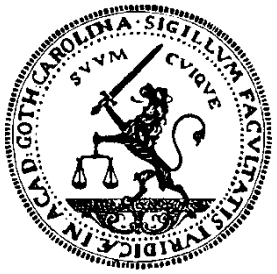

FACULTY OF LAW
Lund University

Jenny Olsson

Undelivered Goods Under the Law of Carriage of Goods by Sea

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Contents

Summary

Delivery of goods at the port of discharge is an obligation incurred upon the carrier under a contract of carriage by sea. The extent of the carrier's obligation is to give the consignee a reasonable time to take proper delivery of the goods against presentation of an original B/L. Delivery of goods is currently not regulated in any international laws on carriage of goods by sea, it is only regulated by domestic laws. As there are numerous parties involved within international trade the result can be prolonged processes where commerce and law needs to agree in order to facilitate carriage of goods by sea.

The contracts used within international trade are independent from one another but also closely linked and dependent at the same time. The reason is that each party needs to fulfill its obligation to the other to be able to complete the sale, carriage and transaction. If the consignee does not take delivery of the goods at the port of discharge the carrier is placed in a difficult position since the duty of care does not terminate on discharge. It is well established within maritime law that goods are not considered delivered until handed over to the consignee or agents thereof against presentation of an original B/L. If the consignee fails to take delivery the carrier needs to provide for storage of the goods and possibly at a later stage arrange for sale or disposal of the goods to recover from expenses.

There is no established duty for the consignee to receive the goods and neither is it in the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. The lack of a uniform international legislation on undelivered goods increases the liabilities of the carrier. In order to avoid extensive costs relating to the undelivered goods time is of essence and the carrier must act fast and correspond with its insurer on how to handle the situation. In the Rotterdam Rules that has not yet entered into force the liabilities of the carrier regarding delivery of goods is balanced between the parties involved.

The obligation to accept delivery is imposed on the consignee and an extensive set of terms are outlined to guide carriers in situations of undelivered goods at the port of discharge. This is a very controversial update of the international rules as there are many opinions both in favor for and against such a comprehensive set of rules.

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There are a few people that I would like to give a special recognition for supporting me while writing this thesis.

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Jenny Olsson
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Abbreviations

B/L – Bill of lading

C.I.F. – Cost, Insurance and Freight

COGSA – Carriage of Goods by Sea Act

CLECAT – European Voice of Freight Logistics and Customs Representatives

ESC – European Shippers' Council

FIATA – International Federation of Freight Forwarders

F.O.B. – Free on Board

ICC – International Chamber of Commerce

ICC CLAUSES – Institute Cargo Clauses

INCOTERMS – International Commercial Terms

ICS – International Chamber of Shipping

L/C – Letter of Credit

MIA – Marine Insurance Act 1906

MSC – Mediterranean Shipping Company

NVOCC – Non-vessel operating common carrier

P&I – Protection and indemnity

P&I club – Protection and indemnity club

UCP 600 – Uniform Customs and Practice for Documentary Credits

U.K – United Kingdom

U.S – United States of America

1. Introduction

1.1 Background

Delivery of goods at the port of discharge is a contractual obligation for the carrier[1] under carriage of goods by sea. There is either a named consignee[2] (typically the buyer) in the bill of lading (B/L) or it is marked to "the order" of or "assigns". The delivery instructions can also be left blank.[3] The main point is not to have a named consignee in the B/L, instead the carrier undertakes to deliver the goods to the party that presents an original B/L at the port of discharge.[4] If no consignee shows up at the port of discharge the carrier must give the consignee a reasonable time to pick up the goods before taking any further actions. The failure of a consignee to take delivery of the goods could therefore have various impacts on the carrier.

There are circumstances when the consignee is aware of the arrival of the goods but refuse to claim the goods at the port of discharge, which could place the carrier in a difficult position. The carrier's obligation to deliver the goods does not cease after discharge of the goods from the ship. Therefore, the carrier has to arrange for temporary storage and keep the goods from being exposed to theft or damages if they are left abandoned or unclaimed.

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[1] The "carrier" is any person or entity that undertakes to carry goods by sea, inland waterway, rail, road, air or multimodal transport under a contract of carriage entered with the shipper. The "shipowner" is a person who formally owns a ship or have shares in the ship, definitions found in Honoré C. Paelinck, *Reeds Dictionary of Shipping and Marine Finance*, at page 15 and 70.

[2] The "consignee" is the party named in the B/L and is entitled to take proper delivery of goods against presentation of a B/L under a contract of carriage, defined in the Hamburg Rules article 1(4) and in the Rotterdam Rules, article 1(11). The consignee is not automatically entitled to take delivery of goods as a result of being designated as such in the B/L see, *Kum* v *Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439.

[3] When there is a named consignee in the B/L with no wording expressed as "to order" or "assigns" it is a straight bill, for further readings about straight bills see, Baughen Simon, *Shipping Law*, Routledge and Cavendish: 2009, at pages 6–7.

[4] Simon Baughen, *Shipping Law*, Routledge and Cavendish: 2009, at page 6.

Under a contract of carriage there is generally an underlying sale contract[5] between a seller and a buyer. There are various circumstances when the consignee may refuse to take delivery. The consignee might as well reject goods that have been damaged during transit, or goods stricken by an import embargo, which makes it impossible to take delivery. Other circumstances can be when the consignee has gone bankrupt or if a bank has become the holder of an original B/L and has the goods as a security for a loan. To summarize, goods can only be successfully delivered when there is a receiver. Under common law there is no obligation upon the consignee to receive the goods from the carrier at the port of discharge, which may cause difficulties for the carrier.[6] The many parties involved within international trade may result in prolonged processes where commerce and law needs to agree in order to facilitate carriage of goods by sea.

The effect of undelivered goods held at the port of discharge over lengthy periods of time is usually associated with high costs for the carrier. After a reasonable period of time the carrier can take actions to sell the goods in accordance to recover from e.g. costs of freight, warehouse expenses, container demurrage etc. Under English law there is no statutory obligation for the carrier to recover from these types of claims, instead they have to rely on expressed terms in the B/L.[7] Neither is there any such protection found in the current international legislation on carriage of goods by sea, instead it has to be solved on a contractual basis. In contrast there has been a controversial update regarding rights and obligations of delivery of goods[8] and a duty to accept delivery by the consignee has been imposed in the United Nations Convention on Contracts for the

[5] The structure of a sale contract will have an effect on the contract of carriage, the most common types of sale contracts are c.i.f. (cost, insurance and freight) and f.o.b. (free on board), there are multiple types of sale contracts but those mentioned are the two most significant, Simon Baughen, *Shipping Law*, Routledge and Cavendish: 2009, at page 3.
[6] Ganado Max and Kindred Hugh M. (ed.), *Marine Cargo Delays*, Lloyds of London Press Ltd: 1990, at page 47.
[7] *Ibid.*
[8] Batz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis (ed.), *Rotterdam Rules: A Practical Annotation*, 5th Edition: 2009, (accessed through i-law on 2013-02-18).

International Carriage of Goods by Sea, 2008 (Rotterdam Rules)[9] chapter 9, articles 43–49 on "delivery of goods".[10]

Within international trade and carriage of goods by sea the B/L is the most important transport document. It serves as a document of title and as an evidence of an existing contract of carriage between the shipper (typically the seller) and the carrier. The holder of an original B/L is also the party, which has title to the goods transported against presentation of the original B/L at delivery. One of the fundamental obligations under a B/L is that the carrier shall only deliver the goods to a party against presentation of an original B/L. If the goods are delivered without production of an original B/L the action will constitute a breach of contract.

The obligation to deliver goods against surrender of a B/L was decided for the first time in *The Sormovskiy 3068* case from the English House of Lords.[11] Although, it is a strict obligation, a great amount of goods are still delivered without presentation of an original B/L. Under these circumstances a letter of indemnity is normally used and function as an enforceable promise normally issued by the shipper. It holds the carrier harmless from any possible liabilities incurred upon the carrier for complying with the terms of the letter of indemnity. It is also used to advance acts that are fraudulent or illegal in nature, such as issuing a clean B/L although the goods shipped are damaged or does not fully comply with the underlying contract.

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[9] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by the General Assembly, on December 11th, 2008, Resolution 63/122, (hereinafter referred to as Rotterdam Rules), It will enter into force one year after the ratification of the 20th United Nations (UN) member state.

[10] Yang Li Edward, An Analysis of Carrier's Obligation to Delivery of Goods under the Rotterdam Rules, website: http://www.seatransport.org/seaview_doc/SV_96/An%20Analysis%20of%20Carrier's%20Obligation%20to%20Delivery%20of%20Goods%20under%20the%20Rotterdam%20Rules.pdf (accessed at 130420).

[11] *SA Sucre Export* v. *Northern River Shipping Ltd* (The Sormovskiy 3068) [1994] 2 Lloyd's Rep 266.

The insurance provided for the carrier is protection and indemnity (P&I) insurance provided by one of the thirteen protection and indemnity clubs (P&I clubs) in the world. The P&I clubs provide for third party liability insurance where cargo insurance is one of the cornerstones.[12] Claims for undelivered goods at the port of discharge are falling under the P&I club cover for 'extraordinary handling costs'. The P&I club only cover claims if all efforts to recover from other parties have first been exhausted and that the consignee has expressly rejected the goods. The P&I club only recover from costs relating to the time after the consignee has rejected the cargo.[13]

The aim of this thesis is to focus on delivery of goods and especially when goods are undelivered at the port of discharge. This thesis will provide for an overview of the different aspects of delivery and the possibility for the carrier to recover from costs relating to undelivered goods from possible remedies and its third party liability insurance.

1.2 Scope and Purpose

The main purpose of this thesis is to examine the problems relating to undelivered goods under the law of carriage of goods by sea from a carrier's perspective. As mentioned earlier in the introduction the carrier may for various reasons be exposed to costs relating to goods that are not collected in the port of discharge. To recover from these costs the carrier could sell, destroy or abandon the goods wholly on account of the consignee.

[12] Skuld P&I club website: http://www.skuld.com/upload/News%20and%20Publications/Publications/Introduction%20to%20PandI/Introduction%20to%20PandI.pdf (accessed at 130415).
[13] Williams Richard, Gard Guidance to the Statutes and Rules, Rule 35, website: http://www.gard.no/ikbViewer/page/iknowbook/forside?p_document_id=6687 (accessed at 2013-04-15).

The main questions that will be examined in this thesis are the following:

- How can carriers prevent undelivered goods in the port of discharge, which might result in economic loss for the carrier?
- Under what circumstances can the carrier recover from costs that relates to undelivered/unclaimed goods in the port of discharge?
- Is it possible for the carrier to recover from its protection and indemnity insurance?

To answer these questions it is necessary to examine the governing law regarding delivery of goods with a focus on the international conventions on carriage of goods, The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Hague Rules 1924") and Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Protocol 1968), (Hague-Visby Rules)[14], United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)[15] and the Rotterdam Rules.

The position taken in English law will also be examined since English law is a main source within maritime law. There are always several contracts within international trade and the carriage of goods by sea. Therefore, when focusing on the concept of delivery it is also necessary to examine the various contracts used within international trade and how they interrelate with the carrier, banks and with P&I insurance. Furthermore, the possibility for the carrier to recover from costs from its P&I club will be examined followed by the core subject which is when goods are not successfully

[14] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, August 25th, 1924, 120 U.N.T.S 2764 ("Hague-Rules"), Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, done at Brussels, February 23rd, 1968, 1412 U.N.T.S 121 (Hague-Visby Rules).
[15] United Nations Convention on the Carriage of Goods by Sea, done at Hamburg, March 31st, 1978, 1695 U.N.T.S 4 (Hamburg Rules).

delivered and become a time consuming problem for the carrier of the goods.

This thesis describes the dynamics of delivery of goods with a focus on the issues that arise if goods are undelivered at the port of discharge. In the context of delivery of goods it is necessary to discuss the surrounding subjects and components within international trade. The use of the expression 'carrier' is chosen because it covers a wider spectrum of operators and could be any person that undertakes to carry goods by sea. Rather than using the term 'shipowner', which is a person who owns a ship and must not always be the same party acting as the carrier.

The objective is to focus only on the B/L and its function as a receipt for delivery in connection with misdelivery, fraud and undelivered goods. Therefore the functions of waybills will not be discussed. The international legislation within the area is briefly examined in this thesis. The Rotterdam Rules are discussed although it has not yet entered into force. The reason is because it is predicted to achieve a greater uniformity within the field of delivery of goods and cargo liability under a contract of carriage. Also, it contains more specific rules governing the definition of delivery and incurs specified obligations upon the consignee when taking delivery of goods.

In order to get a good picture of the different contracts that are used in international trade and the relationship between the carrier and the different parties involved such as the contract of sale and the role of the bank in financing international trade, it is necessary to describe the functions of it. Only the International Rules for the Interpretation of Trade Terms (Incoterms) c.i.f (cost, insurance and freight) and f.o.b (free on board) are discussed in this thesis because it is the most commonly used contracts in international trade.

In regard to the mechanisms of insurance, delivery of goods and P&I insurance, the role of the carriers P&I club is necessary to explain to get an

overview of the carrier's protection. In respect of insurance the focus will mainly be on the carrier and not the consignee nor the receiver of the goods. The reason is because the issues linked to undelivered goods falls on the carrier since it is the carrier that has the contract with the port authorities and hires or owns the containers used for carriage of goods by sea. In the examination of P&I insurance there are 13 P&I clubs that are part of the International Group of P&I clubs. The thesis will mainly focus on the P&I clubs that are operating out of the region where this study is made.

