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# Straight Bills, a Comparative Study

Master thesis

30 points

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Maritime Law

Semester 9

# Contents

<b>SAMMANFATTNING</b>	<b>1</b>
<b>SUMMARY</b>	<b>5</b>
<b>PREFACE</b>	<b>6</b>
<b>ABBREVIATIONS</b>	<b>7</b>
<b>1 INTRODUCTION</b>	<b>8</b>
1.1 Objective	9
1.2 Method	9
<b>2 THE CONCEPT OF “DOCUMENT OF TITLE”</b>	<b>10</b>
2.1 Straight bill as a document of title	15
<b>3 STRAIGHT BILLS</b>	<b>17</b>
3.1 The statutory position in the United Kingdom	17
3.1.1 <i>Case law in the United Kingdom</i>	22
3.2 The statutory position in Singapore	32
3.2.1 <i>Case law in Singapore</i>	33
3.3 The statutory position in Hong Kong	36
3.3.1 <i>Case law in Hong Kong</i>	37
3.4 The statutory position in the United States	42
3.4.1 <i>Case law in the United States</i>	46
3.5 The statutory position in Sweden	50
<b>4 UNCITRAL</b>	<b>55</b>
4.1 The definitions in the Draft Convention	55
4.2 Delivery and Presentation	57
<b>5 POSSIBLE EFFECTS OF IMPLEMENTING THE DRAFT CONVENTION</b>	<b>60</b>
5.1 The aftermath of <i>Rafaela S</i>	61
5.2 Possible effects in the United Kingdom, Singapore and Hong Kong	63
5.2.1 <i>Scenario 1: Straight bills lacking a presentation clause</i>	64
5.2.2 <i>Scenario 2: Straight bills including a presentation clause</i>	65

<b>5.3</b>	<b>Possible effects in the United States</b>	<b>65</b>
<b>5.4</b>	<b>Possible effects in Sweden</b>	<b>66</b>
<b>6</b>	<b>CONCLUSION</b>	<b>69</b>
	<b>BIBLIOGRAPHY</b>	<b>73</b>
	<b>TABLE OF CASES</b>	<b>76</b>

# Sammanfattning

Handel och transport med varor på den internationella marknaden är en hörnsten i de flesta länders ekonomi. Inom sjötransporten har aktörerna på marknaden genom historien använt sig av ett flertal olika transportdokument. Det mest kända och använda är utan tvekan konossementet, eller bill of lading. Detta dokument erbjuder parterna en möjlighet att köpa/sälja varor under transport. Man brukar säga att dokumentet är löpande eller till order. Dokumentet representerar varorna, således kan köparen begära leverans genom att visa upp konossementet. Dokumentet anger uttryckligen till vem leveranser skall ske till, antingen genom namn eller genom att dokumentet är ställt till innehavaren. Konossementets presentationskrav har många gånger beskrivits som en nyckel som krävs för leverans. En hybrid av detta väl använda dokument är det så kallade rekta konossementet, eller straight bill. Detta konossement kännetecknas av att dokumentet enbart är ställt till en viss person och inte till order. Konossementet går med andra ord inte att överlåta till annan part. Även om den internationella marknaden har tvingat länder att enas om tolkning av transportdokument finns fortfarande påtagliga skillnader. Denna uppsats behandlar just denna problematik med presentationskravet för sjötransportdokument. Speciell fokus ligger på straight bills, eftersom detta dokument tolkas annorlunda av common law och civil law jurisdiktioner. Slutsatsen i denna uppsats är att tolkningsskillnader även finns inom common law, där USA och Storbritannien utgör två skiljda skolor. I USA, ett land med betydligt mer kodifierad rätt än övriga common law länder,

finns inget presentationskrav för straight bills. I Storbritannien har rättsläget varit tämligen osäkert i denna fråga och kan i viss mån fortfarande sägas vara osäkert. House of Lords, Storbritanniens högsta domstolsinstans, avgjorde nyligen ett känt rättsfall som berörde detta ämne. Rättsfallet har dock inte fått det genomslaget som domstolen hoppats på i Storbritannien, eftersom presentationskravet inte var huvudfrågan i domen. Domarna i högsta instans valde ändå att kommentera presentationskravet och kom fram till att kravet var i enlighet med brittisk rätt. Problemet med dessa kommentarer är att de inte är bindande, utan är så kallat Obiter. Doktrin på området har ställt sig tveksamma till om frågan om presentationskravet är avgjord eller inte. Detta har lett till en splittring i frågan och sista ordet är nog ännu inte sagt. I Singapore och Hong Kong, två common law jurisdiktioner med nära samhörighet till Storbritannien, har frågan avgjorts på ett betydligt rakare sätt. Båda dessa länder baserade sina senaste avgöranden på den brittiska högsta domstolsdomen, båda fann att ett presentationskrav var i linje med common law. Problemet i samtliga dessa jurisdiktioner har varit att rättfärdiga kravet. Diskussionen har i grund och botten handlat om de rättsliga kvalitéerna som transportdokumenten åtnjuter och i synnerhet väderpappers kvalitet eller document of title. Denna kvalitet är varken lagfäst eller beslutad i rättsfall. Definitionen anses utmynna från ett klassiskt rättsfall och genereras vidare genom tradition. Eftersom ett konossement endast uppfyller ett av de rekvisit som definitionen kräver, nämligen det sakrättsliga, anses dokumentet vara ett kvasi-värdepapper i common law. En straight bill uppfyller inget av kraven och anses således inte vara ett värdepapper i den traditionella meningen. Även om den ovan

nämnda definitionen för värdepapper är den mest kända finns även ytterligare två. Den ena kan härledas till en tidigare lag, den andra bygger på att vissa dokument måste presenteras. Att ett dokument kräver presentation anses i vissa läger räcka för att definiera det som ett värdepapper. I Sverige är rättsläget betydligt klarare. Den svenska sjölagen anger att en straight bill, eller rekta konossement, måste presenteras för att kunna begära leverans. Den svenska modellen skiljer sig något från common law ur denna aspekt. Sjölagen definierar ett rekta konossement som vilket annat konossement som helst, således återfinns kravet på presentation även för dessa. Den svenska definitionen på värdepapper kan dock sägas vara lika omdiskuterad som i common law. Definitionen är inte lagfäst utan bygger på doktrin, förarbeten samt utredningar. Den svenska definitionen bygger på legitimations- och presentationspapper. Likheter med definitionen i common law är slående, båda två bygger på ett presentationskrav.

För att dra frågan till sin spets kommer även en framtida konvention diskuteras. UNCITRAL kommer inom snar framtid presentera en ny transporträttslig konvention, Draft Convention, som är tänkt att ersätta tolkningsolikheter på den internationella marknaden. Konventionen kommer, i den mån den ratificeras, innebära förändringar. Tolkningen av rekta konossementet är inget undantag. Förslaget innebär att en tydligare uppdelning av de transporträttsliga dokumenten. Konventionen bygger på tre tydliga vattendelare: löpande konossement, fraktsedlar samt rekta konossement som uttryckligen kräver presentation. Denna indelning innebär att rekta konossement som inte uppfyller det ställda kravt, med en uttrycklig

presentationsklausul, kommer definieras som fraktsedlar. Vad detta kommer att innebära i realiteten är fortfarande svårt att sja om. Dock kommer denna förändring innebära ett större krav på marknadens parter att tydligt markera vilket typ av transportdokument de avser att använda.

# Summary

This dissertation will be discussing the presentation requirement for straight bills in different jurisdictions, in an attempt to clarify interpretational differences and similarities. Starting with common law; United Kingdom's, Singapore's, Hong Kong's and the United States' legal interpretational views will be analysed and then compared with a civil law jurisdiction, represented by Swedish law. Furthermore, the different jurisdictions will also be compared with the newly drafted UNCITRAL Draft Convention. This dissertation will, among other things, come to the conclusion that common law jurisdictions interpret the presentation rule for straight bills differently. The United Kingdom's, arguably having a position in between the United States and Singapore/Hong Kong for the moment; view on this matter is far from resolved. Even if the House of Lords seem to favour a solution based on the path that Singapore and Hong Kong choose, many critics have in doctrine made it clear that case law is not clear enough and that the United States approach is better. Hence, the issue is so far not resolved.



# Preface

This dissertation is part of the ongoing debate on straight bills and the presentation rule. Even though common law jurisdictions and civil law jurisdictions share many similarities regarding the interpretation of shipping documents, they also have their distinct differences. The effects of the decision regarding the presentation rule, made by the House of Lords in *Rafaella S* have created both certainties and uncertainties in common law. Furthermore, the ongoing drafting work of UNCITRAL, to create a harmonized legal platform regarding the interpretation of shipping documents, will if implemented create even more question marks. It is impossible to state whether the draft convention will be a worldwide success, or if it is actually possible for any of the jurisdictions to implement it without major changes to their legal systems. Nevertheless, I will follow the future debate on the issue of presentation with much interest.

I would like to thank my supervisors, Jur. Dr. Lars-Göran Malmberg and Filippo Lorenzon, for their time and valuable guidance and for introducing me to the interesting debate. Furthermore, a special thank you to Pf. Hugo Tiberg for interesting comments and help.

# Abbreviations

Hague rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), Brussels, 25 August 1924
Hague Visby rules	Visby Amendments, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, ("Hague-Visby Rules") in 1968
COGSA 1971	Carriage of Goods by Sea Act 1971
COGSA 1992	Carriage of Goods by Sea Act 1992
UNCITRAL Trade Law	United Nations Commission on International
U.S.C	United States Code
U.C.C	Uniform Commercial Code

# 1 Introduction

The word ‘straight bill’ derives from the definition of a non-negotiable document in the former United States Pomerene Act from 1916.<sup>1</sup> The Act distinguished between “*straight bills of lading for goods intended for one named consignee and ‘order’ bills of lading, which are negotiable*”.<sup>2</sup> The terminology was changed in 1994, when the United States implemented the U.S.C; the word ‘straight’ was replaced by the term ‘nonnegotiable’.<sup>3</sup> However, the word ‘straight’ had already spread over the world. When the law commission in the United Kingdom was working on COGSA 92, the term ‘straight’ was once again used for defining a form of a non-negotiable document.<sup>4</sup> This term has so far, in the United Kingdom, never been used in statutes, but court decisions and literature have widely used it. The straight bill of lading has always been regarded as a non-negotiable shipping document, both in United States and United Kingdom.<sup>5</sup> Still, what has been more uncertain are the legal qualities and practice regarding the functions of the document. This dissertation focuses on one of these issues, the presentation rule.

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<sup>1</sup> Federal Bills of Lading Act 1916, section 2

<sup>2</sup> “United States Admiralty Law”, Gerard J. Mangone, Brill, 1997, at p.79 *in fine*

<sup>3</sup> Title 49, Subtitle X, Chapter 80103.b.1, United States Code (U.S.C)

<sup>4</sup> The Law Commission Report No. 196, Rights of Suit in Respect of Carriage of Goods by Sea, at §2.50

<sup>5</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §1-007

## **1.1 Objective**

In this dissertation I will analyse different jurisdictions' approaches to the presentation rule regarding straight bills. Beginning with the United Kingdom, I will also include Singapore, Hong Kong, The United States and Sweden. After analysing the legal regime of the proposed UNCITRAL draft convention, the different jurisdictions will be compared with the draft convention. The aim of the dissertation is to clarify the different positions and to identify possible future problems. I have chosen to focus this dissertation solely on the issue of presentation; many closely connected issues have therefore not been discussed. Nevertheless, in order to understand the greater picture of straight bills, those areas must also be considered.

