lading instead of the sea waybill, and for this reason, the question is; are the recommendations of UN/CEFACT incorrectly lacking an important factor, which commercial parties need to consider when choosing between the Bill of Lading and the sea waybill, or is this attitude among respondents of the survey an example of the “*erroneous commercial and official thinking that a non-negotiable transport document gives less security than the traditional bill of lading*”²⁰⁹, as stated in the recommendations?

The document of title function is significant for many reasons. One is that it triggers the application of the Hague/Visby rules. For this reason, a Bill of Lading with the document of title character provides better evidence that the seller has performed his obligations in relation to the buyer, since the negotiability (using Scandinavian and German terminology) of the document excludes the bank from liabilities under the contract of carriage, unlike the sea waybill. If the application of the Hague/Visby rules is an important consideration for commercial parties, then the rules can be made applicable through express incorporation in the sea waybill.²¹⁰

Under normal circumstances the sea waybill qualifies as *prima facie* evidence and the carrier is free to bring evidence against the contract of carriage. The Bill of Lading, on the other hand, when transferred to a third party in good faith is *conclusive evidence* of the contract of carriage. Should the bank fear this risk with the sea waybill, incorporating Art 3, rules 3 and 4, of the Hague/Visby Rules in the sea waybill can solve the absence of “representation”. Incorporating the CMI Uniform Rules for Sea Waybills

²⁰⁸ Ibid, p.26

²⁰⁹ Recommendation No.12, momentarily under revision, http://www.unece.org/cefact/recommendations/rec_index.htm para.35

²¹⁰ In some countries national legislation makes the Hague/Visby rules applicable for sea waybills without express incorporation, Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3 p.8

does this. By incorporating these Rules in the sea waybill, the statements of the sea waybill are converted into conclusive evidence for the consignee, provided that he/she has acted in good faith²¹¹. As the sea waybill designates a certain person as consignee and the document is non-transferable the rights and liabilities under the contract of carriage cannot pass into a third parties hand without the help of the consignee. This means that all general defences that the carrier could have used against the consignee remain against the acquirer.²¹²

Since the carrier does not have to fear the transfer of rights and liabilities to other parties than the consignee (through the transfer of the document), the goods can be released to the consignee upon production of proper identification without requiring surrender of the document. Had the document been transferable, the carrier would have been taking a risk when delivering without surrender of the document, as this could have been transferred to a new consignee triggering the negotiability quality of the document. Hence, a sea waybill can be given the negotiability quality, while allowing delivery of the cargo without surrender of the document, because it is non-transferable by nature.²¹³

Another usual advantage of using a Bill of Lading relates to the issue of possession of the goods. By possessing “the symbol of the goods”, namely the Bill of Lading, the carrier is prevented from delivering to other parties. The holding of the Bill of Lading can, for this reason, be regarded as possessing the goods.²¹⁴ This possession is usually referred to as *constructive possession* because the holder of the Bill of Lading has exclusive control over the cargo.²¹⁵

This advantage is as a matter of fact true, however, by designating a bank as consignee and the intended receiver as “notify” party (as will be the case in most documentary credit operations using sea waybills) a “nearly” equivalent security to that offered by the Bill of Lading, can be achieved. It is John F Wilson that points out that the bank can achieve a “nearly” equivalent security. For this point of view he gives two reasons.²¹⁶

The first is that the right of disposition in a sea waybill might constitute a risk for the bank. The person in the sea waybill with the right of disposition of the goods is the shipper. This poses a risk to the bank as it is not a party to the contract of carriage, and the shipper is free to instruct the carrier to

²¹¹ John F Wilson, Carriage of Goods by Sea, p.164-165, the CMI Uniform Rules for Sea Waybills, Rule 5, <http://www.uctshiplaw.com/cmi/cmiwaybl.htm#Uniform>

²¹² Hugo Tiberg, Legal qualities of transport documents, p.30

²¹³ Discussions concerning the right of stoppage are excluded from this thesis, nevertheless, following sjölagen 13:57 2st, the shipper is only deprived of his/her right of stoppage if the Bill of Lading is transferred to a third party in good faith, i.e. someone else than the original buyer. Hence, the right of stoppage applies similarly to the original buyer irrespective of which document is used. Master thesis written by Johan Eriksson, Stoppningsrätt under godstransport, p.43

²¹⁴ Paul Todd, Bills of Lading and bankers' documentary credits, p.102-103

²¹⁵ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3 p.12

²¹⁶ John F Wilson, Carriage of Goods by Sea, p.164-165

deliver the cargo to someone else than the named consignee (in this case the bank).

