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INTERNATIONAL OCEAN BILLS OF LADING - LOST IN TRANSLATION

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An ocean bill of lading is truly a remarkable creature, born of commerce and the law. One sheet of paper regulates the relationship between three disparate parties: the carrier, the shipper and the receiver. However, the document is equally relied upon by banks, stevedores, forwarders, owners and charterers of ships, and government agencies such as the Customs authorities. A bill of lading provides for the terms and conditions that will apply in different nations, coastal waters and on the high seas, as well as during rail, barge or truck transport. It acts as a receipt for the cargo and it conveys title to the goods that are in transit. The bill of lading equally warrants that the cargo is on board the ship when stated, and guarantees the marks, number, quantity and weight of those goods. The bill also guarantees that the cargo is not dangerous, or if it is, then the nature of the hazard and the care that needs to be taken. Most amazingly, ignoring distances as large as the circumference of the earth, a carefully choreographed ballet of steps has been put in place through bills of lading to make sure the carrier accepts and transports the cargo, that the receiver gets the correct cargo, that the shipper gets paid for the cargo, and that the carrier gets paid for the freight.

Historically, ocean bills of lading were probably born in the Eleventh Century with the rise of commercial regions in the Mediterranean. Before that, the owner of the goods generally travelled with his cargo aboard the ship and arranged to sell the goods on the spot when he reached destination.[1] However, when the owner of

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[1] Arnold W. Knauth, *American Law of Ocean Bills of Lading*, (1953 ed.) p. 115.

the goods no longer accompanied his cargo, the first issue that was encountered was getting a receipt from the vessel that accurately reflected what the Master was being entrusted to transport. As early as the mid-14th century, this problem was handled under a law which required a sworn clerk to prepare a "book" identifying the cargo laden on the ship.[2] Accuracy was important. If the clerk falsified the record, the law called for his hand to be cut off.[3] The book, or manifest, was originally given to the Master when the ship sailed. This prompted a new problem: When a vessel was lost at sea, so was the book. By 1397, the book was turned into a "bill". The law was amended to require that a copy of the bill be provided to the shipper in case of an accident to the ship. Perhaps foreshadowing problems that would be encountered centuries later, the clerk was required to describe not only the packaging, but confirm the cargo inside the packages.[4]

Although the bill of lading served purely as a receipt during the 14th century, the document gained importance over the next two centuries as providing the terms for the contract of carriage. Once owners of cargo stayed at home, they entered into charter parties for the transport of their cargos. Indeed, while the bill of lading was being treated as a form of receipt for the cargo, the charter party was treated as the contract of carriage. However, it became impossible with the growth of commerce for a vessel owner to enter into a charter with every shipper. The result was that some bills were issued that contained the contract of carriage. Consequently, by 1600, the bill of lading began to take on the form used today. A French statute required that the Master of a ship give an "acknowledgment" of the number and quantity of the goods loaded on board the vessel, and required that the document reflect the merchant's marks, its condition, the name of the consignee and the amount of freight owing. The law also required three copies to

[2] Chester B. McLaughlin, Jr., *The Evolution of the Ocean Bill of Lading*, 35 Yale L.J. 548, 551-555 (1926).
[3] *Id*. at 551.
[4] *Id*.

be issued; one to be retained by the shipper, one by the Master, and one to be forwarded by another ship to the consignee.[5] This is how the custom of three bills of lading originated. With this arrangement, bills of lading took on a new task of representing the holder's entitlement to delivery of the goods by virtue of the "Law Merchants".[6] In short, the bill began to provide evidence of title. Up until the early 1800's, the carrier was "chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of conveyance, unless arising from inevitable".[7]

Consequently, on the one side there was government which sought regulation in a wild-west booming industry, while on the other side there was the marine insurance industry, which was essential to the growth of commerce, but sought to be free of any regulation. One of America's leading jurists, Judge Learned Hand, noted that it was up to the courts to balance the "motley patchwork of verbiage thrown together at random, often in unfamiliar diction three hundred years old,"[8] and contained in bills of lading, charters and insurance policies, so that the system could work.

In the English decision of *Sanders v. McLean,*[9] the court noted that "endorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo." That decision recognized that the bill of lading had taken on the three mantels by which bills of lading are commonly identified: a receipt for the cargo, a

[5] *Id*. at 552.

