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Documentation fraud

Fraudulent bills of lading

JASM01 Master Thesis

Maritime Law
30 higher education credits

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Term: Spring 2013

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1 Abbreviations

BIMCO	The Baltic international maritime council
CIF	Cost insurance freight
CMI	Comite Maritime International
COGSA	Carriage of goods act
EDI	Electronic data interchange
ICC	international Chamber of Commerce
ESS	Electronic shipping solutions
IMO	International maritime organization
IMB	International maritime bureau
S.W.I.F.T	Society for worldwide interbank financial telecommunications
TTC	Through transport club
UNCTAD	United Nations Conference of Trade and Development

2 SUMMARY

This thesis investigates the issue of bill of lading fraud and discusses the impact of electronic bills of lading. The thesis will focus on English common law and international conventions under which the issue of bill of lading frauds will be analysed. In the analytical chapters, the thesis will make a detailed descriptive investigating as to the different kind of bill of lading fraud. Further it will look at impact of the Rotterdam rules in dealing with its provision on handling fraudulent bills of lading.

It was argued that electronic bills of lading system were not only created to minimize the problem of late arrival of documents at the port of discharge but also minimizing the risk of fraud. This should foremost be achieved by electronic bills of lading no longer being sent in three or six originals. It is, however, still debatable, due to lack of a reliable e-commerce system, whether this will minimize the incidence of fraud in bills of lading.

Moreover, according to some scholars, the occurrence of bills of lading fraud may even increase due to the likelihood of computer mismanagement and where an open network such as the internet is used. In order for traders to turn to an e-commerce system a reliable and trustworthy system is of essential importance. Further there should be a strong co-operation between states to exchange information about cross-border data flow and access evidence.

The Rotterdam Rules was created to progress the current regimes and were projected to satisfy the needs of shipping industry in the 21st century.

The Rotterdam Regime makes a more comprehensive attempt to further mitigating the occurrence of bill of lading fraud. Foremost, the particulars which are required to be incorporated in the bill of lading are more clarified and precise. Further, it seems that the Rotterdam regime provides a broader security for the carrier who acts in fraud than its former regimes.

3 Acknowledgement

I would like to express my sincere gratitude to all the people who has been behind the organisation and teaching in the maritime law program of Lund University, In particular, Professor Proshanto K. Mukherjee has provided me with a broad knowledge of the maritime law during the course as well considerable support during the writing of this thesis.

In addition I would like to thank my parents as well as my classmate Kouras for their support and encouragement.

4 Introduction

With many years of economic recession in the world, shipping has surely been hardly affected as freight and charter rates has plunged, many jobs getting sacked and vessels being docked.¹ Although transport by sea is undergoing a fatal period, it is an opportunity to look at the enhancement and measures taken to develop the safety of documentation in order to boost carriage of goods by sea.

International sales of goods by sea vary from domestic trade in two significant aspects. Firstly, there is the nuisance of having payment on delivery when the purchaser and the seller are in different states. Furthermore, there is a commercial requirement to be able to sell and resell certain types of cargo still being in transit, such as oil transport, which can be sold and resold over 100 times while in transit. On a sale against documents the parties' contract that reimbursement will be made by the seller tendering various documents to the buyer in return for the agreed cost.

The most important document to be tendered under any sort of sale contract is the bill of lading. The bill of lading is considered to be a multipurpose document which serves as a receipt, a document conferring possession in the sale of goods during the period of the transport, a document of title and a potentially contract of carriage.²

Conclusively the possession of the bill of lading will grant its holder constructive possession of the goods during their transport. This is because the ship-owner, who has the actual possession of the goods, will only transport the goods to a party presenting a legitimate bill of lading. Consequently, the seller is aware that by retaining the bill of lading it will

¹ <http://www.spiegel.de/international/business/that-sinking-feeling-global-crisis-hits-shipping-industry-hard-a-594710.html>.

² Modern Bills of lading, second Edition, Paul Todd, P. 3.

also keep hold of the control over the sale of goods until the buyer pays the agreed price. In turn, the purchaser will feel protected in paying against this document, since possession of the bill of lading will permit it to take delivery of the goods.

However, since a bill of lading can represent goods, combined with its importance as a document, not to mention the exceptional range of functions that it fulfils, the bills of lading are vulnerable, leading to more attraction of fraudster's, and consequently a growing trend of documentary and fraudulent bills of lading has been spotted.

One of many factors contributing to falsified bills of ladings is the custom of issuing bills of lading in sets of three or six originals. This enables the bill to be sent to the consignee by different modes of dispatch and ensures that the consignees gets at least one of the original bills of lading on time to take delivery of shipped goods at the destination. However, this leaves it open to mistreatment as every bill of lading are treated as an original.

The bill can under some circumstances come in the possession of a person who is not the rightful holder and thus not permitted to take delivery of the goods. It can also happened that a person presents a falsified bills of lading to the carrier. Under such circumstances owners may deliver the goods to an incorrect person and may also be held liable for it.

One measure taken to reduce the frauds was the introduction of electronic bills of lading. However, debate was held that not only will it not reduce fraud, but rather increase it.³

³ International trade, 4th edition, Indira carr, P. 198.

4.1 Purpose:

This thesis tends to investigate fraudulent acts occurring from carriage of goods by sea with its aim on bills of lading of frauds. Foremost, the thesis tends to make a comparative analyses from traditional sent documentation towards today's increscent development of electronically documents relating to bills of lading frauds.

Generally, four issues will be identified and examined. Firstly, what kinds of bills of lading frauds are there? Secondly, what impact will the Rotterdam regime have on bills of lading frauds? Thirdly, why is the Rotterdam regime considered to be an advantage or disadvantage in reducing bills of lading frauds compared with other conventions? Fourthly, has electronically send documents decreased or increased bills of lading frauds?

4.2 Method:

The thesis will have its focus on a comparative analysis of traditional sent documentation to electronically sent. The thesis will also be based on a legal dogmatic method which means that the law applicable to the subject in question will be described and investigated in order to establish the current legal structure and the potential principles that are applicable for investigating the reason for a bills of lading fraud. This thesis will be approached from an English common law perspective which means that the common law hierarchy of legal sources will be used.

Analyses of regulations conventions, case-law and articles will have highest value, followed by doctrine. The reason for choosing English law is its influence combined with the amount of existing well known commercial customs deriving from the United Kingdom. All sources used in this thesis are evaluated critically in order to achieve qualified analyses for the conclusion to be drawn. Some of the case which is investigated to in this thesis goes all the way back to 18th century. These cases will be used insofar

they provide relative and primary principle that is coherent to current law or it considered to be part of the stare decisions, doctrine that courts are bound to abide. Since this thesis has a bills of lading fraud perspective, the cases will be used and referred to as long it is in line with the purpose of the thesis

4.3 Disposition

This thesis will have its main core of the evolution of bills of lading frauds. Firstly in chapter five an historical overview of bills of lading will be held. In chapter six, a description of the function and nature of traditional bills of lading will be explained. In chapter seven the legislation of bills of lading will be examined. Chapter eight will investigate the impact of electronic commerce. Further, maritime and different kinds of bills of lading fraud will be investigated in chapter nine. The Rotterdam rules will be examined in chapter ten. Finally, a conclusion will be drawn in chapter eleven.

4.4 Delimitation

This thesis will be based on a English common law perspective and internationally signed treaties, all other national legislation will be excluded. Further, this thesis investigates the evolution between papers send and electronically send bills of lading frauds. Different types of bills of lading fraud will be analyzed. All other documentation frauds will be excluded. The investigation will focus on the specified questions presented in subchapter 4.1 and even though several issues relating to the bills of lading fraud in general could serve as topics of further investigation, these will not be specifically analysed in detail unless they relate to the questions related.

5 History of bills of lading

In the eleventh century the bill of lading was unknown, it was at this period, trade between the ports of the Mediterranean began to grow significantly. Some record of the goods shipped was required and the most efficient way to meet this requirement was by means of a ship register, assembled by the ships mate.⁴ Even though use of such register most likely began informally, it was soon, at least in some ports, placed upon a statutory footing.

Its accuracy was paramount and around 1350 a statute was ratified, which stated that if the register had been in possession of any someone but the clerk, nothing that was stated in it should be trusted, and that if the clerk stated false matters therein he should lose his right hand, be marked on the forehead with a branding iron and all his goods to be seized, whether the entry was made by him or by someone else.⁵

The fourteenth century accomplished the receipt function of the bill of lading which was put into existence by an on board record. Still there was no separate record of the goods loaded as it appeared that shippers still travelled with their goods as there was accordingly no need for one.

