

THE RECEIPT FUNCTION OF THE BILL OF LADING: NEW CHALLENGES

The shipping practice is an evolving landscape, and the diversity of transport documents has been a source of confusion among the shippers, bankers, carriers and cargo receivers. With the rise of containerisation, it is not uncommon for goods to be covered with multimodal transport documents. Can a shipper or consignee named as such in a multimodal transport document covering goods carried partly by sea make use of the statutory provisions on the receipt function of bills of lading? Can such a transport document be treated as tantamount to a bill of lading for that purpose? The ever-changing shipping practice has also left us with re-documentation for cargoes commingled/blended aboard a vessel. For present purposes, this practice raises an important question: Where different parcels of cargo are loaded at different locations, what particulars in relation to such goods must be provided in the consolidated bill of lading and what evidential effects do they have? Another contemporary problem is the common presence of defects in cargoes such as rice, grain and steel. Here, the master's dilemma is obvious. On the one hand, to inaccurately clause the bill of lading would give rise to damages against the shipper. On the other hand, not to clause the bill of lading in respect of goods otherwise than in apparent good order and condition would expose the carrier to a considerably high risk of liability vis-a-vis the cargo receiver. It is true that some visible, but minor, contamination, moisture, discoloration or some other imperfections can be expected of some particular types of cargo. However, where the degree of imperfection can vary considerably and where views of masters may honestly differ, how are carriers to protect themselves against the risk of such misdescriptions? Where the degree of defect in the goods is at dispute, can a letter of indemnity issued against a clean bill of lading be enforceable?

The bill of lading originally started life as a receipt for the goods shipped aboard a vessel. This long-lived function of the bill of lading has always been and still is crucial to the main players in international trade, namely buyers, sellers and bankers. The main reason behind this is the nature of the international sale of goods, where the agreed place of delivery is usually some distance from the agreed destination. This peculiar nature of international sales is seen particularly in sale contracts on shipment terms (namely on CIF, CFR and FOB terms). In such sales, the delivery of goods generally¹ takes place on shipment. Aware that the risk of loss of or damage to goods during transit lies with them, buyers naturally wish to part with their money against the tender of a “conforming” receipt: a receipt covering the contract goods and showing that the goods were in apparent good order and condition at the time of their shipment.² In the case of damaged and/or short-delivered goods, a “conforming” receipt can help buyers establish the carrier’s liability.³ Such a receipt makes it possible to prove that the apparent condition and/or quantity of the goods shipped are different from what has actually been delivered by the carrier.

Given that buyers part with their money in reliance on the particulars of the goods specified in the bill of lading, sellers naturally wish to be sure of getting from the

¹ It is possible for parties to change this default rule and agree that risk will pass before or after shipment. Where parties can be said, even by implication, to have intended to change the default rule, an English court may give effect to the parties’ intention to that effect. However, under the Incoterms rules, parties must have an express and clear agreement to change the default rule on the passing of risk.

² Under English law, a claused bill of lading is considered to be a bad tender even in cases where the sale contract is silent on this matter. However, if a bill of lading records a post-shipment damage, it has to be treated as a “clean bill of lading” and be accepted. See the decision in *The Galatia* [1980] 1 Lloyd’s Rep 453. The situation is different in cases where the payment is agreed to be made through a letter of credit and where the letter of credit incorporates the UCP600. Article 27 of the UCP600 makes no difference between pre-shipment and post-shipment damages. Consequently, if a bill of lading contains a statement that negatives the pre-printed words “shipped in apparent good order and condition”, it will not be a good tender, unless the letter of credit contracts out of Article 27.

³ For a cargo claim in bailment, see the decision in *Elder Dempster v Paterson Zochonis* [1924] AC 522 (HL). Where the buyer has a charterparty with the shipowner who is also the contractual carrier under the bill of lading covering the relevant goods, the bill of lading will not function as a contract of carriage but will still have a receipt function. For this reason, the evidential power of such a bill of lading will not be drawn from the Carriage of Goods by Sea Act 1971, which applies to “contracts of carriage” covered by a bill of lading or a similar document of title, see section 1(4) of the Act and Article I(b) of the Hague-Visby Rules scheduled to the Act. In such cases, the evidential power cannot also be drawn from section 4 of the Carriage of Goods by Sea Act 1992, given that a buyer in such cases does not “become” a lawful bill of lading holder within the meaning of the latter Act, see section 5(1) and (2) of the Act.

carrier a “conforming” receipt. Most bills of lading are now governed either by the Hague Rules or the Hague-Visby Rules, and this allows shippers to demand from the carrier a bill of lading containing the particulars stated in Article III(3)(a) to (c) of the Hague and Hague-Visby Rules.⁴ This is, however, subject to three main conditions. Firstly, the contract of carriage between the shipper and the carrier must expressly or by implication provide for the issue of a bill of lading or any similar document of title.⁵ Secondly, the shipper must “demand” from the carrier a bill of lading containing these particulars. Thirdly, despite the demand of the shipper, the carrier⁶ can refrain from acknowledging the marks, number, quantity or weight of the goods furnished by the shipper. By the same article, the carrier is permitted to make reservations as to these furnished particulars, where he/she has reasonable grounds for suspecting their accuracy or where there is no reasonable opportunity to check the figures.⁷ However, the same is not true in respect of the statements as to the apparent condition of the goods. When demanded by the shipper, the carrier is required to state in the bill of lading the apparent order and condition of the cargo

⁴ These provisions cover three main particulars: the leading marks necessary for the identification of the goods; either the number of packages or pieces, or the quantity, or weight; and the apparent order and condition of the goods. Under the Hamburg Rules, Article 15(1)(a) and (b) requires bills of lading to record the “apparent condition of the goods” and the “number of packages or pieces *and* weight of the goods or their quantity” [emphasis added]. In addition, where applicable, the same provision also requires the dangerous nature of a cargo to be recorded in the bill of lading. With respect to the position under the Rotterdam Rules, see Article 36.