## **1.2 Method**

This dissertation is a comparative study of the presentation rule regarding straight bills. By using case law, statutes, codes, preparation work, articles, reports and the Draft Convention I will try to compare differences and similarities between the jurisdictions. This dissertation will also take special regards to scholars' opinions on the area of law that is arguably unclear. Regarding the draft convention, reports made by UNCITRAL have been my main resource to understand the intention of the drafters.

## 2 The concept of “document of title”

In order to examine the nature of delivery requirements for shipping documents it is important to start at the core of the problem. The concept of “document of title to goods” in the United Kingdom is used in two different ways, a narrow common law sense and a much broader statutory sense.<sup>6</sup> To begin with, in common law there is no authority for a legal definition of the document of title to goods. Though, it has been stated that it is defined as a document that allows transfer of constructive possession of the goods.<sup>7</sup> This definition finds its root in a decision<sup>8</sup> from the year 1787, and was later confirmed by the House of Lords.<sup>9</sup> The court held that it recognised a custom of merchants, “*that a bill of lading by which goods were stated to have been ‘shipped by any person or persons to be delivered to order or assigns’ was ‘negotiable and transferable’ and so enabled the holder...to transfer the property in the goods*”.<sup>10</sup> It is important to note that the terms “negotiable” and “transferable” are used as synonyms regarding bills of lading.<sup>11</sup> This is because a bill of lading is not a truly negotiable instrument. A truly negotiable document has three main characteristics, a bill of lading

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<sup>6</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-001

<sup>7</sup> Benjamin on Sale of Goods, 7ed, Sweet & Maxwell, 2006 at §18-007

<sup>8</sup> *Lickbarrow v Mason (1787) 2 Term Rep. 63*

<sup>9</sup> *Lickbarrow v Mason (1793) 2 H.B.L.211*

<sup>10</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-002, referring to *Lickbarrow v Mason (1794) 5 Term Rep. 684*

<sup>11</sup> Benjamin on Sale of Goods, 7ed, Sweet & Maxwell, 2006 at §18-084

only shares one of those; passing property in goods.<sup>12</sup> Nevertheless, this dissertation will from here on use the term negotiable for this specific characteristic. It has been stated that no other document is recognised to be a “document of title of the goods” in this sense.<sup>13</sup> The second meaning, the broader definition, includes two interesting aspects, the statutory approach and the contractual approach to a document of title. The statutory approach finds its definition in a parliamentary Act from 1889.<sup>14</sup> The Act distinguishes between expressly stated documents and other such documents that are used in the ordinary course of business as proof of the possession. In other words, the latter is a question of fact. The consequences of these two separate definitions have been stated to be that if a document falls within the statutory definition, but not within the common law definition; then the transfer of the document will not transfer constructive possession of the goods.<sup>15</sup> However, if a document falls within the statutory definition, regardless of the common law definition, it could still transfer title to the goods.<sup>16</sup> It is therefore important to distinguish between constructive possession and title. The focus of the common law definition is on custom of merchants. It is not the intention of the parties that transform a document to be a “document of title to goods”, but the recognised custom. The title, still, can pass on the grounds of the intention of the parties by virtue of statute or contract.<sup>17</sup> The contractual approach to document of title is based on the fact that some documents must be produced in order to obtain

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<sup>12</sup> Ibid, at §18-084

<sup>13</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-002

<sup>14</sup> Factors Act 1889

<sup>15</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-003

<sup>16</sup> Ibid, at §6-003 *in fine*

<sup>17</sup> Sale of Goods Act 1979, section16

delivery from a bailee, without being a negotiable document.<sup>18</sup> It has been stated that delivery clauses, or a term in the contract, included in a document can transform it into a type of “document of title”.<sup>19</sup> On the other hand, such clause could never itself transform the document to be negotiable without proof of custom.<sup>20</sup> The conclusion therefore is that a document of title can be described in different ways. The common law approach regulates constructive possession on basis of custom; the statutory approach allows passing of title without constructive possession and the contractual approach relates to the intention of the parties in performance. The problem with defining all three types as document of titles lies in the fact that they are treated differently. The position in Singapore regarding document of title is similar to the United Kingdom position.<sup>21</sup> Furthermore, the position in Hong Kong is also the same as in the United Kingdom.<sup>22</sup> In the United States, the term document of title derives from the definition in the United Kingdom.<sup>23</sup> Yet, every state has, apart from federal legislation, their own legislations and definitions. An early attempt, the Uniform Sales Act, to make a harmonized federal platform, defined a “document of title” in a way similar to the United Kingdom’s broader statutory sense.<sup>24</sup> The reason for the similarities might be because an Englishman drafted the Act.<sup>25</sup> Still, an interesting fact regarding document of title in the United States is that it is

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<sup>18</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-004

<sup>19</sup> Benjamin on Sale of Goods, 7ed, Sweet & Maxwell, 2006 at §18-008

<sup>20</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-004

<sup>21</sup> Singaporelaw.sg, at §25.4.9

<sup>22</sup> Shipping and Logistics Law: Principles and Practice in Hong Kong, at p.218 ff

<sup>23</sup> Clive M. Schmitthoff's Select Essays on International Trade Law, Clive Macmillan Schmitthoff, Chia-Jui Cheng, BRILL, 1988, at p. 114, “[*The enactment*] had been drafted by Sir Macenzie Chalmers, a British draftsman of outstanding quality”

<sup>24</sup> Uniform Sales Act 1906, at section 76

<sup>25</sup> Clive M. Schmitthoff's Select Essays on International Trade Law, Clive Macmillan Schmitthoff, Chia-Jui Cheng, BRILL, 1988, at p. 114

not limited to negotiable documents. The implementation of the Uniform Commercial Code was a major breakthrough in the unification of trade law in the United States. Regarding “document of title” the code states:

*“Negotiable and Nonnegotiable Document of Title.*

*(a) A document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.*

*(b) A document of title other than one described in subsection (a) is nonnegotiable...”<sup>26</sup>*

Accordingly, a document of title can take the shape of both negotiable and nonnegotiable documents in the United States. Furthermore, a negotiable document is a document that allows “negotiation”. That means, according to the U.C.C, “*a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder*”.<sup>27</sup> That is to say, passing possession from a bailee to a third party. Consequently, the United States approach to document of title is different than the other three common law jurisdictions. Swedish law, being the law of a civil law jurisdiction, distinguishes itself from the previous mentioned common law jurisdictions in a few aspects. Similar to common law, Swedish law does not have a specific definition of the term “document of title”<sup>28</sup>. Guidance can be found in various parts of the code.<sup>29</sup> But, the

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<sup>26</sup> The Uniform Commercial Code, §7-104

<sup>27</sup> The Uniform Commercial Code, §3-201

<sup>28</sup> “Värdepapper”



best definition can be found in doctrine and preparation work to various legislation.

*“The concept of document of title in Swedish law is, even though the opinions in doctrine is divided, based on the so called presentation and identification documents, which are characterised by the obligation of the named person in the document not to perform a duty against anyone else but the person presenting the document”<sup>30</sup>*

The first requirement of a document of title in Sweden is that it has to be a presentation document, that is to say the document has to be presented. The second requirement, identification document, is based on the negotiable character. A document of title can take the shape of both negotiable and non-negotiable documents in Sweden. The document can be consigned to “a named person”, to “a named person or order” and to “bearer”. While all three types are regarded as documents of title, only the latter two are always regarded as negotiable documents. The first form, to “a named person”, can be a negotiable document. However, if the document includes a recta clause it is not.<sup>31</sup> An identification document, or a negotiable document, requires a full chain of valid endorsements to be clearly printed on the document. The reason for this requirement is because of the good faith provision in the Swedish code for order documents.<sup>32</sup>

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<sup>29</sup> 1:4 Lag (2007:528) om värdepappersmarknaden, 1:1 Lag (1991:980) om handel med finansiella instrument

<sup>30</sup> “presentationspapper and legitimationspapper”, SOU 2004:62 p. 364 f

<sup>31</sup> Recta clause, a clause stating that the document is “not to order”

<sup>32</sup> Analogy with 2:13, Lag (1936:81) om skuldebrev

## 2.1 Straight bill as a document of title

In the United Kingdom a non-negotiable document is not considered as a document of title in the common law sense, simply because it is not negotiable.<sup>33</sup> Still, in recent case law a straight bill has been defined as a type of document of title.<sup>34</sup> The cases will be discussed more closely below. Therefore, if it is not a document of title in the common law sense it must be so in a different sense. It has been stated that a bill of lading has two main characteristics.

*“The main characteristics of a bill of lading were its negotiability and its recognition as a document of title, requiring presentation to obtain delivery of the cargo. While a straight bill lacked the first of these characteristics, there was no reason to infer that the parties intended to do away with the other also.”*<sup>35</sup>

The approach to define a straight bill as a document of title in a contractual sense is based on separating the negotiable character as a prerequisite for it being a document of title.<sup>36</sup> If a document that requires presentation is considered as a type of document of title, a straight bill including a

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<sup>33</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-023 *in fine*

<sup>34</sup> See chapter 3.2

<sup>35</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2002] 2 *Lloyd's Rep.* 403 at §21, Lord Bingham

<sup>36</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-024

surrender clause could indeed be defined as such.<sup>37</sup> Furthermore, any type of non-negotiable document could by this definition arguably be considered as a document of title as long as it requires presentation. However, by defining it as a document of title will not change the characteristics of a straight bill, that is to say, it can never become negotiable. As we will see below, COGSA 92 regulates right of suit, the contractual relationship between the parties to shipping documents. A straight bill is, within the operation of that Act, considered as a non-negotiable document, regardless if considered a document of title or not. In Sweden a bill of lading is regarded as a document of title.<sup>38</sup> Depending on the wording of the consignee box it can either be negotiable or not. The recta bill, being a bill of lading consigned only to a named person and expressly not to order, is considered as a document of title, although, not a negotiable document of title.