Cuttings from clauses found in Mediterranean Shipping Company's (MSC) B/L's are used in this thesis. MSC is one of the largest shipping company's in the world and therefore their B/L is a suitable model when discussing B/L's.[16]

1.3 Methodology and materials

The method used in this thesis is the legal dogmatic method, which aim is to explain the current legal position in different fields and explains the structure of it.[17] The legal dogmatic method describes the laws in force in different areas and their structure, which also is known as the external factors. The method also develops normative positions to justify and criticize various aspects of law.[18]

The materials used for this thesis are books, peer previewed journal articles and case law mainly from common law jurisdictions with focus on England. The legal system in England is known as the "common law system" and differs significantly from the legal systems in other European countries, which are based on the Roman law approach. The common law approach is

[16] MSC website: http://www.mscgva.ch/about_us/facts.html (accessed at 2013-04-23).
[17] Narits Raul, Principles of Law and Legal Dogmatics as Methods used by Constitutional Courts, Juridica International XII/2007, at page 19.
[18] Peczenik Aleksander, "Juridikens Allmänna" Läror, SvJt 2005, at pages 249–250.

instead based on judicial precedents and does not have a written constitution and the courts mainly rely on developed case law.[19] Electronic resources that are used are selected from well-known websites and databases provided by Lund University and World Maritime University in Malmö, Sweden.

Interviews and personal correspondence is part of this thesis. The people interviewed is treated with industry anonymity and therefore only referred to as personal correspondence.

1.4 Scheme of the thesis

Following this introduction chapter 2 of the thesis primary discuss the concept of delivery of goods with focus on the B/L as the delivery document. Relevant international legislation will be presented and discussed along with case law.

In chapter 3 a discussion regarding the contract of sale is held with focus on the relation between the different parties under the contract and the implications of delay. Chapter 4 aims to focus on the insurance cover and examine the question regarding the carrier and the possibility to recover from the P&I Club from loss relating to undelivered goods at the port of discharge.

Chapter 5 and 6, followed by a summary and conclusion, will discuss potential answers to the issues connected with undelivered goods in light of the discussions held in the previous chapters.

[19] Teaching materials, Beckwith Silas, Introductory Module, "An Introduction to the English Legal System", Postgraduate Diploma in Maritime Law 2008/2010 London Metropolitan University, at page 7.

2. Delivery of goods

2.1 Delivery of goods under a B/L

The B/L is the document that serves as a receipt for the goods shipped. It is also a *prima facie* evidence of a contract of carriage but essentially; it is not the contract itself. Historically, the use of a B/L can be traced back to the 14th century. Traders used it as a receipt for the goods, issued by the carrier to the merchant and later incorporated into a contract of carriage to be able to resolve disputes between the cargo owners and the carrier.[20]

The Hague-Visby Rules only applies to contracts of carriage that are covered by a B/L.[21] According to Hague-Visby Rules the carrier has an obligation to issue a B/L if the shipper so demands and the B/L shall show necessary remarks for identification of the goods, the number of packages or pieces and the apparent order and condition of the goods shipped.[22] In comparison with the Hamburg Rules defines a contract of carriage as any contract where the undertaking is to pay freight against the carriage of goods by sea from "one port to another" and is not only applicable to a B/L.[23] The same requisite applies for the Rotterdam Rules, which is similar to the Hamburg Rules in regard to defining the contract of carriage. Unlike its predecessors the Rotterdam Rules is a more extended set of rules and applies carriage by other modes than only the sea-leg. The Rotterdam Rules therefore applies from "one place to another".[24]

In the United Kingdom (U.K) the Hague-Visby Rules is implemented in the Carriage of Goods by Sea Act 1992 (COGSA 92)[25], it applies to any B/L,

[20] Wilson John F, *Carriage of Goods by Sea*, Pearson: 2010, at page 115.
[21] Hague-Visby Rules, article I (b).
[22] *Ibid*, article III (3).
[23] Hamburg Rules, article 1.6.
[24] Rotterdam Rules, article 1.1.
[25] Carriage of Goods by Sea Act, 1992, Elisabeth II, Chapter 50, (COGSA 92).

Seaway Bill and any ship's delivery order.[26] The application of international conventions is usually mandatory in carriage of goods by sea, which all promotes for harmonization of the laws governing carriage of goods by sea.[27]

Delivery of goods at the port of discharge takes place when the carrier passes the goods over to the person entitled to them against presentation of an original B/L.[28] The moment the carrier deliver the goods to the consignee the carrier's obligations under the contract of carriage will automatically cease. The delivery of goods may take place at the port of discharge, alongside the ship's rail, at a container yard or at an inland destination in case of a combined carriage.[29] The Hague Rules or the Hague-Visby Rules does not impose a duty upon the consignee to take delivery of goods nor does the Hamburg Rules.

Under common law there is no statutory obligation, which give the carrier a right to bring claims against a consignee that has failed in receiving the goods. The carrier will have to rely on the contract of carriage itself and the implied duties in the B/L to try to get compensated for costs relating to undelivered goods.[30] The Rotterdam Rules has implemented a statutory duty on the consignee to receive the goods and compensate the carrier under circumstances of undelivered goods. The duty to accept delivery is only imposed on the party that is entitled to take delivery of the goods under the contract of carriage.[31] The Rotterdam Rules is an attempt to solve the issues connected with delivery of goods and to harmonize the legislation that governs carriage of goods by sea. Although, there are different opinions

[26] COGSA 92, article 1(1).
[27] *Supra*, note 13 Rule 35.
[28] *Supra*, note 20 at page 81.
[29] Gaskell, Asariotis, Baatz, *Bills of Lading: Law and Contracts*, LLP: 2000, at page 448.
[30] Supra, note 8 at chapter 9 [43–02].
[31] Rotterdam Rules, article 43.

about the effects of the harmonization.[32] This matter will be discussed further in this chapter.

The B/L is the most important document issued by the carrier under carriage of goods by sea.[33] The B/L serves as a receipt for the goods shipped, as an evidence of the contract of carriage and as a transferable document of title in cases when the seller wish to transfer the ownership of the goods during transit.[34] Along with the development of international trade the B/L has been, and still is, of great importance for banks within the financing of international trade since the bank is checking the compliance of the B/L, as being the only evidence for the goods shipped, with the terms and conditions required for granting credit to the seller or the buyer.

If the financing bank has the B/L as a security for the goods shipped under a letter of credit (L/C)[35] it will check the compliance of all the documents presented to ensure that the seller has fulfilled the obligations agreed upon under the L/C. The bank undertakes to irrevocably pay for the goods if the documents required under the L/C are compliant with the terms.[36] If there is default in payment the bank can obtain the B/L and take delivery of the goods as a security to recover from the loss.[37]

A B/L is normally issued in set of three originals, this increase the risk of one party taking delivery of the goods before the bank in case of a possible default. To avoid such situations the terms of the credit usually states that a

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[32] Yang Li Edward, An Analysis of Carrier's Obligation to Delivery of Goods under the Rotterdam Rules, at page 8, website: http://www.seatransport.org/seaview_doc/SV_96/An%20Analysis%20of%20Carrier's%20Obligation%20to%20Delivery%20of%20Goods%20under%20the%20Rotterdam%20Rules.pdf (accessed at 2013-04-20).
[33] *Supra*, note 20 at page 135.
[34] *Ibid*, at pages 5–6.
[35] A letter of credit is a combination of a payment guarantee and a payment instruction used within international trade, the issuing bank will irrevocable pay against presentation of documents, but with reservation for discrepancies, for a more comprehensive explanation see, Todd Paul, Bills of Lading and Bankers' Documentary Credits, LLP: 1998, at chapter 2.
[36] *Supra*, note 20 at pages 135–136.
[37] *Ibid*.

full set of B/L's is to be sent to the bank before performing any payment. The goods sometimes arrive at the port of discharge before the bank has examined the documents, which can result in delayed delivery. The seller and the buyer sometimes agree that one original B/L is travelling with the goods to be able to take delivery in case the goods arrive before the documents. The bank normally restrain from recommending sellers to act in such a way since it can jeopardize a proper delivery of goods if a wrong party get hold of an original B/L that has been separated from its full set.[38]

The contractual obligations incurred upon the carrier arise first under the contract of carriage. It is entered between the carrier and the seller or the buyer depending on which party that has been allocated to contract with third parties under the sale contract. Delivery of goods to the consignee is therefore an essential undertaking. If the consignee fails in taking delivery of the goods at the port of discharge the carrier will be confronting problems.

Since delivery of goods to the holder of an original B/L is a requirement under the contract of carriage the carrier cannot leave the goods on the quay or at the port if there is no party claiming the goods at the port of discharge. The responsibility of the carrier will not automatically cease due to lack of performance on part of the consignee. This may give rise to certain issues in regard to delivery, responsibility for the goods, temporary storage, and a possible economic loss for the carrier.[39]

2.2 "Clean" or "claused" B/L

When goods are shipped the B/L indicates a statement of the condition of the goods prior to and after loading. A "clean" B/L does not have any clause indicating that the goods are defective or damaged when loaded on the ship.

[38] Gleaned from personal correspondence with a representative of a bank.
[39] *Supra*, note 20 at page 81.

If there are any such clauses in a B/L the bank will most likely reject the documents and refuse to pay under a L/C.[40] The Uniform Customs and Practice for Documentary Credits 600 (UCP 600)[41] issued by the International Chamber of Commerce (ICC) states in article 27 the following:

> A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word "clean" need not appear on a transport document, even if a credit has a requirement for that transport document to be "clean on board.

The statement of the word "clean" is not necessary in the B/L but it is of great importance if there are statements indicating that the B/L is "claused", which means that there are notifications on defects or shortages of the goods shipped notified by the carrier.[42] A claused B/L will not be acceptable by the bank and considered a discrepancy, which results that the bank is no longer obliged to pay for the goods under a L/C.

2.3 Responsibility for delivery of goods

As mentioned earlier the Hague-Visby Rules does not impose a duty on the consignee to take delivery of the goods, but in contrast it impose a duty for the carrier to "…properly and carefully load, handle, stow, carry, keep, care, for, and discharge the goods carried."[43] The Hague-Visby Rules only mention the obligation to 'properly discharge' the goods at the port of discharge not deliver the goods to the consignee. Article III(2) of the

[40] Gleaned from personal correspondence with a representative of a bank.
[41] UCP 600 came into force in July 2007, and was drafted by the ICC Banking Commission and is very successful around the world since it has been universally accepted, for further reading see ICC's website: http://www.iccwbo.org (accessed at 2013-04-13).
[42] *Supra*, note 20 at page 118.
[43] Hague-Visby Rules, article (III)2.

Hague-Visby Rules sketches the responsibilities that are stipulated for the carrier under the rules.

One commentator point out that the rules were drafted without the word 'delivery' on purpose to avoid possible interpretation barriers or conversely leave it open for a wider interpretation.[44] The meaning of the word 'delivery' is when the carrier hand over the goods to the consignee or a designated agent of the consignee. The carrier is expected to place the goods at a safe and proper place and give the consignee a reasonable time to take actual delivery of the goods at the port of discharge. The court decided in the case of *Centerchem Products v. A/S Rederiet Odfjell*[45] to define the word 'delivery' and established that a proper delivery of goods occur when the carrier discharges the goods from the ship, designates the goods, notify the consignee which is given a reasonable time to pick them up.[46]

The consignee has a period of time from when the goods are discharged until it has to be collected. The period is usually between 3–6 days but may vary depending on domestic laws and customs by ports.[47] The carrier is normally responsible for the goods during the time when the goods are stored and pending to be picked up by the consignee. The responsibilities are not subject to Hague or the Hague-Visby Rules but to the terms stipulated in the contract of carriage or any other storage contract that applies after the goods are discharged. The Charge for this 'free time' is called wharfage[48] and is not charged the consignee during the period of 'free time' and the goods are kept under custody of the carrier.[49]

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[44] Tetley William, *Marine Cargo Claims*, third edition, International Shipping Publications BLAIS: 1988, at page 569.
[45] *Centerchem Products* v. *A/S Rederiet Odfjell* 1972 AMC 373, (E.D. Va. 1971) case referred to in Tetley William, *Marine Cargo Claims*, third edition, International Shipping Publications BLAIS: 1988, at page 570.
[46] *Ibid*.
[47] *Supra*, note 44 at page 571.
[48] Wharfage is defined by the business dictionary as followed "A charge assessed by a shipping terminal or port when goods are moved through the location. Wharfage is one of the costs of transport goods within the distribution system used by a business to bring its goods to market", website: http://www.businessdictionary.com/definition/wharfage.html (accessed at 2013-02-

After the period of 'free time' the responsibility of the carrier will cease automatically and the consignee is responsible for paying additional charges for the goods. Although there have been cases when the carrier has been excluded from liability during the time under which the goods are stored.