⁵ See section 1(4) of the English Carriage of Goods by Sea Act 1971. Some scholars, including Tetley, take the view that carriers should not have the liberty to issue a sea waybill or other non-negotiable receipt in the case of ordinary shipments. According to this view, the liberty to issue a sea waybill or other non-negotiable receipt enables the carrier to effectively avoid the application of the Hague and the Hague-Visby Rules. See S. Baughen, *Shipping Law* (5th edn, 2009), p. 100. On this issue, see also Steyn J. in *The European Enterprise* [1989] 2 Lloyd’s Rep. 185 (QBD), 188, where he said: “It follows that shipowners, if they are in a strong enough bargaining position, can escape the application of the rules by issuing a notice to shippers that no bills of lading will be issued by them in a particular trade”.

⁶ Given that most carriers are corporations, the reference to “carrier” should be taken to mean either the master or the person who has the express, implied or apparent authority of the carrier to sign bills of lading.

⁷ The restrictions as to the carrier’s right to make reservations are tighter in the Hamburg Rules (Art 16(1)) and the Rotterdam Rules (Art 40(2)). Under English law, there seems to be no effective restriction on the carrier’s right to qualify the statement of the shipper as to the weight and quantity of the goods with a “weight and quantity unknown” or a similar clause. See the decisions in *The Atlas* [1996] 1 Lloyd’s Rep 642 and *The Mata K* [1998] 2 Lloyd’s Rep 614, where the courts firmly held that such clauses were valid and could not be invalidated by Article III/8 of the Hague and the Hague-Visby Rules.

being shipped.⁸

From the perspective of the banks financing the sale of goods under letters of credit, the evidentiary function of the bill of lading is also important. The banks need to pay against a “clean” bill of lading⁹ covering the contract goods in order to have a proper claim against the applicant buyer for reimbursement. Furthermore, against the risk of non-payment by the applicant buyer, the banks would wish to pledge over a bill of lading covering goods that are not apparently defective and/or damaged at the time of their shipment. Undoubtedly, to pledge over a clean bill of lading provides a better security for their credit exposure.

To have a “reasonably accurate”¹⁰ snapshot of the particulars of the goods actually loaded is important to the carrier under the bill of lading.¹¹ A carrier under a bill of lading may be liable at common law for damages arising from false statements in the bill of lading about the goods.¹² In particular, where a master or other agent of the

⁸ *The David Agmashenebeli* [2003] 1 Lloyd’s Rep 92.

⁹ See fn 2 above. Although the decision in *The David Agmashenebeli*, above fn 8, governs the issue of the carrier’s standard of duty towards the shipper, the required standard of duty established in this decision can equally be applied to a dispute between the carrier and the transferees of bills of lading. See, for instance, the decision in *The Saga Explorer* [2013] 1 Lloyd’s Rep 401.

¹⁰ See the decision in *The David Agmashenebeli*, above fn 8, where Colman J took the view that Article III(3) did not require the carrier to state the apparent order and condition of the goods with absolute accuracy. The master is required to express his opinion that reasonably reflects the apparent order and condition of the cargo, considering the extent of any defect in the cargo. Thus, there will be no breach of Article III(3), as long as his view on the apparent order and condition of the cargo can properly be taken by a “reasonably observant” master. A somewhat contrary view was expressed by Evans LJ in *The Artic Trader* [1996] 2 Lloyd’s Rep 449, 458.

¹¹ It must be noted that a shipowner can in some cases be subject to a cargo claim by the bill of lading holders in bailment. For this reason, the stated particulars in relation to the goods may be important to a shipowner, even in cases where the bill of lading is a charterer’s bill of lading, see fn 3. For present purposes, an important limitation to an action in bailment is that the bailment relationship usually arises between the shipper and carrier, see *The Aliakmon* [1986] AC 785, 818. Where a shipper may be regarded as agent of a named consignee in making the contract covered by the bill of lading, the consignee can be the bailor, see *East West Corp v DKBS 1912 A/S* [2003] EWCA Civ 83, at para. 34.

¹² Where a shipped bill of lading is issued for unshipped goods, the carrier can be protected by the rule established in *Grant v Norway* (1851) 10 CB 665. Although the signer of the bill of lading can be held liable for breach of warranty of authority, see *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd’s Rep 1. Alternatively, it may be possible to hold the signer liable for the tort of deceit, see *Standard Chartered Bank v National Shipping Corp of Pakistan* [2003] 1

carrier recklessly or deliberately¹³ makes false statements about the goods in the course of his employment or within the scope of his authority, the carrier and the issuer of the bill of lading¹⁴ will be liable in the tort of deceit.¹⁵ In such cases, they will be liable to those who have been induced into accepting the bill of lading and thereby suffered a loss.¹⁶ An over-zealous master who has negligently claused a bill of lading for goods that were apparently in good order and condition will also expose the carrier to liability.¹⁷

The duty not to make any false representations in the bill of lading is generally considered to be a duty towards the transferees of bills of lading, even in cases where the vessel is subject to at least one charterparty. For this reason, a charterparty provision requiring the master to sign the bill of lading “as presented” by the charterer is not interpreted as an obligation on the part of the master to issue a clean bill of lading irrespective of the apparent condition of the goods.¹⁸

Lloyd’s Rep 227.