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<sup>37</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-024

<sup>38</sup> Allmän transporträtt, 5ed, PA Norstedt & Söners förlag, 1977, at p.59

## 3 Straight bills

### 3.1 The statutory position in the United Kingdom

The straight bill is by its nature a non-negotiable document on a negotiable document form in the United Kingdom;<sup>39</sup> therefore, it is important to scrutinize the main formal differences between the negotiable and the non-negotiable document. Shipping documents, in the United Kingdom, are regulated by the statutory *Carriage of Goods by Sea Act 1924*. Being concerned with right of suit, contractual rights and liabilities, the Act distinguishes between bill of lading and sea waybills. The Act states in section 1:

“(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement;

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(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—

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<sup>39</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §1-009 *in fine*

*(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and*

*(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.”<sup>40</sup>*

In the United Kingdom a bill of lading has three main characteristics; firstly it is a receipt for the goods, secondly it is an evidence of the contract of carriage and thirdly it is a document of title.<sup>41</sup> Only the two first characteristics are expressly mentioned in the Act. COGSA 92 defines a bill of lading as a document capable of being transferred by indorsement. This characteristic of the bill, being able to be transferred, is because it is a document of title in the common law sense, allowing constructive possession to pass along the document. The Act defines a sea waybill as “*not being a bill of lading*”<sup>42</sup>. Section 1.3 of the Act state that a sea waybill “*is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea*”<sup>43</sup>. Having only two of the bill of ladings’ three characteristics, the sea waybill is not regarded as a document of title in the common law sense.<sup>44</sup> Instead, the sea waybill is only concerned with delivery to a named consignee, incapable of being transferred by indorsement.<sup>45</sup> The reason why it is important to distinguish between the two is because of presentation. Delivery of goods under a negotiable

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<sup>40</sup> Carriage of Goods by Sea Act 1992 (c. 50), section 1.2 & 1.3

<sup>41</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §2-001, §3-001 and §6-001

<sup>42</sup> Carriage of Goods by Sea Act 1992 (c. 50), section 1.3

<sup>43</sup> Ibid, section 1.3.a

<sup>44</sup> Ibid, at §8-003

<sup>45</sup> Ibid, at §8-004

document requires presentation, and possession, of the bill of lading,<sup>46</sup>  
section 5.2 of the Act state:

*“(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—*

*(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;*

*(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill...”<sup>47</sup>*

Delivery under a sea waybill does not require presentation by default. Instead, the only person being capable of demanding delivery is the named consignee. The Act defines a named consignee as a person being identified in the document, by stating:

*“(3) References in this Act to a person’s being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document...”<sup>48</sup>*

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<sup>46</sup> Ibid, at §1-006

<sup>47</sup> Carriage of Goods by Sea Act 1992 (c. 50), section 5.2

<sup>48</sup> Ibid, section 5.3

The Act does not mention straight bills. However, in the case of the *Rafaela S* a straight bill was held to be a sea waybill within the operations of COGSA 92.<sup>49</sup> One of the reasons why the House of Lords came to such conclusion was because the law commission had stated so in an earlier report.<sup>50</sup> The straight bill is therefore considered as a non-negotiable document in this sense.<sup>51</sup> The effects of this interpretation of the definition would be that the straight bill does not require presentation, similar to the sea waybill, and only is deliverable to the named consignee on proper identification made by it. On the other side, it is possible to argue that COGSA 92 includes further elements that need to be included in the interpretation. This notion is based on contractual terms; either expressed or implied, that affects straight bills to require presentation. Section 2.1.b state that, “[*the named consignee*] whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract”.<sup>52</sup> The important element in this interpretation is that delivery is to be made in *accordance with the contract*. Hence, the carrier and the consignee must arguably honour an expressed or implied term that requires presentation. Still, the section can either be interpreted to include conditions, such as presentation, or it could be interpreted only to specify the true identity of the consignee as stated in the contract.<sup>53</sup> It has been stated that

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<sup>49</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2005] 1 Lloyd's Rep. 347 at §50,

<sup>50</sup> *The Law Commission Report No. 196, Rights of Suit in Respect of Carriage of Goods by Sea*, at §2.50 and §4.10-4.12

<sup>51</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §1-008

<sup>52</sup> Carriage of Goods by Sea Act 1992 (c. 50), section 2.1.b

<sup>53</sup> Carver on bills of lading, 2ed, Sweet & Maxwell, 2005, at §6-022

the latter is the correct interpretation; this argument was made on the basis that all sections of the Act shall be interpreted in a similar way.<sup>54</sup> Even though one must respect the authority of this view, I find it hard to fully accept it. To begin with, a straight bill is not a normal shipping document; it is a hybrid between a negotiable bill and a non-negotiable bill. If the parties to a straight bill wanted either of those documents, they could easily have chosen to conclude so. By not completely being either of the two, the straight bill should have the benefit of being interpreted as including elements from both. The law commission considered the straight bill to be a sea waybill within the operations of COGSA 92, because the bill is not negotiable in the common law sense.<sup>55</sup> On the other hand, the law commission did not consider the contractual form of document of title. Even though a straight bill cannot transfer constructive possession in accordance with COGSA 92, it can transfer contractual obligations. Nothing in COGSA 92 restricts straight bills from being interpreted in a special way regarding section 2.1.b. Furthermore, it could be possible to argue that the presentation rule is a separate obligation, falling outside COGSA 92. This argument would be based on a notion that presentation for straight bills derives from a common law principle. Still, I have tried to find support in textbooks for this argument without succeeding. Nevertheless, I would like to submit that the Courts have previously created new principles, even though they generally are reluctant to do so. It would, nevertheless, not be impossible for the Courts to impose a requirement of presentation by referring to common law.

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<sup>54</sup> Ibid, at §6-022

<sup>55</sup> *The Law Commission Report No. 196, Rights of Suit in Respect of Carriage of Goods by Sea*, at §4.12



### 3.1.1 Case law in the United Kingdom

In a leading decision from 1873 the privy council set out a corner stone for distinguishing the difference between negotiable and non-negotiable documents.<sup>56</sup> By setting focus on the wording of the consignee box, Sir Robert P Collier wrote in a famous and well-cited passage:

*“It appears that a bill of lading was made out, which is in the usual form, with this difference, that the words “or order or assigns” are omitted. It has been argued that...this bill of lading was a negotiable instrument, and there is some authority at nisi prius for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as “or order or assigns” ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading is not a negotiable instrument.”*<sup>57</sup>

Accordingly, even though both the negotiable and the non-negotiable document are issued on a bill of lading form, the wording in the consignee box prevails. A straight bill is to a named consignee, without the words “to order” which will trigger the negotiable character. More than 120 years later, the same issues arose again in a case from the year 2000. In the case of

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<sup>56</sup> *CP Henderson & Co v Comptoir d'Escompte de Paris* [1873] L.R. 5 P.C. 253

<sup>57</sup> *Ibid*

“*The Chitral*”<sup>58</sup> the Queen’s Bench Division gave a decision in line with the ratio from *CP Henderson & Co v Comptoir d’Escompte de Paris*. The case was concerned with two sets of different bills, the first clearly being negotiable but the second set was more doubtful. The latter contains a phrase in the consignee box, argued by the defendant to trigger the negotiable character. Mr. Justice David Steel held in the case:

*“I remain doubtful whether the phrase ‘issue a delivery order in the name of’ is a commonplace substitute for ‘deliver to the order of’ in Dubai. But this is not really to the point. For the reasons outlined above I conclude, in common with the Bremen Court, that the...bill was non-negotiable.”*<sup>59</sup>

After deciding that the bill was non-negotiable and straight, Mr. Justice David Steel moved on to decide the issue of title to sue. By stating, “*The defendants further relied upon the fact that [the buyer] purported to endorse the bill to [a third party]. But an ‘endorsement’ of a non-negotiable bill must, by definition, be ineffective*”<sup>60</sup>, he concluded that the fact that the consignee to a non-negotiable bill had endorsed the bill to a third party did not alter the first consignee’s title to sue. Simply because an endorsement of a non-negotiable bill was not valid, and any attempts were deemed to be void. Two years later, the issue once again came to the courts attention. In

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<sup>58</sup> “*The Chitral*” [2000] 1 Lloyd’s Rep. 529

<sup>59</sup> *Ibid*, at §21

<sup>60</sup> *Ibid*, at §20

the “*Happy Ranger*”<sup>61</sup> the question regarding the non-negotiable character was first raised as a defence in the Court of Appeal. Lord Justice Tuckey gave the leading speech in the case, giving a judgement against the argument of a straight bill. He began by describing the document at hand:

*“...in this case the printed words on the front of the bill refer to delivery of the goods to the ‘consignee or to his or their assigns’. It is accepted that the latter words mean ‘or order’. Those words do not appear in the consignee box but there is nothing in that box or anywhere else in the bill to show that it was not intended that they should have that effect.”*<sup>62</sup>

Lord Justice Tuckey came to the conclusion that the wording of the document did indeed trigger the negotiability of a bill of lading. The document was a negotiable document, and not a straight bill. However, perhaps the most interesting part of the case was not the issues answered, but the questions brought up by the parties. The claimants made an argument regarding the legal qualities of the straight bill, Lord Justice Tuckey stated:

*“...[the claimant] says that...the bill is his only key to possession of the goods, it must be regarded at least as a document of title in the sense contemplated by the rules if it is*

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<sup>61</sup> *Parsons Corporation and Others v C.V. Scheepvaartonderneming “Happy Ranger” and Others (The “Happy Ranger”)* [2002] 2 Lloyd’s Rep. 357

<sup>62</sup> *Parsons Corporation and Others v C.V. Scheepvaartonderneming “Happy Ranger” and Others (The “Happy Ranger”)* [2002] 2 Lloyd’s Rep. 357 at §29

*not a bill of lading within the meaning of those rules. The arguments about this need also to take into account the provisions of COGSA, 1992 which now define 'straight' bills not as bills of lading at all but as seaway bills.*"<sup>63</sup>

Instead of giving the interesting issue an honest attempt, Lord Justice Tuckey was quick to end discussion. He stated:

*"Because I have decided that the bills actually issued in this case were not 'straight' bills, it is not and will not be necessary to decide this point in this case. And nor do I think that we should do so. It should be decided in a case where it arises and initially at first instance rather than on appeal...All I need add is that I think it would be unwise to assume that the statements in the text books are correct."*<sup>64</sup>

Furthermore, an interesting aspect of the this passage is the general criticism the judge aims at the text book scholars, a view shared by Lord Justice Rix in the case of *Rafaela S.*<sup>65</sup> The most important benchmark regarding straight bills was set in the case of *Rafaela S.*<sup>66</sup> The case was concerned with a cargo claim for damaged goods, still, the underlying issue was whether the

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<sup>63</sup> *Ibid*, at §30

<sup>64</sup> *Parsons Corporation and Others v C.V. Scheepvaartonderneming "Happy Ranger" and Others (The "Happy Ranger")* [2002] 2 Lloyd's Rep. 357 at §31

<sup>65</sup> "In conclusion, I would merely underline Lord Justice Tuckey's comment that it would be unwise to assume that all of the statements in the text books regarding 'straight' bills are correct", *Parsons Corporation and Others v C.V. Scheepvaartonderneming "Happy Ranger" and Others (The "Happy Ranger")* [2002] 2 Lloyd's Rep. 357 at §49

<sup>66</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. ("The Rafaela s")* [2005] 1 Lloyd's Rep. 347

limitation regime of *Hague* or *Hague Visby*<sup>67</sup> rules applied to the contract of carriage. The claimant was the buyer of goods under a straight bill, on a shipment performed by the defendant carrier, from Durban to Felixstowe with final destination Boston. The parties were initially referred to arbitration resulting in an award in favour of the defendant, by stating that the straight bill was not a document of title and did therefore not trigger the compulsory application of *The Hague Visby* rules. The claimants appealed the decision to the Queen's Bench's Commercial Court. One of the main issues in the appeal was “*Whether...the ‘straight consigned’ bill of lading...was a bill of lading within the meaning of s. 1(4) of COGSA, 1971*”.<sup>68</sup> The judge, Langley, J, examined case law and textbook scholars and came to the conclusion that a straight bill is not a document of title. He stated:

*“[Document of title] is a document by which goods can be transferred by endorsement and delivery of the document itself. A straight consigned bill of lading is not such a document. Indeed the parties to this bill have a choice, exercisable by inclusion in...[the consignee box]...of the words ‘Order of’ before naming the consignee, whether or not to constitute the bill a document of title in the sense to which I have referred.”*<sup>69</sup>

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<sup>67</sup> Hague rules & Hague-Visby rules

<sup>68</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2002] 2 *Lloyd's Rep.* 403 at §4 (i)

