



Centre for Maritime Law
Faculty of Law

NUS Centre for Maritime Law Working Paper 22/04

NUS Law Working Paper No 2022/013

THE STRAIGHT BILL OF LADING IN A PAPERLESS FUTURE

Michiel Spanjaart

Visiting Senior Research Fellow, Centre for Maritime Law, NUS

[Uploaded September 2022]

© Copyright is held by the author(s) of each Centre for Maritime Law (CML) Working Paper. CML Working Papers may not be republished, reprinted, or reproduced in any format (in part or in whole) without the permission of the author(s).

The views expressed in this working paper are those of the author(s). They do not necessarily represent or reflect the views of CML, NUS or the author's employers.

The straight bill of lading in a paperless future

*Michiel Spanjaart**

This paper examines the status and historical development of straight bills of lading. It analyses the position of straight bills of lading under the Carriage of Goods by Sea Act 1924 (UK), and the practical function of straight bills of lading as a mechanism for blocking the transfer of goods to a consignee. The paper goes on to explore the possible future of electronic straight bills of lading under the Rotterdam Rules and the UNCITRAL Model Law on Electronic Transferable Records. The paper argues that electronic straight bills of lading can be successfully introduced without the need for registers, blockchain technology, or even revised legislation.

Keywords: Carriage of goods by sea, straight bills of lading, non-transferability, the presentation rule, electronic transport documents, blockchain technology.

* Partner/advocate with Trains & Co in Rotterdam, Lecturer in Maritime Law in Rotterdam and Leuven, and Academic Fellow, Centre for Maritime Law, Faculty of Law, National University of Singapore. This working paper was prepared during the author's research visit to the Centre for Maritime Law (CML) at the Faculty of Law, National University of Singapore. The author would like to thank the CML for the hospitality and funding which supported this research, and Elson Ong for his help on the blockchain and distributed ledger technology.

1 Introduction

There are order, bearer, and straight bills of lading. Order and bearer bills of lading are the ‘archetypical fully negotiable, i.e. repeatedly transferable’ bills,¹ designed to switch hands often and easily by endorsement and delivery.² They are documents of title at common law, capable of transferring the possession of the goods by their transfer.³

Straight or non-negotiable bills of lading are transferable (by mere delivery) as well, but only once, and only between the shipper and the named consignee.⁴ They are not meant to be transferred beyond the named consignee. Straight bills of lading do not qualify as documents of title at common law. Straight bills of lading cannot be transferred by endorsement and delivery, and their transfer will not transfer the possession of the goods.⁵

Still, a straight bill of lading shares all the other bill of lading functions with its ‘negotiable’ relatives. A straight bill of lading operates as a receipt, and evidences the contract of carriage. The delivery of the goods under a straight bill of lading contract is subject to the presentation rule.⁶ This rule prescribes that the carrier must release the goods against the

¹ *The Rafaela S* [2003] 2 Lloyd’s Rep 113 (CA), per Rix LJ.

² Or just delivery, in the case of a bearer bill of lading.

³ *Lickbarrow v Mason* (1794) 5 TR 683; *Barber v Meyerstein* (1870) LR 4 HL 317; *Sanders Brothers v Maclean* (1883) 11 QBD 327; *The Delfini* [1990] 1 Lloyd’s Rep. 252; Francis MB Reynolds and Francis D Rose, *Carver on Bills of Lading* (5th edn, Sweet & Maxwell 2022) para 6-002.

⁴ *The Rafaela S* [2005] 1 Lloyd’s Rep 347 (HL); and see also Stephen Girvin, *Carriage of Goods by Sea* (3rd edn, UOP 2022) 110, para 5.16.

⁵ *Kum v Wah Tat Bank* [1971] 1 Lloyd’s Rep 439.

⁶ *Voss v APL* [2002] 2 Lloyd’s Rep. 707; *The Rafaela S* (n 4).

surrender of an original bill of lading to its lawful holder and may only release the goods to the presenter of an original bill of lading.⁷

Since the name of the consignee is already given in the case of a straight bill of lading contract, the 'physical' presentation of the bill of lading is hardly necessary to identify the receiver.⁸ Here, the added value of the surrender really lies in a valuable side-effect of the rule for the unpaid seller in a contract of sale.⁹ If the carrier is exposed to liability when it delivers the goods without presentation of an original bill of lading, it will obviously be very reluctant to do so. And if the consignee/buyer needs to present the bill of lading to the carrier to obtain delivery of the goods, the shipper/seller can effectively block this delivery by retaining the bill of lading until it is paid.

This objective, however, does not necessarily require (the transfer of) an original piece of paper. It only requires consent and adequate documentation thereof, and this may be an opportunity for the straight bill of lading in a paperless future. An electronic straight bill of lading can cover all the functions of the current paper version without the need for a register, blockchain (related) technology, or even revised legislation.

⁷ *The Stettin* (1889) 14 PD 142; *Carlberg v Wemyss* [1915] SC 616; *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576; *Barclays Bank v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81; *The Sormovsky 3068* [1994] 2 Lloyd's Rep 266; *The Houda* [1994] 2 Lloyd's Rep 541; *Motis v Dampskibsselskabet* [2000] 1 Lloyd's Rep 211; *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2014] EWCA Civ 1382.

⁸ It will either be the shipper or the consignee, and no one else, as the straight bill of lading cannot be transferred beyond the named consignee.

⁹ And the proper discharge of the carrier under the contract: see M Spanjaart, 'The Surrender of the Bill of Lading "Duly Endorsed"' (2014) 20 JIML 327.

2 The development of the straight bill of lading

Although it is difficult to pin down the exact year or even a decade, the straight bill of lading seems to have been used as a negotiable bill of lading well into the nineteenth century. Despite the fact that it already identified the consignee as the potential receiver, the straight bill of lading was transferred by endorsement and delivery as an order bill of lading.

Perhaps the earliest evidence of this dates back to 1539, the (straight) bill of lading in *The Mary Martyn*.¹⁰ The bill of lading mentioned that a shipment of 71 kintalls (ie quintals or hundredweights) of iron had been 'consygned in London unto John Collet mercer.' In fact, John Collet was not only the consignee, but also the shipper of the goods under this straight bill of lading.¹¹ Collet must have found a buyer for his iron after shipment as he later sold the goods to Hurlocke and Saunderson. The skeleton report in Seldon reads on this point:¹²

The iron was sold afloat by Collett to Hurlocke and Saunderson; see the bill of sale, Act Book, No. 128, 18th Jan. 1539. A copy of the bill of lading is endorsed upon the article upon first decree, upon passing of which the goods were delivered to Hurlocke and Saunderson.

Apparently, the straight bill of lading could in 1539 not only be transferred by endorsement and delivery, but also freely be transferred to anyone (and not just to the named consignee). Moreover, the phrase 'upon passing of which the goods were delivered to

¹⁰ *The Mary Martyn*, Reginald G Marsden (ed), *Select Pleas in the Court of Admiralty. Volume I, The Court of the Admiralty of the West (AD 1390-1404) and The High Court of Admiralty (AD 1527-1545)* (Bernard Quaritch, 1894) 88-89.

¹¹ His name is variously given in the (not even one-page) report as 'Collet', 'Collett' and Collette'.

¹² *The Mary Martyn* (n 10).

Hurlocke and Saunderson' suggests that the delivery of the straight bill of lading equalled the delivery of the goods themselves.¹³

There is more evidence of a symbolic function of the straight bill of lading in later years in the Low Countries (in the making).¹⁴ Merchant cities such as Amsterdam, Middelburg, and Rotterdam followed local mercantile customs. Legal practitioners would obviously advise on these customs, and some of these opinions (*advysen*) have been preserved.¹⁵

One of these opinions goes back to 1696. Two Amsterdam attorneys, Vlaming and Van den Ende, discuss the operation of a custom whereby the possession of the goods is transferred by means of a transfer of the bill of lading. The advice not only confirms the existence of the custom itself, but also contains a rather familiar metaphor, as the authors advise that:¹⁶

by the remittance of bills of lading and waybills, and by payment upon receipt thereof by the inhabitants of Holland as above, the case is such that these inhabitants are held to have acquired the possession and the ownership of the goods on board ... just as with the handover

¹³ It is tempting to deduce from these words that the iron was symbolically delivered to Hurlocke and Saunderson when John Collet passed them the bill of lading, but that is arguably too optimistic. The report is very brief, very old, and the fact that Mr Collet's name is variously given in the report as 'Collet', 'Collett' and Collette' raises certain doubts as to its accuracy. More importantly perhaps, the words also allow for another interpretation whereby the bill of lading was transferred first, then presented to the master, and the goods were (physically) delivered afterwards. In fact, it is even possible to read the report as requiring the endorsee to 'duly endorse' the bill of lading, but that seems rather unlikely in 1539.

¹⁴ Several northern provinces had formally rejected the rule of Philips II in 1581, the Spanish Armada was defeated in 1588, and the VOC (the United East-India Company) was established in Amsterdam in 1602. At the beginning of the seventeenth century, the united provinces were open for business.

¹⁵ The first national codification at the beginning of the nineteenth century followed the Code Napoleon. It is therefore not a stretch to argue that the Republic used a (sort of) common law system in those days as well.

¹⁶ JM Barel, *Advysen over den Koophandel en Zeevaart* (Hendrik Gartman 1780) 216-217.

of keys of warehouses where the goods have been locked up ... as if the goods themselves had been handed over.¹⁷

The advice shows that the transfer of possession of the goods by means of the transfer of the bill of lading was already customary in Amsterdam at the end of the seventeenth century.¹⁸ Moreover, the advice does not distinguish between the different kinds of bills of lading, arguably because there was no reason to. In fact, the custom apparently also extended to waybills at that time.

Either way, the endorsement and transfer of straight bills of lading was practiced in Europe for at least another 130 years. The straight bill of lading in *Renteria v Ruding*, for instance, mentioned 'Messrs Andrew O'Brien and Loughnan' as consignee, without a reference to any 'order or assigns'.¹⁹ Although this was not an order bill of lading, O'Brien treated it as such. He endorsed the bill of lading and passed it on to Ruding.