¹³ It may also be possible for the carrier to be liable for negligent misstatement in the bill of lading, although this option has not been judicially explored. Colman J. in *The David Agmashenebeli* [2003] 1 Lloyd’s Rep. 101 (QBD) took the view that the carrier’s obligation to issue a bill of lading cannot concurrently be based on Article III(3) and on tort. Where the Hague-Visby Rules do not govern the issue of misstatement, the carrier will be held liable in tort of negligence, see *Hedley Bryne & Co. Ltd. v Heller Partners Ltd.* [1963] 1 Lloyd’s Rep. 485 (HL), 517, per Lord Devlin. However, it is unlikely for the signer to be held liable for negligent misstatement without the proof of duty of care between the signer and the representee, see the decision in *Williams v Natural Life Health Foods* [1998] 2 All ER 577.

¹⁴ See *Standard Chartered Bank v National Shipping Corp of Pakistan* [2003] 1 Lloyd’s Rep 227, where the House of Lords held that other persons involved in the making of false statements. For this reason, the seller’s managing director in this case was also held to be liable in deceit.

¹⁵ See *Standard Chartered Bank v National Shipping Corp of Pakistan*, above fn 14.

¹⁶ In *Standard Chartered Bank v National Shipping Corp of Pakistan*, the persons who joined in issuing a falsely dated bill of lading were liable towards the bank that was induced into making payment under the letter of credit.

¹⁷ *The David Agmashenebeli*, above fn 8, and *Standard Chartered Bank v National Shipping Corp of Pakistan*, above fn. 14.

¹⁸ *The Nogar Marin* [1988] 1 Lloyd’s Rep 412. Where the charterers have the right to issue a bill of lading on behalf of the master and where they issue a clean bill of lading for apparently defective goods, no term will be implied into the charterparty to allow the charterers to recover their losses arising from such a bill of lading, see *the Arctic Trader* [1996] 2 Lloyd’s Rep 449 (CA).

Consequently, the shipowner does not have any remedies against the charterer in damages or under an implied or express indemnity, where it suffers a loss as a result of the false representations in the bill of lading as to the apparent condition of the goods.¹⁹ This well-established rule is consistent with the courts' refusal to enforce letters of indemnity provided to the carrier in consideration for the issue of a clean bill of lading covering apparently defective goods.²⁰ Against this background, it is timely to consider first the evidentiary effect of multimodal transport documents.

A. The evidentiary effect of multimodal transport documents

Since the decision in *Compania Naviera Vasconzada v Churchill & Sim*, it has been clear that the statements in the bill of lading as to the goods are only representations of fact,²¹ not contractual promises.²² They can amount to prima facie evidence as to the state of the goods at the time of their shipment.²³ Provided that the elements of common law estoppel are established,²⁴ these representations may become conclusive evidence as against the carrier.²⁵ On the construction of the bill of lading as a whole, the statements in the bill of lading as to the goods may not

¹⁹ See the decision in *The Nogar Marin*, above fn 18. This rule should equally apply in relation to false statements as to the quantity of goods shipped in cases where the master knew or ought to have known the actual quantity of the cargo shipped.

²⁰ *Brown Jenkinson v Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Lloyd's Rep 1. From this case it appears that a letter of indemnity will be unenforceable, even in cases where the master was not actually dishonest when issuing a clean bill of lading in consideration for a letter of indemnity. For a brief discussion as to all the ingredients of deceit, see *Derry v Peek* (1889) 14 App Cas 337, 374.

²¹ [1906] 1 KB 237.

²² *Ibid.* See also *The Mata K* [1998] 2 Lloyd's Rep 614.

²³ *Smith v Bedouin Navigation Co.* [1896] AC 70 (HL).

²⁴ The representations contained in a bill of lading can give rise to an estoppel in favour of a transferee of the bill of lading where the transferee relied to his detriment upon the representations therein and where it would be inequitable to allow the carrier to resile from the representations, see *Compania Naviera Vasconzada v Churchill Simm* [1906] above fn 21.

²⁵ *Compania Naviera Vasconzada v Churchill Simm*, above fn 21.

be sufficiently clear and unqualified to give rise to estoppel. Hence, there is no estoppel in relation to the weight and quantity of the goods shipped where the bill of lading contains a “weight and quantity unknown” or a similar clause.²⁶ In *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Ltd*, a stamped endorsement in a received for shipment bill of lading that read “signed under guarantee to produce ship’s clean receipt” was held to qualify the words “shipped in apparent good order and condition”.²⁷ Thus, the carrier was not estopped from showing that the goods were shipped in other than apparent good order and condition.

1. *Grant v Norway*

At English common law, representations in a bill of lading have no evidentiary effect where in fact no goods have been shipped.²⁸ In *Grant v Norway*, it was held that the master had no apparent authority to sign a bill of lading for goods that had not been put on board.²⁹ This rule was extended also to cases where a bill of lading indicated a larger quantity of goods than the quantity of goods actually shipped.³⁰ This undesirable result arising from the application of *Grant v Norway* has been greatly diminished through the enactment of The Carriage of Goods by Sea Act (COGSA) 1992. Pursuant to section 4 of that Act, the carrier is estopped from denying, as against the lawful holder of the bill of lading, the shipment of the goods or their receipt for shipment.

²⁶ *The Mata K*, above fn 22 and *The Atlas* [1996] 1 Lloyd’s Rep 642.

²⁷ [1947] AC 46.

²⁸ *Grant v Norway* (1851) 10 CB 665.

²⁹ The carrier will obviously not be able to make use of this rule if he is also the signer of the bill of lading covering unshipped goods.

³⁰ *Rasnoimport v Guthrie & Co.* [1966] 1 Lloyd’s Rep. 1 (QBD).

Provided that a multimodal transport document purports to be a receipt, the representations as to the goods made thereunder can give rise to prima facie evidence or conclusive evidence at common law. Just as with the representations made in bills of lading, the question of estoppel in this context must also be decided “on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities”.³¹ If the common law reasoning is adopted, unequivocal representations about the goods, such as the quantity of the goods shipped, their apparent order and condition and the date of shipment, will normally be binding upon the carrier as against the cargo receiver. However, where an agent for the carrier issues a multimodal transport document for goods that he has not actually received, does the rule in *Grant v Norway* apply?