<sup>69</sup> *Ibid*, at §21

The judge seems to have focused on the fact that a straight bill cannot be endorsed. However, he agreed with the claimant on the fact that the issue lacked proper authority, by stating: “*While in terms of strict analysis [the claimant] is right that no binding authority has determined the question, the consistent and overwhelming burden of judicial and other legal sources is against his submission.*”<sup>70</sup> By declining the straight bill the function of document of title, Langley, J moved on to state that the straight bill did not have to be surrendered. He continued:

*“[The defendant] were obliged to deliver the cargo to and only to the consignees. That obligation and the concomitant entitlement of the consignees is not affected by whether or not the consignee has or surrenders the bill of lading. It is a consequence of the agreement between [the defendant] and the shipper to be found in the fact that the bill of lading names the consignee without the words “Order of”. Nor does [the defendant] need the protection of delivering only in exchange for the bill of lading as it would with a transferable bill.”*<sup>71</sup>

The judge ended his decision by concluding that the appeal was dismissed, according to him the straight bill was not a type of document of title and therefore it did not have to be presented. The claimants appealed the judgement once again, this time to the Court of Appeal. One of the main

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<sup>70</sup> *Ibid*, at §22

<sup>71</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2002] 2 *Lloyd's Rep.* 403 at §27

issues was still “*whether a bill of lading consigned to a named consignee, a so-called ‘straight bill of lading’, is a bill of lading within the meaning of the Rules*”<sup>72</sup> of COGSA 1971. Lord Justice Rix, giving the leading speech, made a very thorough analysis of previous case law and textbooks. Apart from affirming that the straight bill was considered as a bill of lading within the meaning of COGSA 1971, the judge included the issues of document of title and presentation in his speech. He stated:

*“Is it a ‘similar’ document of title? If I am right to consider that negotiability is not a necessary requirement of a ‘bill of lading’ within the meaning of the [COGSA 1971], then plainly it is. But I also think that the good sense of regarding a straight bill whose production is required for delivery of the goods as a document of title in turn supports the answer to the prior question of whether a straight bill is a ‘bill of lading’.”*<sup>73</sup>

Coming to the conclusion that a straight bill, with an expressed presentation clause, indeed was a type of document of title within the meaning of COGSA 1971, Lord Justice Rix moved on to the issue whether a straight bill without such clause also was considered as a similar document of title. He continued:

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<sup>72</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2003] 2 *Lloyd's Rep. 113* at §1

<sup>73</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2003] 2 *Lloyd's Rep. 113* at §143 - 144

*“The final question is whether a straight bill of lading is in principle a document of title, even in the absence of an express provision requiring its production to obtain delivery? It would seem that Peer Voss [See below] concluded that it was (at any rate if it is issued in traditional form in three originals). That was also the view of the Law Commission. It is unnecessary to decide the point, but in my judgment it is. It seems to me to be undesirable to have a different rule for different kinds of bills of lading...”<sup>74</sup>*

Lord Justice Rix came to the conclusion that a straight bill was in principle a document of title, irrespectively of a presentation clause or not. By defining it as “in principle” it must be concluded that Rix did not mean a document of title in a common law sense, but in the broader way. It can be argued that Lord Rix only interpreted a straight bill to be a document of title within the operation of COGSA 71. It can also be interpreted as a more general view, something that the House of Lords arguably did. Furthermore, by coming to this conclusion the judge extended the ratio in the case of *Voss Peer v APL*<sup>75</sup>, a case only concerned with the presentation rule and not the legal status of the straight bill. Nevertheless, the defendant appealed the decision to the House of Lords. The main issues of the appeal was still the application of *COGSA 1971*, however, even though the House of Lords dismissed the appeal they still considered the issues of document of title and

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<sup>74</sup> *Ibid*, at §145

<sup>75</sup> *Voss Peer v APL Co. Pte. Ltd. [2002] 2 Lloyd's Rep. 707*



presentation, arguably obiter. Lord Bingham commented restrictively on this issue by stating:

*“The question before the House is not whether a straight bill of lading is a document of title at common law but whether it is ‘a bill of lading or any similar document of title’ for purposes of the Hague and Hague-Visby Rules”*<sup>76</sup>

Furthermore, he seemed reluctant to accept Lord Rix passage regarding a straight bill being a document of title. He stated, *“I am a little puzzled by the third sentence of par. 145 of Lord Justice Rix's judgment.”*<sup>77</sup> The sentence Lord Bingham referred to was Lord Rix's use of the case *Voss Peer v APL* as an authority for the notion that a straight bill was a document of title.

On the issue regarding presentation, Lord Bingham agreed with the earlier Court of Appeal decision. He stated:

*“I have no difficulty in regarding [the straight bill] as a document of title, given that on its express terms it must be presented to obtain delivery of the goods. But like Lord Justice Rix...I would, if it were necessary to do so, hold that production of the bill is a necessary pre-condition of requiring*

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<sup>76</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2005] 1 *Lloyd's Rep.* 347 at §22

<sup>77</sup> *Ibid*, at §24

*delivery even where there is no express provision to that effect.”*<sup>78</sup>

The passage seems to indicate that Lord Bingham supports the notion that a straight bill always has to be presented, even without a presentation clause. Furthermore, the judge also concluded that a straight bill could be defined as a document of title because it requires presentation, either by expressed or implied terms. Lord Steyn, giving another leading speech, held that the defendant’s comparison of straight bills with sea waybills was incorrect. He stated:

*“In the hands of the named consignee the straight bill of lading is his document of title. On the other hand, a sea waybill is never a document of title...Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally, a straight bill of lading shares all the principal characteristics of a bill of lading as already described.”*<sup>79</sup>

Lord Steyn also agreed with Lord Rix on the issue of presentation by stating:

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<sup>78</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2005] 1 *Lloyd's Rep.* 347 at §20

<sup>79</sup> *Ibid*, at §46 *in fine*

*“In my view the decision of the Court of Appeal of Singapore in Voss v. APL...that presentation of a straight bill of lading is a requirement for the delivery of the cargo is right.”<sup>80</sup>*

Consequently, the House of Lords agreed with the Court of Appeal in its decision that a straight bill was to be considered as a bill of lading when operating within COGSA 1971. Still, on the issues whether a straight bill constitutes a type of document of title and whether it requires presentation, the decision does not seem absolutely clear. Although the closest conclusion would be that it indeed is a type of document of title that requires presentation, reason for doubt does exist. The reason is because, as stated by Lord Bingham above<sup>81</sup>, the House of Lords were not concerned with these two issues. Arguably, the speeches given by the judges on these issues can be considered as obiter and followingly not binding. On the other hand, I must conclude that it would be wrong to disregard from the opinion of two House of Lords judges. This aspect of the decision will be further analysed below, taking scholars’ opinions into account.

### **3.2 The statutory position in Singapore**

Singapore has implemented an Act that is the mirror image of the United Kingdom’s COGSA 92.<sup>82</sup> The Act is supposed to be interpreted *pari*

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<sup>80</sup> *Ibid*, at §45

<sup>81</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. (“The Rafaela s”)* [2005] 1 *Lloyd's Rep.* 347 at §22

<sup>82</sup> The Bill of Lading Act 1994, as ammended in 1999

*materia*, with COGSA 92 as a blueprint.<sup>83</sup> Being in force since 1994, the Act has only been amended once to include a broader definition regarding alternative ways of communication.

### **3.2.1 Case law in Singapore**

One of the first cases in Singapore to highlight the presentation rule was *Olivine Electronics v. Seabridge Transport*.<sup>84</sup> The case was concerned with a cargo dispute of a shipment between Singapore and Russia. The plaintiff was the identified shipper and the defendant was the identified carrier and issuer of a straight bill. At port of discharge the defendant released the cargo to a receiver without the production of the original straight bill. Since the plaintiffs had not been paid for the goods, they commenced an action against the defendant on ground of misdelivery. The action was an application for a summary judgement against the defendant. Yet, the assistant register allowed conditional leave to defend, a decision latter confirmed by the appellate High Court by dismissing an appeal. The case was never brought to any further litigation since the defendant failed to provide for security, allowing a decision of default for the plaintiffs. It is hard to draw any clear conclusions from this case; however, it has been argued that this case represents the first indication of an implied duty of presentation for straight bills.

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<sup>83</sup> Singaporelaw.sg, at § 25.4.12

<sup>84</sup> *Olivine Electronics v. Seabridge Transport* [1995] 3 SLR 143, “Shipping and Logistics Law: Principles and Practice in Hong Kong”, at P. 233

*“By affirming the Assistant Registrar’s decision, His Honour appears to be suggesting that straight consigned bills of lading have to be presented for delivery of cargo...”<sup>85</sup>*

In the case of *Voss v APL*<sup>86</sup> the question regarding presentation of straight bills once again came to the Singapore court’s attention. This case was also concerned with a cargo claim for misdelivery. The plaintiff Voss was the seller and shipper of luxury cars from Germany to South Korea and the defendant APL was the carrier of the goods. When the defendant reached port of discharge he delivered the goods to the named consignee, but without any presentation of the straight bill. The simple reason for the consignee’s inability to present the bill was that he did not possess it, the plaintiff had not been paid for the sale of the luxury cars and therefore not transferred the documents to the buyer. The bill contained a clause stating *“set of three originals issued by the carrier and upon surrender of any one negotiable bill of lading properly endorsed all others stood void”*<sup>87</sup>. The plaintiff brought a summary action against the defendant who applied for determination of the question of law. The question of law was whether a straight bill of lading, only naming a specific person as consignee without words importing transferability, similar to an order bill had to be presented at time of delivery. At the first instance<sup>88</sup>, Singapore High Court judge Judith Prakash J. held that APL was not entitled to deliver the cargo to the named consignee without production of the bill of lading, therefore, APL was liable

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<sup>85</sup> Michael Lai (Haq & Selvam), forwarderlaw.com, November 30, 2002

<sup>86</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd’s Rep. 707

<sup>87</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd’s Rep. 70, at §2

<sup>88</sup> *Voss Peer v APL Co Pte. Ltd.* [2002] 3 SLR 176

in conversion and damages. The Judge based her decision on authorities giving support for presentation of negotiable bills of lading and by distinguishing them from sea waybills, stating:

*“...A shipper who, like Mr. Voss in this case, asks for the issue of a straight bill of lading even though the alternative of a sea waybill is available to him, wants to retain some degree of control over the delivery of the goods. The shipowner is aware of this. If he is not prepared to accept the restriction on delivery rights that a bill of lading imposes he can insist on issuing a waybill instead. Once he issues a bill of lading instead, however, whether it is an order bill or a straight bill, he must not deliver the cargo except against its production.”<sup>89</sup>*

The defendant appealed the decision to the Court of Appeal. After a similar approach to the issue at the lower court, the court decided to dismiss the appeal. Judge Chao Hick Tin ended his judgement by stating:

*“In the light of the foregoing, we hold that in respect of a straight BL, the shipowners should only deliver the cargo against its presentation. In the circumstances, there is no defence to the respondent’s claim.”<sup>90</sup>*

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<sup>89</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd's Rep. 707 at §33

<sup>90</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd's Rep. 707 at §55

The issue seems, in the aftermath of *Voss v APL*, quite settled. Singapore's view on the presentation rule of straight bills is that the carrier must always demand presentation in order not to get caught in the hopeless situation of misdelivery, depriving him of all protection under his straight bill.<sup>91</sup> In spite of this, none of the two above cases deals with the issue of document of title. The question that still remains is whether the presentation rule derives from the fact that the straight bill is defined as a bill of lading, or because the Singapore jurisdiction recognises the straight bill to be a type of document of title. The closest interpretation that can be made is that the decision was based on the attestation clause that required surrender. If this conclusion were right, I would state that the straight bill is not considered as a document of title in the common law sense; but rather a document of title in the broader contractual sense.