By the time that the carrier, Renteria, arrived in London, the freight was still due. Renteria initiated proceedings against Ruding for payment of the freight, who then argued that this bill of lading 'was not assignable by indorsement, their usual words "or their assigns" being omitted'. The argument failed, as the intentions and expectations of the parties outweighed the formalities:²⁰

¹⁷ The original advice is in rather old Dutch, hence the sometimes awkward translation.

¹⁸ The custom must have been even older as it was 'in line with prior ... practices'.

¹⁹ *Renteria v Ruding* (1830) M&W 509.

²⁰ This rather relaxed view on the formalities of a transfer also returned in *Mitchel v Ede* (1840) 11 AD & E 888, discussed below. The bill of lading listed 'Messrs Ede, Bond & Pearce or their assigns' as the consignee, but the shipper (Mackenzie) did not forward it to this consignee, but he sent it to Mitchel instead, endorsed as follows: 'The within sugar will be delivered to Messrs. Ede, Bond, and Pearce, on

Lord Tenterden C.J., after referring to the Treatise on Shipping, p. 286, fifth edit., and reading, 'For if a person accepts anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge upon himself,' said, this seems to me to be the correct principle, and the omission of the words 'or their assigns' makes no difference.²¹

Although the final decision does not seem to have depended on this, the Meeson & Welsby report also shows that Renteria had been able to prove 'by a witness acquainted with the Spanish trade, that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by indorsement.'²²

All the same, the practice to freely transfer straight bills of lading by endorsement must have started to fade shortly afterwards, and by 1873 it was gone. The Privy Council held in *Henderson v Comptoir d'Escompte de Paris*:²³

It appears that a bill of lading was made out, which is in the usual form, with this difference, that the words, 'or order or assigns' are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority, at nisi prius, for that proposition; but, undoubtedly, the general view of the

condition that they give security to Messrs. A. Stewart and Westmoreland that they will pay the bills for advances that Hector Mitchell, Esq. has made or may make to me, on for account of Air Mount and Harbour Head estate; otherwise the 150 hogsheads of sugar within mentioned will be delivered to Messrs. A. Stewart and Westmoreland; but, if they give that security, then all other shipments of sugar from those estates will go to them free and unshackled.' Lord Denman CJ held (in spite of the formalities): 'The intention of Mackenzie to transfer the property to the plaintiff is unquestionable; and we think that, under the circumstances, he has carried that intention into effect.'

²¹ This is not a very surprising outcome, as Lord Tenterden wrote this edition himself.

²² Since it was once acceptable to transfer straight bills of lading to a third party by endorsement and delivery, it is not unlikely that the property in the goods may (occasionally) have passed to the endorsee by endorsement and delivery as well.

²³ *Henderson v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253.

mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as 'order or assigns' ought to have been in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument.²⁴

The explicit link between 'straight' and 'non-negotiable' bills of lading then followed in the wording of the US Uniform Bills of Lading Act 1909, and the US Federal Bill of Lading Act 1916 (the Pomerene Act). Section 2 of the Pomerene Act stipulated that a 'bill in which it is stated that the goods are consigned or destined to a specific person is a straight bill.' Section 6 explicitly prescribed that a straight bill of lading 'shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable"'.

This is then arguably the legislation Tuckey LJ must have had in mind when he said in *The Happy Ranger*:

A 'straight' bill has no English law definition, but the term derives, it appears, from earlier U.S. legislation referring to a 'straight' bill as one in which the goods are consigned to a specific person as opposed to an 'order' bill where the goods are consigned to the order of anyone named in the bill or bearer.²⁵

²⁴ The reference to a 'negotiable instrument' is somewhat unfortunate as a bill of lading is not negotiable. The Privy Council held in *Kum v Wah Tat Bank* (n 5) 446: 'It is well settled that 'Negotiable', when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.'

²⁵ *The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357.

Straight bills of lading and non-negotiable bills of lading are more or less used indiscriminately nowadays,²⁶ and this makes good sense, as they are one and the same document.²⁷ Whereas the identity of the consignee under a negotiable bill of lading can easily change in the course of the voyage, the identity of the intended consignee under a straight, non-negotiable bill of lading is a given. As such, they lack a symbolic quality, and the Privy Council held in *Kum v Wah Tat Bank*²⁸ that:

it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all. The bill of lading obtains its symbolic quality from the custom found in *Lickbarrow v. Mason* and that is a custom which makes bills of lading 'negotiable and transferable' by endorsement and delivery or transmission. To the same effect the Bills of Lading Act, 1855, recites that a bill of lading is by the custom of merchants 'transferable by endorsement'. There appears to be no authority on the effect of a non-negotiable bill of lading.

3 The straight bill of lading under the COGSA 1992

This crucial difference between (non-negotiable) straight and (negotiable) order/bearer bills of lading caused the English and Scottish Law Commissions to treat them differently under the Carriage of Goods by Sea Act 1992 (UK) (the COGSA 1992). The Act applies equally to order, bearer, and straight bills of lading but, to paraphrase George Orwell, some

²⁶ Michael Bridge (ed), *Benjamin's Sale of Goods* (11th edn, 1st supp, Sweet & Maxwell 2021) 1294-1295.

²⁷ With the qualification that the US Pomerene Act requires a (straight) bill of lading to express that it is in fact 'nonnegotiable'.

²⁸ (n 5) 446.

bills of lading are more equal than others. A bill of lading in the sense of the Act does not include any document that is 'incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement'.

Clearly, this implies that the straight bill of lading does not qualify as a bill of lading under the Act. The default solution is then that the straight bill of lading equals a sea waybill under the Act.²⁹ The ratio behind the split goes back to the 'non-negotiable' character of the straight bill of lading.³⁰ The Law Commissions decided that a bill of lading 'must be transferable, thus following the preamble to the 1855 Act'.³¹

This line of thought suggests that the Bills of Lading Act 1855 (UK) (the 1855 Act) (also) prescribed that a bill of lading had to be transferable by endorsement and delivery, but it did not. Admittedly, the preamble of the 1855 Act did mention the merchant custom to transfer bills of lading by endorsement and delivery, but the provisions of the 1855 Act applied to order, bearer, and straight bills of lading.³² Section 1 of the 1855 Act specifically referred to '[e]very consignee of goods named in a bill of lading, and every endorsee of a bill of lading.'³³

²⁹ Section 1(3), COGSA 1992: 'References in this Act to a sea waybill are references to any document which is not a bill of lading but — (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.'

³⁰ The main objective of the COGSA 1992 was obviously to remedy the shortcomings of the 1855 Act. A side objective, however, was to build on the 1855 Act whenever possible to keep the material changes to a minimum: Law Commission and Scottish Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea* (Law Com No 196, Scot Law Com No 130, 1991) 12.

³¹ *Ibid* 20.

³² Lord Rodger observed in *The Rafaela S* (HL) (n 4) that the 'inclusion of both categories shows clearly that the legislature was not confining the enactment to the particular mischief identified in the preamble. The preamble cannot, therefore, be used to qualify or cut down the enactment'.

³³ *The Rafaela S* (CA) (n 1), Rix LJ: 'I can see no reason why straight bills of lading have not always been within the 1855 Act.'

The argument is not very convincing on its merits either, not least because it makes little sense to accept ‘that a bill of lading must be transferable’ for historical reasons if the historical shortcomings of that exact same Act are under review.

But more importantly, perhaps, the Law Commissions went on to frame the discussion in the next sentence, suggesting that the straight bill of lading is not transferable, as only ‘documents of title at common law’ are transferable.³⁴ Further, ‘a “straight” consigned bill of lading,’ according to the Law Commissions, ‘such as one made out “to X” without any such words as “to order”, is not a document of title at common law.’

It is submitted that the Law Commissions first posed, and subsequently answered, the wrong question, namely the question of whether the straight bill of lading is a document of title at common law in the absence of an order clause. The real question is whether the straight bill of lading is still transferable in the absence of an order clause.³⁵ Whether it is a document of title at common law is then irrelevant, instead of decisive.

One consequence of the distinction between order/bearer bills of lading and straight bills of lading is that a bona fide consignee/straight bill of lading holder cannot rely on the protection of section 4 of the COGSA 1992, as it is only available to bill of lading holders in the stricter sense of the Act.

³⁴ *Rights of Suit* (n 30) 20.

³⁵ *The Rafaela S* (HL) (n 4). The main issue in the case was, of course, whether the straight bill of lading was a bill of lading or similar document of title in the sense of art 1(b) of the HVR, but the transferability of the straight bill of lading was extensively discussed in the process. Lord Steyn held: ‘Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally, a straight bill of lading shares all the principal characteristics of a bill of lading as already described.’

Another consequence is that the consignee of the straight bill of lading does not have to become a lawful holder of the bill in order to exercise contractual rights of suit under the straight bill of lading contract.³⁶ The mere mention of its name in the consignee box is enough as 'a named consignee becomes a party to the contract in the bill of lading when it is issued.'³⁷

Whereas the shipper of an order/bearer bill of lading loses its contractual rights upon the transfer of the bill of lading, the consignee's acquisition of contractual rights under a straight bill of lading contract does not affect the position of the shipper. Pursuant to s 2(5) of the COGSA 1992, the operation of s 2 of the COGSA 1992 is 'without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill.'

The COGSA 1992 therefore really regulates the statutory accession of the consignee to the straight bill of lading contract instead of a statutory transfer of rights to the consignee under that contract.³⁸

³⁶ Given the 'mutuality' approach in *Borealis AB v Stargas Ltd and Bergesen DY A/S (the Berge Sisar)* [2001] UKHL 17, [2001] 2 All ER 193, [2001] 1 Lloyd's Rep 663, it would then seem to make sense for the named consignee to immediately assume the obligations under the straight bill of lading contract as well, and for the shipper to remain bound to these obligations alongside the named consignee. But that is not the case. Section 3(1) COGSA 1992 relates to 'any document' to which the Act applies, so not just bills of lading, and only imposes liabilities on the named consignee when it 'takes or demands delivery from the carrier of any of the goods to which the document relates' or 'makes a claim under the contract of carriage against the carrier in respect of any of those goods'.