This changed when trading customs transformed and merchants send goods to their correspondents at the port of destination, informing them by letters of advice of the cargo shipped and how to handle with it. Merchants also began to require from the carrier, and send to their correspondent's, copies of the vessels register.⁶

⁴ Bills of Lading, Lord Justice Aikens, Richard Lord QC, Michael Bools, 1st Edition, 2006, P. 1.

⁵ Ibid.

⁶ Ibid.

With the intention of reducing legal disputes, the 1855 bills of lading act was enacted. But due to formality and poorly drafting the 1855 bills of lading was replaced with carriage of goods by sea act 1992 (COGSA).

The COGSA 1992 also includes a part which addresses to electronic bills of lading, the CMI rules and the bolero agreement which permits digital and electronic signatures of bills of lading.⁷

6 The function of Bills of lading

The clearest and simplest definitions of a bill a lading expressed in the maritime public are:

*A document which evidences a contract of carriage by and sea and the taking over and loading of the goods by the carrier and by which the carrier undertakes to deliver the goods against surrender of the document.*⁸

It is stipulated to be a three function document and according to the desires and intentions of the original holder, he to whom it is first issued the shipper or merchant of the goods, it can be in both negotiable and non-negotiable form. The negotiable bill of lading serves three different functions, it is:

- A) Receipt for the goods on board
- B) Best available evidence of the contract of carriage an
- A) Document of title

Its function as a receipt is its practical role, as its proofs that the goods counted and described in the bill have been physically positioned on board the ship.⁹ The practice role is for the goods when loaded aboard the carrying ship to be calculated or checked, if the goods are embalmed or somehow

⁷ International trade law, 4th edition, Indira Carr, 2009. p, 173.

⁸ Malcom Clarke MLCIQ 2002.

⁹ Maritime law, Christopher Hill, 4th edition, 2003, London, P. 243.

combined or measured or evaluated if in bulk and then for a mates receipt, recording the description and number or amount of cargo and accurately noting any discrepant condition of the goods, to be signed by the master or deck officer of the ship.¹⁰ The information in the mates receipt is then to be moved word for word to the bill of lading including any discrepant remarks and it will then be presented to the master or anyone delegated by him. Usually a mates receipt is purely a receipt, hence an evidence that the goods having been placed on board and has no negotiable aspect whatsoever.¹¹

The bill of lading is a proof of the contract of the carriage, as it is never the contract.

This can be described, as is a charter party, it is only signed by one party, the master serving as agent for the owner or someone representing the carrier. It is the best available proof and most likely to be the only written documented proof. But the actual entering into the contract could have preexisted the bill of lading and consist only of an oral agreement between the contraction parties. This phenomenon is well by the Ardennes case¹², where oranges were shipped from Spain to the United Kingdom.

In the Ardennes case the shipper agreed to ship on the strength of a verbal promise that the ship would enroute directly to the UK. However, the vessel called en route at Antwerp causing it to be delayed in its arrival to the UK. During that period of delay, duties on import of fruits had been increased for which the shipper claimed the higher duties as damages. The ship owners defense was that the bill of lading had a liberty clause which allowed the ship to call at a port en route. This defense was however not successful on the basis that the true bargain, the verbal undertaking that the shipping

¹⁰ Ibid.

¹¹ Ibid.

¹² S.S Ardennes(cargo owners v S.s Ardennes owners, 1951.

would be direct, formed the contract and no support could be placed on the liberty clause in the bill of lading document.¹³

6.1 Parties to bills of lading

The most basic type of international sale involves a single seller and single purchaser. More intricate transactions can involve resale's of the goods afloat or/and pledging them to banks to raise money on their security.¹⁴ With basic type deals, the supplier makes some or all of the arrangements for loading and shipment in the exporting state, the purchaser takes delivery in the importing state and the two contracting parties is in no need to meet physically to complete the transaction. Where the goods are resold on the journey, apparently only the first seller makes the arrangements for shipment and only the first seller makes the arrangement for shipment and only the final purchaser takes delivery from the vessel.¹⁵

6.2 Document of title

The transfer of the goods in an international sale can be affected by the transfer of a document of title, commonly a bill of lading.

The most significant function in a bill of lading (if it is created negotiable) is that it can be sent before the goods to whoever will be permitted to claim them from the vessel when arrived.¹⁶

Only the possessor of the bill of lading relating to consignment of goods can oblige the carrier to deliver that consignment to him when the goods arrive at the port. Therefore, the transfer of a bill of lading transfers the right eventually to claim the goods themselves and this is why sales can be

¹³ Maritime law, Christopher Hill, 4th edition, 2003, London, P. 244.

¹⁴ Modern Bills of lading, second Edition, Paul Todd, P. 2.

¹⁵ Ibid.

¹⁶ Modern Bills of lading, second Edition, Paul Todd, P. 3.

affected by transfer of the bills of lading. As a document of title, the bill of lading represents the consignment of goods and transfers practical ownership of it.¹⁷ Its transfer may also transfer property in the goods under certain circumstances.¹⁸ Since the bill of lading can represent the goods, not merely can it be transferred for the first sale, it further allows the purchaser to resell the consignment still at sea. Moreover the bill of lading can be pledged to a bank as security for an advance.¹⁹

6.3 Sets of three

Commonly bills of lading are issued in sets of three one of which being accomplished, the other stands invalid. The rationale for this derived in the early days of international trade, when there was a considerable risk of documentation being vanished. If three copies of bills of lading was sent separately, there was good a possibility that at least one the bill of lading would arrive securely.²⁰

The old system of sending three copies of the bill were unfortunately followed into today's practice, long after its need of it. As a result, fraud can occur, as a consignee or endorsee having received all three sets fraudulently enters into three divided sub-sales of the same goods. Suppose the set of bills is spilt, so that more than one person ends up in control of a bill of lading. This could happen on a subsequent re sale or pledge, where only one bill is used for the later transaction.²¹ In *Glyn Mills and CO V East and west India Dock Co.*²²

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid. .

²⁰ Modern Bills of lading, second Edition, Paul Todd, P. 14.

²¹ Ibid.

²² *Glyn Mills and CO V East and west India* 1882.

Goods were shipped to Cottam and CO as consignees and three bills of lading were issued, marked, first, second and third. During the journey Cottam and Co send the bill marked first to a bank to raise money by a loan. When the goods arrived they were unloaded into the custody of a dock company. Cottam produced the bill marked second and the dock company, which were in good faith and without any awareness of the pledge to former bank, transported the goods to a third party upon delivery orders issued by Cottam.²³

The bank then sued the dock company for conversion. The house of lords stated that the dock company was not responsible of the conversion as its obligations reached no further then to transport the goods to the first person to present a bill of lading and they were not considered to be under any duty to present all three of them, nor were they responsible to take further steps to ensure that the presenter of the document was in fact the consignee.²⁴

It was observed by Earl Cairns that the practice of issuing bills of lading in sets of three was for the advantage for neither the consignee nor the shipper, if indeed it was benefit at all, and it was surely not benefiting the ship-owner. Banks and purchasers can protect themselves by paying only against all three originals bill. Where payment is by banker's documentary credit, banks commonly require all three sets as security for their advance. However, in a common sale contract, the purchaser must pay against one.²⁵

In the case of Sanders Brothers V Maclean and CO, a contract of sale of a quantity of old railway iron where two tenders of the document where created. The court stated that the seller needed to tender only one of the three originals. The purchaser refused the first tender based on the assumption that only two of three bills of lading were tendered, and the

²³ Modern Bills of lading, second Edition, Paul Todd, P. 15.

²⁴ Ibid.

²⁵ Ibid.

second on the ground that the bill could not have been forwarded in time to appear before the transported goods. A breach of contract was sued by the sellers. The court stated the sellers were entitled to damages for non-acceptance.²⁶ Further stating that the first tender was considered to be valid, due to an ordinary sale contract, where payments is to be made against bills of lading, the purchaser is obligated to accept and pay on one bill and cannot thus demand all three originals. Hence, where the law may under some circumstances protect against the bankruptcy of the other party to a sale contract, it does not protect well against his fraud. On the second tender, it was refused to imply as a term of the sale contract that documents would appear before the vessel.

However, it was not supposed that a seller can hang on to the bill as long as he wants, but is obligated to make every reasonable exertion to send it forward as soon as possible and what justifies reasonable exertion will depend on all the circumstances, but there is however no firm rule that the document must arrive before the vessel.²⁷

6.4 Types of bills of lading

It is essential for many purposes that bills of lading are negotiable, unlike bills of exchange, they must be created negotiable expressly by the shipper. They may be out to bearer in which case they are transferred by delivery, but this is uncommon.²⁸ Most usual they are issued to sellers or buyers order, and then transferred by delivery and endorsement.