[6] ***Lex mercatoria*** (from the Latin for "merchant law"), often referred to as "the Law Merchant" in English, is the body of commercial law used by merchants throughout Europe during the medieval period. It emphasized contractual freedom and alienability of property, while shunning legal technicalities and deciding cases *ex aequo et bono*. A distinct feature was the reliance by merchants on a legal system developed and administered by them. States or local authorities seldom interfered, and did not interfere a lot in internal domestic trade. Under *lex mercatoria* trade flourished and states took in large amounts of taxation (citations omitted). https://en.wikipedia.org/wiki/Lex_mercatoria.

[7] *New Jersey Steam Navigation Co. v Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 381 (1848).

[8] *The Tregenna*, 1941 A.M.C. (2d Cir.)1282, 1290.

[9] (1883) 11 Q.B. Div. 327, 341.

contract for the carriage of the goods, and documentary evidence of title.[10] As a direct consequence of that transformation, the bill of lading became a flexible document, familiar and respected in all the ports of the world and under many differing systems of law."[11] Indeed, one of the first legal decisions in the U.S. concerning a bill of lading was a U.S. Supreme Court decision titled *The Delaware.*[12] It defined a bill of lading as a written acknowledgement, "signed by the master, that the goods had been received for carriage to the place of destination, there to be delivered to the parties designated", and that "the goods ought to be on board before the bill of lading is signed".[13]

However, the "holy trinity" of the bill of lading also brought new issues and legal problems. Prior to 1870, there was the overriding principle of freedom of contract as to ocean bills, even with the passing of the British Bills of Lading Act, 1855.[14] After 1870, the growth of steamship companies and railroads, as well as cargo underwriters and Protection & Indemnity Clubs caused a huge spurt in commerce, and the beginning of true governmental regulation. In 1893, the U.S. Congress enacted the Harter Act,[15] which for the first time in the U.S. sought to control carriage under ocean bills of lading. The Act dismissed the common use of exculpatory clauses, and required that a vessel owner exercise "due diligence" in making the vessel seaworthy at the commencement of a voyage.[16] In respect to bills of lading, the Harter Act required the Master to issue bills of lading, and the bills had to show marks, number, quantity, "stating whether it be carrier's or shipper's weight," and the apparent good order and condition of the merchandise.

[10] Knauth, *supra*, at 131.
[11] Id at 134.
[12] 14 Wall. 606 (1871, U.S.)
[13] 14 Wall. 600, 606. (US Sup. Ct. 1871).
[14] 18 & 19 Vict., ch.; 111 (1855) repealed by the Carriage of Goods by Sea Act, ch. 50, Sec. 6(2) (1992). See also Knauth at 116.
[15] 27 Stat. 445 (1893). The Harter Act was recodified in 2006 and can now be found at 46 U.S.C. §§ 30701-07.
[16] Harter Act, §§2 and 3.

The Act made clear that the bill of lading was *prima facie* evidence of the receipt of the goods. The Harter Act has been viewed by many as the template for the Hague Rules, which were to be adopted three decades later.[17]

Indeed, the driving force behind the movement which led to the Hague Convention was the need for assurance that the legal issues presented by bills of lading, whose job was to bridge one nation to another, would receive the same respect and answers in courts of all nations. In *The Etna Maru,*[18] the U.S. federal court noted that the language of the Hague Rules adopted in England and in the United States was identical, and therefore, "if they are to receive a different interpretation in the two countries, many years of painstaking work by commercial men to arrive at uniformity in the law of carriers will have gone for naught." The same admonition was made by Lord MacMillan, who stated that, "it is desirable in the interests of uniformity that their (Hague Rules) interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the Rules be construed on broad principle of general acceptation".[19]

However, with the growth of commerce and the recognition of a bill of lading as providing title to goods, there was also the growth of fraud. Bills of ladings were indeed the "keys to the warehouse".[20] The bill of lading was only a piece of paper, and the buyer of the goods was not at the load port, nor the seller of the goods at the delivery port. The sworn clerk was no longer at the pier, risking his right hand for accuracy. The boom in trade at the beginning of the Twentieth Century was such that many carriers found it impossible to issue handwritten bills of lading for every piece of cargo loaded on the ships, and insisted on the practice of providing only "received for shipment" bills of lading.[21] The steamship lines liked the

[17] Harter Act, §4.
[18] *Consumers Imp. Co. v. Zosenjo*, 320 U.S. 249, 64 S. Ct. 15, 88 L. Ed. 30 (1943).
[19] Scrutton on Charterparties (1948) at 350.
[20] *Enichem Anic A.p.A. v. Ampelos Shipping Co.* [1990] 1 LLoyd's Rep. 252, 268 (C.A. 1989).
[21] Ward, *American Commercial Credits* (1992) at 91.