³⁷ *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509, Tuckey LJ, and in line with s 2(1)(b) COGSA 1992. The consignee 'to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract ... shall ... have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'.

³⁸ Under Dutch law, the acquisition of contractual rights under the bill of lading contract is generally explained by the operation of a third-party stipulation (Hof 's-Gravenhage, 26 June 2008,

4 The key to (lock) the warehouse

The statutory approach of the straight bill of lading under the COGSA 1992 raised some inevitable questions. If straight bills of lading were really just sea waybills, were they then governed by the Hague-Visby Rules (the HVR)? And furthermore, were straight bill of lading contracts then (still) subject to the presentation rule?

The application of the presentation rule to straight bills of lading had been a non-issue before 1992. In 1873, the Privy Council had distinguished between negotiable and non-negotiable bills of lading in *Henderson v Comptoir d'Escompte de Paris*.³⁹ In 1889, Butt J held in *The Stettin* that the distinction had no effect on the presentation rule.⁴⁰ It made no difference:

whether the bill of lading was negotiable or a “namens conossement,” that is a bill of lading made out to a named consignee only, and not negotiable, the contract of the master was to deliver to the holder of the bill of lading. In any case, the named consignee acquired no right

ECLI:NL:GHSGR:2008:BD5585, S&S 2008/115 (*The OPDR Lisboa*). Article 6:253 of the Dutch Civil Code (DCC) provides that a contract may (also) contain stipulations for the benefit of a third party. This article applies to contracts in general, and therefore also to a contract of carriage under a bill of lading. Article 6:254 DCC then provides that the third party accedes to the contract when it accepts the third-party stipulation. The acceptance is in principle form-free, but when a bill of lading has been issued the third party holder has to present the bill of lading to the carrier in order to accede to the contract of carriage (HR 29 November 2002, NJ 2003, 374 (ann KF Haak), S&S 2003, 62 (*The Ladoga 15*)). When the bill of lading holder exercises its rights under the contract of carriage, it at the same time expresses its consent to be bound the obligations under that contract of carriage. After the accession of the bill of lading holder this contract of carriage then has three parties: the carrier, the shipper/charterer, and the holder of the bill of lading. The rights and obligations of the three parties are not necessarily the same. The contract of carriage (often the charterparty) governs the relation between the initial parties (art 8:410 DCC). The bill of lading governs the relation between its lawful holder and the carrier. The bill of lading holder acting in good faith may rely on the bill of lading as evidence of its contract with the carrier (art 8:415 and the first sentence of art 8:441(2) DCC).

³⁹ (n 23).

⁴⁰ *The Stettin* (n 7) 144.

to the goods without the bill of lading, and the master was bound to insist on the production of the bill of lading before delivering the goods.

This decision was confirmed in *The Cornouaille*,⁴¹ and again in *The Altia*,⁴² and Lord Diplock also explicitly referred to *The Stettin* when he held in *Barclays Bank v Commissioners of Customs and Excise*:⁴³

It is clear law that where a bill of lading or order is issued in respect of a contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin*, (1889) 14 P.D. 142).

The 1982 edition of *Carver* was clear that the delivery 'to the consignee named in the bill of lading does not suffice to discharge the shipowner where the consignee does not hold the bill of lading',⁴⁴ and this was the rule to almost the end of the millennium.⁴⁵

According to the Law Commissions, however, a straight bill of lading was not transferable, and in view of this approach it is remarkable that the Law Commissions neither proposed

⁴¹ *Evans & Reid v Cornouaille* (1921) 8 Ll LR 76: 'The fact that the coal was intended to be delivered to the Société Union did not entitle the Master to deliver to anybody without production of the Bill of Lading. It would not have entitiled him to deliver even if the Société Union had been the consignees named in the Bill of Lading.'

⁴² *Kolbin & Sons v Kinnaer & Co (The Altia)* (1930) 376 LR 225.

⁴³ *Barclays Bank v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81.

⁴⁴ RP Colinvaux (ed), *Carver's Carriage by Sea* (Stevens & Sons 1982) 1111.

⁴⁵ *The Ines* [1995] 2 Lloyd's Rep 144; *The Taveechai Marine* [1995] 1 MLJ 413; *Olivine Electronics v Seabridge Transport* [1995] 3 SLR 143; and for instance Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea* (Butterworths 1994) 481-482. Having first discussed the presentation rule in general he writes: 'This is so even if the person to whom the goods have been delivered is named as the consignee in the bill of lading'.

nor suggested discarding the presentation rule in straight bill of lading contracts. In fact, the opposite is true. The Law Commissions implicitly recognised its application, arguing ‘that “straight” bills of lading and sea waybills are much the same type of document save that the sea waybill is not required to obtain delivery.’⁴⁶

It is rather difficult to read this in any other way than that a straight bill of lading and a sea waybill are much alike, except for the fact that an original straight bill of lading must be produced in exchange for the goods. Still, the overall qualification of the straight bill of lading as a non-transferable sea waybill for the purpose of the Act must have seduced many authors to argue that the presentation rule does not apply to straight bills of lading.⁴⁷

Within just a few years the presentation of straight bills of lading was no longer required, and the Hong Kong High Court confirmed this course in 2001 saying that ‘the essence of straight bills is that they are not negotiable and the contractual mandate is to deliver to named consignee without the production of the original document.’⁴⁸

⁴⁶ *Rights of Suit* (n 30) 20.

⁴⁷ JF Wilson, *Carriage of Goods by Sea* (3rd edn, Financial Times Pitman 1998) 158: ‘As the carrier is liable to substantial damages in the event of misdelivery he would obviously prefer a “straight” or non-negotiable bill under which his obligation is to deliver only to the named consignee.’; C Debattista, *The Sale of Goods Carried by Sea* (2nd edn, Bloomsbury Academic 1998) 37: ‘a person named as a consignee on a non-order bill of lading would have a contractual right to delivery of the goods.’; MD Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (LLP 1997): ‘Under English law, the carrier is undoubtedly contractually bound to deliver the goods to the consignee named in the non-negotiable bill With respect to a non-negotiable bill, the position is the same in England and in America; the carrier need not require that it is produced or surrendered.’; NJJ Gaskell, R Asariotis, Y Baatz, *Bills of Lading: Law and Contracts* (LLP London, 2000) 42: ‘there is no real distinction between a waybill and a straight bill, and that neither are needed to obtain delivery of the goods (unless the contract so requires)’.

⁴⁸ *The Brij* [2001] 1 Lloyd’s Rep 431, Waung J: ‘I conclude on this vital issue in favour of the defendants and it therefore follows that the action must be dismissed because the plaintiff must fail in contract since there was no breach because the CAVN bills were straight bills and the plaintiff must also in tort because there would be no breach of duty of care since the duty of the carrier under the CAVN bills was only to deliver to the named consignee, Amaya.’

The Hong Kong decision in *The Brij* was delivered just in time for the 2001 edition of *Carver*:

A 'straight' bill of lading is not a document of title in the common law sense, so that its transfer does not operate as a transfer of the constructive possession of the goods. It is not a symbol of the goods because the carrier is entitled and bound to deliver the goods to the named consignee without production of the bill.⁴⁹

Whereas Hong Kong followed the 'new' rule, Singapore stayed with the presentation rule. *Voss v APL* related to the carriage of a Mercedes car from Hamburg to Busan under a straight bill of lading. Upon arrival in Korea, the buyer had still only paid half of the purchase price and the seller had (for that reason) not parted with the bill of lading yet. APL released the car to the named consignee all the same,⁵⁰ and the Singapore Court found for Voss:⁵¹

The straight bill of lading and the consequent delivery obligation it imposes on a carrier has been well known for decades. A shipper who, like Mr. Voss in this case, asks for the issue of a straight bill of lading even though the alternative of a sea waybill is available to him, wants to retain some degree of control over the delivery of the goods. The shipowner is aware of this. If he is not prepared to accept the restriction on delivery rights that a bill of lading imposes he can insist on issuing a waybill instead. Once he issues a bill of lading instead,

⁴⁹ GH Treitel, FMB Reynolds, *Carver on Bills of Lading* (1st edn, Sweet & Maxwell 2001) para 6-007. The wording suggests that the symbolic function of the bill of lading is directly linked to the presentation rule, but the authors have left this connection aside in later editions.

⁵⁰ In fact, the buyer apparently produced an invoice instead.

⁵¹ *Voss Peer v APL Co Pte Ltd* [2002] SGHC 81, [2002] 1 SLR(R) 823, Judith Prakash J.

however, whether it is an order bill or a straight bill, he must not deliver the cargo except against its production.⁵²

Shortly afterwards, and in line with the reasoning in *Voss v APL*,⁵³ the House of Lords unanimously held that a straight bill of lading was a bill of lading within the framework of the HVR and stressed the role of the straight bill of lading in a sale. Lord Bingham remarked that:

the shipper will not wish to part with an original bill to the consignee or buyer until that party has paid, and requiring production of the bill to obtain delivery is the most effective way of ensuring that a consignee or buyer who has not paid cannot obtain delivery.⁵⁴

As such, the straight bill of lading may not be suited to transfer the possession of the goods, but it can certainly prevent a consignee/buyer from taking possession of the goods without the shipper/seller's consent. A straight bill of lading may not be 'a key which in the hands

⁵² *APL Co Pte Ltd v Voss Peer* [2002] SGCA 41, [2002] 2 SLR(R) 1119, [2002] 2 Lloyd's Rep 707. Despite the position of most of the textbooks, and the 2001 decision of *The Brij* (n 48) in Hong Kong, the judgment in *Voss v APL* will certainly not have come as a surprise (in Singapore at least). One of the Singapore Court of Appeal judges was Tan Lee Meng J, the author of one of the textbooks in favour of the application of the presentation rule to straight bills of lading: see n 45 above.