### **3.3 The statutory position in Hong Kong**

Hong Kong enacted the *Bills of Lading and Analogous Shipping Documents Ordinance* in 1993. The ordinance has, since the transfer of Hong Kong's sovereignty to the People's Republic of China in 1997, been subject to various amendments. On the other hand, the similarities with COGSA 92

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<sup>91</sup> *Sze Hai Tong Bank v Rambler Cycle* [1959] 2 Lloyd's Rep. 114, *M.B. Pyramid Sound N.V. v Briese Schiffsahrt G.M.B.H. and Co. K.G. M.S. "Sina" and Latvian Shipping Association Ltd. (The "Ines")* [1995] 2 Lloyd's Rep. 144. Both these cases relate to misdelivery against negotiable B/L, however, given the interpretation of the HL in *The Rafela S* a straight bill is regarded as B/L in the operations of COGSA 1971 and its schedule. The carrier's protections, potential terms of the contract, would be governed by the Hague Visby and its rule 3.8.

regarding shipping documents are striking.<sup>92</sup> A closer examination of the Hong Kong Act is therefore superfluous.

### 3.3.1 Case law in Hong Kong

The Hong Kong jurisdiction has dealt with two cases regarding straight bills. The first case, the “*Brij*”<sup>93</sup>, from the year 2000 concerned a misdelivery of goods. The plaintiff was the seller and the shipper of goods from China to Venezuela; the defendant was the carrier. The action was brought in both contract and tort. Still, only the part relating to contract is of interest here. Mr. Justice Waung began with stating the main issue of the dispute:

*“The main and most important dispute in this case is whether these...bills are non-negotiable direct consignment bills or straight bills (“straight bills”) intended for delivery by carrier directly to consignee without production of the originals bills of lading or are the ordinary negotiable bills of lading which can be transferred to a third party by indorsement and require the production of the original bills for delivery”*<sup>94</sup>

Before addressing the issue regarding straight bills, the judge came to the conclusion that the plaintiff did not have privity to the contract and

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<sup>92</sup> Shipping and Logistics Law: Principles and Practice in Hong Kong, at p.224

<sup>93</sup> *The “Brij”* [2001] 1 Lloyd's Rep. 431

<sup>94</sup> *Ibid*, at §4 *in fine*



followingly dismissed the matter.<sup>95</sup> However, the judge moved on to discuss the true character of the transport document by establishing the intention of the parties. Having listened to both parties' arguments, the judge decided that the document was a straight bill. The most interesting point with the decision in *The "Brij"* is that the judge came to the conclusion that the market practise was that there was no requirement of presenting the straight bill at time of delivery. He stated:

*"...straight bills are also very much known to the shipping world and the essence of straight bills is that they are not negotiable and the contractual mandate is to deliver to named consignee without the production of the original document."*<sup>96</sup>

Mr. Justice Waung based his decision on a passage from Benjamin on Sale of Goods that stated *"...under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill"*<sup>97</sup>. Benjamin on Sale of Goods did not refer to any authority to support this notion, a key point stated by Judith Prakash J in the latter Singapore case *Voss v APL*.<sup>98</sup> In a recent Court of Appeal case, from 13 July 2007, the Hong Kong courts once again had the opportunity to look into the issue of straight bills.<sup>99</sup> This time, with the House of Lord's

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<sup>95</sup> *Ibid*, at §14 in fine, "In my judgment, the plaintiff was not a party to the...bills and it therefore follows that the claim of the plaintiff in contract must fail. Straight bills or not"

<sup>96</sup> *The "Brij"* [2001] 1 Lloyd's Rep. 431 at §16

<sup>97</sup> Benjamin on Sale of Goods, 5th ed. at p. 900

<sup>98</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd's Rep. 707 at §30 in fine

<sup>99</sup> *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* CACV 328/2006, *Carewins Development (China) Ltd v Hecny Shipping Ltd* CACV 329/2006

decision in *The Rafaela S*<sup>100</sup> to lean back on. The case was concerned with a shipment of goods from Hong Kong to Los Angeles; at port of discharge the goods were delivered without presentation of the straight bill. The plaintiff was the shipper and seller of the goods; the defendants were the two separate freight forwarders, in a joint hearing. As a defence against the claimant's motion of misdelivery, the defendants tried to use the ratio from *The "Brij"*, claiming that the presentation rule for straight bills was not applicable in the Hong Kong jurisdiction. Nevertheless, Reyes J who gave the leading speech was not late to reject such defence. By referring both to the decision in the House of Lords and the Court of Appeal, the judge made an interesting analysis of *The Rafaela S*, and once and for all buried the ratio of *The "Brij"*. He stated:

*"In The 'Brij'...Waung J came to a different conclusion on the sole basis of a statement in Benjamin's Sale of Goods (5th ed.)...That said that 'under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill'. Unfortunately, the passage cited no authority in its support.*

*By contrast, having had the benefit of the House of Lords' decision in The 'Rafaela S', the 7th edition of Benjamin now acknowledges (at §18-071) that 'the weight of current judicial opinion seems to favour the view that the consignee named in*

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<sup>100</sup> J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. ("The Rafaela s") [2005] 1 Lloyd's Rep. 347

*a straight bill is entitled to delivery of the goods only on production or presentation of the bill to the carrier’.*

*In my respectful view then, as far as the presentation rule in respect of straight bills is concerned, The ‘Brij’ cannot be regarded as correct...’’<sup>101</sup>*

After deciding that *The “Brij”* no longer constituted good law, Reyes J continued by giving his grounds for the judgement. By comparing the attestation clause of the bills with the bills from the case of *Rafaela S*, the judge held *“I think that, just as in The ‘Rafaela S’, the attestation clause here clearly indicates that...[the bill]...was a document of title which needed to be produced to obtain the underlying goods.”<sup>102</sup>*. He continued, *“And, like the House of Lords in The ‘Rafaela S’, I would reject any argument along the lines that the attestation clause is to be ignored as being meaningless or inapposite in the case of a straight bill.”<sup>103</sup>* After deciding that attestation clauses were valid on straight bills, the judge moved on to the problem whether a straight bill was a document of title. Reyes J stated:

*“If a bill of lading did not have to be produced by a consignee as a condition of delivery, there would be no reason to “void”*

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<sup>101</sup> *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd CACV 328/2006, Carewins Development (China) Ltd v Hecny Shipping Ltd CACV 329/2006 at §44 – 46.*

<sup>102</sup> *Ibid*, at §55

<sup>103</sup> *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd CACV 328/2006, Carewins Development (China) Ltd v Hecny Shipping Ltd CACV 329/2006 at §55*

*or render 2 original copies ineffective. The ‘voiding’ of 2 of the original copies must mean that only the remaining original copy bill can serve as the document of title or key to delivery of the goods.”<sup>104</sup>*

The judge came to the conclusion that the straight bill indeed was a type of document of title, and therefore he quickly moved on to decide that the presentation rule was applicable:

*“As a matter of general principle and on a specific construction of the attestation clause of the...bills, the Defendants could only deliver the goods to [the consignee]...upon production of the relevant straight bills.*

*The Defendants, however, delivered the goods to [the consignee] without requiring the bills to be produced. Accordingly, the Defendants acted in breach of the contracts of carriage contained in or evidenced by the Set A bills.”<sup>105</sup>*

The judge came to the conclusion that delivery without presentation of a straight bill amounted to breach of contract, the defendants were held liable in tort of conversion. This decision appears to mirror the *ratio decidendi* in *The Rafaela S*, notwithstanding, with a much clearer decision regarding the issue of presentation and document of title. On the other hand, regarding the

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<sup>104</sup> *Ibid*, at §56

<sup>105</sup> *Ibid*, at §65 - 66

issue of document of title, the court never stated that the straight bill was considered as a document of title in the common law sense. The Court of Appeal stated that the straight bill including a presentation clause, in the hands of the consignee, amounted to “*the document of title or key to delivery*”.<sup>106</sup> Followingly, similar to the Singapore approach, the straight bill seems to be considered as a document of title in the broader contractual common law sense. However, the decision is not clear whether presentation is needed regardless of a presentation clause.

### **3.4 The statutory position in the United States**

The United States position on negotiable bills is slightly different from the other mentioned common law jurisdictions. The most important difference is that the statutory law does not recognise any “*necessary connection between the classification of a document as a document of title, and the need to produce the document to obtain delivery of the goods covered by it*”<sup>107</sup> That is to say, it is not the form itself that decide whether a document amounts to a document of title, it is the intention of the parties. The relevant provisions regulating shipping documents in the United States are based on statutory law. *The Federal Bill of Lading Act*<sup>108</sup> constitutes a platform for

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<sup>106</sup> *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* CACV 328/2006, *Carewins Development (China) Ltd v Hecny Shipping Ltd* CACV 329/2006 at §56

<sup>107</sup> G.H. Treitel, “The legal status of straight bills of lading”, (2003) 119 L.Q.R. 608-620, at §15

<sup>108</sup> Title 49, Subtitle X, Chapter 801, United States Code (U.S.C)

distinguishing between different documents. Chapter 80103 of the Act states:

*“(a) Negotiable Bills. –*

*(1) A bill of lading is negotiable if the bill -*

*(A) states that the goods are to be delivered to the order of a consignee; and*

*(B) does not contain on its face an agreement with the shipper that the bill is not negotiable.*

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*(b) Nonnegotiable Bills. –*

*(1) A bill of lading is nonnegotiable if the bill states that the goods are to be delivered to a consignee. The indorsement of a nonnegotiable bill does not -*

*(A) make the bill negotiable; or*

*(B) give the transferee any additional right.*

*(2) A common carrier issuing a nonnegotiable bill of lading must put "nonnegotiable" or "not negotiable" on the bill..."<sup>109</sup>*

The above chapter seems to distinguish between negotiable and non-negotiable bills, with no reference being made to straight bills. Still, as already stated above, the term straight bill has been replaced by the

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<sup>109</sup> Title 49, Subtitle X, Chapter 80103, United States Code (U.S.C)

nonnegotiable document. A negotiable bill is stated to be a document that “states that the goods are to be delivered to the order of a consignee”<sup>110</sup> and lacks any special agreements transforming the bill to being non-negotiable. A non-negotiable bill is stated to be a document that “states that the goods are to be delivered to a consignee”<sup>111</sup>; furthermore, it must contain a clause describing its non-negotiable character. Regarding the issue of presentation, *The Federal Bill of Lading Act* has a special provision regulating to delivery.<sup>112</sup>

*“(a) General Rules...the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill or the holder of a negotiable bill for the goods when the consignee or holder -*

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*(2) has possession of the bill and, if a negotiable bill, offers to indorse and give the bill to the carrier; and*

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*(b) Persons to Whom Goods May Be Delivered -...a common carrier may deliver the goods covered by a bill of lading to -*

*(1) a person entitled to their possession;*

*(2) the consignee named in a nonnegotiable bill; or*

*(3) a person in possession of a negotiable bill if -*

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<sup>110</sup> Ibid, Chapter 80103.a.1 A & B