A bill of lading is more likely to be made out to sellers order if the seller wishes to retain property in the goods as security against payment, or wishes

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

to pledge them on a banker's commercial credit. They may also be created to the order of the buyers endorsement.²⁹

Commonly bills of lading are indorsed personally, but they can however be indorsed in blank, in which scenario further transfer is by delivery alone, as with bearer bills, this practice is however rare.³⁰ Bills of lading are of a mixture of types, but for the purposes of bankers commercial credits and the most important sale contracts it is generally necessary to tender a shipped or an on board bill of lading which indicates that the goods are in fact loaded. A received for shipment or alongside bill of lading is often insufficient.³¹

Further, it should also be a clean and negotiable bill of lading. A bill is clean where there are no clauses stating other than that the goods were in apparent good shape and condition when loaded on board. Difficulties can also arise when not all the terms of the contract of carriage are evident from the bill itself this can be where a bill imports terms from a charter party contract. Banks will deny charter party bills of lading unless expressly instructed to do so since it may be affected by terms of which they most likely possess no knowledge of.³²

²⁹ Modern Bills of lading, second Edition, Paul Todd, P. 16.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

7 Bills of lading legislation

Like any other field within shipping law, the bill of lading is governed by international conventions. Consequently, legislation on the bills of lading is now uniform all over the globe.³³

From the commencement of the last century it is crucial to look over the international improvement of the matter under the scope of the different conventions and national legislation.

The first act, under the recent significance of codification, bore only in the 1890's in the USA, also known as The Harter Act.³⁴

The Harter Act impacted the national legislation of other states, among others the Nordic countries. Equivalent to the creation of the Harter Act, there had been some international activity to create harmonized rules since the 18th century. Surveying the latter progress, the next huge steps could be distinguished, such as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, the Hague Rules, in 1924³⁵, as well as the Hague Visby Rules in 1968 and The Brussels Protocol amending The Hague-Visby Rules in 1979. A final amendment was made in the SDR Protocol in 1979³⁶. The Hague Visby concerns the carriers liability for cargo and are mandatory only where a bill of lading has been issued.³⁷

³³ A study of bills of lading frauds, English translation by Hugo Tilberg, Gunilla Holmberg, 1990, P. 9.

³⁴ International Carriage of Goods by Sea under the Documentary Aspect Including the Recent Challenges of Electronic Commerce, Krisztina Otfília KissEötvös Loránd University of Sciences, 2007, P. 24.

³⁵ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague Rules).

³⁶ Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the SDR Protocol).

³⁷ A study of bills of lading frauds, English translation by Hugo Tilberg, Gunilla Holmberg, 1990, P. 9.

The creation of the Hague Visby rules was prompted by a craving to strengthen the position of the bill of lading as a document of title but despite this, the regime contain only a few provisions directly concerning the effect of the bill of lading in this respect. Instead they prescribe the content for a complete bill of lading. It also prescribes the carriers liability for the correctness of these statements. In this way the regime strengthen the value for the possessor of the bill of lading.³⁸

It was not until the Hamburg rules³⁹ in 1976 that the position of bill of lading as a document of title became more internationally regulated.⁴⁰

Internationally harmonized solutions are exceptionally important in contracts for the carriage of goods by sea. By conventions the significance of jurisdiction and applicable law are decreased, and primarily substantive rules are the foundation for solutions.⁴¹

The Carriage of Goods by Sea Act 1971 incorporates the Hague-Visby Rules into English common Law. These rules obligates that, on demand, the carrier must provide the shipper with a bill of lading that meets the requirements of Article III⁴².

Although COGSA 1992 cannot amend the Hague-Visby Rules, which are an International Convention, it upgrades the status of a bill of lading to be a conclusive proof of receipt for shipment.⁴³

³⁸ Ibid.

³⁹ United Nations convention for the International carriage of goods by sea. (Hamburg rules).

⁴⁰ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 9

⁴¹ Ibid.

⁴² Hague Visby rules, 1924. Article, 3.3.

⁴³ The system of liability of Articles III and IV of the Hague Visby rules, NJ Margetson, P. 17.

Nevertheless, it is a well-known fact that the national perceptive of conventions could differ considerably in some aspects. consequently, it seems more precise to talk about harmonization rather than uniformity.⁴⁴

7.1 COGSA 1971

As stated before COGSA 1971, incorporated the Hague-Visby Rules.

In the United Kingdom treaties and conventions have no direct effect and require to be enacted by the legislator. The COGSA 1971 was the enacting legislator for the Hague Visby rules. The COGSA 1971 provides that provisions of the Hague Visby rules have the force of law.⁴⁵

Article III (3) of the Hague Visby rules stipulates that the carrier or the person who is on the carrier's behalf shall, on requirement of the shipper, issue to the shipper, a bill of lading, indicating the leading marks essential for identification of the goods. The number of the goods or the quantity or weight, the apparent order and condition of the goods after receiving the goods into his possession.⁴⁶

It has been provided that the carrier's responsibility to issue a bill of lading is justified on requiring of the shipper. However, it is not compulsory for him to include all the substance specified from article III (3) paragraph (a) to (c).

Further, it's not only the issuance of the bill of lading, the recording of specific details as to the goods that are not basically within the scope of carrier's obligations, if not they are required by the shipper.⁴⁷

⁴⁴ Ibid.

⁴⁵ The system of liability of Articles III and IV of he Hague Visby rules, N.J Margetson. P. 17.

⁴⁶ The Hague Visby rules, article 3, 3.

⁴⁷ The Hague Visby rules article 3.

Furthermore, the point that the carrier shall be obliged to issue a bill of lading on insist of the shipper, it is however noticeable that this requirement merely arises after the carrier has received the goods into his possession. So, where there is no contrary agreement the carrier shall issue the shipped bill of lading to the shipper only after all the cargo have been shipped on board the vessel.⁴⁸

7.2 Rotterdam rules

The purpose of the Rotterdam Rules is to unify the applicable laws in within carriage of goods by sea and to aid the operation and dispute resolution to the carriage of goods beyond marine transport.

A Bill of lading, whether they are straight or negotiable, consistently falls within the scope of transport document under the Rotterdam regime.

On delivery of the goods to the carrier, it is provided that the shipper is permitted to acquire an appropriate negotiable transport document from the carrier, unless there is an agreement not to use such a transport document or the current customs of the trade not to exercise one.⁴⁹

Following, the provisions over the issuance of the transport document, several details are listed to be incorporated in the transport document.

The essential information includes a description of the goods as appropriate for the transport, the leading marks necessary for identification of the goods, the number and the quantity of goods, and the weight of the goods if furnished by the shipper.⁵⁰ In addition, information of the transport document shall also include a statement of the apparent order and condition of the goods, the name and address of the carrier, and the date on which the transport document was issued.⁵¹

⁴⁸ Ibid.

⁴⁹ The Rotterdam rules, Article 35.

⁵⁰ The Rotterdam rules, Article 36.

⁵¹ Ibid.

The Rotterdam regime makes numerous alterations as to the details to be included in the transport document. Foremost, it expressly provides that the description of the goods should be furnished by the shipper, who is not obligated to do so under the COGSA 1971.

Further, it provides that some additional details shall be included in the transport document, such as the name and the address of the carrier as well as the date on which the transport document was issued which is not demanded under COGSA. The Rotterdam regime also provides that other details, under given qualifying conditions, shall also be incorporated in the transport document. The name and the address should be supplied and incorporated in the transport document, if the consignee has been named by the shipper.⁵²

The name of the ship shall be included in the transport document, if a vessel has been named in the contract of carriage. Further, the Rotterdam regime stipulates that the validity of the transport document is not affected in the absence of one or more details referred to in article 36, paragraph 1, 2 and 3.⁵³ Even with lack or inaccuracy of one or more of the particulars, the legal character and legitimacy of the transport document are not affected and weakened.⁵⁴

At the first view on article 35 it appears that the shipper is permitted to acquire a bill of lading once he delivers the goods to the carrier.

This is however not an accurate statement. The stipulated word “appropriate” is designated that only the particular transport document matching the stage of shipment can be issued to the shipper. Consequently, the shipper can only demand a received for shipment bill of lading on

⁵² Rotterdam rules, Article 36, paragraph 3.

⁵³ Rotterdam rules, Article 39, paragraph 1.

⁵⁴ Ibid.

delivery of the goods and he is permitted to a shipped bill of lading when the goods are shipped on board the vessel.⁵⁵

In conclusion, the Rotterdam Rules offers a far wider range of particulars specified to be incorporated in the bill of lading and these provisions appear to be more complete and comprehensible. Furthermore, the effort to record specified particulars will be collective measure between the carrier and shipper.

But even if one or more particulars contain imprecise information or are in nonexistence, the transport document will not be affected and loss its effect or authority.