⁵³ The straight bill of lading in the *Rafaela S* (like the straight bill of lading in *Voss v APL*) contained a contractual attestation clause that prescribed its presentation, and this was also emphasised by Lord Steyn when he held: 'In any event the issue of a set of three bills of lading, with the provision that "one being accomplished, the others to stand void" necessarily implies that delivery will only be made against presentation of the bill of lading.' This then still left the question whether the straight bill of lading should be presented in the absence of such an attestation clause. In *The Rafaela S* (CA) (n 1) 113, albeit in obiter dicta, Rix LJ had already concluded 'that production of the bill is a necessary pre-condition of requiring delivery even where there is no express provision to that effect.' Several years later, however, the Hong Kong Court of Final Appeal confirmed this reading in *Carewins v Bright Fortune* [2009] 3 HKLRD 409, when Ribeiro PJ held: 'But I would add that, perhaps save in exceptional circumstances, the presentation rule would be an incident of the contract evidenced by a straight bill even if it contains no attestation clause.'

⁵⁴ *The Rafaela S* (n 4) 351.

of a rightful owner is intended to unlock the door of the warehouse,'⁵⁵ but the key in the hands of the (unpaid) shipper/seller does ensure that the warehouse stays securely locked in order to deny the consignee/buyer access to the goods until the purchase price is paid.

It is submitted that this operation of the straight bill of lading as a '*Sperrpapier*' (literally, a blocking paper) is not the mirror image of the symbolic function of the bill of lading as a document of title at common law,⁵⁶ but rather constitutes a welcome side-effect of the presentation rule.⁵⁷ Since the presentation rule applies to all bill of lading contracts, including straight bill of lading contracts, a grip on the goods can effectively be maintained by shippers/sellers under any bill of lading, including therefore those shippers/sellers holding onto a straight bill of lading.

5 The reservation of the right of disposal

Under the Sale of Goods Act 1979 (UK) (SoGA) the property in the goods passes when the contracting parties intend it to pass. The physical delivery of the goods by the buyer to the seller, the transfer of possession, will often mark this moment, but not if the seller negotiates a reservation of the right of disposal. The transfer of property is then detached from the transfer of possession and becomes subject to certain conditions, in practice

⁵⁵ *Sanders Brothers v Maclean* (n 3).

⁵⁶ The authors of *Carver* (n 3) suggest that it is in fact the 'converse' of 'what may be called the "conveyance function" of enabling the holder of the document, by duly transferring it, to transfer the constructive possession of the underlying goods': para 6-002.

⁵⁷ Admittedly, the recognition of the symbolic function is ultimately also a side effect of the presentation rule, but the relevance of this distinction obviously lies in the fact that the presentation rule applies to all bills of lading.

usually the payment of the purchase price in full. The result of such an arrangement is that the property in the goods only passes to the buyer when the payment has been made.

If the goods in question travel under a bill of lading issued to the order of the seller, s 19(2) of the SoGA provides for a presumption of the reservation of the right of disposal:⁵⁸ 'Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal'.

Clearly, the statutory protection of the Act is only available to the seller/shipper of an order bill of lading, and arguably the bank if the bill of lading was issued to the order of the bank as a security. In view of the objective of the rule, however, it is submitted that there is no reason to distinguish between order, bearer, and straight bills of lading. There have been several judgments over the years that support this point of view (in various ways).

In *Mitchel v Ede* a shipment of sugar was carried from Jamaica to London on the *Thisbe*.⁵⁹ Mackenzie was the shipper of the sugar, and the bill of lading listed 'Messrs Ede, Bond & Pearce or their assigns' as the consignee.⁶⁰ Mackenzie knew the consignee well. In fact, he still owed them money, and his regular shipments of sugar to London were used to gradually settle the debt.

⁵⁸ The reservation of the right of disposal differs from the seller's right of stoppage in transit. In the former situation, the seller is still in possession of the goods. In the latter situation, the property has already passed to the buyer, but the seller subsequently retakes possession because the buyer cannot pay the purchase price: see s 44 SoGA.

⁵⁹ *Mitchel v Ede* (1840) 11 AD & E 888.

⁶⁰ Clearly, this was not a straight bill of lading, but in this case that does not matter, as it was not a bill of lading 'to the order of the seller' either. The bill of lading was issued to the order of Ede, the consignee.

Mackenzie had more than one creditor, though. He also owed money to Mitchel. When the *Thisbe* had completed loading the cargo, Mackenzie wrote to Mitchel that he could secure the balance in his favour with the shipment of sugar, and then also forwarded the bill of lading to Mitchel, endorsed as follows:

The within sugar will be delivered to Messrs. Ede, Bond, and Pearce, on condition that they give security to Messrs. A. Stewart and Westmoreland that they will pay the bills for advances that Hector Mitchell, Esq. has made or may make to me, on for account of Air Mount and Harbour Head estate; otherwise the 150 hogsheads of sugar within mentioned will be delivered to Messrs. A. Stewart and Westmoreland; but, if they give that security, then all other shipments of sugar from those estates will go to them free and unshackled.⁶¹

Once the *Thisbe* had arrived in London, and Ede had failed to provide the security as per the endorsement, both Mitchel and Ede claimed the sugar. With a clear focus on Mackenzie's intentions and the fact that Ede had never acquired the bill of lading, Lord Denman CJ first held that 'the property remained in Mackenzie notwithstanding the delivery of the sugars on board of the "*Thisbe*" and the signature of the bill of lading by the master'. Lord Denman CJ then went on to say that Mackenzie's initial idea may indeed have been to deliver the sugar to Ede, but that:⁶²

The owner of the goods may change his purpose, at any rate before the delivery of the goods themselves or the bill of lading to the party named in it, and may order the delivery to be to some other person, to B. instead of to A. ... And accordingly, on the 6th of April, in furtherance

⁶¹ Messrs A Stewart and Westmoreland were Mitchel's agents, hence their involvement.

⁶² *Mitchel v Ede* (n 59).

of that undoubted purpose, he indorsed and delivered the bill of lading to the plaintiff; the case further stating that ‘the bill of lading was never in the hands of the defendants’.

The consignment of the goods to the carrier had not transferred the property to the consignee since Ede had never acquired the bill of lading.⁶³

The decision in *Mitchel v Ede* has retained its value over the years.⁶⁴ One-and-a-half century later, several containers with the (rather unlikely) combination of insecticide and electric cables were carried by Elder Dempster Lines from Bremen to Douala on the *Lycaon*.⁶⁵ The agent of the carrier had issued a ‘received for shipment’ bill of lading which mentioned Hilaire Kotalimborah as the consignee.⁶⁶

This bill of lading had been issued to a forwarder,⁶⁷ Inter-Transport, who passed it on to Fuhs, the shipper/seller of the goods. At that point, two remarkable things happened:

⁶³ The Adolphus & Ellis case report then goes on to state: ‘The intention of Mackenzie to transfer the property to the plaintiff is unquestionable; and we think that, under the circumstances, he has carried that intention into effect.’ It is submitted that this last conclusion may be premature. The mere fact that Mackenzie was able to frustrate Ede’s access to the sugar does not mean that he could transfer the property in the sugar to a party than the named consignee or assigns by endorsement and delivery of the bill of lading. Apparently, however, this happened more frequently prior to the decision in *Henderson* (n 23) – see eg the discussion in *Renteria* (n 19).

⁶⁴ See also *Thrige v United Shipping Co* (1923) 16 Ll L Rep 198.

⁶⁵ The sale and subsequent carriage of the goods gave rise to two different, yet connected, proceedings: *Ishag v Allied Bank* [1981] 1 Lloyd’s Rep 92 and *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd’s Rep 548.

⁶⁶ Once the goods had actually been shipped on board, however, an ‘on board’ bill of lading was issued, covering the same shipment of insecticide and electric cables. At that point, the goods were therefore covered by two bills of lading. The value of a received for shipment bill of lading (see also *The Marlborough Hill* [1921] AC 444) and the relation between Zaki Ishag and Allied Bank was discussed in *Ishag v Allied Bank* (n 65).

⁶⁷ The case report in *The Lycaon* (n 65) is not entirely clear on the bill of lading. The report mentions at 548: ‘The consignee and notify party named in the bill of lading was Hilaire Kotalimborah.’ At 554, however, the report reads that: ‘the bill of lading originally called for delivery to Mr. Kotalimborah as consignee, or to his assigns.’ Just as with *Mitchel v Ede* (n 59), however, it is submitted that it really makes no difference in the end, as it was in any case not a bill of lading ‘to the order of the seller’ in the sense of s 19(2) SoGA.

Fuhs 'endorsed' the bill of lading in favor of the Allied Bank as security for a loan given to him by Zaki Ishag and the bank,⁶⁸ and the word 'consignee' was deleted from the bill of lading at the request of the bank.⁶⁹

Whereas the property in the goods would in principle pass from the seller to the buyer upon consignment,⁷⁰ the circumstances of the case led to a different conclusion. The consignee had never paid the purchase price, and he had never held the bill of lading either. As such, the matter closely resembled the situation in *Mitchel v Ede*, and it was also resolved in the same way:

The whole object of reserving the jus disponendi is to enable the seller to divert the goods if the buyer is unable or unwilling to pay. Although this is usually done by taking the bill of lading to order of the seller or his agent, it can also be done where the consignee has been named in the bill of lading, by changing the name of the consignee: (see *Mitchell v. Ede*, (1840) 11 A. & E. 888).

This last part of the decision in *The Lycaon* is confusing to the extent that it suggests that the right to divert and the reservation of the right of disposal are one and the same thing,

⁶⁸ The possibility of doing this, and if so, how it might be achieved, was not discussed in either of the cases.

⁶⁹ The question of whether the bill of lading would then be 'consignee-less' was just a side issue. Lloyd J held in *The Lycaon* (n 65): 'I reject the argument that the bill of lading thereby ceased to be regular on its face. I also reject the argument, which I regard as artificial, that, by failing to insert the words "To order" when deleting the word "Consignee", there ceased to be any consignee at all.'

⁷⁰ *The Sevonia Team* [1983] 2 Lloyd's Rep 640.

but they are not. It is true that the net result is indeed often the same, yet the underlying basis is different.⁷¹

The reservation of the right of disposal pursuant to s 19(2) of the SoGA follows from the contract of sale, and can be invoked by the seller. The right to control, divert, redirect, or instruct, however, follows from the contract of carriage. This right can (initially) be exercised by the shipper, the contractual counterpart of the carrier.⁷² The right of control does not depend on the presence of a bill of lading (or similar document of title), it is inherent to the contract of carriage.