"received for shipment" bills because they were not limited to carrying cargo on a particular ship. Shipowners only offered to try their best to use stamps that said the cargo was "on board."[22] One author summarized the situation by stating that the "carriers developed the 'free' contract to the point where it could be said that the carrier accepted the goods to be carried when he liked, as he liked and wherever he liked".[23] Although centuries earlier, shippers had insisted on certain vessels and Captains handled their cargo because of their reputation for seaworthiness, a new era provided for the sloppy practice of failing to provide even the name of a ship on the bill of lading, unless the ship was actually in port when the cargo was delivered.

One result of this unregulated system was the "Cotton Frauds."[24] In the early 1900's, shippers were delivering bales of cotton to American ports and receiving bills of lading stamped "received for shipment". The bill of lading only signified that the cargo of cotton was in the port of shipment. However, ports can be large places and the cotton was often nowhere near a ship. The merchandise would wait for unspecified periods of time before finally being loaded on a random vessel. The result was that some shippers began to sell the same cargo sitting on the pier over and over again to unsuspecting buyers overseas.[25] The shippers were able to provide the different buyers with the same copy of the bill of lading stamped "received for shipment". In the United States, the government took action and passed the Pomerene "Federal Bills of Lading" Act (1916),[26] which was primarily intended to protect subsequent holders of bills of lading.[27] The Act provided, amongst other things, that a carrier "whose actual or apparent agent issues a bill of lading is responsible for the goods not received, misdescribed, or

[22] *Victor v. Nat'l City Bank*, 200 App. Div. 557, 565-6 (1st Dept. 1922).
[23] Knauth, *Supra* at 116.
[24] *Id.* at 394-402.
[25] *Friedlander v. Texas & P. Ry. Co., 130 U.S. 416, 9 S. Ct. 570, 32 L. Ed. 991 (1889),* overruled in part by *Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 49 S. Ct. 161, 73 L. Ed. 415 (1929)*.
[26] 49 U.S.C §§. 80101-16.
[27] Knauth, *Supra* at 86.

received later than the date stated".[28] The "on-board" bill was born, and criminal penalties were put into place for issuing false bills. The Pomerene Act has been critiqued as a particularly good piece of U.S. legislation. Unfortunately, that legislation remains unique in the world.

National legislation to control carriage under ocean bills of lading finally gave way to international conventions in recognition of the need for uniformity of laws:[29] The Twentieth Century brought us The Hague Rules,[30] the Hague-Visby Rules,[31] and the Hamburg Rules, which were adopted over a seventy-year period, each advancing the percepts of uniformity of legal regimes for transportation of goods by sea.[32] The grandfather of these conventions, the Hague Rules of 1924, was viewed as a "broad business adjustment of the risks of ocean transportation" and "represented the maximum of bill of lading standardization and uniformity obtainable in the present state of balance of the commercial and shipping interests of the world."[33] However, all three of these conventions are primarily dedicated to the issue of liability, and how to assess responsibility when cargo is lost or damaged. They are based on a view of shipping that goes back to the late Nineteenth Century.

The more recent Hague–Visby and Hamburg Rules, while a product of a call-to-arms for the need to require our maritime laws to keep pace with significant developments in maritime technology, have in large part failed to keep pace with modern day shipping. "Containerization" of cargo transportation began more than

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[28] *Id.* at. 124.
[29] Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1 (1991.
[30] *International Convention for the Unification of Certain Rules of Laws relating to Bills of Lading*, August 25, 1924, 120 U.N.T.S. 155.
[31] *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Feb. 23, 1968, 1412 U.N.T.S. 128 and the *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Dec. 21, 1979, 1412 U.N.T.S. 146.
[32] *United Nations Convention on the Carriage of Goods by Sea*, Mar. 31, 1978, 1695 U.N.T.S. 3.
[33] Knauth, Forward to the First Edition.