As a consequence of this risk, the practice of the shipper relinquishing his/her right of disposal to the consignee has developed. Banks today, will most likely insist on cutting off the shippers right of disposal through clauses incorporated in the sea waybill. Two examples of these contractual security clauses are the NODISP (no disposal clause) clause and the CONTROL clause. The NODISP clause usually provides; *“By acceptance of this waybill, the Shipper irrevocably renounces any right to vary the identity of the Consignee of the goods during transit”*.

The CONTROL clause, on the other hand, usually provides; *“Upon acceptance of this waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the carrier) the shipper irrevocably renounces any right to vary the identity of the Consignee”*.²¹⁷

These clauses aim at creating “control” mechanisms giving the consignee using the sea waybill equivalent security to that of the Bill of Lading. Recognizing this need, the CMI Uniform Rules for Sea Waybills a incorporates a rule stating that; *“The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee...”*²¹⁸

Unfortunately, unlike the Bill of Lading, these control mechanisms have not been tested in much case law since considering its current use, it is most often used in transaction where litigation is less likely to occur and for this reason, it is hard to make exact predictions of their efficiency.²¹⁹

The second reason for Wilson stating that a “nearly” equivalent protection can be achieved by naming the bank as consignee, is that because the document of title function is absent in the sea waybill, the cargo is not immediately disposable should the buyer default on the repayment of the documentary credit.²²⁰

A consignee is entitled to immediate delivery of the goods after their arrival at the port of discharge, just as under a Bill of Lading. However, there is no point in only allowing the consignee to collect the goods, the value lies in the possibility to realize the cargo, should the buyer default on his/her repayment.

The purpose of a pledge is to give the creditor a security against the risk of the debtor not fulfilling his/her obligations. A pledge requires the creditor to be cut from his right of disposition over the goods. For this reason a pledge is achieved by the transfer of the Bill of Lading, which is seen as a transfer

²¹⁷ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3 p.13

²¹⁸ rule 6 (ii), <http://www.uctshiplaw.com/cmi/cmiwaybl.htm#Uniform>

²¹⁹ It should also be pointed out that banks could be both shipper and consignee, consequently avoiding the above-mentioned problem. However, this would hinder the negotiability quality from being triggered.

²²⁰ John F Wilson, Carriage of Goods by Sea, p.164-165

of possession in the goods. Following the ruling in *Sewell v. Burdick* the holder of a Bill of Lading obtains a “pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realize them for the purpose of security”²²¹

This is, however, not the only way to achieve a pledge. The goods transported under a sea waybill can also be pledged to the bank as security by designating the bank as consignee while also cutting of the shippers right of disposition by incorporating either a “NODISP” or a “CONTROL” clause in the sea waybill. The rules governing pledges seem to apply in this situation as well.

Hence, by designating the bank as consignee while using express provisions to cut of the shippers right of disposition, the bank replaces the buyer as receiver of the cargo and consequently obtains the right to decide to who the goods is to be released, at port of discharge. If the carrier delivers to anyone else, the consignee has a right to sue the carrier for misdelivery. Through this procedure the bank is equally as well protected as when using a Bill of Lading.²²²

For the above-mentioned reasons it seems the recommendations of the UN/CEFACT were correct in stating;

*“From the commercial point of view the “value” of the transport document is its ability to ensure the commercially desirable “constructive delivery”. This result can be achieved equally well by using the legal “document of title” characteristics of the negotiable bill of lading or by the practical “transfer of control” possibility of the sea waybill.”*²²³

John F Wilson was perhaps being too modest when saying that a “nearly” equivalent security can be achieved, since with express provision in the sea waybill, equivalent security to that provided by a Bill of Lading, is a possibility.