The shipper under a sea waybill, the consignor under an air waybill, and the sender under a CMR consignment note, all have the exact same right. They can redirect the carrier, give new instructions, change the destination, or indeed the identity of the consignee, in the course of the voyage.⁷³ As waybills and consignment notes are not documents of title, and

⁷¹ The reference to 'disposal' perhaps adds to the confusion. The Montreal Convention on international carriage by air (the MC), the Convention on international carriage by road (the CMR), and the Convention on carriage of goods by inland waterway (the CMNI) address the right to 'dispose of the goods' under the contract of carriage, whereas the 'reservation of the right of disposal' follows from the contract of sale. In *Wilmar Trading Pte Ltd v Heroic Warrior Inc (The Bum Chin)* [2019] SGHC 143, [2020] 4 SLR 357, [2020] 1 Lloyd's Rep [2020] 130 [33], Belinda Ang J steered clear of 'disposal' and referred instead to the shipper 'reserving its title to the shipment'.

⁷² The right of control is defined in art 1(12) of the Rotterdam Rules (the RR) as 'the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.' Article 50 RR outlines the extent of the right of control: 'The right of control (...) is limited to: (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and (c) The right to replace the consignee by any other person including the controlling party.'

⁷³ See art 14 CMNI for the difference between bill of lading contracts and other contracts: 'The shipper shall be authorized to dispose of the goods; in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document. The shipper's right of disposal shall cease to exist once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods and, (a) where carriage is under a consignment note, once the original has been handed over to the consignee; (b) where carriage is under a bill of lading, once the shipper has relinquished all the originals in his possession by handing them over to another person.'

do not have to be presented to obtain delivery of the goods, the right of instruction can be exercised irrespective of any *holdership* of the document.

A bill of lading complicates the matter because of the presentation rule. Since (only) one original bill of lading needs to be produced in the port of discharge, the right of instruction under the bill of lading contract attaches to the full set. The *holdership* of all original bills of lading is required for the exercise of the right of control in the course of the voyage. The HVR are silent on the matter (as they are on the presentation rule), but art 15(1) of the CMNI stipulates, for instance: 'The shipper ... must, if he wishes to exercise his right of disposal: (a) where a bill of lading is used, submit all originals prior to the arrival of the goods at the scheduled place of delivery'.

This also explains why the bill of lading is, in practice, so often issued to the documentary shipper, the one mentioned in the shipper's box.⁷⁴ If the underlying contract is a FOB sale, for instance, the seller is free from further obligations under the contract once it brings the goods on board of the ship. The FOB seller does not have to arrange for the transportation, it is not a party to the contract of carriage, and in principle it cannot exercise any rights under the contract of carriage either.

The FOB seller will still receive the bill of lading from the carrier, though. It needs the bill of lading as a receipt, but also to retain a grip on the goods. When the seller is mentioned as the shipper on the bill of lading, upon instruction of the (contractual) shipper, it can

⁷⁴ Article 1(9) RR.

exercise the right of control under the bill of lading contract. This mechanism is common enough: see for instance the German Supreme Court decision in *The Dithmarschen*:⁷⁵

The FOB buyer was not the shipper; he was just mentioned as such on the bill of lading for the sake of convenience. ... The three original bills of lading were clearly issued to the plaintiff as he, the exporter and the owner of the goods still not paid for by the FOB buyer, wanted to, and had to, in compliance with the CAD arrangement, present these three original bills of lading to the bank in order receive the payment of the purchase price.

The operation of the reservation of the right of disposal was examined in *Scottish & Newcastle v Othon Ghalanos*, albeit obiter, albeit expressed by Lord Rodger alone, and albeit in a general way.⁷⁶ *Scottish & Newcastle* had sold 11 containers of cider to Othon Ghalanos, delivery CFR Limassol (Cyprus), and payment was due within 90 days after the arrival of the vessel in Cyprus. The parties to the sale had agreed that the bills of lading were to be non-negotiable, that they would mention Othon Ghalanos as the notify party, and that they would immediately be sent to them as well.

The application of the prima facie rule of s 32(1) of the SoGA implied that the property passed upon consignment. Lord Rodger did not disagree, but stressed the relative effect of the rule. Clearly, *Scottish & Newcastle* had no intention whatsoever to retain the bill of

⁷⁵ OLG Hamburg 11 September 1986, TranspR 1987, 67; BGH 25 April 1988, TranspR 1988, 288 (*The Dithmarschen*).

⁷⁶ *Scottish & Newcastle v Othon Ghalanos* [2008] 2 All ER 768, [2008] 1 Lloyd's Rep 462. The case was really about the qualification of the CFR Incoterm and the jurisdiction of the English courts, but it touched upon the transfer of property in the process.

lading pending payment of the purchase price in this particular case, but a different contractual arrangement could override the statutory presumption:⁷⁷

A term under which the seller is to retain the bills of lading until payment is, of course, common in both CIF and FOB contracts. Since the bill of lading is the symbol of the goods, under such an arrangement the seller or his agent not only retains the bill of lading but also, thereby, retains the right to possession of the goods until the price is paid. Often, the property in the goods will also be intended to pass only on payment. In such a case, even though the seller ships the goods on board a vessel nominated by the buyer, by doing so he does not intend to transfer possession of the goods to the buyer. On the contrary, the intention of the parties is that the buyer is not to obtain possession of the bill of lading — and hence of the means to take delivery of the goods from the carrier — unless and until he has paid the price. In that situation it seems to me at least arguable that the prima facie rule in section 32(1) of the Sale of Goods Act would be displaced by the terms of the contract between the parties.

In this approach, the prima facie rule of s 32(1) of the SoGA is really a default rule, applicable only if the parties to the sale have not agreed otherwise. It is submitted that this is the correct approach, and that a ‘cash against documents’ or similar arrangement (or intention in fact) in the sales contract would therefore set aside s 32(1) of the SoGA.⁷⁸

Finally, and recently, the Singapore High Court reflected on the matter in *The Bum Chin*.⁷⁹

NMA had sold three shipments of palm oil to Wilmar, delivery FOB Indonesian ports.

⁷⁷ Ibid, Lord Rodger.

⁷⁸ *Benjamin's Sale of Goods* (n 26) 1528.

⁷⁹ *Wilmar Trading Pte Ltd v Heroic Warrior Inc (The Bum Chin)* (n 71).

Accordingly, Wilmar had to arrange for the transportation and NMA had to bring the oil on board.

Wilmar chartered the *Bum Chin* for the carriage by sea from Kuala Tanjung (Indonesia) to Jeddah and Adabiyah (Saudi Arabia). The owner was to draw up a 'non-negotiable' bill of lading that mentioned the seller as the shipper, but this bill of lading was ultimately never issued as the oil was damaged in the course of loading.

One of issues in the case between Wilmar and the (registered) owner of the *Bum Chin* related to the transfer of the property and the contemplation of the issuance of the non-negotiable bills of lading played a role in that respect. Belinda Ang J held with regard to the transfer of the property in the oil:

The prima facie presumption in section 19(2) is that by reserving its right of disposal in the bill of lading, the property in the goods remains with the seller until the seller has received payment of the price in full. Evidence of such a reservation of right is where the bill of lading is made out to the seller as shipper or to the shipper's order. In this case, while no bills of lading were issued, the non-negotiable bills of lading can serve as proxies as to the intention of the buyer and seller on the passing of property in the goods at the time of shipment. The way the non-negotiable bills of lading were intended to be made out is consistent with the payment term of the three sales contracts. Ms Chen's testimony that MNA is the named shipper on the non-negotiable bill of lading. Further, in the email of 12 April 2013 which sets out the revised shipping instructions to MNA (also referred to above at para 29), MNA would be the named shipper, and the non-negotiable bills of lading were contemplated to be made out to the order of the shipper, with the plaintiff as the notify party. These are clear

indications that the shipper, MNA, would be reserving its title to the shipment of palm oil products. Whilst the non-negotiable bills of lading were contemplated for custom clearance purposes, the information on the non-negotiable bills of lading as described evidentially supports an intention by MNA to reserve its right of disposal. This is logical in the light of the terms of payment in the sale contracts (see paras 27 to 30 above on the alternative modes of payment).

Again, it is submitted that this is a correct approach. In fact, it is submitted that the presumption of s 19(2) of the SoGA can be applied irrespective of the negotiability of the bill of lading. The intention of the parties to a sales contract to reserve the right of disposal should be determinative, not the difference between an order and a straight bill of lading.

If the seller and buyer agree on an invoice with an expiry date of 90 days after delivery, for instance, the seller obviously had no intention to reserve the right of disposal. Conversely, a 'cash against documents' provision in the sales contract, or in fact really any arrangement whereby the buyer would ultimately need to present the bill of lading in the port of discharge to gain access to the goods, triggers a presumption that the seller has reserved the right of disposal pending payment of the purchase price.⁸⁰

⁸⁰ Arguably, Belinda Ang J also leaned this way when she held (ibid [34]) on the onus of proof: 'The plaintiff has not shown evidence of payment nor shown there was no intention on the part of the seller to reserve its right of disposal.'

6 Electronic bills of lading

An electronic bill of lading is basically a paperless equivalent that matches the functions of a classic bill of lading. The advantages of an electronic bill of lading are obvious and compelling.

The first, and probably the best, argument for an ultimately successful introduction of the electronic bill of lading is that it will save considerable costs. Estimates on the savings as a result of the use of electronic instead of 'paper' documents roughly vary around 8 to 15% per voyage,⁸¹ or alternatively, in round figures and subject to a 50% adoption rate, USD 4 billion per year.⁸²

Second, it will be easier to work with electronic documents, especially in times of pandemics (and other calamities). Whereas the dealings with paper documents require the physical presence of people to sign, send and receive them, electronic documents can be accessed and processed from basically any laptop or smart device.