If a master or other agent of the carrier has no apparent authority to sign a bill of lading for unshipped goods, then it seems to follow that an agent acting for the carrier cannot also have an apparent authority to issue a multimodal transport document for goods that he has not received. In order to decide if the rule can equally apply to multimodal transport documents covering non-existing goods, it is important to discuss the rule in more detail. The rule in *Grant v Norway* relieves the carrier from liability in contract, or by way of estoppel, for an unauthorised statement that is false. Despite the attempts at extending the application of the rule to other statements,³² the rule only bites against statements as to the shipment of the goods and their receipt for shipment. What makes the fact of shipment (or receipt for shipment) different from others?

³¹ *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Ltd*, above fn 27, 55.

³² The application of the rule is not extended to statements as to the date of shipment (*The Saudi Crown* [1986] 1 Lloyd’s Rep 261), deck carriage (*The Nea Thyi* [1982] 1 Lloyd’s Rep 606), nor the apparent order and condition of the goods (*Compania Naviera Vasconzada v Churchill Simm*, above fn 21).

Devlin J in *Heskell v Continental Express Ltd* said: “in many cases ... no contract [of carriage] is concluded until the goods are loaded or accepted for loading”.³³ In respect of a bill of lading covering goods that have not been received, Lord Esher in *Leduc v Ward* took the *obiter* view that the master had “no authority to make a contract of carriage to bind the shipowner, except in respect of goods received by him. If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the ship owner.”³⁴ These *dicta* clearly show that, when these cases were brought, the fact of non-shipment (or non-receipt of goods) was an important factor for finding against a valid and binding contract of carriage.

The question of whether there is a valid and binding contract between the parties depends on the facts of each case,³⁵ and much turns on at what point in time the parties had a mutual intention to enter into a binding contract.³⁶ It may well be possible for parties to have intended to enter into a contract of carriage when the goods are shipped or received for shipment. Thus, the shipment of the goods or their receipt may well be a condition precedent to the making of a contract of carriage.³⁷ The application of the rule in *Grant v Norway* does make sense where there is no mutual intention to enter into a contract unless the goods are actually shipped or received for shipment.

In modern circumstances, contracts of carriage by sea are in almost all cases entered

³³ [1950] 1 All ER 1033, 1037.

³⁴ (1888) 20 QBD 475, 479.

³⁵ *The Pacific Champ* [2013] 2 Lloyd’s Rep 320.

³⁶ *Pagnan Spa v Feed Products* [1987] 2 Lloyd’s Rep 601.

³⁷ *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] 2 Lloyd’s Rep 495, which was concerned with the question of whether the obligation to open a letter of credit was condition precedent to the making of a contract of sale.

into before the shipment of the goods or their receipt for shipment. The terms of these antecedent contracts are in almost all cases found in booking notes.³⁸ In the case of multimodal carriage of goods partly by sea also, there is usually an antecedent contract stage, at which a contract of carriage is entered into before the receipt of the goods by the freight forwarder. For this reason, it would appear that the rule in *Grant v Norway* is normally not applicable to goods covered by a multimodal transport document. This approach can even more readily be followed in cases where the goods are covered by a multimodal transport document in the standard FIATA Multimodal Bill of Lading form. In this form, it is stated that the goods are “taken in charge” while other standard forms only provide that the goods have been “received”.³⁹ In the former phrase, the emphasis is placed on the assumption of responsibility, and this makes it more justifiable to rule out the application of the rule in *Grant v Norway* to the goods covered by a FIATA Multimodal Bill of Lading.

2. The Carriage of Goods by Sea Act 1992

A more straightforward, if not alternative, way to avoid the application of the rule in *Grant v Norway* is to bring the multimodal transport documents within COGSA 1992. Effectively reversing the *result* of the rule,⁴⁰ section 4 of the Act provides that:

A bill of lading which –

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

³⁸ See F. Reynolds and G. Treitel, *Carver on Bills of Lading* (3rd edn, 2011) para 2-008.

³⁹ See the standard COMBICONWAYBILL, COMBICONBILL forms.

⁴⁰ See Reynolds and Treitel, above fn 38, para 2-017, where the learned authors emphasised the fact that section 4 of the Act does not override the *reasoning* in *Grant v Norway*.

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading

shall, in favour of a person who has become the lawful holder of the bill of lading, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

As is clear from the wording, section 4 purports to prevent the carrier from denying that the goods have been shipped or have been received for shipment. In so doing, it rules out the application of the rule in *Grant v Norway*. Nonetheless, there are limits to its application. The section applies to lawful bill of lading holders only. The consignees named as such in sea waybills, ship's delivery orders and straight bills of lading cannot make use of the statutory estoppel created by this section. Moreover, the section only bites against the statements as to the shipment of the goods and their receipt for shipment. Any other statements as to goods, such as their apparent order and condition, cannot be brought within it.⁴¹

Given that the definition of the bill of lading in the Act includes received for shipment bills of lading, the question arises as to whether multimodal transport documents can be treated as received for shipment bills of lading. If they can be treated as such, the rule in *Grant v Norway* can effectively be avoided in the context of multimodal transport documents. All multimodal transport documents have one key feature in common, making them distinctive instruments: they show inland points as the place of receipt and/or delivery of goods, and they cover more than one mode of transportation. Where only these features make a multimodal transport document distinct from transferable shipped bills of lading, there is a

⁴¹ *Ibid.*, para 2-028.

compelling suggestion that such a document should be treated as a “received for shipment bill of lading” under COGSA 1992.