8 Introduction to international electronic commerce

Arguments supporting electronic documentation system are numerous, such as lower cost positive influence on the risk of fraud and corruption, as well as confronting the goods arriving before the bill of lading.⁵⁶

Even though there was frustration among traders to get rid of paper documentation, it took extremely long time for the international community to act and recognize electronic documentations. The motive could be based on several factors, it could be due to the permanency of the paper, or the validity to a person's signature in paper. As well as the complications of transfer or rights to be proofed in a tangible form and endorsement of delivery.⁵⁷

⁵⁵ Rotterdam rules, Article 36.

⁵⁶ Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal, Ibrahima 1999. P. 1.

⁵⁷ Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal, Ibrahima 1999. P .2.

International commerce requires a fine and organized net of procedures since a documentation can involve purchaser, sellers, forward agents, bankers, carriers, lenders, insurers and numerous of regulatory authorities. As a matter fact, an estimated fifty different parties may be involved in a cross border transaction. All these parties is dealing with numerous documents that proofs evidence to transport, insurance or banking contracts and other promises.⁵⁸

The merchant costumes are constantly evolving and along with its documentation. A significant shift towards a more modernized documentation has been acknowledged in the last decade due to the increase of electronic means of communication. One of the most fundamental document in a common cross border transaction is a transport document, the bills of lading whether in the form of a nonnegotiable air waybill or in the form of negotiable ocean bill of lading.⁵⁹

The first important step was taken by the Comite Maritime International (CMI) which set out rules relating to electronic bills of lading. These rules does not have the power of law but may be engaged through an agreement. The aim was rather to set out minimum requirements for the creation of electronic bills of lading. A fundamental element is the replacement of the paper bills of lading through a private key. However, this system was not successful due to, there was no neutrality in this system since the carrier was assuming at the same time the function of clearing house for the private key.⁶⁰ As well as the paper work was still active since the shipper was usually required to request a paper sent bills of lading when clearing his

⁵⁸ The problems and possibilities for using electronic bills of lading as collateral, Marek Dubovec, 2005, P. 2.

⁵⁹ Ibid.

⁶⁰ Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal, Ibrahima 1999. P.2.

goods before the customs services.⁶¹ The first real commercial attempt to create electronic bills of lading was the Bolero project. Which was based on a project set up in the early 1990s by The Baltic international maritime council (BIMCO). The Bolero project has during the past years being developed from a pilot project sponsored by the European Commission, whose goal was to achieve electronic bills of lading.

The partners involved in the bolero commercial venture were the TTC (the through transport club) and the society for worldwide interbank financial telecommunications (S.W.I.F.T) representing roughly 10000 organizations which have direct interest in the evolution of world trade. That is why a desire for a real and well-functioning electronic bill of lading system is needed.⁶²

The obstacle of launching a worldwide well functioning electronic bill of lading was not the technology itself but rather the legal profession, which has stuck to the legal principle that a document of title can only be issued and transferred by a signature in handwriting. The emergence of new technological inventions, has, however not yet found suitable national and international legislation. Further, the existing regulations in many countries act as barriers to electronic commerce due to the requirement of written document signatures as well as many provision envisages ordinary paper documentation.⁶³

In order to prevail over these obstacles, there was a need to create such a legal framework for all users of electronic bills of lading until all laws and regulations will recognize electronic bills of lading as equivalents of paper bills of lading. Trading parties in Electronic data interchange (EDI) have

⁶¹ Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal, Ibrahima 1999. P. 2.

⁶² Ibid.

⁶³ Ibid.

been with the use of a communication agreement, able to minimize the risks and uncertainties of operations that have not been addressed by regulations. Nevertheless, these agreements are of contractual character and consequently, they cannot surpass legal obligations arising from mandatory law.⁶⁴

8.1 Electronic bills of lading

Incoterms 2000⁶⁵ expected an increase in the use of electronically sent documents, so it made suitable amendments in trade terms to accommodate the use of electronic bills of lading. This development has also been progressed in the COGSA 1992, even though the commission's consultation document did not reflect on electronic transmission of transport documents.

In recent years there has been a desire to approach the disadvantages that ordinary bills of lading had, with the use of modern technology.⁶⁶ For any system of documentation to be effective, it should be acceptable to a wide variety of interest including, carrier, shippers and consignees, underwriters, banks and P and I clubs.⁶⁷

However, a survey conducted by United Nations Conference of Trade and Development (UNCTAD)⁶⁸ explains that alternatives to traditional documentation do not play as fundamental a role in commercial trade as first expected. It was clarified that to be acceptable in the market, an electronic bill must fulfill two basic requirements. On the practical side it must

⁶⁴ Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal, Ibrahima 1999. P. 3.

⁶⁵ Published by the International Chamber of Commerce (ICC), the Incoterms rules or International Commercial terms are a series of pre-defined commercial terms that are widely used in International commercial transactions or Procurement processes.

⁶⁶ International trade law, 4th edition, Indira Carr, 2009. P, 197

⁶⁷ Ibid.

⁶⁸ UNCTAD report, The use of transport documents in international trade, 2003.

replicate the functions of the originally bill of lading in an electronic environment while at the same time possessing the same legal recognition as it originally paper sent.⁶⁹

It appeared to be little doubt that an electronic bill could adequately accomplish two of the functions of the paper document, namely that of receipt and of proof of the terms of the contract of carriage.

Hence, there should be a minor difficulty, substituting an electronic record for a paper send waybill. The fundamental question was rather if it could replicate the third function, which is unique to a traditional send bills of lading, acting as a document of title. From a legal perspective, the position was far from clear. As there were doubt, for example, as to whether an electronically send bill would qualify by definition as document so as to trigger the operation of the COGSA 1971 and 1992, the wording of the provisions appears to assume the use of a papers document. However, 1992 COGSA provided regulations where information technology is used.⁷⁰

Further, CMI/UNCITRAL proposal for carriage regime created to supercede the Hague Visby rules, with its aim to establish a general principle of equivalence between electronic and paper communication, as the use of an electronic bill must have the implied or express consent of the carrier an shipper involved as well.⁷¹ The means by which this objective is to be achieved is, nevertheless, left to rules of procedure contracted by the parties to the transaction. However, an ultimate success is most likely to arise on the drafting of a set of uniform rules of procedure by an internationally recognizes body.⁷²

⁶⁹ Carriage of goods by sea, John, f, Wilsson, P, 164.

⁷⁰ Ibid.

⁷¹ UNCITRAL working paper Chapter 2, article 6.

⁷² Ibid.

8.2 Pros and cons with electronic bills of lading

Electronic bills of lading are regarded by some merchandisers and practitioners as a vast improvement on paper bills of lading. Electronic bills of lading is assumed to minimize problems of late arrival of documents at the port of discharge as well as minimizing the risk of fraud since electronic bills of lading no longer will be sent in three or six originals in paper form. Even though there is some validity in the view that problems, legal and logistical associated with the late arrival of mailed transport documents, will be resolved by their electronic transmission.⁷³

It is however debatable, whether this will minimize the incidence of fraud in bills of lading. The occurrence of fraud may even increase due to the likelihood of computer mismanagement and where an open network, such as the internet is used.

The prosperous implementation of paperless documents within the shipping commerce is only possible if there are foremost, a reliable security that would make it near to impossible for the fraudster to gain access. As well as there should be adequate mechanisms in the available law, or new laws which are enacted at both national and international levels that would deter the hacker or fraudster.⁷⁴

Further, there should be greater co-operation between countries to exchange information about cross-border data flow and access proof as well the laws of evidence allowing for admissibility of computer generated documents.⁷⁵

As for security devices using digital cryptology that makes computer hackings extremely difficult.

⁷³ International trade law, 4th edition, Indira Carr, 2009, P. 198.

⁷⁴ Ibid.

⁷⁵ Ibid.

However, even though encryption of data is a possibility, such technologies is treated in some countries as defense material and thus regulated.⁷⁶

9 Maritime fraud

Although it has been argued that there is no clear universal legal definition of maritime fraud, due to the fact, that rather than being a specific object, it is a term easier to recognize than to define. In order to define maritime fraud, one alternative would be to define fraud in general and later apply it to a maritime case. Bills of lading frauds should however be considered to belong to the more general category of documentary frauds.⁷⁷

However, just viewing maritime fraud merely as a feature of fraud is not as uncomplicated as it first appears due to the danger that one may lose prospect of the complex area of shipping. So any investigation or discussion of any maritime fraud must take these factors in consideration.⁷⁸

The international maritime bureau (IMB) with its main function to protect all types of maritime crime and malpractices has however created a necessary definition of what constitutes a maritime fraud; *“Maritime fraud occurs when one of these parties succeeds, unjustly and illegally, in obtaining money or goods from another party to whom, on the face of it, he has undertaken specific trade, transport and financial obligations”*.⁷⁹

⁷⁶ International trade law, 4th edition, Indira Carr, 2009, P. 199.