Nevertheless, one advantage of using a Bill of Lading (taking into consideration the clauses that can be incorporated into the sea waybill in order to further protect the consignee, thus the bank) as security is the simplified procedure in using the traditional form of a Bill of Lading, not requiring specific provisions. However, considering the high level of security that can be achieved, banks will be willing to use sea waybills instead of Bills of Lading. The bank, as any other commercial company, aims at maximizing profits and as competition has stiffened within the financial sector banks have realised the need to become more customer-oriented. Hence, it will be of no significance that using a Bill of Lading

²²¹ Paul Todd, Bills of Lading and bankers’ documentary credits, p.125

²²² Grönfors, Towards Sea Waybills and Electronic Documents p.55-56. Kurt Grönfors discussed this issue already during the 1970s.

²²³ Para 35, http://www.unece.org/cefact/recommendations/rec_index.htm

involves a more simple procedure.²²⁴ Today, a bank refusing to open a documentary credit using a sea waybill risks losing the customer to another bank that is willing to do so²²⁵. In most cases where the bank agrees to the use of a sea waybill the customer is, however, usually known in advance. Furthermore, the documentary credit is only opened after a normal control of the customer's credit rating. This control of the customer's credit rating seems to apply irrespective of which of the two documents, the Bill of Lading or the sea waybill, that is to be used in the documentary credit operation.

Hence, banks do not seem to pose the greatest obstacle in increasing the use of sea waybills when there is no need to use Bills of Lading. It is most likely "*the erroneous commercial and official thinking*" of commercial trading parties that cause the excessive use of the Bill of Lading. This was also confirmed by the survey performed by UNCTAD, which revealed that contractual "CONTROL" clauses were not seen as alternatives to the security of the Bills of Lading.²²⁶ This survey, however, also revealed other factors influencing the choice of the Bill of Lading instead of the sea waybill.

8.1.2 Other Factors

One interesting observation made by the UNCTAD survey was that the sea waybill was often disregarded as an alternative to the Bill of Lading due to a lack of interest and/or knowledge. Conversely, the survey also indicated that the Bill of Lading was often used as a matter of standard practice. By using it as a matter of course respondents secured themselves just "*to be on the safe side*".²²⁷

It is in this context, considering the erroneous thinking in connection with the security offered by the sea waybill and the use of the Bill of Lading as a matter of standard practice, that information and recommendations may have a positive effect on encouraging the use of the sea waybill where the Bill of Lading is unnecessary. This is especially so when there are advantages of using the sea waybill instead.

Speed is essential in modern international trade. Costly delays are in practice usually avoided by carriers releasing the goods against letters of indemnity, issued by banks to facilitate delivery of the cargo.²²⁸ This

²²⁴ discussions with banks.

²²⁵ Another example of this customer-oriented thinking is the fact that banks today often provide means for the release of the goods through instructions to the forwarding agent

²²⁶ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3. p.31

²²⁷ Ibid, p.20, p.26

²²⁸ As expensive delays may be the result of slow documentary credit transactions, many carriers will be prepared to release the goods against guarantees reimbursing them for possible claims made by people holding the Bills of Lading. This practise has raised the following question in relation to the liability of banks; what is the responsibility, if any, of an issuing bank under the UCP and a collecting/presenting bank under the URC if they

practice involves higher transaction costs since banks also take greater risks when guaranteeing to reimburse the carriers if delivery is made to wrong parties. Nevertheless, this is part of the modern customer oriented thinking.²²⁹ Access to the cargo is usually granted to the customer by the bank. From this perspective, the delivery mechanism of the non-negotiable Bill of Lading is an obstacle preventing easy access to the cargo. Hence, the advantages of using a sea waybill are that delivery procedures are faster and more cost-efficient. Furthermore, the problems associated with lengthy documentary procedures are avoided. These are advantages commercial parties need to consider.

Hopefully recommendations and information will decrease the misuse of the Bill of Lading. However, recommendations are just “recommendations” and it is most likely that, even in the future, the Bills of Lading will be used when there is no special need for a document of title. Nevertheless, carriers should accept this as part of the industry in which they are involved and refrain from trying to convert Bills of Lading by incorporating delivery clauses. It is essential that customers are free to choose between different transport documents, depending on their specific situations.