⁸¹ SD Girvin and E Ong, 'Electronic Bills of Lading, Blockchain and Distributed Ledger Technology (DLT)' in Stephen Girvin and Vibe Ulfbeck (eds), *Maritime Organisation, Management and Liability: A Legal Analysis of New Challenges in the Maritime Industry* (Hart Publishing 2020) 195.

⁸² See <<https://dcsa.org/wp-content/uploads/2020/05/20200519-DCSA-taking-on-eBL.pdf>>: 'Nonetheless, our research derived a comparison that indicates the total cost of processing paper bills is almost three times that of eBLs. At a global economic growth rate of 2.4% through 2030, as forecasted by the OECD, we estimate that the industry can potentially save more than \$4 billion per year if 50% eBL adoption is achieved. IATA introduced e-Air Waybills (e-AWB) for airfreight in 2010. At present, adoption of e-AWB is over 68%. If we start on standardising eBL now, we have reason to believe a 50% adoption rate is feasible by 2030.'

Third, it will arguably be safer. Paper documents can be falsified,⁸³ but more importantly perhaps, they can simply get lost.⁸⁴

Fourth, it will be quicker. Whereas paper bills of lading need to travel (by courier) from one desk to the next, electronic bills of lading travel (by email) on the digital highway.

Fifth, but certainly not least from a global environmental perspective, it will save paper, and therefore wood, and therefore ultimately rainforests.⁸⁵

In spite of all these advantages, however, it is certainly not blue skies all round. In fact, with a less than 2% market share in 2022,⁸⁶ the electronic bill of lading is still very much a work in progress.⁸⁷

⁸³ This argument works the other way as well, of course. Digital systems can be hacked, and digital codes can be intercepted, as in *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep 508, discussed by M Goldby, 'What is Needed to Get Rid of Paper? A New Look at Delivery Orders' (2015) 21 JIML 339; M Song and M Tsimplis, 'Innovation and the Law: Legacy v Efficiency and Optimisation' (2017) 17 Shipping & Trade Law 11; A Tettenborn, 'Bills of Lading and Electronic Misdelivery' [2017] LMCLQ 479; S Rainey, 'Pinning Down Delivery: *Glencore v MSC* and the Use of PIN Codes to Effect Delivery' in B Soyer and A Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Informa 2019) 47; M Spanjaart, 'Surrender, Release and Digital PIN Codes' in Stephen Girvin and Vibe Ulfbeck (eds) *Maritime Organisation, Management and Liability: A Legal Analysis of New Challenges in the Maritime Industry* (n 81) 177.

⁸⁴ E Ganne, *Can Blockchain Revolutionize International Trade?* (World Trade Organisation 2018) 17: 'International trade transactions involve a multitude of actors and continue to rely extensively on paper. In 2014, shipping company Maersk followed a refrigerated container filled with roses and avocados from Kenya to the Netherlands to document the maze of physical processes and paperwork that impact every shipment. The numbers speak for themselves: they found that around 30 actors and more than 100 people were involved throughout the journey, with the number of interactions exceeding 200. The shipment took about 34 days to go from the farm to the retailers, including 10 days waiting for documents to be processed. One of the critical documents went missing, only to be found later amid a pile of paper.'

⁸⁵ This may not be entirely true, as the underlying technology can be rather energy consuming.

⁸⁶ <<https://www.bimco.org/insights-and-information/contracts/20220714-eb1>>.

⁸⁷ In a 2003 UNCTAD survey, <<https://studylib.net/doc/10461600/distr.-general--unctad-sdte-tlb-2003-3>>, respondents commented on the obstacles for the implementation of electronic equivalents. The three biggest concerns were that the infrastructure/market/trading partners were not yet ready, the legal framework was not clear enough or adequate, and that electronic equivalents are not sufficiently secure. The survey is obviously rather outdated, though.

As always, the costs precede the benefits, and (the already conservative circle of) carriers, terminals, banks and insurers will have to invest substantially today in order to benefit at some point in time in the future.⁸⁸

Another problem may be that there is at present no uniform framework to regulate electronic bills of lading. The Rotterdam Rules have yet to enter into force, of course, and national legislation sometimes trails behind.⁸⁹

UNCITRAL has drafted a template in the shape of a model law (the UNCITRAL Model Law on Electronic Transferable Records (the MLETR)) for countries to incorporate into their domestic legislation.⁹⁰ Arguably, the most important rule follows from art 7(1) MLETR: ‘An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form’.

This is essentially a paramount rule, as it ensures that ‘electronic’ and ‘paper’ documents are equal in the eyes of the law,⁹¹ but there is a catch. The MLETR only covers electronic

⁸⁸ It also means that ‘late adopters’ will benefit from the efforts of the ‘early adopters’, and may enjoy a free ride to some extent.

⁸⁹ It is submitted that this is somewhat inherent to the development of commercial law, though. Commercial law is not drafted by commercial lawyers in order to be observed by commercial people. It has always been the other way around. Commercial people do their commercial business in a way they see fit, and commercial lawyers then try and fit commercial practice into the legal system afterwards.

⁹⁰ Several countries have incorporated (their version of) the MLETR in domestic legislation, Singapore very recently amongst them. See <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status> for the progress.

⁹¹ The principle of functional equivalence: *UNCITRAL Model Law on Electronic Transferable Records* (New York 2018) 23; M Goldby, *Electronic Documents in Maritime Trade Law and Practice* (2nd edn, UOP 2019) 38.

versions of negotiable bills of lading,⁹² but not electronic versions of a straight bill of lading:⁹³

The definition of 'electronic transferable record' does not cover certain documents or instruments, which are generally transferable, but whose transferability may be limited due to other agreements, for example in the case of straight bills of lading.⁹⁴

Finally, there is an obvious practical issue.⁹⁵ It is not so difficult to imagine that an electronic bill of lading can effectively operate as a receipt, and that it may very well evidence the contract of carriage, but there are complications with regard to the document of title function.

How do you 'hold', 'deliver' and 'endorse' an electronic document;⁹⁶ how do you 'present' an electronic document to the carrier in the port of discharge; and how can something intangible symbolise the goods?

⁹² Pursuant to art 11(1) MLETR the 'possession' of an electronic record requires the establishment of the 'exclusive control of that electronic transferable record' and the identification of its controller. Article 11(2) MLETR then provides that 'Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.' When an endorsement is required, art 15 MLETR stipulates that this requirement is met 'if the information required for the endorsement is included in the electronic transferable record.' The information must further be compliant with the requirements set forth in arts 8 and 9 MLETR. These provisions relate to the need for records to be in writing and/or signed.

⁹³ *UNCITRAL Model Law on Electronic Transferable Records* (n 91) 39.

⁹⁴ Strangely enough, the list of indicative documents does suggest an air waybill: *ibid* 27.

⁹⁵ And perhaps a certain fear of the unknown as well: see N Gaskell, 'Bills of Lading in an Electronic Age' [2010] LMCLQ 283.

⁹⁶ Girvin and Ong (n 81) 204-206.

Over time, several solutions have been advanced to address these questions,⁹⁷ and that, in itself, perhaps introduces yet another potential problem. At present, there is no standard template for an electronic bill of lading. There are initiatives, there are pilots, but there is no interoperability.⁹⁸

Bolero is not the oldest system, but it is the oldest system still around.⁹⁹ The Bolero bill of lading was introduced in 1999, together with a messaging platform, a register, and a rule book.¹⁰⁰ The basic idea behind the Bolero bill of lading is to capture the transfer of rights through the concept of novation, whereby a new relation between the carrier and the ‘transferee’ replaces the initial contract between the carrier and the shipper. This is challenging from a dogmatic point of view, as the concepts of novation and transfer of rights would seem to exclude each other by definition.¹⁰¹

The constructive transfer of possession of the goods in the Bolero system requires attornment.¹⁰² The carrier acknowledges the position of the new bill of lading holder,

⁹⁷ Several of these initiatives have meanwhile been recognised by the International Group of P&I Club, which basically means that liabilities regarding goods travelling under electronic bills of lading enjoy P&I cover. See eg the Swedish Club circular <<https://www.swedishclub.com/news/circulars/p-and-i-circulars/electronic-paperless-trading>>: ‘Since 20 February 2010 liabilities arising in respect of the carriage of cargo under such paperless trading systems were covered, ... the Group has approved electronic i.e. paperless systems administered by EssDOCS, by Bolero International Ltd (more specifically the Rulebook/Operating procedures September 1999), E-TITLE, edoxOnline, WAVE, CargoX, TradeLens (TradeLens eBL), and now IQAX Limited has been added to the list of IG approved system providers.’

⁹⁸ See eg <<https://www.bimco.org/insights-and-information/contracts/20220714-eb1>>.

⁹⁹ See in great detail the dissertation of T Eckardt, *The Bolero Bill of lading Under German and English Law* (Sellier European Law Publishers 2004).

¹⁰⁰ <www.bolero.net/wp-content/uploads/2020/04/Bolero-Insights-The-Bolero-Rulebook-NW.pdf>.

¹⁰¹ Novation implies that the initial contract between the shipper and the carrier is replaced by a new contract. The counterpart of the carrier in this new contract cannot be a transferee, since nothing has been transferred.

¹⁰² Girvin and Ong (n 81) 199.

confirms that the goods will be delivered to it and the possession of the goods passes by designation.¹⁰³

There can only be one holder of the bill of lading. The shipper, or subsequent bill of lading holder, when there are multiple transfers during the voyage, can no longer enforce any rights under its contract with the carrier.¹⁰⁴ Bolero records all the changes in the register and cancels the private key with which the former holder could exercise control over the goods.¹⁰⁵

In recent years, the focus has shifted to blockchain bills of lading. The information in the bill of lading is then basically translated into digital tokens and stored in an electronic ledger.¹⁰⁶ In principle, it cannot be tampered with afterwards, as future 'blocks' with information are linked to the existing 'chain', hence the blockchain.¹⁰⁷

¹⁰³ The Bolero rulebook describes the procedures in art 3.4.1. as follows: '(1) The transfer of constructive possession of the goods, after the creation of a transferable Bolero Bill of Lading, shall be effected by the Designation of: (a) a new Holder-to-order, (b) a new Pledgee Holder, (c) a new Bearer Holder, or; (d) a Consignee Holder.