In *Captain v Far Eastern Steamship Co*[50] the B/L contained a clause limiting the liability for the carrier only to cover the period under which the carrier operated the ship. The containers carried were being transshipped and was stored in the open for several weeks before the last shipment took place. The court held that the carrier could rely on the clause in the B/L excluding liability during the period when the goods were stored since the Hague Rules only applies during the actual sea carriage and not while stored on a dock.[51] In *Kinderman & Sons v. Nippon Yusen Kaisha Lines*[52] it was held by the court that goods burned on a pier during the 'free time' was not considered to be under the responsibility of the carrier. The court held that it was irrelevant to discuss responsibility during 'free time' in relation to proper delivery of goods.[53]

2.4 Delivery of goods without a B/L

Under a contract of carriage the carrier has an obligation to deliver the goods only against presentation of the B/L. If the carrier delivers the goods without presentation of a B/L it will be considered a willful misconduct and a breach of the carrier's contractual obligations under the contract of carriage. If the carrier is in good faith and delivers the goods to the wrong party it will also be considered a breach of the contractual obligations and the carrier will loose the protection set in the contract of carriage and, if

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24).
[49] *Supra*, note 44 at page 571.
[50] *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595.
[51] Ibid, at page 602.
[52] *Kinderman & Sons* v. *Nippon Yusen Kaisha Lines* 322 F.Supp. 939 (1971).
[53] *Supra*, note 44 at pages 571–572.

applicable, the exemptions and limitation of liability provided under the Hague Rules or the Hague-Visby Rules.[54] Protection provided from the carrier's P&I club will also be jeopardized if the carrier choses to deliver the goods without presentation against a B/L.[55]

The carrier can be exposed to problems linked to the obligation on delivery of goods against presentation of a B/L. In *The Ines*[56] case it was held that it would constitute a breach of contract if the carrier delivered to the person entitled to the goods under the B/L but without presentation of an original B/L, even though it would be no damages to recover from. Gard P&I club expresses the following in their guidance to the P&I rules: "Wrongful delivery is considered highly imprudent, with the result that cover is not available for such liability unless the Association in its sole discretion decides otherwise".[57]

In *The Sormovskiy 3068*[58] case the question whether discharge of cargo without production of a B/L was considered to be a breach of contract or not. The shipowner discharged the goods without production of a B/L and it was held by the court that the shipowner was in breach of contract. The court held:

> Subject to the particular terms of the contract concerned (which may and often does include a provision whereby the master is to deliver the cargo in return for a letter of indemnity), a master or shipowner is not entitled to deliver goods otherwise than against an original bill of lading unless it is proved to his reasonable satisfaction both that the person seeking the goods is entitled to possession of them and that

[54] Hague-Visby Rules, article IV.
[55] The Swedish Club, P&I Rules 2013/14, Rule 4 section 4. See also Gard Rules 2013, Rule 34 (i).
[56] *M.B. Pyramid Sound M.V.* v. *Briese Schiffahrts G.M.B.H. and Co. K.G. M.S. "Sina" and Latvian Shipping Association Ltd.* (The "Ines") 2 Lloyd's Rep. 144.
[57] *Supra*, note 13 Rule 34 Cargo Liability.
[58] *SA Sucre Export* v. *Northern River Shipping Ltd.* (The "Sormovskiy 3068") [1994] 2 Lloyd´s Rep. 266.

> there is some reasonable explanation of what has become of the bills of lading.[59]

The case *the Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*[60] concerned a clause in a B/L stating that the shipowners liability for the goods ceased as soon as the goods were discharged from the ship. After the arrival of the vessel in Singapore the goods were discharged and released to the consignee without production of a B/L and instead delivered through an indemnity given by a bank. These actions were considered "common practice" in Singapore during that time. The court held that delivery of goods without the production of a B/L amount to breach of contract and therefore carriers' protection under the contract is deprived and at the carriers' own peril.[61] According to one commentator the courts will continue to interpret exemption clauses strict even if the concept of fundamental breach no longer operates as a rule of law[62] and instead focus on the construction of the clause to withhold the purpose of production and presentation of an original B/L before delivery of goods.[63]

An interesting query was brought before the ICC Banking Commission regarding a clause found in a B/L, which incorporated a clause stating that the carrier reserves the right to deliver goods without the production of an original B/L.[64] Earlier the ICC Banking Commission has refused to give its opinion in regard to this matter but made an exception to this specific query. The question brought was regarding a condition set in a documentary credit that stated the following: "bills of lading that on their face indicate that goods may be released without presentation of an original B/L are not

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[59] *SA Sucre Export* v. *Northern River Shipping Ltd.* (The "Sormovskiy 3068") [1994] 2 Lloyd´s Rep. 266, at page 272 (L.J Clarke J).
[60] *Sze Hai Tong Bank Ltd* v *Rambler Cycle Co Ltd* [1959] 2 Lloyd's Rep 114.
[61] *Supra*, note 58.
[62] The concept of fundamental breach was rendered obsolete in a decision from the House of Lords, see *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827.
[63] *Supra*, note 20 at pages 156–157.
[64] Maersk Website "Provisions to Bill of Lading Clauses": http://www.maerskline.com/link/?page=lhp&path=/africa/southafrica/consumer%20protection%20act/Provisions (accessed at 2013-03-02).

acceptable" contradicts to a clause in the B/L indicating that a delivery clause is applicable when it is issued in a non-negotiable or negotiable form. The bank questioned if this type of clause was an alleged discrepancy. The B/L in question did contain the following wording:

> Where the bill of lading is non-negotiable, the Carrier may give delivery of the Goods to the named consignee upon reasonable proof of identity and without requiring surrender of an original bill of lading.[65]

The ICC Banking Commission considered that the wording, as mentioned above, was terms and conditions in the contract of carriage and therefore not applicable for review under UCP 600 and cannot be refused payment by the bank.[66]

As discussed earlier the carrier may be exposed to issues relating to the presentation of the B/L, which has consequences for the carrier. Since delivery of goods requires production of a B/L issues will arise if there is no B/L to present. The carrier is not a party to the contract of sale and is therefore only under a contract of carriage with the party who arrange for the carriage of goods. Since the carrier is not a party to the contract of sale the carrier is also generally unaware of the identity of the consignee and the B/L is the only "receipt" for the delivery of the goods.

Problems that the carrier may be exposed to are e.g. that the goods arrive at the port of destination before the documents, which is common within the carriage of bulk cargo and oil. If the documents are late the carrier may have issues with warehousing the goods before a proper presentation of documents and a proper delivery can take place, which may cause problems in result of delay on account of the carrier for the next upcoming voyage, demurrage and detention. The carrier then has to evaluate if it is worth

[65] Website: http://www.coastlinesolutions.com/news23.htm (accessed at 2013-02-13).
[66] *Ibid.*

loosing the P&I cover provided by the P&I club before delivery of the goods without a proper presentation.[67]

2.5 Delivery of goods under the Rotterdam Rules

Unlike the previous and current regime of carriage of goods by sea chapter 9 of the Rotterdam Rules deals with delivery of goods and contains a wide range of rules in regard to delivery of goods. The issues linked to delivery of goods have not been regulated in any previous international conventions and has instead been dealt with on a national level, which give rise to legal uncertainties.[68] The ambition with the Rotterdam Rules has been to improve the legislation on carriage of goods by sea and to provide for legal certainty. Article 47 aims to solve problems if the carrier is unable to deliver the goods at the port of discharge, such problems might be non-production or presentation of a B/L.

Article 47 of the Rotterdam Rules has been very controversial and subject to criticism.[69] The criticisms leveled against the provisions in article 47 are that it undermines the object and purpose of a B/L.[70] A B/L servers as a document of title and the lawful holder has an exclusive right to take delivery of the goods at the port of discharge. The application of article 47 of the Rotterdam Rules makes it possible, under certain conditions, for a carrier to deliver goods without surrendering a negotiable transport

[67] *Supra*, note 20 at pages 157–158.
[68] Pejovic Caslav, Article 47(2) of the Rotterdam Rules: Solution of old problems or a new confusion? (2012) 18 JIML, at page 350–351.
[69] *Ibid*, at page 349.
[70] For further reading in regard to criticism against the Rotterdam Rules see amongst others, Johansson Svante, Oland Barry, Prudsen Kay, Ramberg Jan, Tetley William, Schmitt Douglas, A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules, 2009, accessed through website: http://www.mcgill.ca/maritimelaw/sites/mcgill.ca.maritimelaw/files/Summationpdf.pdf (accessed at 2013-06-01).

document or a negotiable electronic transport document.[71] The lack of a harmonized system for electronic B/L, and as long as there are countries that are not recognizing electronic B/L's as a document of title- legal uncertainties will prevail.

The discussions held concerning article 47(2) in the Rotterdam Rules has been twofold but mainly negative. International Federation of Freight Forwarders (FIATA) has raised opinions together with the European Voice of Freight Logistics and Customs Representatives (CLECAT) and the European Shippers' Council (ESC) saying that article 47(2) of the Rotterdam Rules will increase the risk of maritime fraud, create problems with letter of credits and complicate international litigation. On the contrary, the International Chamber of Shipping (ICS) is positive to the terms set out in article 47(2) since it provides protection for all parties involved.[72]

The current legislation in regard to carriage of goods by sea is based on that delivery of goods is accomplished with presenting an original B/L. The trade practice is to a large extent performed without presentation of a B/L at the port of discharge. One commentator estimates that within liner trade a B/L is not presented in 15 percent of all cases, within the bulk trade it is estimated to be 50 percent and almost 100 percent within the oil trade.[73] The provisions set out in article 47(2) of the Rotterdam Rules departs from the rules earlier established by international law, which has been up for discussion, and gives the carrier a possible solution to a problem that is well recognized within todays trade.

The approach taken in article 47(2) in the Rotterdam Rules is called a functional approach. The functional approach is a mechanism used within comparative law to reach a specific goal. It aims to take all circumstances into consideration instead of strictly follow the text of a specific provision.[74]

[71] Rotterdam Rules, article 47(2).
[72] *Supra*, note 65 at page 352.
[73] Van Der Ziel, Delivery of Goods Transfer of Rights, (2008) 14 JIML.
[74] Gleaned from personal correspondence with Abhinayan Basu Bal.

The use of the functional approach within maritime law has been clear within the field of strict liability for carriers and the risk for pollution linked to the carriage of oil and cargo owners. In order to satisfy all parties involved in a specific trade it is sometimes necessary to use the functional approach to be able to reach an agreement and avoid inappropriate balance of liabilities. The development of communication and technology has rapidly increased in recent years. Questions are raised on how these electronic measures can be used as an alternative to the traditional paper documents such as the B/L. For such a system to be effective within the global trade there is a need for uniformity and acceptance. There are various opinions raised in regard to the development of electronic B/L's and the legal standpoint is not very clear since the international legislation on the area is expressly applies to paper B/L's. The Rotterdam Rules has proposed a solution to the legal dilemma with electronic B/L and seeks to establish a general principle, which makes electronic and paper documents equal under the law. Also, the parties under a contract of carriage have to express their consent if an electronic B/L is used.[75]

2.6 Protection with an indemnity or a guarantee

A letter of indemnity is used to perform undertakings that are not obligated in the contract. It sometime serves as a flexible instrument to fulfill contractual obligations without delay and still protecting the rights of the performing party and avoid that the performing party have to suffer loss or damage from any liability as a result of the performance. A letter of guarantee is normally used when there are problems with the documents during the transport. It is an undertaking by a bank or an insurance company to cover loss or damage, which arise from a failure to act, e.g. the non-production of a B/L as mentioned earlier, which hinder the carrier to

[75] *Supra*, note 20 at pages 165–166.

successfully deliver the goods to the consignee.[76] The liability, which arises if the goods are delivered without production of a B/L, has historically not been recoverable by the P&I clubs.

A standard letter of indemnity was proposed in 1984 by the P&I clubs to be used under circumstances when their members were under pressure to make delivery of goods without production of a B/L.[77] In the case *The Aegean Sea*[78] the question the carrier brought was whether a letter of indemnity was a "demand for delivery" or not. The court held that a letter of indemnity is not a "demand for delivery" and the receiver does not have an obligation to take delivery of the goods. The letter of indemnity is considered to indemnify certain claims if the goods are delivered, and it only intends to operate if the receiver of the goods takes actual delivery.[79]

One negative aspect of letter of indemnities is that it is sometimes used to perform acts that are fraudulent or illegal in nature. The carrier is persuaded to issue clean B/L or a B/L issued at a certain date when international sale contracts usually involve terms of payment that requires clean a B/L to provide payment by the bank. Since the banks only check the compliance of the documents required under the terms of payment it is of great importance for the B/L to be 'clean'.[80]

2.6.1 Validity of Letter of indemnities

The ordinary stance taken by the P&I clubs is to not cover claims from their members when goods have been delivered without the production of a B/L. Although, the international group of P&I clubs have approved the use of

[76] Tetley William, Letters of indemnity at shipment and letters of guarantee at discharge, [2004] ETL 287–344, at page 4, website: http://www.mcgill.ca/files/maritimelaw/letters.pdf (accessed at 2013-05-04).
[77] *Supra*, note 29 at pages 425–426.
[78] *Aegean Sea Traders Corporation* v. *Repsol Petroleo S.A. and Another* (The "Aegean Sea") [1998] 2 Lloyd's Rep. 39.
[79] *Ibid*, at pages 63–64.
[80] Richard Williams, Letters of Indemnity, (2009) 15 (JIML), at pages 394–395.

standard letter of indemnities to be used if a B/L is tied up in the banking system where the documents are checked under a documentary credit or if the carrier is exposed to pressure from the consignee to deliver the goods without production of a B/L.[81] There legal standpoint in regard to letters of indemnities varies significantly between common law and civil law. In civil law the view is far more liberal and relies on the principle of good faith in contracts. In contrast the common law is more reluctant to apply any principles in regard to good faith and letter of indemnities is considered to be an illegal act.[82]

The Hague-Visby Rules only cover loss or damage arising from the carriage of goods and does not cover delivery. Current case law from various jurisdictions have stated that the carrier takes a prominent risk if delivery of goods takes place without the production of or presentation of an original B/L, which may result in a misdelivery or that the consignee defaults in payment of the goods.[83] In *The Houda*[84] case the court held the following:

> Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession. But the shipowner is not discharged by delivery to the holder if he has notice or knowledge of any defect of title.[85]

There are different types of standard letter of indemnities, which are used when the carrier deliver goods without the production of a B/L. The two basic forms are called "A" and "C" and relates to delivery of goods without

[81] Teaching materials, Rodgers Paul, Module 3 Bills of Lading Contracts, Postgraduate Diploma in Maritime Law 2008/2010 London Metropolitan University, at page 25.
[82] *Supra*, note 76 at pages 10–11.
[83] *Supra*, note 71 at pages 26–27.
[84] *Kuwait Petroleum Corporation* v. *I & D Oil Carriers Ltd.* (The "Houda") [1994] 2 Lloyd's Rep. 541.
[85] *Kuwait Petroleum Corporation* v. *I & D Oil Carriers Ltd.* (The "Houda") [1994] 2 Lloyd's Rep. 541, at page 553 (Millet L.J).

a B/L. These forms may also be combined with a guarantee from a bank and is called standard forms "AA" and "CC".[86] An important remark made by one commentator is that the letter of indemnity is only an indemnity, which is linked to the contract of carriage and has nothing to do with the contract of sale.[87] Delivery of goods without a production of a B/L is incurred with great risks for the carriers and a risk of being held in charge for breach of contract. Under certain circumstances the carrier may be caught in a dilemma when it is worth taking the risk and deliver without the production of a B/L, and instead rely on a letter of indemnity.