If this suggestion is accepted, many different types of multimodal transport documents, such as the Combined Transport Bill of Lading (Combiconbill 1995), the FIATA Multimodal Transport Bill of Lading and the Multimodal Transport Bill of Lading (Multidoc 95), will readily come within the sphere of COGSA 1992. This will also bring more certainty to multi-purpose bills of lading that can operate as a port-to-port or a combined transport bill of lading, depending on whether any inland movement prior or subsequent to sea carriage is indicated therein. Irrespective of any indication of an inland movement in these transport documents, COGSA 1992 will in any case be applicable to them.

At this juncture, it is important to note that not all types of multimodal transport documents can come within COGSA 1992. Caution must be exercised in not calling all multimodal transport documents “bills of lading”. By the definition of “bill of lading” in the Act, straight bills of lading are excluded from the scope of the bill of lading.⁴² For this reason, a multimodal transport document that is not transferable cannot be brought within section 4 of the Act. For the purposes of deciding which types of multimodal transport document can be brought within the purview of the Act, we should focus on the content of the document as opposed to its heading.⁴³ That said, a multimodal transport document, however named, is not a bill of lading if it is issued by a freight forwarder who assumes liability for the entire carriage as agent only.⁴⁴ Such a document is naturally taken as a contract of agency, not as a

⁴² See s. 1(2)(a) of the Act.

⁴³ *Comalco Aluminium Ltd v Mogal Freight Services* (1993) 113 ALR 677.

⁴⁴ *The Maheno* [1977] 1 Lloyd’s Rep 81.

contract of carriage, and hence it lacks one of the key attributes of bills of lading.⁴⁵

Can a multimodal bill of lading covering carriage partly by sea be taken as a “bill of lading” within the meaning of COGSA 1992? Where the sea leg is the significant component of a multimodal transportation, we may well be more inclined to answer this question in the affirmative. Nonetheless, determining the application of COGSA 1992 on the basis of the magnitude of sea carriage in a multi-stage transport operation presents an unattractive prospect of uncertainty over the legal force of multimodal transport documents. Thus, balance comes down heavily in favour of bringing multimodal transport documents within the definition of “bills of lading” under COGSA 1992, and one further point must be made in support of this. By including “received for shipment” bills of lading within its scope, the act naturally implies that a transport document indicating an inland movement prior or subsequent to sea carriage is to be considered as a “bill of lading”, regardless of the proportion of the sea carriage involved. Hence, as long as the multimodal carriage contains a sea leg and is covered by a multimodal transport document that carries the key attributes of a “received for shipment” bill of lading, COGSA 1992 must be applicable.⁴⁶

On the application of section 4 to such multimodal transport documents, there is one further issue to be discussed. Given the express reference to receipt of goods for shipment on board “a vessel” in section 4(a) of the Act, should the multimodal transport document identify the vessel on which the goods are to be shipped? In other words, should the express reference be taken to mean that the goods have

⁴⁵ See also M.G. Bridge, *Benjamin’s Sale of Goods* (8th edn, 2010) para 21-083.

⁴⁶ However, this should be subject to the overarching condition that the application of COGSA 1992 does not run counter to any international transport convention that may wholly or partly govern the multimodal transportation of goods covered by such documents.

been received for shipment on a “named” vessel? It would appear that the provision requires for the transport document to provide at least the name of the proposed vessel.⁴⁷ Hence, a transport document providing that the goods have been received for shipment on board a named vessel or an alternative should qualify for this purpose.⁴⁸

3. The Hague-Visby Rules

Article III(4) of the Hague-Visby Rules (the Rules) provides that the statements as to the leading marks, weight/quantity of the goods and their apparent order and condition will be conclusive evidence as against the transferee of the bill of lading acting in good faith. Given that the provision makes no reference to statements as to the fact of shipment or receipt of goods for shipment, it can be argued that the rule in *Grant v Norway* survives the Rules.⁴⁹ This seems to be an overly technical reading of Article III(4). Where a transferee of a “shipped” bill of lading relies in good faith on a statement as to the weight/quantity of the goods, that statement will be conclusive evidence as regards the weight/quantity of the goods “shipped”. Thus, the rule in *Grant v Norway* should not have any role to play where the transport document is mandatorily governed by the Rules.⁵⁰

The next step is then to ask whether multimodal transport documents fall within the

⁴⁷ For a similar view, see Reynolds and Treitel, above fn 38, para 2-025.

⁴⁸ See the received for shipment bill of lading in *The Marlborough Hill* [1921] AC 44, which stated that the goods were received for shipment on board *The Marlborough Hill* or an alternative. A multimodal transport document containing a similar statement should qualify for the purposes of application of section 4.

⁴⁹ Reynolds and Treitel, above fn 38, para 2-041.

⁵⁰ However, where a sea waybill is mandatorily governed by the Rules through incorporation pursuant to s. 1(6)(b) of the Carriage of Goods by Sea Act 1971, Article III(4) does not apply to such a sea waybill despite the incorporation, see the last paragraph of s. 1(6).

definition of “a bill of lading or a similar document of title” under Article I(b) of the Rules. It is suggested that these transport documents must be governed by the Rules so far as they relate to carriage of goods by sea and provided that the entire carriage covered by the document is not wholly regulated by another international convention. The main underpinnings of this suggestion are both literal and purposive. In the absence of a special provision in the article excluding some particular types of bill of lading from the scope of the Rules and given the expansive wording used in the article, it is clear that the range of bills of lading to which the Rules apply is intended to be wide.⁵¹ This is also supported by the unequivocal and indisputable policy reason behind the Rules, which was to afford protection to cargo interests against “unduly onerous terms in the contract of carriage”.⁵² Viewed in that light, Article I(b) of the Rules must be interpreted broadly and thus in line with their international spirit, instead of by reference to restrictive English common law or statutory definitions on “bills of lading” and “document of title”.