⁷⁷ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 33.

⁷⁸ D.G Powles and S.J Hazelwood, maritime fraud, 1984, journal of Business law 31.

⁷⁹ Guide to prevention of maritime fraud (1980) I.C.C. Publication No. 370. 3.

Maritime Fraud has also been identified Peter Kapoor as;

- a) Loss or damage to, prejudice or withdrawal of property or proprietary rights,
- b) Loss suffered due to dishonesty, fraudulent misrepresentation, disguise or an act of deliberate dishonesty.
- c) The injured party must have acted on the dishonesty or falsehood.⁸⁰

Further Kapoor states that maritime fraud is a generic term usually used to explain the obtaining of money, services, property in the goods, or a financial advantage by one or more parties to a transaction from the other party or parties, in the light of unfair or illegal means.⁸¹

9.1 Bills of lading fraud

The term maritime fraud has come to include an abundance of violates of crimes, such as deviation and theft of cargo. By definition this acts do not fit technically into this legal category except partly. However, the common factor is rather that they occur in shipping, and thus, the accurate name for theme would be maritime crime.⁸²

As there is no universal accepted definition of bills of lading fraud, it must be contemplated to belong to the more general category of documentary. Documentary fraud has been explained by the obtaining of money, property in the goods or pecuniary advantage by the issuance of forged or falsified documents such as a bill of lading.⁸³

⁸⁰ Peter Kapoor, Definition and classification of Maritime Fraud, 1983 Lloyd's Maritime and Commercial Law 33.

⁸¹ Ibid.

⁸² A study of bills of lading frauds, English translation by Hugo Tilberg, Gunilla Holmberg, 1990, P 2.

⁸³ A study of bills of lading frauds, English translation by Hugo Tilberg, Gunilla Holmberg, 1990, P. 33.

UNCITAD further stipulates, before investigating the impact of technology, attention should draw to fraudulent bills of lading.⁸⁴ As bills of lading are commonly issued in sets of three or six originals, the mercantile custom enables the bill to be sent to the consignee by different modes of dispatch and ensures that the consignee gets at least one of the originals on time to take delivery of the goods at the agreed destination. Consequently, when treating each bill of lading as an original leaves it open to misuse.⁸⁵

The carrier delivers the cargo against the presentation of a bill of lading and it is not necessary for the holder of a bill of lading to present the entire set to the carrier. Presentation of part of a set is sufficient. Delivery of the cargo against one of a set would not give rise to problems if the consignee had the entire set, nevertheless it is usual for the endorser to transfer only part of a set to the endorsee, which means that both the endorsee and endorser constitute part of a set, where part of a set is endorsed to the endorsee and their remaining unendorsed, or in case of fraud it may be endorsed to other third parties.⁸⁶

As each bill of lading set is constituted as an original, the endorser or other third parties as well as the endorsee can claim delivery of the goods.

The risks involved in issuing bills of lading in sets of three or six originals were highlighted by Lord Blackburn in *Glyn Mills V East West India* where twenty hogsheads of sugar were shipped in Jamaica on the *Mary Jones* and consigned to *Cottam & Co* in London.⁸⁷

⁸⁴ International trade law, 4th edition, Indira Carr, 2009. P. 195.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Cases & Materials on the Carriage of goods by Sea, Martin Dockray, third edition, 2004, P. 90.

While bill of lading frauds do not affect a great percentage of the whole documentary credit systems, such a fraud is nevertheless an economic catastrophe to the victim. IMB have investigated that most bills of lading frauds are being executed on higher amounts. The victims of the increased number of bills of lading frauds are mostly within the developing countries. The basis of their greater expose compared with industrialized countries is said to be their weak and unstable economy combined with their need for imports. This combination has often created a desperate need to get specific products at the lowest price as possible.⁸⁸

It is then exploited by skillful imposters who possess knowledge about the situation in the country. There have also been situations of an imposter systematically defrauding companies in states whose political system make it difficult for the victim to take effective measure against the criminal.

Such country is for example Iran, where the victims dilemma is enhanced by the danger of being prosecuted for currency smuggling, in the sense of currency having left the country deprived of goods in return, a crime that is subject to death penalty in Iran.⁸⁹

9.2 The bill of lading fraudster

Foremost, the first question to ask is, where do we find the bill of lading fraudster? It has been showed that most victims of most of the crime within the shipping world, including bills of lading frauds, have been in companies in developing countries. Nevertheless, those who are engaged in defrauding them do not fit into classifications of nationality or status of state.

⁸⁸ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 68.

⁸⁹ Ibid.

Further,⁹⁰ it is not possible to confine the typical offender by looking at the nationality of well-known bill of lading fraudsters.⁹¹

Nevertheless, it appears that certain countries, whose anti extradition rules are particularly strict, may harbor a number of persons who have already committed fraudulent acts of this type and who may still be continuing their behavior. It can confidently be said that the criminals ought to have a rather thorough experience of the handling of documents and must be rather well established within the shipping marketing in order to be capable to commit these acts. Consequently, it seems likely that the greatest opportunity exists within the main shipping countries.⁹²

Compared with the size of international trade, the transactions in which maritime fraud occurs constitutes an exceptionally minor part. In spite of this, both the international maritime organization (IMO), the United Nation Comate for trade and development UNCITAD as well as the international Chamber of Commerce ICC have seriously investigated the prevention of these crimes in a number of conferences. It has however not been possible to reach any wider agreement as what measurers to be considered to best combat these crimes. But at least these agreements had led to the creation of International Maritime Bureau IMB which led to an increased exchange of information to the benefit potential victims by bringing the existence of the problem to their awareness.⁹³

⁹⁰ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 58.

⁹¹ Ibid.

⁹² A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 59.

⁹³ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P.1.

9.3 Seller's bills of lading fraud

The motive of the seller for forging the bill of lading when he is involved in credit transaction is that, by presenting the document to the bank and cashing the purchase money, he will be able to obtain the economic gain he desired.⁹⁴ Usually a seller who perpetrates this type of crime must be ready to disappear from the scene before he is detained. In any circumstance he will be practically, excluded from conducting any serious commerce in the future.⁹⁵

There are two principals' categories of this type of fraud that may be distinguished as, forgeries of bills of lading and alterations of bills of lading by insertion etc. Under the first category, the issue of falsified bills of lading is found. While the second category, cases where no goods exist, merely a bill of lading as well as shipped goods which does not consent with the contract.⁹⁶

9.4 issuing of a false bill of lading

In this type of crime it is characteristic that the bill of lading has been falsified in its entirety for the commission of fraud. As there exists neither vessel or goods, or merely one of these.⁹⁷ The background to the fraudulent act is that there exists a contract of sale between two parties. An importer and exporter and payment is to be effected through a commercial credit. This type of crime might, although it's rare, be committed by the purchaser.

⁹⁴ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990P. 34.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 35.

As issuing of a falsified bill of lading is a typical exporter's crime. The act may be committed without or with the assistance of a carrier.

In the case of M/V Fenera a Saudi Arabian importer entered a CIF based contract with a business man from Italy.⁹⁸

The seller issued a falsified bill of lading which was signed by ship-owners agent who was in collusion with the seller. The buyer cashed the credit of 110,00 USD. The fraud was later discovered when neither cargo nor vessel arrived to the importer. The importer took action and contacted the IMB which through its agency contacted the seller. The seller assumed responsibility for the nonexistent delivery and under threat of prosecution promised to deliver the cargo instantly. or repay the purchase money.⁹⁹

Nevertheless, neither delivery nor compensation happened and the seller was prosecuted before an Italian court.

According to the Italian law the maximum sentence for fraud is three years and the police report showed that the seller had very limited financials. Further, it was not possible to trace the purchase money and Saudi Arabian business man suffered a total loss.¹⁰⁰

9.5 where no goods exists

This can occur when a seller who makes a contract acquires a blank bill of lading form. This is not complicated since such a form can be brought from most well-stocked book seller. He then fills out the bill of lading form with such statement as the time of a vessel, the contracted type and quantity of goods, the port of loading etc, after he signs the document either as carrier

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

or as his agent.¹⁰¹ Further he will also falsify other documentation which the letter of credit may need, such as certificate of origin documents of insurance etc.

Further it is vital, in this connection, to consider combination writing, which may be thought to significantly increase the seller's means of committing this kind of fraud.¹⁰² Combination writing implies a synchronized filling out of set of documents by mechanical means. This practice is extensive in the branch and indicates that all information concerning the cargo will steam from the shipper which usually is the exporter.¹⁰³ In the Aghios Nikolaos case an Iraqi oil company ordered 6500 tons of caustic soda of an estimated value of 3.5 million USD from an exporter from Switzerland.