(2) The Carrier shall, upon Designation of such Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder, acknowledge that from that time on it holds the goods described in the Bolero Bill of Lading to the order of the new Holder-to-order, Pledgee Holder, Bearer Holder or Consignee Holder, as the case may be.

(3) Where a new To Order Party is Designated, no transfer of constructive possession of goods shall take place until such time as the To Order Party also becomes Designated as Holder and so becomes a Holder-to-order.

(4) Where a new Consignee is Designated, no transfer of constructive possession shall take place until such time as the Consignee also becomes Designated Holder.'

¹⁰⁴ The shipper can still be liable, though: see art 3.5.2.(3)(a) of the rule book.

¹⁰⁵ Girvin and Ong (n 81) 199.

¹⁰⁶ Whereas Bolero (and EssDOCS and E-TITLE) is a register-based system, this is a token-based system. See in more detail E Ong, 'Blockchain bills of lading and the UNCITRAL Model Law on Electronic Transferable Records' [2020] JBL 202.

¹⁰⁷ Awareness of blockchain technology is really quite common these days, not so much because of the electronic bill of lading, alas, but because of the popularity of bitcoins and other crypto currencies.

A blockchain bill of lading will often operate on the basis of Distributed Ledger Technology (DLT).¹⁰⁸ The ‘distributed’ part of this technology implies that the system does not operate a central register. The information is simply available to, and can be verified by, all users of the ledger.¹⁰⁹

Another advantage of a token-based system over a register-based system is that it more closely resembles the existing ‘paper’ practice. The blockchain bill of lading is actually transferred, instead of just registered as such, and is therefore better equipped to be used as a document of title:¹¹⁰

Blockchain technology could make the legal distinction between paper and e-bills less problematic. The technology guarantees that each e-bill is and remains entirely unique. This ensures that only the holder of the e-bill can exercise the right to claim the goods, making blockchain e-bills better suited to use as a document of title than traditional e-bills.

All the same,¹¹¹ blockchain bills of lading have not made their giant leap forward yet, and it may actually still take some time for all stakeholders involved to grow used to the concept.¹¹²

¹⁰⁸ It is therefore not a case of equivalence: see Ganne (n 84) 17: ‘Because it is simple and catchy, the term “Blockchain” is often used to refer to distributed ledgers whatever their specific features are. Blockchain, however, is only one type of distributed ledger technology (DLT) – one that compiles transactions in blocks that are then chained to each other.’

¹⁰⁹ Girvin and Ong (n 81) 203.

¹¹⁰ Reed Smith LLP, *Blockchain Distributed Ledger Technology and Designing the Future* (Reed Smith 2019) 75.

¹¹¹ Obviously, there are weaknesses as well: see in more detail Goldby (n 91) 40-42.

¹¹² T Mcalister, ‘Trust is the Missing Link in Shipping’s Bid to Harness Benefits of Blockchain’ *Trade Winds* (20 May 2020); Girvin and Ong (n 81) 221.

7 Electronic bills of lading under the Rotterdam Rules

The RR are supposed to succeed the HVR in due course, although it is not entirely clear when (and whether) they will actually achieve this objective. Many countries were happy enough to sign the Convention in Rotterdam in 2009, but its ratification has proved to be a tedious process so far.¹¹³

The RR regulate contracts for the carriage of goods (at least partly) by sea, and specifically cater for the use of electronic transport documents in that respect.¹¹⁴ The Rules do not refer to bills of lading. Instead, the drafters of the Rules have chosen to refer to a more general 'transport document'.¹¹⁵

Article 1(14) RR defines the transport document as 'a document issued under a contract of carriage by the carrier that: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage.' A transport document under this definition effectively covers order, bearer and straight bills of lading.

¹¹³ See <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> for the progress. At present, Cameroon, Congo, Spain, and Togo have ratified the RR. Benin has acceded to the RR. At least 20 ratifications are required for their entry into force.

¹¹⁴ See also the Preamble on this objective: 'Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents ...'.

¹¹⁵ The objective of the drafters of the RR was to 'avoid the ambiguities and confusion that would inevitably accompany the use of established terms with inconsistent meanings': MF Sturley, T Fulita, G van der Ziel, *The Rotterdam Rules* (Sweet & Maxwell 2020) 212.

The paperless equivalent of a transport document is the 'electronic transport record', defined in art 1(18) RR as 'information in one or more messages issued by electronic communication under a contract of carriage by a carrier', including all the necessary attachments.¹¹⁶

A negotiable electronic record can be held and transferred,¹¹⁷ provided that the integrity of the record is secured in accordance with the procedures of art 9(1) RR.¹¹⁸ Article 57(2) RR stipulates:

When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

To qualify as a negotiable record, art 1(19) RR prescribes that an electronic record must mention that it is either 'to order', or that it is 'negotiable', or otherwise contain similar

¹¹⁶ Namely, 'information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, ...'.

¹¹⁷ In view of the definitions of 'holder' and 'transfer' under the rules, only negotiable electronic records can be held and transferred. Article 1(10) RR defines the holder as the person 'to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.' Article 1(22) RR reads: 'The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.' The transfer of a non-negotiable electronic transport record, however, is not defined.

¹¹⁸ Article 9(1) RR prescribes: 'The use of a negotiable electronic transport record shall be subject to procedures that provide for: (a) The method for the issuance and the transfer of that record to an intended holder; (b) An assurance that the negotiable electronic transport record retains its integrity; (c) The manner in which the holder is able to demonstrate that it is the holder; and (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.'

words.¹¹⁹ In the absence thereof, the electronic record is a non-negotiable electronic transport record.¹²⁰ This has consequences for the operation of electronic straight bills of lading under the RR.

Straight bills of lading will obviously not contain an order clause,¹²¹ and they will not claim to be 'negotiable' either. A paperless equivalent of the straight bill of lading, an electronic straight bill of lading, would therefore necessarily qualify as a non-negotiable electronic transport record under the RR by default.

It is submitted that this is very unfortunate,¹²² especially since the RR aim to codify the presentation rule in a mandatory regime in combination with the fact that art 46 RR only applies to non-negotiable transport documents, and not to non-negotiable electronic transport records.

The presentation rule under the RR basically works as follows. Article 45 RR stipulates that delivery in the case of carriage under a non-negotiable transport document is simply made to the consignee. Article 46 RR, however, ensures that the delivery shall be made against surrender if the non-negotiable transport document states that it must be surrendered.¹²³

¹¹⁹ Pursuant to art 1(18) RR: "Negotiable electronic transport record" means an electronic transport record: (a) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and (b) The use of which meets the requirements of article 9, paragraph 1.'

¹²⁰ Article 1(20) RR.

¹²¹ As they would otherwise be order bills of lading.

¹²² And a violation of the (UN) principle of functional equivalence, so it seems.

¹²³ This is common practice: see eg the Conline bill of lading (2016): 'One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order, whereupon all other Bills of

This provision does not mention non-negotiable electronic transport records. Article 47 RR then prescribes that the delivery is made against the surrender of a negotiable transport document or negotiable electronic transport record.

This means that paper straight bills of lading and electronic straight bills of lading are treated differently under the RR. Classic 'paper' straight bills of lading containing the standard extended attestation (surrender) clause still need to be presented in accordance with art 46 RR. Electronic straight bills of lading, however, even if they were to contain the standard extended attestation (surrender) clause do not have to be presented, as they are non-negotiable electronic transport records.

The contractual incorporation of a standard extended attestation (surrender) clause in a non-negotiable electronic transport record cannot override the system of the RR. The introduction of a contractual presentation rule in the electronic straight bill of lading obviously affects the obligations of both the carrier and the shipper under the RR, and is therefore void pursuant to art 79 RR.¹²⁴

lading to be void. IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date'.

¹²⁴ *Sidhu v British Airways* [1997] Lloyd's Rep 76.

8 The future of the electronic straight bill of lading

The maritime world is conservative. It is not unreceptive to new developments when it must,¹²⁵ but it seems to prefer the status quo when it can. The basic attestation clause in the *Mary Martin* bill of lading of 1539, for instance, still very much resembles the corresponding provision in the standard MSC bill of lading almost 500 years later:

In wytness of the truythe I the sayde master or the purser for me have firmyd iji bylls of the one tenor the one complyed with and fulfilled the other to stand voyd.¹²⁶

IN WITNESS WHEREOF the Carrier or their Agent has signed the number of Bills of Lading stated at the top, all of this tenor and date, and wherever one original Bill of Lading has been surrendered all other Bills of Lading shall be void.¹²⁷

Mutatis mutandis, the same applies to the (initially late medieval) practice of issuing a bill of lading in several originals. Clearly, the issuance of several originals diminished the chances that the sole original is lost, burnt, or otherwise damaged, but this practice dates back to the Middle Ages when copies were necessarily hand-written, and a copy was therefore in fact an extra original.

¹²⁵ The container revolution, eg, was wholeheartedly embraced.

¹²⁶ *The Mary Martyn* (n 10) 88-89.

¹²⁷ <<https://www.msc.com/en/carrier-terms>>.

This practice to issue bills of lading in several originals has never been abandoned,¹²⁸ however.¹²⁹ Lord Blackburn suspected, already as early as 1882, with admirable foresight, that ‘merchants dislike to depart from an old custom for fear that novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out.’¹³⁰

This conservative attitude presents an opportunity for the straight bill of lading in a paperless future. It is submitted that an electronic straight bill of lading can be introduced overnight without the need for registers, blockchain technology, or even revised legislation.

It is not too difficult to digitalise the functions of a bill of lading as a receipt and the evidence of the contract of carriage.¹³¹ Conversely, it is rather difficult to simulate the symbolic function in a paperless system.

The absence of this symbolic function, however, just happens to be the crucial difference between negotiable (order/bearer) bills of lading and non-negotiable (straight) bills of lading.¹³² Admittedly, a standardised one-size-fits-all electronic bill of lading is, and remains, the holy grail, but while the search continues, a dedicated electronic straight bill of lading may just be the next best thing.