This does not mean that there are no ways in which the misuse of the Bill of Lading may be decreased, even further. One way seems to be by giving the sea waybill the same evidentiary value, regarding the goods, as a Bill of Lading. In fact, the UNCTAD survey showed that 93% of the respondents thought that there should be no evidentiary difference between transport documents.²³⁰ Considering the result of the survey there is little reason why third parties under a sea waybill should not be protected in the same way as when a Bill of Lading is used. Hence, appropriate supportive legislation could strengthen the positions of users of the sea waybill.

The Hague/Visby rules are older than the sea waybill itself and perhaps it is time to update the applicability of the rules. The consignee in a sea waybill is as much a third party as a consignee using a Bill of Lading. The Hamburg rules that were created at a later time are applicable to documents other than Bills of Lading.

Of course it could be argued that the sea waybill should be kept in its present form and this may in fact be true. Nevertheless, a document offering the same protection to a consignee as a recta Bill of Lading or a straight Bill of Lading with the document of title function, with the difference of allowing delivery to be made without surrender of the document, seems to be an alternative that may help decrease the misuse of the Bill of Lading. Such a document is in fact desired within the industry and I see no reason why the sea waybill should have to be manipulated in order to offer this function.

provide the means for the release of goods without utilising the documents in their possession? This legal issue is momentarily being discussed within the ICC, but is not part of the subject covered by this thesis.

²²⁹ discussions with banks

²³⁰ Report by the UNCTAD secretariat, UNCTAD/SDTE/TLB/2003/3. p.9

9 Conclusion

The purpose of this thesis is to describe and analyse the effects of delivery clauses on the character of negotiable and non-negotiable Bills of Lading and to study what implications these effects have on the documentary credit operation and the parties involved. Another aim of this thesis is to cover the reasons for carriers introducing delivery clauses in their Bills of Lading and to explore alternative solutions to the root of the problem.

This subject raises legal issues within the area where transport law, letter of credit (L/C) law and sale's law intersect.

The effects of a delivery clause on the character of a transport document will in its turn affect the documentary credit operation and since the documentary credit is an operation within which the seller and the buyer are enabled to exchange performances, these parties will be affected as well.

The common root to the issues covered in this thesis is the document of title character of Bills of Lading. A document of title requires surrender of the document for delivery of the goods from the carrier and, consequently, the transfer of the document could be said to mirror the physical delivery of the goods. By linking the delivery of the goods to the document of title, the document enables both the sale of the goods in transit and the use of the document as security under a documentary credit operation. Furthermore, third parties need to be able to rely on a document that transfers title and, for this reason, a document of title will be conclusive evidence in the hands of third parties in good faith.

The international regulations in connection with **negotiable** Bills of Lading are similar in the sense that all negotiable Bills of Lading are documents of title. The international regulations relating to **non-negotiable** Bills of Lading, on the other hand, are far from uniform.

American and English non-negotiable Bills of Lading are referred to as straight Bills of Lading. In Germany and Scandinavia these documents are called recta Bills of Lading.

At present time, the non-negotiable Bill of Lading in England, Germany and Scandinavia is a document of title, while the non-negotiable Bill of Lading in America is a sea waybill.

The sea waybill is a transport document that lacks the document of title character. This document, in its present form, can best be described as functioning as a receipt and providing evidence of the contract of carriage. These two characteristics are shared with the Bill of Lading. There is no reliance on the sea waybill and consequently it is only prima facie evidence. Since the document of title function is absent in this document it does not need to be surrendered for delivery of the goods. Instead, the goods will be released to the named consignee upon proper identification.

Hence, there are three types of documents with distinct qualities. These are the negotiable Bill of Lading, the non-negotiable Bill of Lading and the sea waybill. The negotiable and non-negotiable Bills of Lading, except the American non-negotiable Bill of Lading, are documents of title.

A document of title compared to a sea waybill, involves greater liabilities for carriers. The document of title function of the Bill of Lading and the speeding up of transports in the last couple of decades in combination with lengthy documentary procedures, causes expensive delays for parties involved in transports when the goods arrive at the port of discharge before the documents of title. The release of the goods without surrender of the document of title involves significant misdelivery liabilities for a carrier. Considering this, the use of sea waybills reduces costs and liabilities for carriers. Furthermore, the use of sea waybills will not trigger the mandatory regulations of the Hague/Visby rules. This could further reduce the liabilities and risks of carriers. For these reasons, carriers usually prefer the legal qualities of a sea waybill.