The exporter was totally unknown to the Iraqis. They had nevertheless, contacted them through a business contact, who they considered as reliable and thus not checking the seller. The parties agreed to arrange payment by an irrevocable commercial credit, and due to customs, it was demanded from the purchaser the presentation of a clean bill of lading.¹⁰⁴ The seller presented the documents as required to the purchaser's bank in Switzerland. The bill of lading stated that 6500 tons of caustic soda had been loaded on board the ship Aghios Nikolaos in Trieste.

The bill of lading was signed for the master and stamped with the vessels name on, however the stamp was misspelled to Agihos Nikolaos. After examined the documents, the agreed price of 3.6 million dollar to the seller was paid.¹⁰⁵

¹⁰¹ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 36.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 37.

¹⁰⁵ Ibid.

When the purchaser did not receive his cargo, he contacted his insurance company, which discovered after investigation, that the stamp on the bill was falsified. This was observed when the spelling of the vessels name in the stamp as well as elsewhere in the bill was matched. There existed six vessels named Aghios Nikoaos, but merely one of these had the necessary capacity for this kind of cargo and that vessel was in Lagos at the time of loading.

Further the alleged owners of the ship had never owned her as well as they had gone insolvent.¹⁰⁶ The exporting company was registered in Liechtenstein and the address they had given the purchaser was only an address belonging to a bank. After intensive investigation the insurance company in cooperation with IMB was capable of finding the fraudsters. There was a prosecution and seeking of the 3.6 million dollars with the help of Swiss authorities was held.¹⁰⁷

9.6 unknown goods

This circumstance occurred when a Thai company contracted with government of Somalia to ship 10.000 tons of sugar. Payment was agreed to be made through a commercial credit. A bill of lading was presented by the Thai company at the agreed bank and was able to cash 6000000 USD.

The bills of lading stipulated that the sugar had been loaded onboard the vessel Delwind with its route to Somalia. The bills of lading were falsified.¹⁰⁸

The vessel Delwind was laid up for repairs in Japan. In order to cover the crime the fraudsters chartered the ship Lord Byron and loaded her with 687 tons of sugar.¹⁰⁹

¹⁰⁶ Ibid.

¹⁰⁷ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 38.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

The loading was taken place on a Saturday night, usually under such circumstances that the charter did not receive any bill of lading during the loading of the goods but merely when the vessel reaches the port of discharge. The Greek master of the vessel, which was innocent, had no suspicion when he was notified that the bills of lading would be issued merely on her arrival in Somalia.¹¹⁰ When the vessel arrived at the agreed destination with a cargo of only 687 tons of sugar, an arrest was held by the Somali authorities of Greek master, alleged of having disposed the remaining 9313 tons of sugar the Somali government had paid for but not received.¹¹¹

In most bills of lading frauds both the vessel and ship owner exists, as well as some type of cargo loaded on board the ship. The bills are altered ``corrected`` by the shipper either before the carrier has received the documents or subsequently, when the shipper receives it in return, accordingly signed by the carrier or an agent working for him.

Under some circumstances the correcting of the document is also done with carrier's participation.¹¹² This procedure implies a correction of the bill of lading so that it corresponds to what has been agreed with purchaser.

The shipper can then use the bill of lading to cash the agreed purchase money and thus putting the fraud into existence. The corrected statements are such as concern the cargo, i.e. its type quantity and quality.¹¹³

Another usual alternation concerns the date of shipment, so as to accord with what is demanded according to the letter of credit.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 39.

¹¹³ Ibid.

This kind of improper conduct is usually performed by the carrier at the shipper's encouragement and is usual under some circumstances.¹¹⁴

9.7 Incorrect cargo statement

Bills of lading frauds are often high cost frauds where worthless cargo has been shipped instead of value full cargo as stated in accordance with the sale contract in the bill of lading. In the Angolan groundnuts fraud case¹¹⁵, the Angolan government decided to import groundnut oil. An importer from Portugal named Pires was contacted and an agreement was made of delivery of 13.000 tons of de hulled groundnuts suitable for the extraction of oil.¹¹⁶

The agreement was made on CIF terms where two Angolan boarders, and payment was agreed to be made through letter of credit. Pires urged payment of 7 million USD to be carried out through Union bank of Switzerland and so the government of Angola opened a letter of credit with the Swizz bank.¹¹⁷ The documents to be presented for the bank were apart from a clean on board bill of lading as well a certification of origin as well as a packing certificate issued by an international organization.

However, Pires was not capable to deliver the goods within the agreed time and therefore he turned the counterpart to extend the letter of credit for the three times.¹¹⁸ Furthermore, he managed to change the specification of the goods to groundnuts without shells.

¹¹⁴ Ibid.

¹¹⁵ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 40.

¹¹⁶ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990P. 39.

¹¹⁷ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990P. 40.

¹¹⁸ Ibid.

In order for Pires to arrange to arrange for delivery he had contacted Lima who was operating a shipping company from Hamburg. Lima only used time chartered tonnage for his business.¹¹⁹ The bills of lading which was presented for the Swiss bank stated that the peanut delivery had been loaded onboard the ship Pistis and Saracinicos Gulf. The documents were signed by Limas agent in Beira and carried the seal of Limas office in Hamburg.¹²⁰ Since the documents appeared to be legitamine the bank paid the agreed amount of 7 million USD to Lima. When the ship Pistils arrived at the port of discharge the fraud was reviled. When goods was unpacked it was discovered to be groundnut cake which was worthless for its former purpose.¹²¹

The government from Angola seized the vessel and the innocent Greek shipmaster was accused of fraud. As well as the ship Saronic Gold which was loaded with the same kind of worthless goods. A complained to Pires in Portugal was held by the Angolans. Pires referred to Lima and recommended that the Angolans seize another two Greek owned ships that were located in that occurrence in the Angolan port. The Angolans took actions and seized the two ships but as well sued Lima, Pires and the innocent Greek ship owners.¹²²

Besides cases where worthless cargo has been delivered, the category of incorrect cargo statement also includes such cases where the quality or quantity of the agreed cargo is less than the agreed in the bill of lading. This depends not on reasonable mistakes but on purposely misleading statements. In all scenarios where bills of lading fraud has occurred it must

¹¹⁹ Ibid.

¹²⁰ *ibid.*

¹²¹ Ibid.

¹²² A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 41.

be proved that the wrongdoer has had at least an underlying intent to follow through the illegal act, however the seller can simply justify himself by attributing the incident to lack of care.¹²³

9.8 Buyers fraud

This type of frauds can occur with a transaction where payment is to be made by documentary collection. It is considered as customary for the seller to mail a copy of the bill of lading to the purchaser as evidence that the goods have been loaded on board the ship in a proper condition.

The original bill of lading is sent to the seller's bank at the purchaser's place of business in anticipation of the purchaser's payment.¹²⁴ The purchaser then falsifies the original bill of lading by using the copy as a model.

When the vessel arrives at the port of discharge with the goods, the purchaser presents the falsified bill of lading to the carrier and consequently he receives the cargo without having paid the agreed amount.¹²⁵

Another example of a fraud committed by the purchaser occurred during a 18 months period when about twenty bills of lading were falsified by fraudsters in Nigeria. The fraudsters appeared at the beginning to be legitimating business men. This assumption made the victims suffer a total loss of 2 million USD as the fraudster did not get arrested.¹²⁶

All these cases concerned documentary collections, where the copies received as confirmation by the alleged importers were falsified into originals. The forgeries were then presented to the owners agents at the place of discharge and the goods were then acknowledged and receipted.

¹²³ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 43.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

Under some circumstances the agents were even bribed into participation in the fraudulent act.¹²⁷

9.9 Double sale

Double sale can occur when a seller sells the same goods to two or more purchasers. The term double sale implies even for cases where the purchaser commits this kind of fraud by using a bill of lading.¹²⁸

As it is a standard practice to issue the bill of lading in three or more originals, and in order to obtain delivery of the goods while being in transit one is obligated to present the full set of copies, while, however, at the port of destination it is sufficient to present only one original.¹²⁹

In order to prevent the exporter from negotiation any spare original and thus conferring the right of claiming reception to someone other than the correct purchaser, a bank in a documentary credit transaction will demand the exporter to present the full set of originals before paying the agreed price.