<sup>111</sup> Title 49, Subtitle X, Chapter 80103.b.1, United States Code (U.S.C)

<sup>112</sup> Ibid, Chapter 80110

*(A) the goods are deliverable to the order of that person; or*

*(B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.”<sup>113</sup>*

The Act distinguishes between negotiable and non-negotiable bills. Accordingly, negotiable bills require possession and presentation.<sup>114</sup> Non-negotiable bills do not require presentation; delivery is simply to be made to the named consignee.<sup>115</sup> Still, both documents are defined as bills of lading. Furthermore, as stated in the previous chapter, both documents can be a document of title, depending on the intention of the parties. An interesting point regarding nonnegotiable documents is that it can be transferred, or indorsed, to a third party. Being a document incapable of negotiation, the transfer is different from the negotiable bill of lading. The Federal Bill of Lading Act states, “*The holder of a bill of lading may transfer the bill without negotiating it by delivery and agreement to transfer title to the bill or to the goods represented by it*”.<sup>116</sup> Upon transfer of a nonnegotiable document the carrier must be informed. The transfer will not be valid until such notification has reached the carrier.<sup>117</sup>

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<sup>113</sup> Title 49, Subtitle X, Chapter 80110, United States Code (U.S.C)

<sup>114</sup> Ibid, Chapter 80110.b.3

<sup>115</sup> Ibid, Chapter 80110.b.2

<sup>116</sup> Ibid, Chapter 80106.1a

<sup>117</sup> Ibid, Chapter 80106.1c



### 3.4.1 Case law in the United States

In the United States problems do not, arguably, occur in situations where the shipping documents are easy to identify as either negotiable or nonnegotiable; but in situations where the bills can be interpreted to be either one. The operation of inserting a presentation clauses can furthermore act as catalysis for confusion. To highlight this problem two cases from the United States District Court Southern District of New York will be discussed. In a case from 1994 the court was concerned with a dispute relating to delivery of goods without presentation of the bill.<sup>118</sup> The plaintiff was the seller of goods and the defendant was the carrier of the same. The bill contained a surrender clause stating, "*One of the originals of this Bill of Lading must be surrendered duly endorsed in exchange for the goods or Delivery Order.*"<sup>119</sup> However, the defendant released the cargo against a letter of indemnity without presentation of the bill. The plaintiff filed for a summary judgement for breach of contract. The main issues of the case were whether the bill was negotiable or non-negotiable and whether the presentation clause was valid. The judge, Peter K. Leisure, granted the plaintiff's action, holding that the surrender clause was not ambiguous. He continued by stating:

*"If the clause of the bill at issue herein had been of no effect,  
and if the bill had been a straight bill, the consignee would not*

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<sup>118</sup> *International Knitwear Co v. M/V Zim Canada*, 1994 WL 924203, 1997 A.M.C. 1290, S.D.N.Y., Oct 06, 1994 (NO. 92 CIV. 7508 (PKL))

<sup>119</sup> *Ibid*

*have needed to produce an original bill in order to receive the goods and, accordingly, [the buyer] would not have presented carrier with a letter of indemnification, agreeing to hold defendants harmless of any liability that they might suffer in releasing the freight without presentation of an original bill of lading.*"<sup>120</sup>

The judge based his judgement on circumstantial evidence to come to the conclusion that the bill indeed was negotiable and therefore required presentation. The judge's decision was based on the fact that the bills did not bear a clause stating that they were non-negotiable, a requirement that is expressly stated in *The Federal Bill of Lading Act*<sup>121</sup>. Since the bills did not carry such clause, the judge concluded that it must be negotiable. A criticism to this judgement must be that the judge overlooked the corresponding requirement for negotiable bills, that they must include a clause stating that the bill is "to order".<sup>122</sup> Nevertheless, the interesting part of this case is the reasoning of the judge, where he stated that a straight bill does not require presentation. Two years later, a case with almost the identical issues came to the court's attention.<sup>123</sup> The dispute derived from a sale of meat from the US to Japan. The plaintiff was the seller of goods and the defendant was the carrier of the same. After the goods were loaded on the carriers' vessel, 4 separate bills of lading were issued and delivered to

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<sup>120</sup> *Ibid*, at §14

<sup>121</sup> Title 49, Subtitle X, Chapter 80103.b.2, United States Code (U.S.C)

<sup>122</sup> Title 49, Subtitle X, Chapter 80103.a.1, United States Code (U.S.C)

<sup>123</sup> *Porky Products Inc. v Nippon Express U.S.A (Illinois) Inc, 1 F.Supp.2d 227, S.D.N.Y., August 21, 1997 (NO. 95CIV.5037(MBM)(SEG))*

the plaintiff. Each bill contained an expressed surrender clause stating, "*This Bill of Lading duly endorsed must be surrendered in exchange for the goods or delivery order*".<sup>124</sup> The plaintiff transferred the bills to his bank, to be used as security for payment. However, the plaintiff released the shipment to the buyer without receipt of either the bills of lading or payment. Instead, the defendant required a letter of indemnity from the buyer protecting him from liability arising out of release of the shipment without the bills of lading. The buyer later became insolvent and filed for bankruptcy proceedings in Japan. One of the primary issues was whether the bill was a negotiable or non-negotiable, and whether the surrender clause was applicable. The defendants argued that since the bill did not contain the words "to order" it was a non-negotiable bill and therefore the surrender clause did not apply. The judge, Sharon E. Grubin, following the previous case, held that the presentation clause was valid. The judge did not decide on the issue whether the bill was negotiable or non-negotiable. Still, she made an interesting observation on the matter. She stated:

*"Finding as this Court does, that the language on the front of the bill of lading was a clear, unambiguous, term of the contract, the Court need not reach the issue of whether the bill at issue was a negotiable bill or a straight bill, because the plain terms of the contract must govern. However, the Court notes the passing observation that, the absence of the words*

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<sup>124</sup> *Ibid*, at §4

*‘to order’ aside, the parties appear to have conducted themselves as if the bill at issue were negotiable”*<sup>125</sup>

The judge seems to, similar to the previous case<sup>126</sup>, have used circumstance evidence to come to the conclusion that the bill was negotiable. The same criticism can be applied to this case, since the requirement of an expressed clause stating “to order” was not present. Nevertheless, the conclusions that can be drawn from these two cases is firstly, in the absence of a surrender clause no presentation is needed for non-negotiable bills, and secondly, the US approach to surrender clauses is that they prevail over the statutory regulations. Hence, a non-negotiable bill with an unambiguous presentation clause will require presentation regardless of *The Federal Bill of Lading Act*. To support this conclusion, a recent New York Supreme Court’s decision will be cited.<sup>127</sup> On the issue whether presentation is needed for a non-negotiable bill, judges Martin J. and Kerins, J held:

*“Plaintiff has demonstrated that [the buyer] contractually undertook the responsibility to require both negotiable and non-negotiable bills of lading to be accomplished or surrendered to the carrier in order to obtain delivery of the cargo. It is clear that "accomplished" is synonymous with "surrender for delivery" to prevent a bill of lading from*

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<sup>125</sup> *Porky Products Inc. v Nippon Express U.S.A (Illinois) Inc*, 1 F.Supp.2d 227, S.D.N.Y., August 21, 1997 (NO. 95CIV.5037(MBM)(SEG)), at §12

<sup>126</sup> *International Knitwear Co v. M/V Zim Canada*, 1994 WL 924203, 1997 A.M.C. 1290, S.D.N.Y., Oct 06, 1994 (NO. 92 CIV. 7508 (PKL))

<sup>127</sup> *Edelweiss (USA) Inc. v Vengroff Williams & Ass*, 2007 WL 2236336 (N.Y.Sup.), 2007 A.M.C. 1080, 2007 N.Y. Slip Op. 30717(U)

*getting into the hands of an insolvent buyer. Where a bill of lading contains a clause similar to the ones here, such provision results in liability on a carrier who delivers the goods without insisting on the production and surrender of the bill of lading where the shipper suffered a loss as a result. Such liability arises, not from a statute, but from the obligation which the carrier assumes under the bill of lading”<sup>128</sup>*

Consequently, a straight bill is considered to be a nonnegotiable document in the United States. Furthermore, depending on whether a presentation clause is present or not, the straight bill can be subject to surrender of the document. The requirement of presentation has nothing to do with the characteristics of a document of title. Instead, the concept of document of title is a separate issue that can apply to both forms of bills of lading.

### **3.5 The statutory position in Sweden**

The Swedish Maritime Code<sup>129</sup> is a comprehensive text, regulating most aspects of maritime related issues. Chapter 13, being titled “*Transport of Goods*”<sup>130</sup>, regulates transport documents and delivery. The code separates between two main types of transport documents, bill of lading and sea waybills. The Maritime Code states:

*“Section 42 A bill of lading is a document which*

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<sup>128</sup> *Ibid.*, at §5

<sup>129</sup> Sjölag (1994:1009)

<sup>130</sup> “Om styckegodstransport”

*1. is evidence of a contract of carriage by sea and of the carrier's having received or loaded the goods*

*2. is designated by the term bill of lading or contains an undertaking by the carrier to deliver the goods only against the return of the document*

*A bill of lading may be made out to a named person, to a named person or order or to bearer. A bill of lading made out to a named person is considered as a order bill of lading unless it contains a reservation against assignment by terms such as "not to order" or similar.*

*The bill of lading determines the conditions for the carriage and delivery of the goods in respect of the relationship between the carrier and any holder of the document other than the sender.*

*Provisions in the contract of carriage which have not been inserted in the bill of lading shall not be opposable to such a holder unless the bill of lading contains a reference to them.”<sup>131</sup>*

Paragraph 42<sup>132</sup>, being concerned with bill of lading<sup>133</sup>, begins by stating that a bill of lading has two main characteristics. It is considered as an evidence of the contract of carriage, and as a receipt of the goods.

Furthermore, the document has to be marked as a “bill of lading” or contain a clause that allows for delivery against surrender of the bill.<sup>134</sup> The Code

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<sup>131</sup> 13:42, Sjölag (1994:1009), Translation by Hugo Tiberg, The Swedish Maritime Code, 2ed, Jure AB, 2001

<sup>132</sup> 13:42.2, Sjölag (1994:1009)

<sup>133</sup> The Maritime Code uses the term “konossement” as a synonym for bill of lading.

<sup>134</sup> 13:42.1, Sjölag (1994:1009)

continues by separating between order bills and “recta” bills. An order bill, similar to the common law approach, is a negotiable document. The code separates further between bill of lading consigned to “*a named person*”, to “*a named person or order*” and to “*bearer*”<sup>135</sup>. All three types are, initially, considered as order documents. However, a bill consigned to a named person will, in combination with a clause stating “not to order”, be considered as a recta bill. The recta bill is an interesting hybrid in Swedish maritime law. While considered as a bill of lading, the recta bill is not a negotiable document. It is easy to draw a connection with the straight bill in common law. On the other hand, one must not forget that a bill consigned to a named person is considered as an order bill in the absence of a “not to order” clause. Only the recta bill shares similarities with the common law straight bill in that it is a non-negotiable document on a negotiable form. The Swedish Code, similar to the common law approach to order bills, requires presentation of the bill of lading in order to obtain delivery.