At this juncture it is important to note that English courts to date have demonstrated an overwhelming tendency towards interpreting international conventions in a purposeful and internationally accepted manner.⁵³ Notably, Article I(b) of the Rules was read in that spirit by the House of Lords in *The Rafaela S*, where their Lordships held that straight bills of lading fall under the article and hence under the Rules. In this context, their Lordships cautiously referred to the *travaux préparatoires* of the Hague Rules, acknowledging that straight bills of lading were not intended to be ousted from the Rules.⁵⁴

⁵¹ *The Rafaela S* [2005] 1 Lloyd’s Rep. 347 at 360–1, per Lord Rodger.

⁵² *Ibid.*, at 364, per Lord Rodger.

⁵³ *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd’s Rep 537, FCA at 559.

⁵⁴ *The Rafaela S* [2005] 1 Lloyd’s Rep 347, 447 per Lord Bingham.

Could the reasoning of the House of Lords in *The Rafaela S* be followed in support of the argument that multimodal bills of lading must come within the sphere of the Rules? Unlike straight bills of lading, multimodal transport documents were not widely used mercantile instruments when the discussions on the adoption of the Hague Rules were taking place in the early 1920s. Nonetheless, the *travaux préparatoires* lend some support to the suggested construction of Article I(b) of the Hague-Visby Rules for two reasons. First, the *travaux préparatoires* demonstrate the legislators' awareness of those transport documents relating to carriage of goods partly by sea.⁵⁵ Secondly, there is nothing in the *travaux préparatoires* indicating a definite intention to oust such transport documents from the purview of the Rules. Instead, the *travaux préparatoires* evidence the drafters' views favouring the application of the Rules to the sea leg of a multimodal carriage covered by a multimodal bill of lading (however defined).⁵⁶

It would be going too far to treat the *travaux préparatoires* as conclusive for present purposes, given that they do not "clearly and indisputably" point to a "definite" intention as required by *Fothergill v Monarch Airlines Ltd*.⁵⁷ It is thus fair to say that, while not being determinative, the *travaux préparatoires* supplement the underpinnings of the suggestion that multimodal transport documents that carry the key characteristics of bills of lading must qualify for application of Article I(b) of the Rules.⁵⁸

⁵⁵ M.F. Sturley, *The Legislative History of the Carriage of Goods by Sea and the Travaux Préparatoires of the Hague Rules* (1990), 91.

⁵⁶ *Ibid.*, at 92.

⁵⁷ *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251, at 278, where Lord Wilberforce stated that *travaux préparatoires* can be used as an aid to construction only where they are "public and accessible" and where they "indisputably" demonstrate a "definite" legislative intention.

⁵⁸ For a contrary view see the decision in *Bhatia Shipping v Alcobex Metals* [2004] EWHC 2323 (Comm.).

B. Consolidated bills of lading covering blended/commingled goods

Just as with multimodal transport documents, consolidated bills of lading covering blended/commingled goods also raise particular challenges. It is common for carriers to be asked to commingle or blend cargoes shipped aboard their vessels. A number of risks are involved in this practice. In most cases, the commingling/blending of cargoes naturally affects the specification of each cargo commingled/blended with others. Moreover, the apparent order and condition of each cargo also changes with the commingling/blending process. Since this process usually takes place after a bill of lading has been issued for each cargo, it exposes carriers to potential liabilities under the bills of lading covering the commingled/blended cargoes. To avoid liability, they may well consider alerting the holders with an express statement in the bill of lading that the cargo may be commingled/blended. There may be complications in cases where a cargo that has been shipped in other than apparent good order and condition is to be treated during transit. Should the bill of lading covering this cargo be claused? Despite the planned treatment of the cargo during transit, if the cargo is not properly treated, the carrier will be exposed to liability under a bill of lading that is not claused.⁵⁹ Nonetheless, considering the planned treatment of the cargo, the carrier is expected to issue a clean bill of lading in consideration for a letter of indemnity. A letter of indemnity provided in such cases should be enforceable, since the issue of a clean bill of lading in such cases does not amount to fraudulent or reckless misrepresentation.⁶⁰

Another important complication arises in relation to the dates and places of shipment to be stated in the bills of lading covering the commingled/blended cargoes. If each cargo commingled/blended with others has been shipped by

⁵⁹ R. Lord *et al.*, *Bills of Lading* (2005) para 3.94.

⁶⁰ Consider the facts in *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Lloyd's Rep 1.

different shippers, in different places and/or at different times, should a single bill of lading covering each cargo be issued? Where the individual bills of lading are surrendered to the carrier in exchange for one consolidated bill of lading, what should the consolidated bill of lading provide as the date and place of shipment and who should be named as the shipper?

As is clear from the decision in *Mitchell v Ede*, when the bill of lading remains in the hands of the shipper, the shipper has the right to redirect the goods to a different consignee “before the delivery of the goods themselves or of the bill of lading to the party named in it.”⁶¹ This rule, established in *Mitchell v Ede* is normally taken to apply to straight bills of lading.⁶² In *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul & Ord*,⁶³ the rights of the original consignee under a straight bill of lading were lost when that bill of lading was cancelled by the carrier upon the request of the shipper and when it was replaced with a new straight bill of lading requiring the carrier to deliver the goods to a different consignee.⁶⁴ The case clearly suggests that the original parties can properly terminate their contract of carriage covered by a bill of lading and substitute it with a new contract by the issue of a new bill of lading.