In case of documentary credit transaction, a dishonest exporter which intends to sell the same lot of cargo to numerous importers must thus forge a whole set of bills of lading in order to succeed with the criminal act.¹³⁰

This practice, has however, not given protection against the exporter who deliver the goods quite in accordance with the contract and then falsifies the set of bills of adding. He then presents the correct bills of lading at the bank and further selling the falsified ones to another purchaser, probably by a similar negotiation of these documents to another bank. In the port of

¹²⁷ *ibid.*

¹²⁸ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990 P. 47.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

discharge there will then be two or more purchasers demanding to have the cargo transported to them.¹³¹

Since the bill of lading is a document of title, the carrier is under an obligation in such a situation to deposit the goods, pending the determination of the proper receiver.¹³²

Since good faith purchase is possible for bills of lading, the first presenter is not merely permitted to demand delivery of the goods, but as well becomes the rightful owner of the goods if he was in good faith when receiving the bill. This, nevertheless, is not the case when it can be proved that the bills of lading were falsified. The defense of forgery is not lost to the legit amine owner by another achievement of the falsified bill in false faith.¹³³

In the case of Gloria Noble a false set of bills of lading was put in circulation. The correct bills of lading had been made out by a shipping agent. In the port of discharge the vessel was arrested due to the ship owner did not received the agreed payment for the freight.

The shipper had gone insolvent and the importer had heard reports of falsified bills of lading being into circulation and thus notified the bank and the agent at discharge port.

The falsified bill of lading set was presented to the shipping agent at the discharge port before the importer had a chance to receive the goods. Nevertheless, as the agent had been alerted, the criminals never got chance to collect the goods.¹³⁴

Even a purchaser may be guilty of double sale. In the same was as he may falsify the bill of lading copy he receives by mail from the seller and consequently receiving the goods without paying, he might instead make two falsifications and sell of the bills or sets to a third part against cash.

¹³¹ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 48.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

The purchaser will then get the money for the falsified document and in addition received the goods without having paid for it.¹³⁵

The problem with huge amounts of frauds was clearly recognized by the United Nations and the international maritime organization which pushed for a solution. Firstly there was several proposals in order to grasp with bills of lading frauds by simplifying the method in which documents are handled, some of the proposals were intended to improve the bill of lading by consolidation its position as a negotiable instrument, while other alternative sought the solution in substituting the tradition of bill of lading with other types of document.¹³⁶

9.10 Are electronic bills of lading the solution?

The ICC have been a keen participator in the development of e-commerce. Their engagement with EDI, resulted in the widely uniform regime on Conduct for interchange of trade data by tele transmission (UNCID) published in 1987. UNCID was nevertheless, originated for closed networks and was insufficient for establishing trust and reliability in open network systems. The ICC therefore established guidelines for e-commerce on open network systems. As result (GUIDEC) general usage for international digitally ensured commerce was created.¹³⁷

¹³⁵ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990. P. 49.

¹³⁶ A study of bills of lading frauds, English translation Hugo Tilberg, Gunilla Holmberg, 1990, P. 94.

¹³⁷ International trade law, 4th edition, Indira Carr, 2009. p, 117.

The extremely long handling time of paper documents in the world can be due to its, durability, portability, ability to be read in ordinary language, the ability to be authenticated by a visible signature, ability to provide a permanent record as well as the aspects of transfer of rights to be evidenced in tangible form and endorsement of delivery.¹³⁸

As many attempts failed to establish an electronic bills of lading system, many companies are still working hard to establish a well-functioning electronic trade system. The danger associated with paper bills of lading are highlighted following the discovery by the IMB of fraudulent bills of lading for shipments of goods into Nigeria. This occurred when a bills of lading enclosed small quantities of consumer products carried in containers to be shipped into Lagos and all featured the logos of key carriers.

IMB enquiries found that that the shipments had taken place on board the stated ships, between the stated ports, nevertheless, the shipments had taken place up to three months prior the stated dates and often with carriers dissimilar to those on the presented Bills of Lading.¹³⁹

IMB Deputy Director Michael Howlett stated that: *“This recent spate of suspicious documents emphasises the need for banks to carry out thorough checks, even on those transactions which appear to be genuine. In these cases, the information did relate to a shipment of the correct containers to the correct ports on the stated vessels. The problem was, however, that it had all happened months before the dates mentioned on the bills of lading and, in all likelihood, has been designed to wrongly draw funds under the documentary credit system.”*¹⁴⁰

¹³⁸ Electronic Data Interchange; Its benefits in trade activities for developing countries Nova 1999, P. 15.

¹³⁹ <http://www.essdocs.com/news/paper-risks-fraudulent-bills-lading>, Marina Comminos 2011.

¹⁴⁰ Ibid.

Safe electronic communications are noticeably the answer to this longstanding problem and the electronic shipping solutions (ESS), offers Cargo Doc Services as a viable option.

Security is a main element of the ESS Data Bridge Docs Exchange. For example, external penetration testing and functional application security testing is undertaken by Price Waterhouse Cooper at least yearly.¹⁴¹

EES says they are committed to security, as it is further supported by ESS's eRisks insurance, which provides cover of up to 20 million USD per electronically bill of lading for any loss caused by electronic Crime i.e. a fraudulent interface with an electronically bills of lading or interference with a user's right of control through password mining hacking etc. An electronic bill of lading will therefore be secure and the risk of fraudulent bills being a thing belonging to the past.¹⁴²

10 Rotterdam rules a better regime?

The Rotterdam Rules were as stated before, created to progress the current regimes and were projected to satisfy the needs of shipping industry in the 21st century. Before its entering in the international arena, analysis on its potential influence on maritime trade issues is essential.

Since the purpose of this thesis is limited to bill of lading fraud, this section will focus on provisions under the Rotterdam rules which are relevant with bill of lading fraud. Further it will investigate possible changes arising from these provisions.

¹⁴¹ Ibid.

¹⁴² Ibid.

10.1 Fraudulent Acts arising from shipper

Even though it has been showed that fraudulent acts may arise either at the process of loading the cargo or at the discharge of the it. It is however justified to say that most of the maritime frauds are executed by the persons at the port of loading, such as the consignor or shipper.

Under the Rotterdam regime, it is obligatory for the carrier to qualify the particulars which are required to be recorded in the bill of lading, as provided in article 36(1) of the Rotterdam Rules, if he has actual knowledge that the statement is artificial or if there reasonable basis for suspecting that the statement is falsified.¹⁴³

The carrier's qualification shall not consign to the details enumerated in article 36(2) and (3) of the regime. The information contained in article 36(1) is furnished by the shipper and the carrier usually is unable to control or adjust it. Consequently, it is in benefit of the carrier if he does not wish to assume any liability for the falsified or deceptive information. Once it is found that the shipper furnishes falsified or deceptive statement as to the particulars contained in article 36(1) of the regime and the carrier, despite the actual knowledge of its deceptiveness or with reasonable doubt of its accuracy, fails to make any qualification, the carrier shall be held accountable of breach of his obligation.¹⁴⁴

Resembling the Hague-Visby Rules, the Rotterdam regime also expressly states that the evidential effect of the contractual particulars. As between the carrier and the shipper, the bill of lading shall operate as a prima facie evidence of contract.

¹⁴³ Rotterdam rules, article 40.

¹⁴⁴ Ibid.

Whereas from the perspective of a third party acting in good faith, the Rotterdam Rules stipulates that the bill of lading is governed by conclusive evidence.¹⁴⁵

It can be argued that the third party's interest is well confined by such a rule that dissimilar evidence as to any particulars recorded in the bill is not allowed to be raised by the carrier to exclude a non guilty third party's legal claim.

Furthermore, since the particulars demanded by the Rotterdam Rules are more widespread and clear than the former regimes, the defending instrument is correspondingly able to cover more situations. That the name and address of the carrier shall be addressed in the bill of lading, which constitutes conclusive confirmation as to the identity of the carrier is one of the examples of the more protective regimes of the Rotterdam rules.

The Hague-Visby Rules article III (3) has a more limited list, (a) leading marks; (b) number of packages or pieces, quantity or weight of the goods, and (c) apparent order and condition of the goods.¹⁴⁶ whilst the Rotterdam Rules in article 36(1), (2) and (3) provides a much more plain and comprehensive list for the particulars, which contain other information as well, such as the address and name of the carrier, and the date on which the carrier receives the cargo, etc.¹⁴⁷

Where a consignee in good faith issues an action against the carrier as stated in the bill of lading, there is a minor defence left for the carrier to plead that he is only a time charterer of the ship, and the party to the bill of lading contract should be the ship owner.

In the light of English common law legislation, the identity of the carrier is an inconvenient issue confronted with the victim of the fraudulent crime. However, this matter is clearly settled in the Rotterdam Rules since the

¹⁴⁵ Rotterdam rules, article 41, paragraph 1(a), (b)(i).