The delivery clauses covered by this thesis seem to have been considered by some carriers as a solution to these extra liabilities connected with the document of title function. The delivery clauses aim at exempting the carriers from liability for delivery of the goods without surrender of the Bills of Lading. In other words, the delivery clause practically aims at depriving the Bill of Lading of its document of title function. Deprived of this function, the document will have the characteristics of a sea waybill.

These delivery clauses can have one of two possible effects. Either the clause is considered invalid, the document being a Bill of Lading, or the carrier has issued a document that has the character of a sea waybill. The prevailing view seems to be that a delivery clause printed in large letters on the “front” side of a Bill of Lading will give the document the same character as a sea waybill. There are, however, strong arguments supporting the view that delivery clauses are invalid, especially since they are highly unusual and try to exempt the carrier from a fundamental obligation connected with Bills of Lading. Furthermore, the validity of the clause seems to depend on how it is construed and where in the document it is inserted.

Nevertheless, it seems correct to say that a well placed and strictly construed delivery clause will convert the document of title into a sea waybill. This possible change in character has been causing confusion for banks working with documentary credits.

The need to tender the right documents is especially evident in documentary credits. The documentary credit is a mechanism that provides a means of payment by substituting a bank for the buyer. The bank then conditions its payment to the seller against certain documents specifically stated in the documentary credit. This operation should be seen as a service to the buyer in which the bank must examine all documents received from the seller with

reasonable care to ascertain that they appear to be in accordance with the terms and conditions of the credit.

Since commercial parties often consider the Bill of Lading as the best security-providing document and agree upon its use already in the underlying sale's contract, the instructions of most documentary credits will require the seller to present a Bill of Lading with the document of title character.

Considering the purpose of the delivery clauses, banks are faced with the question; should a Bill of Lading that incorporates a delivery clause be accepted under the documentary credit as being compliant with the instructions of the credit?

More specifically the question relating to documentary credits is whether the bank has to take the delivery clause into consideration when examining the document.

One limitation to the bank's duty of examination is that it does not need to consider the "terms and conditions" of the Bill of Lading. There are good arguments for both the view that the clause should be considered such "terms and conditions" that the bank is entitled to ignore and the view that the clause should not be considered as such "terms and conditions". The latter option will result in the rejection of the document, if a document of title is required by the credit.

Since there is no clear answer to the question and the uncertainty needed to be resolved, banks looked to the ICC's Banking Commission to make a statement in the matter.

The first opinion of the ICC was that the delivery clauses were such "terms and conditions" that the bank is entitled to ignore. This opinion of the ICC was much criticised since accepting delivery clauses in documents of title may have several adverse implications.

These adverse effects are connected with the loss of the document of title function. This would in fact make negotiable Bills of Lading "non-transferable" since the holding of such a document would no longer be equivalent to possession of the goods. The negotiable Bill of Lading with its present qualities is of great significance for trade.

Furthermore, this would have the effect of banks having to expressly state within each documentary credit, what type of documents that are accepted under the credit and also that delivery clauses are to be considered as noncompliant with the credit.

Taking account of the criticism, the ICC modified its statement and concluded that delivery clauses relating to **negotiable Bills of Lading** are harmful to trade and should be removed. The documentary security afforded by negotiable Bills of Lading was considered necessary for international trade, especially in trade towards developing countries. Delivery clauses relating to **non-negotiable Bills of Lading**, on the other hand, are accepted as conforming to the credit and should following the statement, not be considered as cause for rejection.

It seems that most banks have chosen to comply with these statements, while certain banks are refusing to accept *non-negotiable* Bills of Lading with the document of title character, if they incorporate delivery clauses. Since the instructions of most documentary credits call for negotiable Bills of Lading, this statement solves most of the problems linked to documentary credit operations.

Nevertheless, some problems remain since most banks following the statement of the ICC, accept delivery clauses in non-negotiable Bills of Lading. The delivery clause is a contractual provision that reallocates certain risks. A document of title that incorporates a delivery clause on its “front” is most likely a sea waybill and, hence, certain risks have been reallocated from the carrier. Depending on the situation these risks will fall on either the bank or on the customer of the bank. Furthermore, there are situations in which banks and buyers are obliged to accept non-negotiable Bills of Lading. The acceptance of delivery clauses in these situations could possibly pose a risk when the customer of the bank expects a document of title, or when the bank itself requires the documentary security afforded by the document of title.