¹²⁸ Usually three, but sometimes even more. In *Australia Capital Financial Management Pty Ltd v Freight Solutions (Vic) Pty Ltd* [2017] NSWDC 279, there were eight originals.

¹²⁹ In spite of the recommendations made to issue just one original at the CMI in Venice in 1983: see J Schultsz, R.J.L. Thomas, *Bills of lading and Fraud: CMI Colloquium on Bills of Lading* (Venice 1983) 42, 52.

¹³⁰ *Glyn Mills & Co v East and West India Dock* [1882] 7 App Cas 591.

¹³¹ The electronic air waybill is already fully operational, and had a market share of 68% in the summer of 2020: <<https://dcsa.org/wp-content/uploads/2020/05/20200519-DCSA-taking-on-eBL.pdf>>.

¹³² Apart from the endorsement mechanism, of course.

The presentation rule can easily be simulated in this context, since the name of the intended consignee is already given and the bill of lading cannot be transferred to anyone else. In other words, the 'physical' presentation of the bill of lading is not necessary to identify the consignee. The presentation of a straight bill of lading is really only necessary to ensure that the unpaid shipper/seller retains its grip on the goods, and that the carrier can show afterwards that it delivered the goods to the person entitled to them.¹³³

These two objectives are not subject to the 'singularity requirement'.¹³⁴ The protection of the unpaid seller, and the proper discharge of the carrier, do not necessarily require (the transfer of) an original piece of paper. They only require that it is clear from the representations of the parties that the shipper/seller agrees to the delivery of the goods to the named consignee, and that the carrier is discharged from its obligations under the contract of carriage when it delivers the goods to that named consignee.¹³⁵

An electronic straight bill of lading can largely follow the template of an electronic waybill, but with two extra features: one optional feature regarding the transfer of the right of control, and one absolutely essential feature in order to simulate the presentation rule.¹³⁶

It does not happen that often in practice, but the shipper/seller is in principle free to transfer its right of instruction to the consignee at any time during the voyage. The

¹³³ The lawful holder is, in this particular context, perhaps not the best term.

¹³⁴ Goldby (n 91) 37 describing this as: 'recording the performance obligation in such a way as to preclude the risk of it being duplicated (known as the 'singularity requirement').

¹³⁵ Spanjaart (n 9).

¹³⁶ The system would also remedy the unfortunate treatment of the electronic straight bill of lading under the Rotterdam Rules (as described above).

shipper/seller will usually have no reason to, but that may be different, for instance, if the consignee/buyer has already paid the purchase price in advance. The shipper/seller can then transfer the right of control to the consignee. In the case of a 'paper' bill of lading, the shipper/seller would then transfer the straight bill of lading to the consignee, but this result can easily be achieved in another way.

In this scenario, the shipper would take the initiative, as it would now. It would contact the carrier and the consignee, and inform them both that the right of control under the electronic straight bill of lading passes to the consignee. The notification of passing of the right of control to the consignee would replace the passing of the physical document to the consignee. The situation is then really the same as if the shipper/seller had sent the full set of the original straight bill of lading to the consignee. The consignee does not have to formally acknowledge or accept the (passing of the) right of control: it can simply exercise the right of control, or of course decide not to.

This process whereby the shipper/seller would send the notification to the carrier as well is slightly different from the current 'paper' scenario. Normally, the carrier would in due course be notified, namely when the consignee would produce the full set of the original straight bill of lading in order to exercise its right of control.¹³⁷ Since that is for obvious reasons no longer possible, the 'heads-up' to the carrier really only moves this moment forward in time, which probably also helps to avoid surprises and smoothen the delivery process later on.

¹³⁷ The RR have codified this rule in art 51(2) RR, but only for a non-negotiable transport document which states that it must be surrendered. This provision does not mention non-negotiable electronic transport records.

Where the right of control has already passed to the named consignee in the course of the voyage, the presentation rule can be discarded. The right of control includes the right to ask for the delivery of the goods, and it does not need to be re-established in any other way.

Assuming that the right of control has not passed, however, the delivery of the goods requires an extra formality. In this case, the carrier would take the initiative, partly because it actually already does so in the current situation, and partly because it is probably the easiest way to proceed and in its own interest as well.

Sometime, usually between 24-96 hours prior to arrival at the port of discharge, the carrier will send a notice of arrival to the cargo interests.¹³⁸ These notices of arrival have over time evolved into elaborate documents with contractual effect. The CMA CGM arrival notice, for instance, contains the following provision:¹³⁹

¹³⁸ <<https://www.maersk.com/support/faqs/arrival-notice>>: 'Arrival notice is a document issued by Maersk to the import parties (e.g. Consignee, First Notify) 24-96 hrs prior to vessel arrival. This document provides details on the shipment such as vessel/voyage number, party details, cargo/container details, estimated arrival date time at the discharge location and in some cases outstanding charges. This information can be used by the consignee to plan for cargo release i.e. arranging customs clearance, requesting for a delivery order, clearing outstanding charges, and planning haulage.'

¹³⁹ <<https://www.cma-cgm.com/static/MY/attachments/Arrival%20Notice%20Clauses%2025072019.pdf>>. The full text of the clause (for arrivals in Malaysia) is more extensive and reads: 'THIS SERVES AS A NOTICE to inform you of the arrival of your consignment. It cannot be regarded as Delivery Order and presented for Cargo Release/Delivery. You are kindly requested to present the ORIGINAL BILL OF LADING to us in exchange for the DELIVERY ORDER. The vessel ETA date is only an estimation (Expected to Arrive). This notice is solely FOR INFORMATION only. Failure to give such notification shall not involve Carrier's Liability nor relieve Merchant of any obligation for taking delivery of the Cargo as per Bill of Lading's Terms and Condition Clause 11 (1).'

THIS SERVES AS A NOTICE to inform you of the arrival of your consignment. It cannot be regarded as Delivery Order and presented for Cargo Release/Delivery. You are kindly requested to present the ORIGINAL BILL OF LADING to us in exchange for the DELIVERY ORDER.

This notice only needs a few changes and follow-up correspondence to arrange for an orderly delivery of the goods in accordance with the reasoning behind the presentation rule. First, the arrival notice is obviously sent to the shipper, and for good order's sake to the named consignee in copy. The current wording is then amended as follows:

THIS SERVES AS A NOTICE to inform you of the arrival of your consignment. It cannot be regarded as Delivery Order and presented for Cargo Release/Delivery. You are kindly requested to confirm that the goods can be delivered to the consignee mentioned in the BILL OF LADING (as attached).

If the requested confirmation does not follow, everything stays as it was before. The carrier can, of course, try again later, but in the absence of a different answer or other instructions, the goods will simply be delivered to the shipper.

If the shipper indeed confirms that the goods can be delivered to the named consignee, the carrier can proceed with the next step. The carrier now contacts the consignee, and this time with the shipper in copy:

You are kindly requested to confirm that you will take delivery of the goods carried under the BILL OF LADING (as attached) in exchange for the DELIVERY ORDER.

If the requested confirmation does not follow, everything moves back again to square one. The carrier can, of course, try again later, but absent any confirmation from the consignee, the goods will ultimately need to be delivered to the shipper. This is essentially the 'paper' situation whereby the consignee holds an original, but for some reason fails to present the bill of lading to the carrier.¹⁴⁰

If the consignee indeed confirms that the goods can be delivered to the named consignee, the carrier can proceed with the issuance of a delivery order or (more likely) a PIN code so that the actual delivery of the goods can take place.¹⁴¹ The consignee's confirmation then equals the surrender of the bill of lading 'duly endorsed', enabling the carrier to prove afterwards that it delivered the goods to the correct receiver.

There is no need for any blockchain technology. A secured email with a two-step verification process will do.¹⁴² In view of their pivotal role in the process, however, carriers will probably prefer to run all communications through their own site or platform (where the booking was probably made in the first place).¹⁴³ Either way, this is nothing new, and

¹⁴⁰ This usually becomes a messy situation whereby the goods are kept at the terminal, costs are incurred, demurrage is running, and legal proceedings are likely to follow. Still, this is something that actually happens on a daily basis. The carrier will also have made arrangements for this situation on the reverse of the bill of lading.

¹⁴¹ Spanjaart (n 83) 177.

¹⁴² In the Netherlands, the email communication between advocates and courts has been secured in this way. The adoption of the concept was accelerated by the pandemic, and legal documents can now simply be exchanged by email (instead of regular mail or courier).

¹⁴³ *UNCITRAL Model Law on Electronic Transferable Records* (n 91) 23 also introduces 'the principle of technological neutrality'. It really does not matter so much how, and through which channels, and/or means, this communication takes place, provided that it works.

the use of already customary procedures will only facilitate the general acceptance of electronic equivalents.

There is no need for revised legislation either. Admittedly, the delegates to the Hague Conference will not have foreseen the use of electronic bills of lading in 1921, but the absence of a 'paper' bill of lading does not necessarily mean that the HVR are then irrelevant. The application of the HVR does not depend on the actual issuance of a bill of lading. The contemplation of its issuance is enough,¹⁴⁴ and the choice of the parties to the contract of carriage for an electronic straight bill of lading arguably encompasses its contemplation.

On a more principled approach, however, it is submitted that an electronic straight bill of lading is a bill of lading in the sense of art I(b) HVR, since there is really no sensible commercial reason why the drafters would have wished to deny the shipper or consignee named in an electronic straight bill of lading the minimum standard of protection afforded to the holder of a 'paper' straight bill of lading.¹⁴⁵

¹⁴⁴ *The Bum Chin* (n 71); *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 1 Lloyd's Rep 321; *The Happy Ranger* (n 25), Tuckey LJ: 'It does not seem to me that the rules are concerned with whether the bill of lading contains terms which have been previously agreed or not. It is the fact that it is issued or that its issue is contemplated which matters.'

¹⁴⁵ Lord Steyn held in *The Rafaela S* (n 4): 'There is simply no sensible commercial reason why the draftsmen would have wished to deny the CIF buyer named in a straight bill of lading the minimum standard of protection afforded to the CIF buyer named in an order bill of lading.'