50 years ago and yet courts still struggle with the issue of what exactly is being acknowledged as received on a bill of lading when the cargo is in a sealed container. None of the three conventions require the shipper to warrant the contents of the container. Is it beach umbrellas or rifles? Obviously, the contents affect not only the freight rate, but the security of the ship, its crew and in these troubled times, the safety of the public. Similarly, there is no requirement for due diligence on the part of the shipper that its cargo, or its packing, need to be "cargo worthy" for the expected voyage. The shipper is relying upon the carrier's container to provide the protection while at sea, when traditionally it was up to the cargo owner to provide proper packing in the bulk-trade business. This situation is changing for the worse as more and more shippers begin employing their own containers, especially in specialized trades like bulk liquids. Does the carrier have a claim over against the shipper, or the receiver, when their shipper's container fails and spills product onto the ship or other cargo?

By the same token, from the viewpoint of cargo interests, is the defense of error in navigation or error in management really viable when ships are connected online to the home office computers twenty-four hours a day? Shouldn't other parties who are involved in the maritime venture be joined and covered by the same law, such as stevedores, tugs, forwarders or terminals? While the issue of the amount of limitation of liability may be one that only "sheds crocodile tears,"[34] the fact is that the disparity of limitation amounts amongst the various conventions and land laws creates confusion and ambiguity, and therefore should be standardized.

Most importantly, the current conventions have not provided for coverage during multi-modal transport, which now dominates the container trade. Commerce needs a uniform set of laws that will govern bills of lading when the cargo starts from an inland place in one country, travels by truck, rail, barge, or

[34] *Nichimen Co., v. M.V. Farland,* 462 F.2d 319, 335 (2d Cir. 1972).

costal vessel before being loaded on an oceangoing ship, and goes through the same process after discharge. Currently, a patch-quilt of international, national and local laws, and custom and practice, control such movements. That makes pricing of insurance, goods and freights more difficult.

Recently, there has been a clamor for facilitation of electronic bills of lading. Ships cross the Atlantic in a week or less. Traditional mailing of bills of lading to the consignee can't keep up with the speed of ships. If the bills have to go through the banks because of letters of credit, the cargo is at the delivery port long before the letters have been drawn down. This often results in receivers seeking delivery without presentation of bills of lading, on Letters of Indemnity, which present all sorts of problems within many of the legal system. Commercial people have shrugged off the law and pressed ahead during the past two decades with EDI (Electronic Data Interchange) systems to transfer bills by computer. This has given rise to the "sea waybill",[35] the "data freight receipt" and memo bill of lading. In effect, to keep pace with the speed of modern vessels, cargo interests have jettisoned the paper, shunned surrender of the bill, and diminished the importance of title to the cargo, perhaps even the terms of carriage. The industry has accepted the EDI system as a necessary substitute for the paper bills of lading, but the "symbolic" delivery of title recognized in a paper bill of lading at the end of the 19th Century is hard to translate when the bill is reduced to bits of electronic data. How does the receiver waive his bill of lading and claim title to the goods when the carrier, or worse, a government officer, asks for proof it is his? How does the carrier know he has delivered the cargo to the proper party who is intended to receive it? How does the receiver endorse the bill to a new buyer when there is nothing to write on? How does the shipper retain control over the goods to change

[35] At least one US case has held that a sea waybill is not a bill of lading as contemplated by US COGSA. *J.C.B. Sales v. m/v Seijin*, 1996 A.M.C. 1507 (SDNY, 1996).

the name of the consignee, or even the discharge port on an electronic document?[36]

Obviously, because it was needed, international trade has gone on through the Law Merchant to accept the commercially-created "bastardized" EDI bill of lading. Now there is a growing fear that someone will "hack" into the EDI system and bring international commerce to its knees. In fact, that fear was realized on June 27, 2017, when a massive cyber-attack on Maersk Line disrupted port terminals around the world, including the US, Spain, India, and the Netherlands, resulting in a US $300 million loss.[37]

The industry is now clamoring for the need of "blockchain" technology to protect electronic bills of lading. Blockchain is a "specific type of database where time-stamped and authenticated digital records are compiled," and is founded on the idea that "the data added to a blockchain by a party cannot be changed by any other party, and the data compiled in the blockchain is added and verified by multiple parties."[38] Without getting sucked into the details of the software technology, which is better left to teenage kids, blockchain is revered as the savior of electronic bills of lading in commerce. It is already predicted to render substantial savings for both the carrier and the cargo interests.[39] But how do you present an electronic document before a judge when the day comes that

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[36] *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (Int'l Academy of Comparative Law, 14th Int'l Congress of comparative Law) (A.N. Yiannopoulos ed. 1995).