In light of the explanations above, it is clear that a new set of consolidated bills of lading can properly be issued for commingled/blended cargoes, where the carrier and all the shippers of the relevant cargoes agree. What is not so clear is how the

⁶¹ See (1840) 11 Ad. & El. 888 at 903. The main rationale behind this rule is that the consignee in a bill of lading does not acquire any right under the bill of lading by merely being named as a consignee in that bill of lading.

⁶² G.H. Treitel, *The Legal Status of Straight Bills of Lading* (2003) *Law Quarterly Review*, 608 fn. 25.

⁶³ [2010] EWHC 355 (Comm).

⁶⁴ It should be noted that both the shipper and the original consignee had in fact the right to exercise control over the goods covered by the straight bill of lading, see ss. 1(3)(b), 2(1)(b) and 5(3) of COGSA 1992. However, the decision now suggests that the original consignee’s right is in any case subject to the shipper’s right to redirect the goods.

date and place of shipment and the identity of the shipper should be provided in a consolidated bill of lading. Given the carrier's obligation to give a "reasonably accurate" snapshot of the goods covered by the bill of lading, the consolidated bills of lading should fully provide all the details in relation to each cargo commingled/blended aboard the vessel.⁶⁵ If this approach is followed, then many sets of consolidated bills of lading will provide more than one date of shipment, place of shipment and shipper. This will have further implications as between the buyers and sellers in the context of the international sale of goods.

Where parties to a sale contract agree that the payment is to be made through a letter of credit incorporating UCP600, such a bill of lading will not be acceptable pursuant to Article 20 of UCP600. Given that the provisions in the UCP600 are not mandatory, it will be for the parties to agree on the terms of the letter of credit to be opened for payment. A further complication, of even more relevance, is the applicability of the Rules to consolidated bills of lading. Where only some part of the commingled/blended goods was shipped from a Hague-Visby State, can the consolidated bill of lading be governed by the Rules pursuant to Article X(b) of the Rules? The answer to this question has a great impact on the evidential value of such consolidated bills of lading due to Article III(4) of the rules, but currently no definitive answer can be given to this question.

C. To clause or not to clause?

The final point to discuss is the increasing sophistication surrounding the master's duty to give a reasonably accurate snapshot of the goods. Most types of goods invariably display some defect/damage, and the degree of such imperfections varies

⁶⁵ Bengt E. Nergaard, Redocumentation of Cargoes in Tanker Trade. Paper delivered at the 19th International Congress of Maritime Arbitrators, 11–15 May 2015.

considerably. On the question of what degree of defect/damage justifies clausuring the bill of lading Colman J in the English case of *The David Agmeshenebeli* said:⁶⁶

... the law does not cast upon the master the role of an expert surveyor. He need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful master. What he is required to do is to exercise his own judgment on the appearance of the cargo being loaded. If he honestly takes the view that it is not or not all in apparent good order and condition and that is a view that could properly be held by a reasonably observant master, then, even if not all or even most such masters would necessarily agree with him, he is entitled to qualify to that effect the statement in the bill of lading.

With this guidance, due performance of this duty under English law can seem attainable, although not free from challenges. Where a small portion of the goods contains foreign materials, rust, moisture or discoloration, should carriers clause the bill of lading covering such goods? Imagine the surface of a cargo which is contaminated by coal dust dropped from hatch covers, or a cargo of steel which is slightly scratched on its surface. Would such minor defects justify the issue of a clausured bill of lading? In *The David Agmashenebeli*, Colman J took the view that “the presence of a miniscule quantity of contaminants does not render the cargo otherwise than in good order and condition”.⁶⁷ This view has much to commend it, when the drastic consequences flowing from a clausured bill of lading are considered: a clausured bill of lading is not fit to pass through the hands of traders and is thus not ordinarily accepted as good tender for payment in international trade.⁶⁸

⁶⁶ *The David Agmashenebeli*, above fn 8, 105, per Colman J.

⁶⁷ *Ibid.*, at 115

⁶⁸ For letters of credit sales, see UCP 600, Article 27. For cash-against-documents sales,

On considering whether or not to clause the bill of lading, the master's dilemma is obvious: on the one hand to inaccurately clause the bill of lading would give rise to damages arising from non-compliance with Article III(3).⁶⁹ On the other hand, not to clause the bill of lading in respect of goods otherwise than in apparent good order and condition would expose the carrier to a considerably high risk of liability vis-a-vis the cargo receiver. It is true that some visible, but minor, contamination, moisture, discoloration or some other imperfections can be expected of some particular types of cargo. However, where the degree of imperfection can vary considerably and where views of masters may honestly differ as to the identification of the correct degree when looking at the goods, how are carriers to protect themselves against the risks of misdescriptions? The practical attempt at avoiding this dilemma has been to introduce "RETLA clauses" into bills of lading. In essence, these clauses are designed to redefine the pre-printed words "shipped in apparent good order and condition". To this end, RETLA clauses purport not to qualify, but to redefine these words, with a view to keeping the bill of lading fit to pass through the hands of traders.⁷⁰ With a RETLA clause introduced into a bill of lading, the words "shipped in apparent good order and condition" no longer import the meaning that the goods are free from any of the visible defects listed therein, such as rust, decay and discoloration. From the perspective of a cargo receiver, who is also generally the buyer of goods under a sale contract, this effect of RETLA clauses may raise

see Bridge, *Benjamin's Sale of Goods*, above fn 45, para. 19–126. See also *The Galatia* [1980] 1 Lloyd's Rep. 453 (QBD), where the court took the view that a bill of lading that contained a notation indicating that the goods had been damaged during loading should be treated as a clean bill of lading and be accepted by the buyer for payment. The damage to which the notation referred was a post-shipment damage which had to be borne by the buyer. The decision cannot find room for application in the case of a letter of credit incorporating UCP 600 by reason of its Article 27.

⁶⁹ This will be the case where the Rules are applicable to the contract of carriage.