¹⁴⁶ Hague-Visby Rules article III(3)

¹⁴⁷ Rotterdam Rules article 36 (1), (2) and (3).

address and name of the carrier is an obligatory fact which shall be incorporated in the transport document.¹⁴⁸

In addition to a more comprehensive register of contract particulars which are compulsory to be incorporated in the transport document, the Rotterdam Rules furthermore concentrate on the shipper's responsibility towards the carrier.¹⁴⁹

The problematic of non-existent goods in English legislation, where there is no cargo, as it is hard to say that a contract of carriage is completed, if not there is satisfactory proof that a contract has existed between the carrier and the shipper. In situation of a nonexistence contract, the bill of lading then turns to be a proof of nothing. Furthermore, the guiltless holder of the bill of lading, although he can declare that the carrier is accountable for non-delivery of the cargo, he is not at liberty to rely on the terms in the bill of lading contract.

The Rotterdam regime states that it is the shipper's requirement to deliver the cargo unless otherwise decided in the contract of carriage.¹⁵⁰

Consequently it is clear that the shipper is in breach of the statutory requirement set out in the Rotterdam regime, and the carrier is permitted to reimbursement from the shipper if his infringe causes any loss or damage.¹⁵¹

10.2 In Respect of Consignee's Fraudulent Acts

¹⁴⁸ Ibid.

¹⁴⁹ Rotterdam rules, article 27

¹⁵⁰ Rotterdam rules, article 27, (1).

¹⁵¹ Rotterdam rules, article, 30, (1).

After an investigation on the issue how the Rotterdam regime deal with potential fraudulent acts at the phase of shipment, it now comes to examine the situation of delivery, where the dishonest person who is not allowed to possession of the goods may act in deception to acquire the goods from the carrier.

The Rotterdam regime addresses the obligation on the carrier to deliver the cargo to the consignee.¹⁵² This requirement is more specifically stipulated in article 47 (a), which stipulates that the carrier, after having arrived at the place of destination, shall deliver the goods to the holder of the bill of lading, subject to the requirement that the person to whom the goods are delivered satisfies the provision of article 1(10)(a)(i) of the Rotterdam regime. If the prerequisite is not fulfilled, the carrier shall decline delivery of the goods.¹⁵³ The majority of fraudulent acts occur without presentation of an original bill of lading.

Under such circumstances, the person who claims delivery may present a falsified bill of lading, or even present no bill of lading at all.

Customarily, the carrier transports the cargo aligned with a letter of indemnity issued by the shipper, or a bank guarantee issued by the person who claims delivery of the goods.

Both expressly address that the carrier will be indemnified for his possible liability.

Such practice prevails virtually universally, and it gives rise to grave impact on transport legislation, as the bill of lading value is getting reduced and banking practice being opinionated, the Rotterdam regime however, even though it recognizes the custom that delivery may be engaged without presentation of a negotiable transport document. It, nevertheless contemplate that a number of rules shall be subject to it. Article 47(2) can be

¹⁵² Rotterdam rules, article 11.

¹⁵³ Rotterdam rules, article, 47(1)(a).

seemed as an endeavour to mitigate the likelihood of bill of lading fraud at the stage of delivery.

The first prerequisite is that the bill of lading is required to expressly permit delivery without presentation of transport document.¹⁵⁴

It does not contradict the role function of a bill of lading, but rather endow with a resolution to the situation where the bill of lading is unavailable at the stage of delivery.

Further, the second prerequisite is that the carrier is required to acquire instruction from the shipper in subject of the delivery of the goods exclusive of presentation of a bill of lading.¹⁵⁵

The reason for this is that the shipper is the person recognized to the carrier and is further the person who may have incitements in the cargo.

Furthermore, it is also recommended to seek instruction from the shipper, which is a time-honoured custom in numerous trades where transport document is not accessible at the time of delivery.¹⁵⁶

Although, the carrier have an responsibility of notice, as provided in article 47(2) (a)(i), preceding to the connection with the shipper. Usually, in the case where payment for the value of the goods is accomplished by a letter of credit, the bank will frequently demand that it should be portrayed as notify party in the bill of lading.

Consequently even if the purchaser fails to exchange the bill of lading, the bank will be the first person to be aware that the goods have arrived at the agreed port of destination and will further use the right of pledge if not paid by the buyer. Such kind of notice operates as both a reminder and a warning to the possessor, and consequently the notice is a necessary obligation on the carrier.

¹⁵⁴ Rotterdam rules, article, 47(2).

¹⁵⁵ Rotterdam rules, article, 47(2)(a).

¹⁵⁶ Michael f. Sturley, the Rotterdam rules, Thomson, 2010, Para. 8.087.

Frequently under shipping trade the shipper may observe whole the sale of the goods during its transport, However, in some cases, the shipper may without knowledge of the identity of the holder, this occur often cases where goods are resold.¹⁵⁷ It is still obligatory that the carrier should perform in reasonable effort.

The question is just what is the exact measurement of reasonable effort?

Article 47(2)(a)(iii) stipulates that where the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may have a request to the shipper.¹⁵⁸

For that reason, the reasonable effort should interpreted to the extent that the carrier can find the consignee or the holder of the bill of lading.

It is recommended that the requirement on the carrier is to deliver the cargo to the named consignee, who has an obligation to make it known to the carrier.¹⁵⁹ Furthermore the shipper, should firstly also apply reasonable effort, to help the carrier find the consignee or holder of the bill of lading.

Based on the two requirements above, the carrier then discharges his requirement to transport the cargo under the sale contract, as provided in article 47(2)(b), and the person who gives information shall indemnify the carrier's loss arising from his delivery in accordance with such instruction.¹⁶⁰ Undeniably, The article 47(2)(a) to (c) ease the prospect of incident of fraud in situation where the cargo arrives at the port of discharge prior than the bill of lading.

If the consignee who claims delivery of the cargo is not capable of presenting an original bill of lading, the carrier might first control whether

¹⁵⁷ Ibid.

¹⁵⁸ Rotterdam rules, article, 47(2)(a).(ii).

¹⁵⁹ Michael f. Sturley, the Rotterdam rules, Thomson, 2010, Para. 8.103

¹⁶⁰ Rotterdam rules, article 47(2)(c)

or not any express statement allowing delivery with no fabrication of a bill of lading.

If so, the carrier is permitted to acquire instruction from the shipper, or documentary shipper, to ensure whether or not the person who claims delivery is a legitimate person. Only in compliance with the three provisions, the carrier is capable to perform his requirement to deliver the goods and allowed to claim indemnity against the person who gives the instruction.

But in case where the consignee presents a falsified bill of lading to claim delivery, the provisions may effect a minor influence. The key reason is that the false bill of lading is hard to identify by the carrier, if not the shipper or the legitimate holder alert the carrier to prevent delivery.

11 Conclusion

This thesis concentrates on the investigation of different kinds of bills of lading frauds. A comparative analyse has been held between different regimes in dealing with their advantages and disadvantages on the security of bills of lading. English common law recognizes the bill of lading as a multi-functional document. As a receipt of the goods, a document of title and as an evidence of the contract of carriage, this leads to the fraudster's interest in the document. Bill of lading fraud is not a new problem within the maritime field and even though attempts have been made in order to reduce the amount of bill of lading fraud, it is still not an unusual occurrence.

One of the main argument for implementing an electronic bills of lading system were not only to minimize the problem of late arrival of documents at the port of discharge but rather minimizing the risk of fraud. This should

be achieved by electronic bills of lading no longer being sent in three or six originals. However, it is still argued whether this will minimize the incidence of fraud in bills of lading. Moreover, the occurrence of bills of lading fraud may even increase due to the likelihood of computer mismanagement and where an open network such as the internet is used.

The implementation of paperless documents within the shipping commerce is only possible if there are foremost, a reliable security that would make it near to impossible for the fraudster to gain access in combination with laws which are enacted at both national and international levels that would deter the hacker or fraudster. There should be a strong co-operation between states to exchange information about cross-border data flow and access proof as well the laws of evidence allow for admissibility of computer generated documents. The main obstacle of launching a worldwide well functioning electronic bill of lading was not the technology itself but rather the legal profession, which has stuck to the legal principle that a document of title can only be issued and transferred by a signature in handwriting.

When it comes to conventions the Rotterdam Regime makes a more comprehensive attempt to further mitigating the occurrence of bill of lading fraud. Foremost, the particulars which are required to be incorporated in the bill of lading is more clarified and precise. Further, it seems that the Rotterdam regime provides a broader security for the carrier who acts in fraud than its former regimes. The main adjustment is that the stage of carrier's responsibility has been extended in the Rotterdam regime.

In conclusion, English common law and their different regimes have their respective features in reducing fraudulent bills of lading and these features replicate the purpose and perception of that time to tackle these criminal acts. It will be an illogical statement to criticize any of the regimes on the issue of bills of lading security. It is however, justified to say that fraudulent bills of lading cannot be entirely eliminated through a distinct legal resolution. Efficient preventive methods combined with a suitable remedy

and a technical secure system is required to tackle the occurrence of fraudulent bills of lading.

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