[37] See *A.P. Moller-Maersk reveals $300m Loss After Trojan Style Cyber Attack*, Transport Security World, August 29, 2017. https://www.transportsecurityworld.com/shipping-giant- A.P. Moller-Maersk-reveals-300m-loss-after-Trojan-style-cyber-attack.

[38] *Special Coverage: A Blockchain-backed Bill of Lading*, The American Shipper, December 5, 2016,https://www.americanshipper.com/Main/News/Special_Coverage_A_blockchainbacked_bill_of_lading_66056.aspx.

[39] A trial use of the combined Maersk and IBM blockchain program called TradeLens demonstrated that it "can reduce the transit time of a shipment of packaging materials to a production line in the United States by 40 percent, avoiding thousands of dollars in costs." *See* https://markets.on.nytimes.com/research/stocks/news/press_release.asp?docTag=201808090700PR_NEWS_USPRX____NY75278&feedID=600&press_symbol=151846.

something goes wrong? The Conventions are all based on the proposition that the bill of lading is made of paper.

Enter the Rotterdam Rules.[40] The Rotterdam Rules are a project by the United Nations that began over ten years ago. The draft Convention was not only designed to modernize the law governing carriage of cargo, but to broaden its reaches ashore and to bring a larger number of parties within in its ambit. One of the particularly commendable aspects of the Rotterdam Rules is that it confronted the question of aiding electronic commerce and allowing for the recognition of electronic substitutes for bills of lading and other shipping documents. Notably, the Convention addresses delivery, right of control, and right of transfer,[41] making clear that the parties can agree on electronic bills of lading without restriction. The provisions – which would extend to the use of blockchain technology – represents a leap into the 21st Century and would provide some relief to the industry - but only if the Convention is ratified.[42]

In sum, history certainly makes clear that commerce moves faster than the law, and that the delays in the legal system to accommodate the latest developments in transportation may only have the consequence of creating ambiguity, frustration, litigation and expense. More importantly, history has shown that commerce will not wait for the law to catch up if there are viable commercial options: the Law of the Merchant, the lex mercatoria, will evolve without regard to the bounds of the current legal systems. The result has been - and will continue to be - a less than harmonious legal system in international transportation; one that stumbles over self-imposed hurdles created by forcing antiquated laws to apply to

[40] *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Sec. 11, 2008, General Assembly Resolution 63/112, U.S. Doc. A/Res/63/122.
[41] Charters 9, 10 and 11.
[42] Ratification by 20 countries is necessary to bring the Rotterdam Rules into force. Currently, there are only four countries which have confirmed ratification. http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html.

modern technology and systems. While modernization of international conventions governing bills of lading and carriage of goods would seem to be the quickest and most efficient road to bringing commerce and the law onto the same page, the fact is that it is usually the most parochial rules and laws that are the easiest to modify, while the international conventions take decades to enact. By the time they are in force, the draft conventions are already outdated to deal with the contemporary issues in the industry. The fact is that the Law Merchant is admittedly creeping back into the regulation of the maritime industry. It will create a certain harmony within an economic, geographical or political region, but the Law Merchant will not globally accommodate all nations.

Maritime commerce operates on a razor thin margin. If ever there was an industry that needs efficiency in the law, it is in the ocean transport of goods.[43] Certainly, even the Rotterdam Rules are growing stale with age, and there will be a need to update their provisions as the industry changes. There are already questions developing about the liability for operation of autonomous ships; the continued need for General Average in liner services; the impact on carriage and delivery when a carrier files for bankruptcy; cargos which are so sophisticated that no one is certain about their hazardous characteristics; and compliance with government regulations regarding suspicious cargos and the identification of the real owners of the goods.

The bill of lading today may no longer be the symbol of the goods that it was over two hundred years ago, but the bill of lading is the only "luggage tag" the industry has invented so far that receives due recognition in most places around the world. It is important that we, as maritime lawyers, commit to the industry we serve, and that should include insuring that bills of lading provide the flexibility and recognition needed to keep commerce flowing, and that bills of lading do not become another document lost in translation.

[43] *See* footnote 39 above.