Paragraph 52 states:

*“Section 52 The person presenting a bill of lading and appearing, through its content or, in the case of an order bill, through a continuous chain of endorsements or through an endorsement in blank as the rightful holder in due course, is authorised as receiver of the goods.*

*If the bill of lading has been issued in several originals, it suffices for due delivery at the port of destination that the receiver*

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<sup>135</sup> 13:42.2, Sjölag (1994:1009)

*demonstrates his authority by presenting one original of the bill of lading. If the goods are deliverable at any other port, any other originals must also be returned or security be lodged for any claim that a holder of any other original in circulation might raise against the carrier.”*<sup>136</sup>

A recta bill, being classed as a bill of lading regardless of not being negotiable, also requires presentation.<sup>137</sup> On the other hand, the bill cannot be transferred by endorsement; only the person being named on the bill can demand delivery. Similar to common law, the Swedish Code has adopted the “*on presentation of one bill of lading the rest stands void*”-approach. Still, the code also allows for delivery against indemnity; something that common law does not recognise.<sup>138</sup> Paragraph 58 of the Code is concerned with sea waybills, it states:

*“Section 58 A sea waybill is a document which*

*1. is proof of a contract of carriage by sea and of the carrier having taken reception of the goods, and*

*2. contains an undertaking by the carrier to deliver the goods to the consignee named in the document.*

*Even after the issuing of the sea waybill, the sender may elect that the goods shall be delivered to someone other than the consignee named in the document, unless he has waived this right as against*

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<sup>136</sup> 13:52, Sjölag (1994:1009), Translation by Hugo Tiberg, The Swedish Maritime Code, 2ed, Jure AB, 2001

<sup>137</sup> *Ibid*, a recta bill is considered as a “bill of lading”

<sup>138</sup> *Ibid*



*the carrier or the consignee has already asserted his right. A bill of lading may be required according to section 44, unless the sender has waived his right under the second paragraph to elect another receiver.”*<sup>139</sup>

The Swedish Code has adopted the Hamburg rules approach to sea waybills.<sup>140</sup> Similar to a bill of lading, the sea waybill is regarded as a proof of the contract of carriage and as a receipt of the goods. However, the sea waybill only contains an undertaking by the carrier to deliver the goods to a named consignee. The Maritime Code, and Swedish law in general, does not consider a sea waybill as either a document of title or as a negotiable document. By not being a document of title, the sea waybill does not require presentation to obtain delivery of the goods.<sup>141</sup> Paragraph 58 continues by stating that the shipper maintains the right of control of the cargo, even after the issuing of the sea waybill, that is to say, the right to elect a new consignee for delivery of the goods. The shipper, against the carrier, can contractually waive the right of control.<sup>142</sup> Furthermore, the right of control will further be extinguished in situations where the original consignee has asserted his right.

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<sup>139</sup> 13:58, Sjölag (1994:1009), Translation by Hugo Tiberg, The Swedish Maritime Code, 2ed, Jure AB, 2001

<sup>140</sup> Hamburg rules, article 18

<sup>141</sup> The sea waybill is not defined as negotiable document.

<sup>142</sup> 13:58, Sjölag (1994:1009), Translation by Hugo Tiberg, The Swedish Maritime Code, 2ed, Jure AB, 2001

## 4 UNCITRAL

At the UNCITRAL's 29<sup>th</sup> session in 1996, the commission proposed to undertake a legal review in the area of international carriage of goods. The aim of this review was to establish a need for harmonized rules. The commission's suggestion was welcomed at the meeting. Among other issues, the commission was told "*...that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, the relation of those transport documents...*"<sup>143</sup>. Eventually, working group 3 was born; the first step towards the draft convention was taken. The work in the group continued during the years, and at the 21<sup>st</sup> session in 2008 a new edition of the draft convention was released.

### 4.1 The definitions in the Draft Convention

At a first glance at the convention it is easy to appreciate the comprehensive work done by the group, covering approximately 100 articles. In article 1, defining terms used in the convention, the proposed text regarding transport documents state:

*“15. ‘Transport document’ means a document issued under a*

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<sup>143</sup> A/CN.9/476 - Transport Law: possible future work

*contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:*

*(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or*

*(b) Evidences or contains a contract of carriage.”<sup>144</sup>*

To begin with, it is interesting to notice the compromise done by the group. By limiting the conditions down to two, not mentioning the issues regarding document of title, the group's suggestion effectively avoids possible conflicts with national law. This general definition used for transport documents will include many different bills of lading, including the different approaches that states have to straight bills. The term 'transport documents' are being used as an umbrella term for all different variations of documents existing on the market. As long as they satisfy at least one of the above conditions they will be considered as a valid transport document within the meaning of the draft convention. Regarding the two sub-categories, negotiable and non-negotiable documents, article one continues by stating:

*“16. ‘Negotiable transport document’ means a transport document that indicates, by wording such as ‘to order’ or ‘negotiable’ or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper,*

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<sup>144</sup> A/CN.9/WG.III/WP.101 - Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea], article 1.15

*to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'.*

*17. 'Non-negotiable transport document' means a transport document that is not a negotiable transport document.”<sup>145</sup>*

The convention defines a non-negotiable document as the opposite to a negotiable document, similar to a catch-all article that can furnish for all documents, subject to satisfying at least one of the conditions in article 1.15, that does not qualify as negotiable.

## **4.2 Delivery and Presentation**

Chapter 9 of the draft convention covers delivery of goods. The first article in chapter 9, article 45, governs general provisions regarding time and location of the delivery. It states, “*the consignee that exercises its rights under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage...*”<sup>146</sup>. Accordingly, it is the agreement between the parties in the contract of carriage that prevail. Moving on, chapter 9 distinguishes between the different transports documents above discussed. Regarding straight bills, two provisions are of interest. To begin with, article 47 is generally concerned with documents that are not negotiable<sup>147</sup>, it states:

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<sup>145</sup> A/CN.9/WG.III/WP.101 - Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea], article 1.16 & 1.17

<sup>146</sup> Ibid, article 45.1

<sup>147</sup> Ibid, article 47 noting the heading: “*Article 47. Delivery when no negotiable transport*

*“When no negotiable transport document...has been issued:*

*(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 45, paragraph 1. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier.”<sup>148</sup>*

Since the draft convention, as above mentioned regarded article 1.17, define all documents that are not negotiable as non-negotiable; article 47 deals with all such non-negotiable documents. Instead of using the term ‘non-negotiable’ the group seems to have preferred the wording ‘no negotiable’ in article 47. The article requires that the consignee properly identify himself, failing to do so leaves the carrier with a choice to refuse delivery. The second provision that will affect straight bills is article 48, regulating non-negotiable documents that bear a surrender clause. The article states:

*“When a non-negotiable transport document has been issued that [provides] [indicates] that it shall be surrendered in order to obtain delivery of the goods:*

*(a) The carrier shall deliver the goods at the time and location*

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*document or negotiable electronic transport record is issued”*

<sup>148</sup> A/CN.9/WG.III/WP.101 - Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea], article 47

*referred to in article 45, paragraph 1, to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.”<sup>149</sup>*

The wording of article 48 is almost identical to article 47, except for the additional requirement that the document must be surrendered. Failing any or both of these requirements will, similar to article 47, allow the carrier to refuse delivery. Furthermore, only one of possibly many documents relating to the specific goods needs to be surrendered. Hence, the draft convention expressly includes a common clause used for negotiable bill of lading, namely the “on presentation of one bill of lading the rest stands void” clause.<sup>150</sup>

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<sup>149</sup> Ibid, article 48

<sup>150</sup> *Voss Peer v APL Co. Pte. Ltd.* [2002] 2 Lloyd's Rep. 707, The bill of lading included a clause stating “set of three originals issued by the carrier and upon surrender of any one negotiable bill of lading properly endorsed all others stood void”.

# 5 Possible effects of implementing the Draft Convention

Before beginning to analyse possible effects that the draft convention could have on straight bills in different common law jurisdictions, it is important to clarify the present position of each of the mentioned jurisdictions. The United States' approach to straight bills is that no presentation is needed for non-negotiable documents; it therefore distinguishes itself from the other common law jurisdictions. The latest case law in Singapore on the issue of presentation was decided in 2002, 3 years before the House of Lords decision in *Rafaela s*. Regarding the Hong Kong jurisdiction, the latest case law was decided in 2006. Similar to the Singapore court, the Hong Kong courts decided firmly that straight bills require presentation. Yet, the latest case law in Hong Kong does not reveal whether this requirement is regardless to any surrender clause. In Singapore, it is. However, on the issue of document of title both jurisdictions seem unclear. In the United Kingdom the decision in the *Rafaela s* constitutes the leading case. Scholars, arguing that the *ratio decidendi* is unclear on the issue of presentation and document of title, have heavily discussed both the House of Lords' and the Court of Appeal's decision in the *Rafaela S*.<sup>151</sup> One of the main reasons for this

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<sup>151</sup> See Chapter 5.1

discussion is because the decision does not clearly state if the presentation rule constitutes the default position for straight bills, or whether the given decision was because of the expressed presentation clause on the straight bill. Therefore, in order to clarify the United Kingdom's position a closer look at these arguments is needed.

## 5.1 The aftermath of *Rafaela S*

In 2003 G.H. Treitel wrote an article about the Court of Appeal's decision in *Rafaela S*.<sup>152</sup> Regarding the issue of presentation he stated, "*If an express term in a straight bill can impose a requirement of production of the bill to obtain delivery, then the same requirement can be presumably be imposed by a implied term.*"<sup>153</sup> He continued, "*...the possibility that a term requiring production of a straight bill may be implied no doubt exists; but the judgments in *The Rafaela S* do not make it clear whether such a term is to be implied merely by virtue of the nature of the document, e.g. because it calls itself a bill of lading.*"<sup>154</sup> Treitel concluded that the decision appeared, to him, to be based on the surrender clause and followingly did not constitute the default position.<sup>155</sup> On the other hand, it is important to note that Treitel wrote his article before the House of Lords had decided the case. Given the speeches of Lord Bingham and Lord Stayn,<sup>156</sup> affirming the position of presentation as a default position, arguably obiter, the conclusion

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<sup>152</sup> G.H. Treitel, "The legal status of straight bills of lading", (2003) 119 L.Q.R. 608-620

<sup>153</sup> G.H. Treitel, "The legal status of straight bills of lading", (2003) 119 L.Q.R. 608-620, at §10

<sup>154</sup> *Ibid*, at §10

<sup>155</sup> *Ibid*, at §10

<sup>156</sup> *J. I. Macwilliam Co. Inc. v Mediterranean Shipping Co. S.A. ("The Rafaela s")* [2005] 1 *Lloyd's Rep.* 347 at §20 and §45



must be that presentation is required regardless of a surrender clause. Later articles by scholars have indeed confirmed this notion. Paul Todd wrote in an article, *“In the House of Lords, great regard was had to the form of the document...In the case itself, the attestation clause required production of the document in order to obtain delivery, and there would otherwise have been no need for three originals to be issued. However, it is clear that the same conclusion would have been reached, even in the absence of the attestation clause...”*<sup>157</sup> Still, Todd’s view was not wholly shared by Stephen Girvin, who one year later published an article stating<sup>158</sup>:

*“English courts have confirmed that if there is an appropriate clause in the bill of lading...[surrender clause]...a straight bill of lading will to be treated in the same way as an order bill of lading and must be presented in order to obtain delivery of the goods. Singapore law...[see Chapter 3.2.1]... would go further than this and holds that, regardless of whether there is an express statement, both straight and order bills of lading must be presented in order to obtain delivery of the cargo. There is obiter support for this proposition in English law and elsewhere in Asia there appears to be support for this viewpoint”*<sup>159</sup>

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<sup>157</sup> Paul Todd, “Bills of lading as document of title (case comment)”, J.B.L. 2005, Nov, 762-779, at §29 *in fine*

<sup>158</sup> S. Girvin, “Bill of lading and straight bills of lading: principles and practice”, J.B.L. 2006, Jan, 86-116

<sup>159</sup> S. Girvin, “Bill of lading and straight bills of lading: principles and practice”, J.B.L. 2006, Jan, 86-116, at §66

Girvin continued by stating that the Hong Kong view was still unclear on the issue of presentation for straight bills,<sup>160</sup> On the other hand, his article was published one year before the leading case of *Carewins Development*.<sup>161</sup> The Hong Kong position now is arguably, as already mentioned, the same as the Singapore view. In the light of the decision of the House of Lords, the above arguments made by scholars and the latest decisions from Singapore and Hong Kong, the conclusion must be that the UK position indeed is that a straight bill requires presentation regardless of any surrender clause.