2.7 Misdelivery and fraud

Misdelivery of goods is when goods are delivered to a party that is not entitled to have possession of the goods shipped. As mentioned earlier the carrier would be in breach of contract if delivery of goods were made without the production of a B/L or to a party without presentation of a B/L. The carrier's obligation under delivery against presentation of a B/L is strict and the carrier does not have any defenses as regard to limit the liability towards the owner of the cargo that is misdelivered. Misdelivery may also occur under circumstances when the carrier is not aware of the fact that the presented B/L is not the original and has been subject to fraud or forgery.[88] There are different types of situations were maritime fraud may occur within the handling of documents, fraud may be in a forged B/L, forged shipping manifest or a forged letter of indemnity.

A carrier's delivery obligation is not an expressed obligation under the Hague-Visby Rules. It has been argued that since cargo is usually delivered outside the scope of the rules, which is the "tackle to tackle"[89] period, the

[86] *Supra*, note 71 at page 32.
[87] *Supra*, note 71 at page 34.
[88] The Hague-Visby Rules, article III (2), the Hamburg Rules see implied terms, article 5 (1) and the Rotterdam Rules, article 11.
[89] The Hague-Visby Rules, article I (e).

delivery obligations is not part of the rules.[90] On the other hand it has been argued that the delivery can occur during the "tackle to tackle" period if the goods are delivered right after discharge of the cargo. It has also been argued that misdelivery could fall within the ambit of rule III(2) which states that "…the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried".

The applicability of rule III(2) would also make rule III(8) applicable to declare clauses null and void which limit the liability of the carrier in a B/L and make the limitation of liability rules in the Hague-Visby Rules effective against misdelivery.[91] Under the Hamburg Rules the carrier's period of responsibility is extended from "tackle to tackle" to "port to port" and until the carrier has delivered the goods.[92] In the Rotterdam Rules the carrier's delivery obligation is clearer and states the following: "the carrier shall, subject to this convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee".[93]

The MSC Amsterdam[94] case concerned forged bills of lading and misdelivery of goods shipped from Durban, South Africa and delivered in Shanghai, China. The case raised interesting queries regarding the possibility for the carrier to exclude or limit its liability for misdelivery and the applicability of the Hague-Visby Rules to the B/L, and the possibility for the cargo owner to claim damages arising from hedging prices and conversion.[95] The cargo owners (Trafigura) claimed against the carrier (Mediterranean Shipping Company "MSC") for conversion and damages for

[90] Simon Baughen, Misdelivery claims under bills of lading and international conventions for the carriage of goods by sea, at section 9.14–9.17, in Rhidian Thomas D (ed.), Carriage of goods under the Rotterdam Rules, ed: 2010, chapter 9.
[91] *Ibid*, at section 9.15.
[92] The Hamburg Rules, article 4 (1).
[93] The Rotterdam Rules, article 11.
[94] *Trafigura Beheer BV and Another* v. *Mediterranean Shipping Company SA* (The "MSC Amsterdam") [2007] 2 Lloyd's Rep. 622.
[95] *Supra*, note 88 at page 624.

breach of contract arising from the misdelivery of 18 containers loaded with copper.[96]

Trafigura argued that the Hague-Rules or the Hague-Visby Rules only applied between the period of loading and discharge of the ship and that the terms and provisions of the B/L governed the period post-discharge.[97] The argument put forward by the shipowners in the first instance was that if the limitation provisions in the Hague-Rules or the Hague-Visby Rules were not applicable the damages were to be measured from the date of the discharge of the goods and not covering the hedging losses since they were consequential and not reasonable foreseeable at the time of the conversion. The court ruled in favor of Trafigura and was later appealed by the shipowners.[98]

In the court of appeal the shipowners argued that the liability is to be limited depending on the applicability of the Hague-Rules or the Hague-Visby Rules or the provisions in the B/L.[99] The paramount clause in the B/L was up for review by the court and stated the following:

> "For all trades, except goods shipped to and from the United States of America this B/L shall be subject to the 1924 Hague Rules with the express exclusion of art IX, or, if compulsory applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or the said protocols. Where Hague-Visby or similar legislation is compulsory applicable, the Hague-Visby 1979 Protocol ("SDR" Protocol) shall also apply whether or not mandatory".[100]

The paramount clause raised difficult issues in regard to its construction, both parties agreed that either the Hague Rules or the Hague-Visby Rules

[96] *Supra*, note 88 at page 624.
[97] *Ibid*.
[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*

applied to the case but did not agree upon whether the Hague-Visby Rules applied only if compulsory by English law or could they apply through a contractual incorporation.

The court of appeal held that the Hague Rules applied as the Hague-Visby Rules did not compulsory apply, meanwhile South Africa was not a contracting state. It was held that the Hague Rules applied as the "default position".[101] Also, the possibility for the carrier to limit its liability and rely on article IV(5) of the Hague Rules was not possible since the cargo was already discharged from the ship. The clause that was inserted in the B/L was not consistent with the arguments put forward by the carrier and was rendered by the court and clearly existed to protect the carrier, the court recognized that the sole intention of the parties was that the applicability of the Hague Rules should cease after the discharge of the cargo.[102]

It has been argued that *The MSC Amsterdam* is the first case were the English Court has expressed a view on whether the Hague Rules or the Hague-Visby Rules applies post-discharge. This would also enable shipowners to limit liability in cases of misdelivery. Although, parties to a contract of carriage should be reluctant when inserting clauses in a B/L concerning limitation of liability if the clause is not explicitly clear.

[101] Lexology, summary of the case accessed through website: http://www.lexology.com/library/detail.aspx?g=8625f85c-bb41-40bf-ab43-90a3d39415a0 (accessed at 2013-02-18).
[102] *Supra*, note 88 at page 623.

3. Delivery mechanisms in international trade

There are various kinds of contracts used in international trade between merchants, the dynamics lies within the interrelationship between these contracts. For tangible goods to be shipped from point A to point B there are more than one party involved, a seller and a buyer and depending on if they agree to ship on c.i.f or f.o.b. terms one or the other needs to arrange for a contract of carriage with a carrier and an insurance policy indicating the insured value of the goods shipped.

Generally, the risk passes to the buyer at the moment the goods have passed over the ship's rail under both c.i.f. and f.o.b. Since the payment of the goods is performed before the buyer has taken physical delivery of the goods the buyer usually opens a 'documentary credit' with a bank, which is considered to be one of the most secured way to finance international trade.[103] The payment will then be made upon presentation of a number of specified documents provided by the seller such as an invoice, an insurance policy, an inspection certificate and transport documents e.g. a B/L, the latter being the most important document. The buyer will perform payment to the seller upon presentation of compliant documents.[104]

3.1 Parties under a sale contract

An international contract of sale involves a seller/exporter and a buyer/importer in different countries and includes a carriage of the goods between the countries. Under international sale of goods the main sale contract also includes several other contracts. These contracts are independent from each other but are linked through common denominators.

[103] *Supra*, note 20 at page 135.
[104] *Ibid*.

An important factor to highlight is that the carrier is not a party to the sale contract, the carrier is only contractually bound to the contract of carriage and the party under the sale contract which is designated to arrange for the transport. There are terms set out to identify how the carriage of the goods will be performed. These terms are called "shipment terms" or the incoterms which is an initiative taken by the ICC and are widely recognized within international sale of goods.[105] Incoterms are seen as customary rules in many jurisdictions but applies only if stipulated in the contract according to English law.[106]

The sale contract will normally identify one set of shipment terms that is to be followed by the parties to the contract. The two most commonly used shipment terms are c.i.f. and f.o.b. terms. The contract of sale and the shipment terms are used to decide who is responsible for what under the sale contract and the intentions of the parties involved such as, insurance, terms of payment, time for delivery, jurisdiction clause, packaging of goods etc.[107]

The seller and the buyer will have a chain of contractual relationships under the sale contract. There is a contractual relationship with the carrier who transports the goods, a contractual relationship with a bank for providing credit and handling the payment of the goods, and with an insurer who provides for e.g. cargo insurance. Although the carrier is not a party to the sale contract itself the terms negotiated by the seller and the buyer will be affected on the carrier in the terms of the contract of carriage. The sale contract is therefore both independent and linked to other contracts at the same time.

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[105] *Supra*, note 20 at page 135.
[106] Teaching materials, Susan Hawker, Module 2 International Sale of Goods and Remedies, Postgraduate Diploma in Maritime Law 2008/2010 London Metropolitan University, at page 22.
[107] *Supra*, note 4 at page 3.

There are several issues that may arise in relation to the contract of sale, which will involve the carrier and effect the notion of delivery and may cause the consignee of the goods to refuse delivery. If the goods arrive at the port of discharge and are damaged the question of whether the risk has passed from the seller to the buyer will be raised and if it is possible for the buyer to sue the carrier under the contract of carriage. As soon as the risk has passed from the seller to the buyer any claim concerning loss or damage to the goods will be brought against the carrier instead of the seller.[108] A clean B/L will then be the evidence of that the goods was shipped in good order and passed from the seller to the buyer in a good condition.

3.2 Responsibilities under the contract of carriage

Once the goods are loaded on the ship at the port of loading the carrier will issue a B/L. The B/L serves as negotiable document of title within international trade. It allows the shipper to transfer the ownership of the cargo during transit. The endorsement of the B/L also transfer all the rights in the goods that was held by the first consignee and enables the endorsed consignee to take proper delivery of the goods at the port of discharge.[109] The carriers responsibilities in regard to the contract of carriage is to provide a seaworthy and a cargo worthy ship which is suitable for the goods that are to be shipped. These are implied obligations that are acknowledged custom and commercial usage within carriage of goods by sea.[110]

[108] Teaching materials, Hawker Susan, Module 2 International Sale of Goods and Remedies, Postgraduate Diploma in Maritime Law 2008/2010 London Metropolitan University, at page 10.
[109] *Supra*, note 20 at pages 5–6.
[110] *Ibid*, at page 9.

3.3 Payment mechanisms

The B/L has resolved many issues relating to conflicts between merchants within international sale of goods. It both serves as a security for the seller that the goods have been loaded onboard the ship and it provides the buyer with an assurance of a performance by the seller before the buyer pays for the goods shipped. From a bank's perspective a clean B/L is the most important document used in financing of international trade. It is a statement that the goods have been loaded on board the ship in apparently good order and a guarantee for payment from the buyer's bank if it complies with the terms of the 'documentary credit'.[111]

3.3.1 Letter of credit

The L/C can either be irrevocable or revocable but is rarely used in a revocable form. Under an irrevocable L/C a bank undertakes to pay directly to the beneficiary (typically the seller) if the required documents are presented within the validity of the L/C and complies with the terms and conditions set out in the L/C and without discrepancies.[112] As soon as the seller is notified that the L/C is issued the production of the goods or the arrangement for shipment can start since the seller is secured payment from the buyer.

It is difficult for exporters to verify creditworthiness of a foreign buyer and therefore payment with a L/C solves many of the possible difficulties that may arise under an international transaction, the bank takes the risk for financing the transaction and will irrevocably pay under the documentary credit if the sellers documentation complies with the terms provided under the L/C.[113]

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[111] Todd Paul, *Bills of Lading and Bankers' Documentary Credits*, LLP: 1990, at page 13.
[112] *Ibid*, at page 20.
[113] Gleaned from personal correspondence with a representative of a bank.