⁷⁰ In the meantime, RETLA clauses also typically confer upon shippers a "notional" right to request a substitute bill of lading setting out the defects – a right that is unlikely to be exercised by shippers, who would naturally wish to receive payment under a sale contract or a letter of credit.

eyebrows. The cargo interest places heavy reliance on the words “shipped in apparent good order and condition” when it intends to part with its money only against a clean receipt. When viewed from this perspective, RETLA clauses would appear to render the words “shipped in apparent good order and condition” meaningless to the detriment of the cargo receiver. However, it is possible for the cargo receiver to avoid this by simply asking the seller under the sale contract to tender a bill of lading without a RETLA clause.⁷¹

Leaving this practical solution to one side, the alternative would be a judicial solution, which, if preferred, may lead to two possible routes of judicial approach. The first approach, the “trade approach”, would be to give the RETLA clause full effect, with the result that the carrier would be able to avoid claims arising from pre-shipment damage to goods. If this approach were followed, the cargo receiver would be urged to seek redress against the seller. In the absence of a provision in the sale contract requiring the tender of a bill of lading without a RETLA clause, the cargo receiver would be left with a highly risky option, which it may not wish to take: to reject the bill of lading tendered by the seller on the grounds that the bill of lading contains a RETLA clause. This would possibly trigger an action by the seller for wrongful rejection. In such an action, the cargo receiver would have to navigate in uncharted waters, trying the plea before a court or an arbitral tribunal that such a bill of lading was not clean and was therefore a bad tender. The second approach, the “carriage approach”, would be to give no effect⁷² or only limited effect to RETLA

⁷¹ Difficulties may arise, however, where a letter of credit is in place and where the RETLA clause appears on the reverse side of the bill of lading. In such circumstances, the bank is likely to accept such a bill of lading contrary to the buyer’s intention, see Article 14 of UCP 600, which provides that the bank will accept documents that appear on their face in compliance with the requirements in the letter of credit. See the English case of *The Starsin* [2003] 1 Lloyd’s Rep. 571 (HL).

⁷² Under English law, as with weight and quantity unknown clauses, RETLA clauses should not offend Article III(8), which has no teeth to bite representations made in the

clauses. To follow this approach would have the effect of putting carriers at risk in relation to claims arising from pre-shipment damage and thereby giving cargo receivers enough incentive to seek redress against the carrier. Recently, Simon J in *The Saga Explorer* opted for the “carriage approach” when he said:⁷³

The Retla clause can and should be construed as a legitimate clarification of what was to be understood by the representation as to the appearance of the steel cargo upon shipment. It should not be construed as a contradiction of the representation as to the cargo's good order and condition, but as a qualification that there was an appearance of rust and moisture of a type which may be expected to appear on any cargo of steel: superficial oxidation caused by atmospheric conditions. The exclusion of “visible rust or moisture” from the representation as to the good order and condition is thus directed to superficial appearance of a cargo which is difficult, if not impossible, to avoid. The combined effect of Colman J's approach in *The David Agmashebeli*⁷⁴ and that of Simon J in *The Saga Explorer* is that RETLA clauses have now been rendered redundant. The net result is that, in the case of any defect that is more than minimal, carriers are now expected to clause the bill of lading, whether or not the bill of lading contains a RETLA clause. When holding that the bill of lading should have been claused in that case, Simon J's second reasoning also suggests that the RETLA clauses may now be invalidated by Article III(8) of the Hague and Hague-Visby Rules. With respect, there is insufficient legal basis for upholding this reasoning. Given that statements as to the goods are only representations of fact, but not contractual promises, these statements cannot in fact be struck down by Article III(8).⁷⁵ If Simon J's approach is endorsed by other

bill of lading.

⁷³ *The Saga Explorer*, above fn 9, para. 44.

⁷⁴ See fn 66.

⁷⁵ *The Mata K*, above fn 22, 620, per Clarke J. See also *The Atlas*, above fn 26.

courts and higher courts, this will surely create a platform for cargo receivers to challenge the well-established validity of the weight and quantity unknown and similar clauses. Another important point with respect to the decision in *The Saga Explorer* is this: in that case the master/carrier agreed to issue a clean bill of lading in consideration of a letter of indemnity. On the master's/carrier's decision to issue a clean bill of lading, Simon J said: What occurred was not an honest and reasonable non-expert view of the cargo as it appeared but a deceitful calculation made on behalf of the owners by their authorised agent at the request of the shippers and to the prejudice of those who would rely on the contents of the bills of lading...⁷⁶ Due to Simon J's finding of dishonesty on the part of the carrier, the validity of the letter of indemnity given to the carrier in exchange for a clean bill of lading would naturally be tainted with this dishonesty. It is important to highlight the fact that the letter of indemnity was accepted in a situation where the legal effect of the RETLA clause in the bill of lading had not been tested by English courts. Consequently, the decision suggests that a letter of indemnity provided in exchange for a clean bill of lading is enforceable only in cases where the master has a genuine doubt about the apparent condition of the "goods", not about the law.⁷⁷ Should this be the way forward?

D. Conclusion

The specific issues discussed here in relation to the receipt function of the bill of lading and indemnities will no doubt attract more judicial scrutiny in the future. Until the law in respect of these issues is further clarified by the courts, these issues will remain as a challenge for all the main players in shipping and trade markets.

⁷⁶ *The Saga Explorer*, above fn 9, para 55.

⁷⁷ See also B. Eder *et al.*, *Scrutton on Charterparties and Bills of Lading* (22nd edn, 2011), para 8-018.

Dr. Melis Özdel
E-mail: m.ozdel@ucl.ac.uk
Director, UCL Centre for Commercial Law
Lecturer in Maritime and Commercial Law
UCL Faculty of Laws, Bidbrough House,
London