## **5.2 Possible effects in the United**

### **Kingdom, Singapore and Hong Kong**

Since the default position in these jurisdictions, arguably, is that presentation is always needed for straight bills, a number of interesting issues will appear. To begin with, it is crucial to distinguish between two scenarios; the first being a straight bill that lacks a presentation clause, the second a straight bill that includes a presentation clause. The reason for this distinction is because the draft convention will treat the two documents quite differently. A straight bill that lacks a presentation clause will be subject to article 47 of the draft convention, while a straight bill that includes a presentation clause will be subject to article 48. Article 47, as already mentioned above, describes a document that is very similar to a common law sea waybill, allowing delivery to the named consignee upon

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<sup>160</sup> Ibid, at §66 *in fine*

<sup>161</sup> *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd CACV 328/2006*,  
*Carewins Development (China) Ltd v Hecny Shipping Ltd CACV 329/2006*

identification. However, article 48 of the draft convention requires also, besides from identification, that the named consignee present the straight bill in order to demand delivery.

### **5.2.1 Scenario 1: Straight bills lacking a presentation clause**

The main concern in this scenario relates to security. To begin with, article 43 of the draft convention regulates evidential effects of the documents. A straight bill would, in this scenario, be considered as a “*transport document...that evidence the receipt of the goods*”.<sup>162</sup> Such documents would only amount to *prima facie* evidence of the carrier’s receipt of the goods shipped. Furthermore, chapter 10 of the draft convention regulates rights of the controlling party. Article 53 states that the ‘right of control’ of the ‘controlling party’ includes the right to give or modify instructions in respect of the goods, the right to obtain delivery of the goods and the right to replace the consignee. Article 54 states that the shipper is the controlling party, allowing him to exercise the ‘right of control’ on proper identification. Consequently, a consignee in this scenario does not by default have the protection of the estoppels regarding the receipt of the goods. Yet, the main problem would be that this form could never be used as security for payment. A consignee in possession of this type of straight bill would actually be the holder of a common law sea waybill.

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<sup>162</sup> A/CN.9/WG.III/WP.101 - Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea], article 43.a

## **5.2.2 Scenario 2: Straight bills including a presentation clause**

In this scenario, the consignee in possession of the straight bill would be in a far better position. Regarding the issue of evidentiary effects, article 43 states that this form of straight bill constitutes conclusive evidence of the carrier's receipt of the goods. Furthermore, similar to the first scenario the shipper is the controlling party according to article 54. But, the 'right of control' can only be transferred to the named consignee. The 'controlling party' must both identify itself and surrender the documents in order to exercise its rights. Article 54 also states that if more than one straight bill has been issued all documents must be surrendered. Consequently, a straight bill in this scenario could arguably be used as security for payment. The buyer can be named as the consignee. Yet, without the possession of the straight bill(s) he could not obtain delivery. Once the named consignee has possession of the document the shipper can no longer exercise the 'right of control'.

## **5.3 Possible effects in the United States**

In the United States the draft convention is less likely to create difficulties. The US approach to straight bills, as already stated above, has always been that they do not require surrender of the straight bill. Given the case law on the area, the importance of including a presentation clause to achieve such

effect is something that is already known to the US jurisdiction. The definitions regarding non-negotiable documents in the United States Code are very much in line with article 47 of the draft convention. Both provisions lack a requirement of presentation; furthermore, both also state that delivery is to be made upon identification by the consignee. Even though a straight bill, by default, does not require presentation in the US, an expressed clause demanding such is still honoured by the courts. Therefore, if the parties want to include a requirement of presentation, the document will qualify as an article 48 bill. The conclusion must therefore be that the difference between the two positions is very little. It seems like the US model was used as a strong benchmark for the drafting of the convention.

## **5.4 Possible effects in Sweden**

Swedish law will, if implementing the Draft Convention, be subject to changes. The Swedish Maritime Code recognises a straight bill, or *recta konossement*, to be a bill of lading in form. Since all types of bills of lading require presentation in Sweden, the requirement of a presentation clause in the Draft Convention will come as a change. The most interesting aspect of possible effects to Swedish law is the bill of lading consigned to a named person. As already mentioned, depending on whether a “*not to order*” clause is included in the bill, two different interpretations can be made. A bill, lacking such clause, will be considered as a negotiable document in Swedish law. Given the wording of article 16, freedom of every member state to define a negotiable document, the bill could still probably be regarded as an

order document in the Swedish jurisdiction.<sup>163</sup> The requirement of an “*indicating word*” could be interpreted as direction rather than an expressed term on the bill. This, however, is limited to Swedish jurisdiction only. On the other hand, it is also important to remember that the objective of the convention is to create harmonised international rules. Since no reservations are allowed by the convention, abnormalities such as the Swedish interpretation could probably face changes. The same document would, in the UK for instance, clearly be regarded as a non-negotiable straight bill of lading. Regarding a bill of lading including a “*not to order*” clause, article 16 of the Draft Convention is much clearer. The article expressly states that such a document will be regarded as non-negotiable document, leaving only two possible interpretations. The first one, article 47 being a default provision, regulates documents similar to the sea waybill. The article provides for a requirement of identification in order to obtain delivery, a requirement synonymous to the Swedish Code. Article 48, being the other possible interpretation, also requires identification. Furthermore, the latter also provides for presentation of the bill of lading. While Swedish law interpret a straight bill to offer almost the same type of security<sup>164</sup> as a negotiable bill of lading, the Draft Convention clearly does not. Both article 47 and article 48 documents are considered as non-negotiable documents. Given the freedom of every member states to interpret any additional legal qualities of each transport document differently, the requirement of a

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<sup>163</sup> Article 16 states: “‘*Negotiable transport document*’ means a transport document that indicates, by wording such as “*to order*” or “*negotiable*” or other appropriate wording recognized as having the same effect by the law applicable to the document...”

<sup>164</sup> Security, payment against letter of credit

presentation clause is not one of them. Hence, it will be important for the Swedish market to change, to include presentation clauses, in order to achieve the effects of a straight bill.

## 6 Conclusion

The position in the United Kingdom regarding interpretation of straight bills, in the aftermath of the House of Lords' decision in *Rafaela S*, is still unclear. The House of Lords seems to have come to the conclusion that straight bills constituted a type of document of title that required presentation in order to obtain delivery. As mentioned in chapter 2, I have shown that it is possible to give straight bills the attribute of a type of document of title. Furthermore, as mentioned in chapter 3, it is possible to interpret COGSA 92 in a way to include contractual obligations such as presentation. Even though scholars have highlighted problems, whether the presentation rule actually was part of the ratio of the decision or not, it is fair to say that an argument pro presentation has more judicial weight than the opposite. Furthermore, two out of five judges, Lord Bingham and Lord Steyn, expressly stated in their judgements that presentation was required regardless of any surrender clause. Lord Rodger gave a quite extensive judgement regarding the issues of document of title. However, after concluding that a straight bill did constitute a document of title within the meaning of COSA 71, the judge stopped to acknowledge his position, "*On that basis, and for the reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, I too would dismiss the appeal*". Lord Nicholls and Lord Brown did not give any further reasons for their judgement, both stopped short by acknowledging the conclusions of the other three judges. Nevertheless, by choosing not to dissent from anything



in the previous speeches and simply acknowledging them, it must be held that all three agreed with Lord Bingham and Lord Stain on the matter of presentation. Therefore, I would conclude that the United Kingdom's position indeed is that straight bills require presentation regardless of any surrender clause. This conclusion cannot be drawn only by using *Rafaella S* as an authority, simply because the ratio is not clear enough on these issues. A clear decision, by the House of Lords, on these issues would be much welcomed. The Singapore view on this matter rests on the Court of Appeal decision in *Voss Peer v APL*. The ratio in this case is clear, straight bills must always be surrendered in order to obtain delivery. The position in the Hong Kong jurisdiction is also that presentation is needed. Moving from an opposite position in the *Bri*, the Court of Appeal in the case of *Carewinds Development* has turned to clearly acknowledge that straight bills require presentation. I would therefore also conclude that all three jurisdictions have the same approach to presentation. On the other hand, the United States' position is opposite of the previous three. As above shown in both statutory law and case law, I must conclude that the default position in the United States is that presentation is not needed. In addition, I would also like to conclude that it would be unfortunate if a future decision in the United Kingdom would follow the United States approach to delivery. Since most of the world, indeed, require presentation; United Kingdom would join a club of two. The Swedish position on straight bills is clear; presentation is always needed for all types of bills of lading, including the recta bill. Regarding the issue of document of title in Sweden, a straight bill is indeed considered as such. The UNCITRAL draft convention will, if implemented,

create changes to the jurisdictions that acknowledge the default position of presentation. As shown above, the convention distinguishes between straight bills that include a surrender clause and those who do not. The straight bill that includes a surrender clause will have many benefits. The document will be regarded as conclusive evidence of the receipt function. It will also, arguably, be possible to use such bill as security for payment. The straight bill that lacks a surrender clause will not be able to benefit from these two advantages. If the intention of the parties is to have “sea waybill” no harm is done. However, if the parties intend to rely on the position of most jurisdictions regarding straight bills, they will be in for a surprise. Therefore, it will be important for the parties to clearly include a presentation clause in their straight bills to achieve such effect. Even though the convention seems clear on the classification of shipping documents, room for interpretation does exist. The wording of article 48 is not yet resolved. Given that fact, it could be possible for jurisdictions to interpret the requisites differently. Depending on the wording in the final draft, the result might lead to a position where every state has the option to maintain their respective views on the matter. Still, that would probably lead to an unwelcoming result that goes against the main objectives of the drafting, to create harmonized rules. This would not be a surprising result though. Looking at previous implemented international conventions; the keyword is compromise. The UNCITRAL draft convention will not be an exception. Having clearly adopted a US friendly approach to the classifications of straight bills, by separating between non-negotiable documents that include a surrender clause and those who do not. The reaction will probably not

come short from states with an opposite view, in order to maintain their own default position. It will be interesting to follow the end of the drafting procedure; the last word has definitely not been said on the issue. If the convention is going to be a worldwide success it will be important to get all common law jurisdictions onboard. I therefore must conclude that the draft convention will create changes to the interpretation of the presentation rule regarding straight bills.

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