A bank is never a party to the contract of carriage within an international sale of goods. Neither does the carrier have any contractual relationship with the bank. When the seller has performed under a contract of sale and the goods are loaded on-board the ship a clean B/L is issued and sent to the issuing bank together with the other required documents to receive payment from the buyer. Under both c.i.f. and f.o.b. terms the risk for the goods passes from the seller to the buyer at the moment the goods are loaded onboard the ship. When the risk has passed from the seller to the buyer and the seller has received payment for the goods, the seller's interest in making claims regarding loss or damage of the goods during transit will automatically reduce, unless the goods are re-exported as a result of rejection or abandonment at the port of discharge.[114]

If the bank holds the goods as a security under a L/C it is also important that the bank acquires contractual rights against the carrier. If there are circumstances when goods are undelivered at the port of discharge the carrier may also have an interest in suing the buyer or the receiver of the goods for unpaid freight, storage costs and demurrage.[115] If there are loss or damage to goods, which arise out from fault of the carrier, any subsequent holder of a B/L have the possibility to sue the carrier in negligence if it is proved that the damage occurred during transit. In case of misdelivery as a consequence of delivery without a B/L or fraud the owner of the goods can sue the carrier in conversion. The actions are only available if the claimant has property in the goods since they are outside the scope of the contract. The House of Lords held in *The Aliakmon*[116] that only parties with a property interest in the goods can sue, either by "…legal ownership or possessory title to the property…" when the loss or damage occurred.[117]

[114] *Supra*, note 106 at page 229.
[115] *Ibid*.
[116] *Leigh & Sillavan Ltd. C. Aliakmon Shipping Co. Ltd*., (The Aliakmon) [1986] 2 Lloyd's Rep 1.
[117] *Ibid*, (Lord Brandon) at page 4.

3.4 Delay– and undelivered goods

Delay on account of the carrier has been characterized as a type of loss and has been discussed together with loss or damage to goods. According to one commentator delay in relation to carriage of goods does not fall within the scope of loss or damage. Instead it does fall within the scope of economic loss, "… the delay is not the loss itself but the cause of it, for the loss is the economic disadvantage suffered".[118] It has been expressed as having "special characteristics that have important legal implications".[119] Within carriage of goods by sea the concept of delay has not been covered in a B/L nor by the Hague Rules or the Hague-Visby Rules and it has rather been treated as a "subsidiary topic".[120]

There are different kinds of losses that may be caused by delay, such as damage or loss of goods, progressive damage (perishable goods) or goods that arrive late in a perfect condition but as a consequence there are financial or economic loss, e.g. seasonal goods or machinery components.[121] In the Rotterdam Rules it has been given more space, the carrier is liable for loss, damage and delay in delivery if the claimant can prove that the loss caused by the delay was under the period of the carrier's responsibility.[122] Delay could be one reason for goods to remain undelivered at the port of discharge.

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[118] *Supra*, note 6 at page, 20.
[119] *Ibid*, at page, 1.
[120] *Ibid.*
[121] Teaching materials, Bokareva Olena, Concept of Delay in Maritime and Transport Law, JASN06 International Law on Shipping and Trade, September 14th 2012, Power Point slide 8.
[122] Rotterdam Rules, article 21 "Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed".

3.5 The carrier's responsibility for delay

The carrier's responsibility for delay is usually stipulated in the contract of carriage and therefore the responsibility is limited to what is agreed upon in the contract. The duty imposed on the carrier is to load the goods on board the ship and complete the voyage without any preventable delay. Within the business of liner trade[123] liberty clauses are often inserted in the B/L to reserve the carrier for changes in the scheduled timetable. The "liberty clause" used in the Mediterranean Shipping Company (MSC) states the following:

> The scope of voyage herein contracted for may or may not include usual or customary or advertised ports of call whether named in this Bill of Lading contract or not and may include transport of the Goods to or from any facilities used by the Carrier as part of the carriage, including but not limited to off-dock storage. The Carrier does not promise or undertake to load, carry or discharge the Goods on or by any particular Vessel, date or time. Advertised sailings and arrivals are only estimated times, and such schedules may be advanced, delayed or cancelled without notice. In no event shall the Carrier be liable for consequential damages or for any delay in scheduled departures or arrivals of any Vessel or other conveyances used to transport the Goods by sea or otherwise. If the Carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by such alleged delay, such liability shall in no event exceed the Freight paid for the carriage.[124]

The clause clearly states that the carrier is excluded from liability arising out of delay. In *Squillante & Zimmerman Sales Inc. v. Puerto Rico Marine*

[123] Liner trade is a service rendered by shipowners for anyone who wishes to transport cargo, a B/L usually evidences the contract of carriage.
[124] MSC B/L found at: http://www.mscgva.ch/bl_terms/bl_standard_terms.html#section8 (accessed at 2013-02-19).

Management Inc.[125] case concerned a "liberty clause" inserted in the B/L, which gave the carrier the liberty to delay without any commitment towards the shipper or the consignee in regard to notification of delay. The court held that the clause allowed that some discretion was conferred under the B/L and that it was acceptable with reasonable changes in the scheduled timetable. The carrier was not in breach of contract for the delay.[126] In contrast, if the carrier has expressly guaranteed that the goods will be delivered at a specified time the carrier is strictly liable and obliged to deliver on time if no other exceptions are expressly stipulated in the contract.[127]

3.5.1 Delay under the Hague Rules and the Hague-Visby Rules

The Hague Rules or the Hague-Visby Rules does not cover liability arising from delay. The Hague Rules and The Hague Visby Rules allows for a general freedom of contract but any clause that relieve the carrier from liability that is expressly stipulated will be considered null and void according to rule III(8). The applicability is between the "tackle to tackle" period and it is therefore permitted in article VII to enter into an agreement in which the carrier reserve, or exempt from liability in the goods prior to loading and after discharge. A carrier may also by expressed terms in the B/L "surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these rules".[128]

[125] *Squillante & Zimmerman Sales, Inc.* v. *Puerto Rico Marine Management, Inc.* (1981) 516 F. Supp. 1049 (D.C., Puerto Rico) case referred to in Ganado Max, Kindred Hugh M, *Marine Cargo Delays*, Lloyd's of London Press Ltd: 1990, at page, 28.
[126] *Supra*, note 6 at page 28.
[127] *Supra*, note 6 at page 29.
[128] Hague-Visby Rules, rule V.

3.5.2 Delay under Hamburg Rules

The Hamburg Rules are the first rules governing delay, which is stipulated in article 5 saying that the carrier is liable for loss or damage to goods and delay in delivery.[129] The carrier's limitation for liability in regard to economic loss is two and one half times the payable for the goods delayed but not exceeding the total amount payable freight.[130]

3.5.3 Delay under Rotterdam Rules

Delay is governed under the Rotterdam Rules and "occurs when the goods are not delivered at the place of destination provided for in the contract of carriage".[131] The carrier also has an opportunity to limit its liability for delay and economic loss as a cause of the delay with a maximum amount of two and one half times the freight payable on the goods delayed but not exceeding total amount freight paid under the contract of carriage.[132] If time is of essence for the parties under a contract of sale it is important to express when the goods should be delivered. If the carrier cannot satisfy to deliver the goods on the time agreed upon in the contract the carrier will be liable for paying damages.[133]

If the time is not exactly agreed upon or stipulated in the contract it may give rise to difficulties in calculating damages if there is delay on account of the carrier. Usually within maritime transportation exact dates are not set out in the contracts of carriage and there is instead a use of regular timetables or common trade practices. In such cases the courts have to apply

[129] Hamburg Rules, article 5.
[130] *Ibid*, article 6.
[131] Rotterdam Rules, article 21.
[132] *Ibid*, article 60.
[133] *Ibid*, article 17 and 21.

national contract law to determine the specific intentions regarding time between the parties.[134]

3.5.4 Delay under English law

The Hague-Rules were adopted in the U.K in 1924 and implemented in COGSA 1925, followed by the ratification of the Visby amendment in 1968, which, was implemented, into COGSA 1971. COGSA was updated in 1992 and replaced the Bills of Lading Act 1855. In the U.K there is no domestic law regulating the carriage of sea, instead the Hague Visby Rules are implemented as a force of law. The Hague Visby Rules also applies to non-negotiable transport documents if they expressly state that the rules apply. If not, there is freedom of contract in regard to non-negotiable transport documents.[135] The Hague Visby Rules cannot be avoided merely by a choice of forum clause stating another jurisdiction, which applies a lower limitation of liability, e.g. the Hague Rules.

The English courts must apply the Hague Visby Rules since it is a force of law. Delay is not covered in the Hague Visby Rules and therefore the responsibility for damage to cargo after discharge is not covered and it has to be regulated by terms in the contract.[136] In the case *Port Jackson Stevedoring Pty. Ltd. V. Salmond & Spraggon Ltd. (The New York Star)*[137] it was held by the High Court of Australia that terms of the contract of carriage could cover the period for storage of the goods after discharge.[138]

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[134] Von Ziegler Alexander, Delay and the Rotterdam Rules, Uniform Law Review, Vol. 14, Issue 4, (2009), at pages 997–999.
[135] *Supra*, note 44 at page 1098.
[136] *Ibid*, at page 1099.
[137] *Port Jackson Stevedoring Pty. Ltd*. v. *Salmond & Spraggon Ltd.* (The New York Star), [1981] 1 W.L.R. 138.
[138] William Tetley, *Marine Cargo Claims*, third edition, International Shipping Publications BLAIS: 1988, at page 1099.

3.5.5 When is the carrier exempted from liability for delay?

If a consignee suffer from loss caused by delay on account of the carrier the consignee has the burden of proof in regard to prove the loss that was consequential to delay and a direct cause of it. The Swedish Club has given examples of what could constitute a valid proof of loss, such as if the consignee had to buy similar goods from somewhere else to be able to fulfill the contractual obligations with a sub-buyer, or increased costs relating to storage, transshipment, custom's fees, import duties and insurance premiums.[139]

Under Hague Visby Rules the carrier may rely on exemptions regarding delay if it falls within the ambit of article IV(2) and the exemptions listed, together with the package limitation and time bar, which is provided by the rules.[140] The carrier does not have any right for recovery from the P&I club if the carrier has agreed upon an extended contractual obligation such as delivery at a certain date or within a specific period of time which will result in breach of contract if it cannot be fulfilled and the carrier is delayed. [141]

The Swedish Club rule 5 states that: "Liability pursuant to mandatory rules of law for loss caused by delay in the carriage by the entered ship of passengers, luggage and cargo." is covered by the P&I club and is excluding extended contractual obligations. If the carrier choose to agree to deliver goods on a specific date or within a specific period of time the carrier could also be responsible for loss that is consequential to the delay.

[139] The Swedish Club, Comments to the P&I Rules, at pages 181–182, website: http://www.swedishclub.com/main.php?mid=17191&pid=50&tid=50 (accessed at 2013-05-04).
[140] Hague Visby Rules, article IV(2) and III(6).
[141] The Swedish Club, Comments to the P&I Rules, at page. 181, website: http://www.swedishclub.com/main.php?mid=17191&pid=50&tid=50 (accessed at 2013-05-04).

4. Insurance aspects of undelivered goods

In common law and within English jurisdiction marine insurance is defined in the Marine Insurance Act 1906 (MIA 1906)[142] as:

> A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.[143]

Cargo insurance is predominantly a global market, where the U.K and London is the main centre for insurance companies, P&I clubs and Lloyd's. Therefore the MIA 1906 plays an important role within cargo insurance.[144] Under a contract of sale, whether on c.i.f. or f.o.b. terms, one of the parties will arrange for cargo insurance. The clauses that are commonly followed are the Institute Cargo Clauses (ICC clauses), which is a set of generally accepted standard terms within the marine insurance market. The different covers provided are defined as ICC clauses A, B and C, where A provides for the widest cover and C for the most restrictive set of cover.[145] Another feature of the different clauses is that the A clauses provide for 'all risk' coverage with a number of exceptions whereas the B and C clauses provide for coverage for certain named perils.

In the marine insurance policy there will be explicit terms regarding the duration of the cover, the clause is often referred to as the 'warehouse-to-warehouse' clause. The cover provided by the policy is "during the ordinary

[142] Marine Insurance Act 1906, 1906, 6 Edward VII, chapter 41.
[143] MIA 1906, article 1.
[144] Teaching materials, Hill Julian, Marine Insurance Law, Postgraduate Diploma in Maritime Law 2008/2010 London Metropolitan University, at page 8.
[145] Definition found at: http://www.businessdictionary.com/definition/institute-cargo-clauses.html (accessed at 2013-03-10).

course of transit"[146]. There is no cover for delay if the cause of the delay is not beyond the control of the assured.[147]

4.1 P&I cover for unclaimed goods

Goods damaged during the voyage, rejected by the consignee or in other circumstances have become worthless and caused the consignee to choose not to take delivery of the goods will result in certain problems for the carrier. The carrier is often exposed to difficulties in removing the damaged goods from the ship, or when the consignee rejects the goods, the carrier has to arrange for storage until further actions can be taken, such as public actions to sell the goods or destroy them at the expense of the carrier.[148] The P&I clubs[149] have extended protection in their rules to cover these 'extraordinary handling costs' that are incurred on the carrier to a reasonable extent.[150] The Swedish Club's rules express these 'extraordinary handling costs' as follows:

> Costs or expenses in excess of those which would normally have been incurred in respect of
>
> (a) discharging or disposing of damaged, rejected or worthless cargo,
>
> (b) discharging, handling, storing and reloading cargo where the ship has sustained damage recoverable under the Hull insurance of the entered ship.
>
> Extraordinary costs under a-b above are recoverable only if and to the extent that compensation is not afforded in General Average or

[146] Institute Cargo Clause (A) 8.1.
[147] Institute Cargo Clause (A) 8.3.
[148] The Swedish Club, Comments to the P&I Rules, at page 163.
[149] At the moment of writing this thesis there are 13 P&I clubs in the world, which are members to the "international group of P&I clubs", for further reading see the website of the international group: http://www.igpandi.org (accessed at 2013-03-09).
[150] The Swedish Club, Comments to the P&I Rules, Rule 4 section 6.

> recoverable from any other party and provided such costs are not caused by the nature of the cargo which was known or should have been known by the Member.