A customer of the bank should not have to fear the risk of having to receive a sea waybill when giving the bank the instructions of only accepting a document of title. For this reason, if a bank follows the statement of the ICC relating to non-negotiable Bills of Lading, then a customer of the bank may consider making sure that language is incorporated into the documentary credit which prohibits such delivery clauses from being accepted.

Although the modified ICC statement has solved most of the problems connected with delivery clauses in the documentary credits, the seller’s situation is not solved until carriers refrain from using delivery clauses in their Bills of Lading. The seller needs to be able to tender the document that is required by the underlying sale’s contract. A failure to fully condemn delivery clauses in all documents of title facilitates their continued use by carriers. Maersk has chosen to remove their delivery clauses, but certain carriers continue to employ them, especially in their non-negotiable Bills of Lading. What carriers using these clauses in their Bills of Lading seem to have forgotten, or ignored, is the fact that a customer of the carrier has a legal right according to the Hague/Visby rules to demand a document, which is a “real” document of title. For this reason, a customer of the carrier that requests a document of title has a right to receive a Bill of Lading in which there is no delivery clause.

Hence, the obligation to issue Bills of Lading should not be circumvented by inserting delivery clauses. If carriers refrain from this, then no parties are misled and unnecessary litigation is avoided.

If carriers wish to avoid much of the liabilities associated with documents of title, then information to commercial parties of the possible advantages of using sea waybills is a good alternative method of achieving this. This is the

purpose of recommendations on international level. Recommendation No.12, *Measures to Facilitate Maritime Transport*, published by UN/CEFACT describes how equal protection to that of the Bill of Lading can be achieved using a sea waybill with express provisions. Furthermore, this would simultaneously involve less liability for commercial parties involved. Late arrival of sea waybills causes no problems in the port of discharge. For these reasons, commercial parties need to consider using sea waybills when cargo is not to be sold while in transit. This would increase overall efficiency.

APPENDIX; Example of Bill of Lading

Shipper		Customer No.	Ref. No.	B/L No
Consignee		LINER BILL OF LADING		
Notify address				
Pre-carriage by*	Place of receipt by pre-carrier*			
Vessel	Port of loading			
Port of discharge	Place of delivery by on-carrier*	Freight payable at	Number of original B/L	
Marks and numbers	Number of packages / description of goods	Gross weight Kos.	Measurement Cbm.	
Particulars furnished by the Merchant				
FREIGHT AND CHARGES		<p>SHIPPED on board in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, for carriage to the port of discharge or so near thereto as the Vessel may safely get and lie always afloat, to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns they paying freight as per note on the margin plus other charges incurred in accordance with the provisions contained in this Bill of Lading.</p> <p>In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed stamped or otherwise incorporated, as fully as if they were all signed by the Merchant.</p> <p>IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated above, all of this tenor and date, one of which being accomplished, the others to stand void.</p>		
		Place and date of issue		
Daily demurrage rate (additional Clause A)		Signature		

* Applicable only when document used as Through Bill of Lading

LINER BILL OF LADING

(Liner terms approved by The Baltic and International Maritime Conference) Code Name: "CONLINEBILL"
Amended January 1st, 1950, August 1st, 1952, January 1st, 1973, July 1st, 1974, August 1st, 1976, January 1st, 1978

1. Definition.

Wherever the "Merchant" is used in this Bill of Lading, it shall be deemed to include the shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.

2. General Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply. Trades where Hague-Visby Rules apply. In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - The Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

3. Jurisdiction.

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

4. Period of Responsibility

The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

5. The Scope of Voyage.

As the vessel is engaged in liner service the intended voyage shall not be limited to the direct route but shall be deemed to include any proceeding or returning to or stopping or slowing down at or off any ports or places for any reasonable purpose connected with the service including maintenance of vessel and crew.

6. Substitution of Vessel, Transshipment and Forwarding.

Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only. The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

7. Lighterage.

Any lighterage in or off ports of loading or ports of discharge to be for the account of the Merchant.