P&I cover is a third party liability insurance which provides protection for the shipowner in the carriage of goods and indemnifies the shipowner for loss amongst others damage to goods, cover for cargo liability is one of the cornerstones in P&I insurance.[151] P&I insurance have been referred to as liability insurance but traditionally it is indemnity insurance.

The major distinction between the two types of insurance is that the assured[152] is required to pay the damages to the third party before being entitled to recover from the insurer.[153] In contrast, liability insurance obligates the insurer to cover for losses incurred by the assured, which are falling within the scope of the insurance policy.[154] Loss or damage to goods that is caused by the carrier falls within the scope of P&I cover, claims made by third parties against the carrier that result in liabilities, costs and expenses that arise out from carriage of goods on-board a vessel entered in the P&I club.[155]

P&I clubs do cover additional costs that relates to the discharge and disposing of damaged or worthless goods, which may be a cause for a non-successful delivery. The P&I clubs will then cover for those costs that cannot be recovered from any other party.[156] According to one of the largest P&I clubs in Scandinavia it is not a normal phenomena for goods to be

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[151] *Supra*, note 13 section (A).
[152] The "assured" is the party indemnified against a loss within marine insurance, definition found in Honoré C. Paelinck, Reeds Dictionary of Shipping and Marine Finance, at page 4.
[153] Paid to be paid principle is expressed by Gard P&I club as: "Payment first by Member Unless the Association shall in its absolute discretion otherwise determine, it is a condition precedent to a Member's right to recover from the Association in respect of any liability, loss, cost or expense that he shall first have discharged or paid the same". Found in Gard Rules 2012, Rule 87.
[154] Steven J. Hazelwood, David Semark, *P&I Clubs Law and Practice*, chapter 9 introduction to P&I cover, 4th edition: 2010, at section 9.1–9.5, access through i-law (130304).
[155] *Ibid*, chapter 10, at section 10.55–10.60.
[156] *Ibid*.

rejected at the port of discharge without the happening of any specific incident. Sometimes goods are rejected because it has been damaged during transit, if the carrier is responsible for the damage the P&I club might cover the costs incurred. The P&I club does not cover costs relating to goods that is not collected by the consignee, except for damaged goods, but the revenue from sale or auction could get revenue to the carrier.[157]

4.2 P&I cover for cargo liability

The liability for goods covered by the P&I insurance involve liabilities, costs or expenses for loss, shortage, damage or other responsibility relating to cargo before, during or after the contracted transport by the entered ship.[158] The cover provided by the P&I clubs is usually limited to a certain period of time starting before the commencement of the voyage and ending after delivery of the goods.[159] There are exclusions to the cover provided for cargo liability; such exclusions could be B/L's with a false statement of the condition, quantity or quality of the goods shipped.[160]

The carrier is sometimes put under pressure by the shipper to issue a "clean" B/L although there are discrepancies in the goods shipped that should be inserted as "claused" on the face of the B/L. The reason is that a "claused" B/L will most likely not comply with the terms provided under the contract of sale or in the L/C. This will increase the risk that the buyer will reject the goods at the port of discharge.

Under a c.i.f. contract the buyer is obligated to pay the agreed price upon presentation of documents that complies with the terms provided in the L/C.

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[157] Gleaned from personal correspondence with a representative from a P&I club.
[158] The Swedish Club, Rules for P&I Insurance, Rule 4 section 1, website: http://www.swedishclub.com/main.php?mcid=&mid=129&pid=50&tid=50 (accessed at 2013-05-04).
[159] *Ibid*.
[160] The Swedish Club, P&I Rules and Exceptions, at page 97, website: http://www.swedishclub.com/main.php?mcid=&mid=17191&pid=50&tid=50 (accessed at 2013-04-05).

In other words, payment is advanced before the buyer has examined the goods shipped. If a B/L is issued incorrectly "clean", in theory the buyer will have remedies against the seller for knowingly shipping goods that are not in conformity with the agreed sale contract. In practice this situation may not be easily solved, the seller and the buyer are in different countries and a lawsuit against a foreign seller is automatically linked to certain practical issues. From the carrier's perspective the issuing of a "clean" B/L is a *prima facie* evidence that the goods are shipped in a good and apparent order, which may put the carrier in a difficult position if the goods are not efficient. It was held in the case of *Brown Jenkinson* v *Percy Dalton*[161] that it constitutes fraud to knowingly issue a "clean" B/L when it is clear that the goods are not in apparent good order. Under English law indemnities given by the shipper to the carrier is unenforceable and is treated as an illegal contract.[162]

4.2.1 The "*omnibus*" rule

The shipowners, also known as members, of a P&I club have the possibility to submit claims that falls within the scope of the "*omnibus*" rule. The rule provides the members with a possibility to recover from claims that not obviously falls under any specific category of cover. Claims are brought before the board of directors of the P&I club, which have the authority to decide if a specific claim under a specific circumstance shall be covered by the P&I club.[163] The "*omnibus*" rule is expressed as followed:

> "Subject always to the provisions of Rule 2.4, the Association may in its absolute discretion exercise powers conferred in the Articles of Association to pay compensation in respect of a liability, loss, cost or

[161] *Brown Jenkinson & Co Ltd.,* v *Percy Dalton (London), Ltd.* [1957] 2 Lloyd's Law Rep 557, at page 9.
[162] *Ibid*, at page 12.
[163] Hazelwood Steven J and Semark David (ed.), *P&I Clubs Law and Practice*, 4th edition, Informa:2010, at section 10.227–10.279.

expense which is not otherwise covered under these Rules."[164]

The "*omnibus*" rule is a significant feature for the P&I clubs and is not found in other types of marine insurance. The decision to extend the club cover depends on the shipowners ability to avoid the loss, if the shipowner was unable to avoid the loss or guard against the loss it is a greater chance for the P&I club to vote in favor for a recover, although there is no duty upon the directors of the P&I clubs to grant recovery of a claim. The application of the "*omnibus*" rule provides the P&I clubs with a greater flexibility in regard to insurance cover.[165] The "omnibus rule" is very seldom used by members and never used in connection with recovery of claims for abandoned goods. Claims regarding abandoned goods are subject to circumstances (whether cause of damage/abandonment is a covered risk), often covered under P&I rules.[166]

4.2.2 Direct Action

Within maritime law it sometimes becomes appropriate for third parties to have the opportunity to make a claim directly to the carriers insurer, the P&I club. The consignee of the goods may wish to make a claim directly against the members P&I club instead of suing the member in court. When the carrier is difficult to approach it is more efficient for the consignee to make the claim against the carrier's insurer, the P&I club.[167] One of the cornerstones under P&I insurance is the "pay to be paid rule" which requires the assured to first pay for the claims incurred by the third party before seeking reimbursement from the P&I club. The "pay to be paid" rule

[164] Gard Rules 2013, Rule 2.5, website: http://www.gard.no/ikbViewer/Content/77367/Gard_Rules_2013_web.pdf (accessed at 2013-05-04).
[165] Norman J. Ronneberg, Jr, An Introduction to the Protection & Indemnity Clubs and the Marine Insurance they provide, University of San Francisco Maritime Journal, Winter 1990/1991, at page 4.
[166] Gleaned from personal correspondence with a representative of a P&I club.
[167] Ulfbeck Vibe, Direct Action against the Insurer in a Maritime Setting, [2011] L.M.C.L.Q. p, 293.

is a preventative measure for P&I clubs to avoid third party claims since it is contrary to their rules. The general view under English law is that rights of third parties shall not be greater than the rights of the assured.[168] The possibility for third party claims against a P&I club varies significantly between jurisdictions. The claimant and the insurer do not have a contractual relationship, which may raise issues linked to the possibility of direct action. Under English law direct claims against an insurer is rejected by the courts.[169]

Historically, P&I Clubs have followed the English decisions regarding the possibility of direct action. A landmark decision from the House of Lords the *Fanti and the Padre Islands*[170] established that direct action by third parties is limited and the principle is still preserved in English law. English courts have been subjective in interpreting whether direct action is falling under the provisions of the Third Parties (Rights Against Insurers) Act 1930[171] (now revised into the 2010 Act).

Claims made against the P&I club for abandoned cargo must be made by the member who is usually the container line and not the consignee or the port authority. Each member has a per voyage or incident deductible which is deducted before making final payment. The P&I club would only pay after all efforts to recover the outstanding costs from the shipper or consignee have been exhausted. Only demurrage (port storage) and disposal costs can be recovered not *per diem* (container rent) and ocean freight.[172]

[168] *Supra*, note 154, chapter 17 section (17.32).
[169] *Ibid*, at page 294.
[170] *Firma C-Trade SH* v *Newcastle Protection and Indemnity Association* (The Fanti) and (The Padre Island) No.2[170] [1990] 2 Lloyd's Law Reports 191.
[171] Third Parties (Rights Against Insurers) Act 1930, George V, Chapter 25 20 and 21.
[172] Gleaned from personal correspondence with a representative from a P&I club.

4.3 Cover for delay and economic loss

Consequential loss is the type of loss incurred as a result of a delay, the delay itself is not the loss but the result of the delay cause loss, e.g. loss of profit or economic loss. An example of consequential loss could be delay of certain types of machinery equipment necessary for a chain of production, if the production cannot run without the piece missing as a consequence of the delay the carrier is held responsible for the consequential loss arising out from the delay. Also, seasonal goods and perishable goods that tend to rot or spoil are sensitive for delay and may cause loss of profit for the consignee. Such loss could be loss of profit or economic loss and the carrier will have to compensate for that loss.

The P&I clubs provide cover for consequential loss directly relating from the shipped cargo. In contrast there is no cover provided by the club for damages not relating to the damaged goods.[173] The cover is provided for: "Liabilities, costs or expenses for loss, shortage, damage or other responsibility relating to cargo before, during or after the contracted transport by the entered ship".[174] Under English law the traditional view towards compensation for economic loss has been seen to be too remote. Although, it was held in the *Junior Books* v *Veitchi*[175] that economic loss can be compensated if there is a "special relationship" between the parties, but in general those types of claims are seen to be too remote.[176]

In the landmark decision of *Hadley* v. *Baxendale*[177] principles concerning remoteness of damage and compensation for damages in case of breach of contract was laid down. The principles established in the case are still

[173] The Swedish Club, Rules and Exceptions, at page 103–104, website: http://www.swedishclub.com/main.php?mcid=&mid=17191&pid=50&tid=50 (accessed at 2013-05-04).
[174] The Swedish Club, P&I Rules 2013, Rule 4 section 1, website: http://www.swedishclub.com/main.php?mcid=&mid=129&pid=50&tid=50 (accessed at 2013-05-04).
[175] *Junior Books Ltd.* v. *Veitchi Co. Ltd.* 1982 S.L.T. 333.
[176] *Supra*, note 6 at page 86.
[177] *Hadley* v. *Baxendale* (1854) 9 Ex. C.R. 341; 156 E.R. 145.

applied in the U.K, the United States and Canada.[178] The court held that the following principles should be maintained:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be supposed to have been in the contemplation of both parties, the time they made the contract, as the probable result of the breach of it."[179]

The principles established in *Hadley* v *Baxendale* have been generally accepted and apply to all modes of carriage. The principles have also been expressed being twofold in relation to recovery from damages. The first rule refers to the damages that arise from the natural damages incurred by the breach of contract, and the second rule refers to special damages, that are not falling within the scope of the first rule. The question of whether certain damage is falling within the scope of the first or the second rule depends on the facts of each case.[180] The Hague Rules, Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules do not contain any provisions covering the measure of damages but instead provide for limitation of liability.

[178] *Supra*, note 6 at page 116.
[179] *Hadley and Another* v. *Baxendale and others* (1854) 9 Ex. 342.
[180] *Supra*, note 6 at page 116–117.

5. Undelivered goods at the port of discharge

Goods that remain undelivered at the port of discharge are under the responsibility of the carrier. The terms set out in the B/L is generally giving the carrier freedom to dispose the goods at a suitable warehouse or storage if the consignee delay or fail to take proper delivery of the goods at the port of discharge. After a stipulated period of time, usually 30 days from the expiry of the agreed storage time[181], the carrier may arrange for an auction to sell the goods and possibly recover from the costs relating to storage and preserving of the goods, or otherwise dispose them. In the Conlinebill goods are to be freely discharged as expressed in clause 8: "Loading and discharging may commence without previous notice" and "If the goods are not applied for within reasonable time, the carrier may sell the goods privately by an auction".[182]

The laws regulating the process of public auctions and the disposal of goods that are abandoned are local laws, which may give rise to difficulties and uncertainties for the carrier. Prolonged processes of sale can also increase the costs for storage and perhaps exceed the total value of the cargo, which is even more critical for perishable and seasonal goods. The P&I clubs do not necessarily cover these circumstances and is not usually subrogated into the sale process if there is no expressed fault on the carrier.[183] Time is of essence for a carrier regarding goods that are not properly delivered to be able to avoid unnecessary expenses.

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[181] U.K P&I club, bulletin 675-1/2010, failure to collect cargo problems –Ukraine, access through website: http://www.epandi.com/ukpandi/infopool.nsf/HTML/LPBulletin675 (accessed at 2013-03-11).

[182] Conlinebill, clause 8, referred to in Wilson John F, *Carriage of Goods by Sea*, 7th edition, Pearson: 2010, at page 526.

[183] Gleaned from personal correspondence with a representative in the P&I business.

The carrier is the responsible party towards the port authorities due to the contract for storage at the port of discharge. A common reason for abandoned goods at ports today is the highly competitive market and the low-profit margins, which cause smaller shippers to "walk away" from the goods rather than pay for high storage costs at the port of discharge. It was expressed in an article by the Trade Winds News[184] that smaller shippers tend to have greater 'market power' than large volume shippers because the volume shippers rely on volumes, which is not always linked to the best prices.[185]

Undelivered goods falls within the area that increases the liabilities for the carrier, which ought to fall on another party and such liabilities are expected to be covered from the carriers' insurance. Carriers cannot take actions with abandoned containers that have not been customs cleared. It complicates matters, as the carrier must wait for customs to unload the containers and sell the cargo at auction. This process can take up to 6 months and meanwhile the carrier has many containers out of service. If the cargo has no value, customs may decline and leave the carrier to find a buyer or worse, haul the containers to the dump.[186]

The customs at the port is not in charge of or responsible for undelivered goods. Customs warehouse/temporary warehouses in a port is not Customs' warehouse and is instead usually operated by a port company. These companies take care of undelivered goods and have contractual relationship with the carriers. These companies are free to arrange an auction or a sale if it is available.[187]

[184] Article published in Trade Winds News, U.K.
[185] *Ibid*.
[186] Gleaned from personal correspondence with a representative from a P&I club.
[187] Gleaned from personal correspondence with a representative from the Swedish Customs Authority.

5.1 Extraordinary costs

Extraordinary costs are the costs incurred upon the carrier for goods that is not properly delivered to the consignee. The B/L usually states that the consignee has a period called 'free time' where there is no charges claimed if the consignee delays in taking delivery.[188] The B/L also contains a clause regulating "notification and delivery", the MSC B/L express the following:

> 20.2 The Merchant shall take delivery of the Goods within the time provided for in the Carrier's applicable Tariff or as otherwise agreed. If the Merchant fails to do so, the Carrier may without notice unpack the Goods if packed in Containers and/or store the Goods ashore, afloat, in the open or under cover at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon all liability whatsoever of the Carrier in respect of the Goods, including for misdelivery or non-delivery, shall cease and the costs of such storage shall forthwith upon demand be paid by the Merchant to the Carrier.
>
> 20.3 If the Goods are unclaimed within a reasonable time or whenever in the Carrier's opinion the Goods are likely to deteriorate, decay or become worthless, or incur charges whether for storage or otherwise in excess of their value, the Carrier may at its discretion and without prejudice to any other rights which it may have against the Merchant, without notice and without any responsibility attaching to it, sell, abandon or otherwise dispose of the Goods at the sole risk and expense of the Merchant and apply any proceeds of sale in reduction of the sums due to the Carrier from the Merchant under or in connection with this Bill of Lading.
>
> 20.4 Refusal by the Merchant to take delivery of the Goods in accordance with the terms of this clause and/or to mitigate any loss or damage thereto shall constitute an absolute waiver and abandonment by the Merchant to the Carrier of any claim whatsoever relating to the

[188] *Supra*, note 44 at page 571.

> Goods or the carriage thereof. The Carrier shall be entitled to an indemnity from the Merchant for all costs whatsoever incurred, including legal costs, for the cleaning and disposal of Goods refused and/or abandoned by the Merchant.[189]

The P&I clubs provide cover for "extraordinary handling costs" which are incurred by the member. Such costs could be result of damaged goods, which is difficult to remove from the ship, storage costs for rejected goods and costs resulting from goods that need to be destroyed or damaged. The P&I clubs cover costs that are "reasonably incurred".[190]

5.2 Liens for freight and other expenses incurred at the port of discharge

A lien is a right incurred by the carrier to retain possession of the goods as a security for non-payment of freight[191] or other costs relating to the carriage of the goods. A lien is dependent upon the actual possession of the goods and will cease if the carrier gives it up to another party. In the common law system a lien is solely dependent on the ability of the carrier to get actual possession of the goods and therefore independent from the contract.[192] Recovery for freight on delivery of goods is one of the rights incurred upon the carrier to get a lien on the goods carried. Although, the lien is lost as soon as the goods are delivered to the consignee or an agent to the consignee, it is also restricted to the freight paid on the fixed date for

[189] MSC B/L found at: http://www.mscgva.ch/bl_terms/bl_standard_terms.html#section8 (accessed at 2013-02-19).
[190] The Swedish Club, P&I Rules and Exceptions, at page 163, website: http://www.swedishclub.com/main.php?mcid=&mid=17191&pid=50&tid=50 (accessed at 2013-05-04).
[191] Freight is the definition for the cargo that is transported onboard a ship on commercial terms, definition found in Honoré C. Paelinck, Reeds Dictionary of Shipping and Marine Finance, at page 39.
[192] *Supra*, note 20 at page 303.

delivery and not exercisable on freight that is agreed to be paid at a later time.[193]

There is also a possibility for parties under a contract of carriage to expressly state in for example the B/L what kind of liens that are enforceable under the contract of carriage to avoid the implied terms of the common law system. In the MSC B/L a clause regarding the carrier's lien is expressed as followed:

> The Carrier, its servants or agents shall have a lien on the Goods and any document relating thereto for Freight and for general average contributions to whomsoever due. The Carrier, its servants or agents shall also have a lien against the Merchant on the Goods and any document relating thereto for all sums due from the Merchant to the Carrier under any other contract. The Carrier may exercise its lien at any time and any place in its sole discretion, through the action of any servant, agent or Subcontractor, whether the contractual carriage is completed or not. The Carrier's lien shall also extend to cover the cost and legal expense of recovering any sums due. The Carrier shall have the right to sell any Goods liened by public auction or private treaty, without notice to the Merchant. Nothing herein shall prevent the Carrier from recovering from the Merchant the difference between the amount due to the Carrier and the net amount realised by such sale.[194]

The clause mentioned above is general in scope and provide the carrier with cover for "…any sums due" and also gives the carrier the right to sell the goods either privately or by public auction. A contractual lien falls within the ambit of construction, the enforceability wholly depends on the contract and to what extent the lien is defined in the contract. Contractual liens on cargo for freight sometimes give rise to uncertainties regarding enforcement

[193] *Supra*, note 20 at page 304.
[194] MSC B/L found at: http://www.mscgva.ch/bl_terms/bl_standard_terms.html#section8 (accessed at 2013-03-12).

and priority if the cargo interest conflicts with other liens that are attached to the cargo.[195]

5.3 Responsibility for the carrier

The responsibility of the carrier for the period that relates to the discharge of the goods will to a large extent depend on the national law applicable at the port of discharge. If a B/L is issued the carrier is obliged to deliver the cargo to the lawful holder of such B/L at the port of discharge. The carrier is responsible for the cargo at discharge, after the discharge if the goods are still in custody of the carrier or an agent of the carrier, and after constructive delivery of the goods. The issue of delivery is not dealt with under the Hague Rules or the Hague-Visby Rules and there is no imposed obligation on the carrier to proper delivery of the goods since the Rules do not apply after discharge. Both the Hague Rules and the Hague-Visby Rules apply to every contract of carriage from when the goods are loaded on the ship until they are discharged.[196] Courts have dealt with the issues of delivery and have at times held that the carrier is obliged to deliver under the Hague Rules. In *Centerchem Products* v. *A/S Rederiet Odfjell*[197] it was held that:

> It has been established that proper delivery occurs when a carrier (1) separates goods from the general bulk of the cargo; (2) designates them; and (3) gives due notice to the consignee of the time and place of their deposit, and a reasonable time for their removal.

The court also concluded that 'proper delivery' of goods is affected when the goods have left the ship's pipes (the case concerned liquid cargo) and moved to a flexible hose managed by an agent of the consignee. The carrier

[195] Jackson D.C., *Enforcement of Maritime Claims*, 4th edition: 2005, chapter 20 at sections 20.42–20.45, (accessed through i-law at 2013-03-13).
[196] The Hague-Visby Rules article II.
[197] *Centerchem Products* v. *A/S Rederiet Odfjell* case referred to in Tetley William, "*marine cargo claims*", third edition, International Shipping Publications BLAIS: 1988, at page 570, 1972 AMC 373 at pp. 374–75 (E.D. Va. 1971).

was then relieved by any responsibility for the loss of cargo when it had left the ship.[198] The terms provided in B/L's does not require the carrier to give notice to the consignee for delivery of goods, as expressed in the MCS B/L "Failure to give such notification shall not subject the Carrier to any liability nor relieve the Merchant of any obligation hereunder."[199]

In common law there is no obligation imposed upon the carrier to give such notice if there is lack of any such provision in the contract of carriage. It is customary within liner trade[200] that the carrier gives notice of arrival to the 'notify party' on the face of the B/L in an attempt to reduce the number of delays in delivery of cargo. There are also circumstances when a bank serves as the 'notify party' under the B/L and has an interest in keeping track of the goods to be able to handle potential defaults or cases of false presentation of B/L's.[201]

5.4 Liabilities for the consignee

The liabilities imposed on the consignee in regard to undelivered goods at the port of discharge are not very clear. The relationship between the contract of sale and the contract of carriage is closely related but cannot impose obligations on a non-contracting party, e.g. the carrier and the sale contract. The consignee does not have an obligation to take delivery of the goods in any other manner than what has been contracted for. The same principal applies when delivery at the port of discharge is linked with any kind of danger, e.g. contaminated cargo.[202] According to one commentator the consignee does not have any right to reject the cargo at the port of

[198] *Supra*, note 44 at page 570.
[199] MSC B/L found at: http://www.mscgva.ch/bl_terms/bl_standard_terms.html#section8 (accessed at 2013-03-16).
[200] Liner Trade is ship's operating on a fixed schedule between pre-advertised ports, website: http://www.businessdictionary.com/definition/liner.html (accessed at 2013-04-19).
[201] *Supra*, note 29 at pages 412–413.
[202] *Supra*, note 44 at page 312.

discharge for any other reasons than those mentioned earlier.[203] In case of damaged goods, which is one of the main reasons for rejection of goods at ports[204], the consignee shall take proper delivery of the goods before preceding a claim against the carrier.[205]

Freight forwarders who are also referred to as non-vessel operating common carrier (NVOCC) in the United States of America (U.S), is a common operator of shipments today. They act on behalf of the shipper or the consignee. They do not own the ship but usually issues their own B/L's and has the responsibility for the shipment and act as an intermediary for the arranging of carriage between the seller and the buyer. The fact that a freight forwarder has issued a B/L does not merely mean that it is the carrier of the goods. A common character for the freight forwarders is that they try to contract out from as much liability as possible.[206]

The question of whether the freight forwarder is an agent of the shipper or a principal contractor will depend upon the circumstances in each case and on the law of the jurisdiction where the issues arise. For the court to determine if a freight forwarder has acted as a carrier or an agent it has to look at the surrounding circumstances such as phone calls, the contract with the seller etc. The rights and responsibilities of a freight forwarder is not very clear.[207] The possible difficulty that may arise linked to undelivered goods is when the carrier is stuck with goods at a port and there are uncertainties of which party that bear responsibility for the shipment and the carrier cannot identify the right party. Under circumstances when freight forwarders have undelivered goods at a terminal the goods will remain there until the owner/freight forwarder collects it. The liability for costs incurred by the

[203] *Supra*, note 44 at page 312.
[204] Gleaned from personal correspondence through email with personnel at one of Sweden's biggest container line ports.
[205] *Supra*, note 44 at pages 312–313.
[206] *Ibid*, at page 692.
[207] *Ibid*, at pages 691–694.

port authorities for storage of the goods will be charged upon the party who is identified as the owner.[208]

5.5 Container demurrage

Within the container business the carrier may suffer from a reduction of available containers if they get stuck in ports where the consignee has rejected the goods and has to be stored in waiting for an auction or being destroyed. In case of containers that are hired by the carrier there will be loss of rent and possible difficulties in finding suitable places where the containers can be stored in the process of disposal. At one of Sweden's largest container line ports the 'free time' is 5 working days before any extra costs start running for the carrier.[209] Since the owner of the container seldom is the cargo owner there are increased costs under circumstances of delay in delivery or disposal of the goods at the port of discharge. The carrier is the contractor with the port and therefore also bears the responsibility for extra costs relating to the goods at the port of discharge. That is also the case under circumstances of damaged goods or containers when delivered at the port of discharge.[210]

5.6 Remedies on part of the carrier for unclaimed or rejected goods at the port of discharge

One of the essential obligations arising from the carriage of goods by sea for

[208] Gleaned from personal correspondence with a representative of a freight forwarder company.
[209] Gleaned from personal correspondence through email with personnel at one of Sweden's biggest container line ports.
[210] *Ibid*.

the carrier is to properly deliver the goods at the port of discharge to the right person against presentation of a correct B/L. Certain circumstances may force the carrier to keep custody of the goods even after discharge from the ship. The carrier may be prevented from performing a proper delivery due to a variety of reasons e.g. the consignee may refuse delivery due to damage of the goods during transit or unsolved disputes between the consignee and the shipper.