8. Loading, Discharging and Delivery

Discharging and Delivery of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed. Landing, storing and delivery shall be for the Merchant's account. Loading and discharging may commence without previous notice. The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and - but only if required by the Carrier - also outside ordinary working hours not withstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and deadfreight is to be paid. The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and - but only if required by the Carrier - also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under Clause 16. The Merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above. If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction. The Merchant shall accept his reasonable proportion of unidentified loose cargo.

9. Live Animals and Deck Cargo

shall be carried subject to the Hague Rules as referred to in Clause 2 hereof with the exception that notwithstanding anything contained in Clause 19 the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo.

10. Options.

The port of discharge for optional cargo must be declared to the vessel's Agents at the first of the optional ports not later

than 48 hours before the vessel's arrival there. In the absence of such declaration the Carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercised for the total quantity under this Bill of Lading only.

11. Freight and Charges.

(a) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The Carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred. Interest at 5 per cent., shall run from the date when freight and charges are due.

(b) The Merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing onboard and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by extra handling of the cargo for any of the aforementioned reasons.

(c) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount of freight, weight of cargo or tonnage of the vessel shall be paid by the Merchant.

(d) The Merchant shall be liable for all fines and/or losses which the Carrier, vessel or cargo may incur through non-observance of Custom House and/or import or export regulations.

(e) The Carrier is entitled in case of incorrect declaration of contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. Lien.

The Carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

13. Delay.

The Carrier shall not be responsible for any loss sustained by the Merchant through delay of the goods unless caused by the Carrier's personal gross negligence.

14. General Average and Salvage.

General Average to be adjusted at any port or place at Carrier's option and to be settled according to the York Antwerp Rules 1974, with amendments 1990. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract or otherwise, the Merchant shall contribute with the Carrier in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

15. Both-to-Blame Collision Clause.

(This clause to remain in effect even if unenforceable in the Courts of the United States of America). If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the vessel, the Merchant will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her Owner in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owner of the said goods paid or payable by the other or non-carrying vessel or her Owner to the owner of said cargo and set-off, or recouped or recovered by the other or non-carrying vessel or her Owner as part of his claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

16. Government directions, War, Epidemics, Ice, Strikes, etc.

(a) The master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations

(b) Should it appear that the performance of the transport would expose the vessel or any goods onboard to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.

(c) Should it appear that epidemics, quarantine, ice, labour troubles, labour obstructions, strikes, lockouts, any of which onboard or on shore - difficulties in loading or discharging would prevent the vessel from leaving the port of loading or

reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may discharge the cargo at port of loading or any other safe and convenient port.

(d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra

(e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.

(f) The Merchant shall be informed if possible.

17. Identity of Carrier.

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as the Line Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.

18. Exemptions and Immunities of all servants and agents of the Carrier.

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading. The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such servant or agent of the Carrier for any such loss, damage or delay or otherwise.

19. Optional Stowage, Unitization.

(a) Goods may be stowed by the Carrier as received, or, at Carrier's option, by means of containers, or similar articles of transport used to consolidate goods.

(b) Containers, trailers and transportable tanks, whether stowed by the Carrier or received by him in a stowed condition from the Merchant, may be carried on or under deck without notice to the Merchant.

(c) The Carrier's liability for cargo stowed as aforesaid shall be governed by the Hague Rules as de-facto being carried notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to general average and shall receive compensation in general average.

ADDITIONAL CLAUSES

(To be added if required in the contemplated trade).

A. Demurrage.

The Carrier shall be paid demurrage at the daily rate per ton of the vessel's gross register tonnage as indicated on page 2 if the vessel is not loaded or discharged with the dispatch set out in Clause 8, any delay in waiting for berth at or off port to count. Provided that if the delay is due to causes beyond the control of the Merchant, 24 hours shall be deducted from the time on demurrage. Each Merchant shall be liable towards the Carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question. No Merchant shall be liable in demurrage for any delay arisen only in connection with goods belonging to other Merchants. The demurrage in respect of each parcel shall not exceed its freight. (This Clause shall only apply if the Demurrage Box on Page 2 is filled in).

B. U.S. Trade, Period of Responsibility.

In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

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