In common law the remedies available for the carrier for costs relating to container demurrage, storage costs at the port of discharge, unpaid freight charges and costs for disposal of the goods is traditionally to warehouse the goods, sell the goods by auction or attach a lien on the goods, although it has to be kept in the carrier's possession.[211] Remedies on part of the carrier were dealt with by statute in the Merchant Shipping Act 1894[212] before it was repealed in 1993. Many of the standard form B/L's used within today's trade contain remedies that are available for the carrier. If the consignee fails to take delivery of the goods within the agreed time the MSC B/L provides for the following remedies:

> …If the Merchant fails to do so, the Carrier may without notice unpack the Goods if packed in Containers and/or store the Goods ashore, afloat, in the open or under cover at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon all liability whatsoever of the Carrier in respect of the Goods, including for misdelivery or non-delivery, shall cease and the costs of such storage shall forthwith upon demand be paid by the Merchant to the Carrier.[213]

The remedies provided for the carrier is governed by national laws and terms agreed upon in the B/L. There is no uniform international legislation

[211] *Supra*, note 20 at page 303.
[212] Merchant Shipping Act 1894, [57 & 58 Vict. Ch. 60.] at sections 492–498.
[213] MSC B/L found at: http://www.mscgva.ch/bl_terms/bl_standard_terms.html#section8 (accessed at 2013-03-18).

that provides for legal certainty in regard to proper delivery of goods and suitable remedies to recover from economic loss. The Rotterdam Rules implement an obligation upon the consignee to take actual delivery of the goods in its article 43. Which is a step forward to provide a better clarification upon the terms of delivery, but it has also been a very controversial topic amongst scholars.

6. Undelivered goods, an issue for ocean transport carriers?

6.1 Why are goods abandoned at the port of discharge?

There may be numerous reasons for a consignee of goods to reject or abandon goods at the port of discharge. The underlying contracts that are related to the contract of carriage can play an important role, although the parties are independent from one another. In specific businesses there are a greater risk for carriers to be exposed of abandoned goods at the port of discharge. Such businesses have been identified to be within the trade of waste products, woods, and goods that are of a seasonal character or perishable in its nature. Also, goods have been abandoned in certain jurisdictions due to financial difficulties and bankruptcy on account of the consignee.

A common denominator for all these situations is that the carrier is the party that first has to deal with the problem. The first issue is to examine whether it is possible for the carrier to prevent situations of abandoned or rejected goods at the port of discharge since it will most likely result in extraordinary costs and prolonged proceedings for sale or disposal of the goods. The carrier's insurer, the P&I club, only recover for costs after all efforts have been made to recover the losses from the consignee or the shipper. It is therefore the carrier's responsibility to arrange for the surrounding process of taking reasonable care of the goods until it is disposed.

6.2 Surrounding causes

Delay could be a reason for goods to be left unclaimed or abandoned at the port of discharge. The notion of delay does not necessarily have to be covered in the B/L unless it is expressly inserted in the B/L that time is of essence for the parties involved. If so, the carrier is strictly liable to deliver the goods within the time provided for in the contract of carriage. The concept of delay is not always linked to delay on part of the carrier, delay on account of banks and the handling of documents can also give rise to difficulties in delivery of the goods at the port of discharge. The loss that is related to delay does not necessarily mean that the goods shipped are damaged. Instead there may be economic loss suffered from it.

Examples have been given earlier in this thesis such as the shipment of important machinery components that are necessary in a chain of production or goods that are seasonal and arrive late. In cases of such economic loss, it could be less expensive and even easier for the consignee to abandon the goods and leave them in charge of the carrier. If a bank is involved in the financing of international trade it could be notified as the consignee or the receiver of the goods shipped although the bank does not formally have any contractual obligations towards the goods itself. In case the consignee rejects the goods at the port of discharge as a reason of discrepancies in the documents or non-compliant documents, the bank can be the assigned owner of the goods if it is in possession of the B/L.

The need for time efficient transportation, demanding shippers and consignees that want to haste the process of taking delivery of the goods result in pressure on the carrier. Within the common practice of carriage of goods by sea it is usual that the goods arrive at the port of destination before the documents. The reason is simply that the documents are held up in the banking system, customs or delayed by the mail/courier services. Receivers of goods assume that actual delivery of the goods can take place as soon the goods arrive at the destination. According to P&I clubs missing documents

as a result of slow systems within banking and trade is not a valid excuse for the carrier to release goods without presentation of a B/L. The only way to get compensation for damages caused by delivery without a B/L is for the carrier to sought compensation under the "*omnibus rule*".[214]

The *MSC Amsterdam* is an important decision in regard to misdelivery and forged B/L's in regard to containers.[215] The reason is that these types of goods will usually be discharged before physical delivery and since there is no obvious application of either the Hague Rules, the Hague-Visby Rules nor the Hamburg Rules after discharge of the goods, contracting parties should to be reluctant to insert a clause in a B/L that exempts liability. In regard of undelivered goods it is clear that neither the Hague Rules nor the Hague-Visby rules apply or extend after the discharge of goods is completed and is therefore linked with certain issues.[216]

6.3 Prevention

Within the container business and liner trade goods are usually delivered before physical delivery takes place. Since there is no clear application of international legislation of carriage of goods by sea, as earlier mentioned, delivery of goods is often governed by national legislation. Carriers cannot take actions with abandoned containers that have not been cleared through customs. This complicates matters, as the carrier must wait for customs to unload the containers and sell the goods at auction. This can take up to 6 months and meanwhile the carrier has many containers out of service. If the goods have no value, customs may decline and leave the carrier to find a buyer or worse, haul the containers to the dump.[217]

[214] Gleaned from personal correspondence with a representative from a P&I club.
[215] *Supra*, note 106 at section 5.056–5.059.
[216] *Ibid*.
[217] Gleaned from personal correspondence with a representative from a P&I club.

Issues relating to cargo abandonment have been highlighted by one of the leading P&I clubs where it is suggested that certain precautions is to be taken by the carrier. Carriers within the container business cannot normally afford staying out of business with shippers that book high volumes but are advised to perform strict controls on the bookings to avoid inconsiderate shippers to make bookings of high volumes. For shipments going to the U.S the P&I club advises its members to be aware of products that are costly to dispose, such goods includes amongst others used tires, computers and phone materials.[218]

The shippers of waste products to China have been advised by the P&I club to pursue extra precautions regarding approved and registered scrap suppliers by the Chinese government.[219] If the consignee does not claim the goods within 30 days the carrier should advise the shipper in writing to collect the goods within 10 days and pay the incurred charges, unless, the carrier has the right to sell the goods without any further notice. In case the abandoned goods is of low value and the carrier cannot sell it to recover the costs incurred it is possible to arrange for a return of the cargo to the shipper and inform the latter about the responsibility for all the incurred costs relating to such arrangement.[220] A situation that might occur if freight forwarders are involved and the responsibility for re-export is uncertain.

6.4 Recover from P&I insurance

Costs related to discharge and storage of goods that are not delivered at the port of discharge are covered by the P&I club. Due to those extraordinary costs that arise in connection with goods that are damaged, rejected or otherwise worthless will be covered by the P&I club to a reasonable extent.

[218] U.K P&I club, Preventing Cargo Abandonment, access through website: http://www.ukpandi.com/loss-prevention/article/preventing-cargo-abandonment-27/ (accessed at 2013-03-20).
[219] *Ibid*.
[220] *Supra*, note 212.

In addition to extra costs for crew wages and use of the ship while handling situations of abandoned or rejected goods the member should use its "own organization to reduce his insurance costs" and costs in relation to handling, discharging or dumping at sea of damaged, rejected or worthless goods are not covered by the P&I club.[221]

Due to the lack of uniform rules and international legislation relating to undelivered goods the carrier has to be careful when handling such situations and correspond with its P&I club to dispose the goods and discharge liabilities as soon as possible. Since Hague Rules, the Hague-Visby Rules nor the Hamburg Rules are specifically covering delivery or incur an obligation upon the consignee to take actual delivery of the goods at the port of discharge carriers are bound to contractual relationships and national laws regarding delivery of goods.

[221] Publication published by The Swedish Club, Rules and Exceptions, at page 164, website: http://www.swedishclub.com/main.php?mid=17191&pid=50&tid=50 (accessed at 2013-04-05).

7. Summary and Conclusion

As discussed in the introduction to this thesis, carriage of goods by sea is an important factor in the chain of international trade between merchants. The contract of carriage is an independent contract between the carrier and the party acting as the shipper. The dynamics of international trade makes the different relationships between shippers, carriers, consignees, banks, and P&I clubs both independent and dependent on each other at the same time.

Delivery of goods at the port of discharge is a contractual obligation incurred upon the carrier of the goods but it will only succeed if the other parties also fulfill their obligations and responsibilities in a correct manner. Therefore, the carrier is amongst others dependent on actions made by banks and consignees to be able to perform its part in the chain of international trade. The carrier's responsibility is to carry the goods in a seaworthy and properly manned ship and to carefully load, stow and discharge the goods during transit to the final destination.

As a result of the number of parties involved in an international sale of goods the risk for failure on account of one party increase. In light of proportionality the carrier bears a heavy burden of liability against the different parties under international trade and carriage of goods. The carrier has liability of the goods while in its custody and to perform a proper delivery to the appointed consignee or receiver of the goods. This makes the carrier exposed to a number of difficulties if the parties involved in the specific trade are not fulfilling their obligations. As for example, reject or abandon the goods at the port of discharge. The carrier is then responsible for taking care of the goods and gives the consignee a reasonable time to pick up the goods. After the so-called 'free time' has expired the carrier is still responsible for taking actions of either disposal or sale, which might be a prolonged process depending on the nature of the goods or the national law of the jurisdiction where it has been shipped.

The costs incurred upon the carrier can accumulate to thousands of dollars of storage costs, container demurrage and costs for containers that are occupied for lengthy periods of time and therefore losing revenue and sometimes even lost ocean freight.

The first step to solve the problems and uncertainties connected with delivery of goods at the port of discharge and abandoned or rejected goods is to solve the legal uncertainties within that field of law. As mentioned earlier the current international legislation does not incur any obligations upon the consignee to take delivery of the goods at the port of discharge neither the common law has any responsibilities or liabilities governing those matters since the available remedies was repealed in the updated version of the Merchant Shipping Act 1894.

A modernization of the old rules was made while drafting the Rotterdam Rules, which is the first international convention considering carriage of goods by sea that specifically deals with delivery of goods and put an obligation on the consignee to take delivery. It has not yet entered into force and carriers keep applying the current modes of law governing carriage of goods by sea, where responsibility for delivery is unambiguously put on the carriers. To summarize, carriers slightly bear liabilities that should fall on another party. Once the Rotterdam Rules has been ratified one can assume that a balance between the liabilities will even out to greater extent than before.

The discussion raised among scholars in regard to the draft of the Rotterdam Rules and the functional approach taken when giving the carrier the right to deliver goods without the presentation of an original B/L has been controversial. The current legislation does not coerce with todays trade practice and customs which result in malpractice and legal uncertainties. The Rotterdam Rules and its article 47(2) could be a useful provision when the development of electronic documents has been solved due to today's electronic resources. The electronic transport documents, such as the B/L,

will most likely develop further in the near future and possibly solve some of today's issues regarding presentation of documents when no physical paper can be presented. A functional approach is a helping device to achieve a more balanced division of risk under delivery of goods and actually help the carrier to take clear actions in situations that are out of control. From the banks point of view, a clause in the B/L that permits delivery of goods without a B/L is terms and conditions of the contract of carriage and is therefore not considered to be reviewed under UCP 600, and cannot be held as a discrepancy and a reason not to pay under a L/C.

In regard to permit disposal of goods at the port of discharge it is usually required by the customs to submit an original B/L together with the transport documents such as an invoice, insurance policy, certificate of origin etc. These documents are not in the hands of the carrier at that time, but with the consignee of the goods or the bank, which result in difficulties for the carrier to get permission to dispose the goods. Customs may not be the only authorities that provide permission for disposal of goods; even permission from e.g. sanitary and ecological services can be required in certain jurisdictions, which might as well prolong processes of disposal and add costs for the carrier.

An evident problem for carriers with undelivered goods at the port of discharge is time, because time is money. In practice it usually takes time before a carrier realize that the goods have been unclaimed, rejected or worthless. After several months have passed by and excessive amounts of charges are due to third parties that have stored the goods the chances of being able to recover from those costs and expenses have most likely decreased. The carrier can make a declaration of abandonment to the port, destroy the goods or re-export the goods to the shipper.

It is of great consideration that an eventual sale of the goods goes through quick and trouble-free for the carrier since time could be critical depending on the kind of goods that has been carried together with the possibilities to

recover from costs at an auction. Correspondence and legal advice from the carrier's P&I club play an important role in the effectiveness of rejected or abandoned goods in consideration of time efficiency, although some costs and expenses are covered under P&I insurance the carrier must first exhaust all efforts to recover from the other parties involved and depending on where the goods are trapped some jurisdictions could have lighter rules than others.

In consideration of misdelivery and fraud the carrier could be exposed to pressure from shippers and consignees to deliver goods without an original B/L and become responsible for misdelivery. There are different opinions in regard to if deliveries of goods take place within or outside the scope of the Hague Rules, Hague-Visby Rules and the Hamburg Rule. These uncertainties relating to the applicability of the rules will most likely become clearer when the Rotterdam Rules enter into force and clarify the framework of delivery of goods.

Goods carried in containers are usually discharged before the consignee takes physical delivery of the goods and is placed in a storage area at the port of discharge. Uncertainties in the applicability of the rules will also result in uncertainties when it comes to limitation of liability for loss or damage to goods after discharged from the ship and therefore carriers should be reluctant in exempting liability by inserting clauses in the B/L.

To conclude, the problem lies on legal uncertainties, the primary responsibility incurred upon the carrier and insurance claims that pressure the increase of liabilities that are put on the carriers in relation to carriage of goods by sea. The question remains for further research whether the balance of liability incurred upon the carrier will continue to be a division of risk that is not always fair.

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Correspondence and interviews

Email from a representative of a P&I club in the U.K.

Email from a representative of a P&I club in Scandinavia.

Email with personnel at one of Sweden's largest container line ports.

Email with a representative from a freight forwarder company.

Email with a representative from the Swedish Customs Authority.

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