

THE UNIVERSITY OF HULL

**JUDICIAL ANALYSIS OF THE CONTRACTUAL ROLE
OF BILLS OF LADING AS IT STANDS IN GREEK
UNITED STATES AND ENGLISH LAW**

being a Thesis submitted for the Degree of Doctor of Philosophy

in the University of Hull

by

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ΣΤΗΝ ΜΗΤΕΡΑ ΜΟΥ

(TO MY MOTHER)

ΚΛΕΙΩ

TABLE OF CONTENTS

	Page
ABBREVIATIONS	I
LIST OF CASES	IV
BIBLIOGRAPHY	XVII
INTRODUCTION	1
 Chapter I: The Contractual Role of Bills of Lading under International Conventions and Reports	
1.1 Introduction.....	8
1.2 The Hague Rules.....	9
1.3 The Hague-Visby Rules.....	15
1.4 UNCTAD Reports.....	17
1.5 The Hamburg Rules.....	23
1.6 Deductions.....	25
 Chapter II: The Contractual Role of Bills of Lading under Greek Law	
2.1 Introduction.....	27
2.2 Contractual Role of Bills of Lading under the Private Maritime Code of Greece.....	30
2.3 Demonstrative Value of Documents Issued as Evidence of a Transaction.....	33
2.4 The Charter party as The Contract of Affreightment.....	37
2.5 The Bill of Lading under the Contract of Carriage of Goods.....	39
2.6 Bills of Lading as Contracts of Adhesion.....	48
2.7 Bills of Lading in the Hands of Third Parties.....	50
2.8 Deductions.....	51
 Chapter III: The Contractual Role of Bills of Lading under United States Law	
3.1 Introduction.....	54
3.2 The Common Carrier under the American Law.....	56
3.3 The Bill of Lading as the Contract of Carriage.....	58
3.4 The Contractual Relation between the Parties Prior to the Issue of Bills of Lading.....	66
3.5 Bills of Lading Issued Prior to the Loading of the Goods.....	70
3.6 Oral Agreements Concluded Prior to the Issue of Bills of Lading.....	71
3.7 Bills of Lading as Contracts of Adhesion.....	73
3.8 The Contractual Role Bills of Lading Issued after a Shipment and Had Taken Place under an Oral Contract.....	75
3.9 Cases Regarding the Bill of Lading as Evidence of the Contract.....	77
3.10 The Contractual Role of Bills of Lading According to the Views of American Scholars.....	80
3.11 Bills of Lading in the Hands of Third Parties.....	87
3.12 Deductions.....	89

Chapter IV: The Contractual Role of Bills of Lading Under English Law

4.1 Introduction.....	93
4.2 The Emergence of the Contractual Role of Bills of Lading in Court Cases Prior to the Bills of Lading Act 1855.....	95
4.3 The Bills of Lading Act 1855.....	96
4.4 The Carriage of Goods by Sea Act 1971.....	106
4.5 Bills of Lading in the Hands of the Shipper.....	107
4.5.1 <i>Crooks v Allan Versus Leduc v Ward</i>	107
4.5.2 <i>Margeston v Glynn Case and The Ardennes Case</i>	113
4.6 Bills of Lading in the Hands of Third Parties and the COGSA 1992.....	123
4.7 The Retroactive Force of the Bill of Lading Contract.....	129
4.8 Bills of Lading as Standard Form Contracts of Carriage.....	131
4.9 Parol Evidence Rule and the Contractual Role of Bills of Lading.....	134
4.10 The Contractual Role of Bills of Lading after <i>the Ardennes Case</i>	138
4.11 Conclusion of the Contract of Carriage under the Terms of the Carrier’s Bills of Lading.....	142
4.12 British Literature about the Contractual Role of Bills of Lading.....	146
4.13 Deductions.....	153

CHAPTER V: Comparative Analysis of The Contractual Role of Bills of Lading Under Greek, United States And English Law

5.1 Introduction.....	155
5.2 The Substance of The Term “Covered By”.....	158
5.3 The Common Law Background.....	160
5.4 The Contract of Carriage in Greek Law.....	165
5.5 The Conclusion of the Contract and the Issue of the Bill of Lading.....	169
5.6 The Receipt of the Goods And the Bill of Lading Contract.....	178
5.7 The Offer for the Conclusion of the Contract of Carriage.....	180
5.8 The Bill of Lading in the Hands of Third Parties.....	181
5.9 The Retroactive Force of the Bill of Lading Contract.....	183
5.10 The Bill of Lading as a Contract of Adhesion.....	184
5.11 The Meaning of the Terms “Contained in” and “Evidenced By”.....	185
5.12 The Importance of The Bill of Lading as a Contract.....	188
5.13 The Contractual Role of Bills of Lading as Viewed By the Scholars.....	191
5.14 The Establishment of the Bill of Lading as the Contract of Carriage.....	192
5.15 The Definition and the Utility of the Bill of Lading Contract.....	196

CHAPTER VI: The Negotiability of Bills of Lading and their Contractual Role Under Greek, United States And English Law

6.1 Introduction.....	202
6.2 Greek Law.....	204
6.3 United States Law.....	208
6.4 English Law.....	213
6.5 Deductions.....	222

CHAPTER VII: Bills of Lading under Charter-Parties and their Contractual Role under Greek, United States And English Law

7.1 Introduction.....	225
7.2 Greek Law.....	225
7.3 United States Law.....	230
7.4 English Law.....	237

7.5 Deductions.....	246
CHAPTER VIII: The Contractual Role of Bills of Lading on Matters of Conflict of Laws	
8.1 Introduction.....	249
8.2 Greek Law.....	251
8.3 United States Law.....	254
8.4 English Law.....	260
8.5 Deductions.....	271
CHAPTER IX: The Contractual Role of Computerised (Electronic) Bills of Lading.....	273
CHAPTER X: The Contractual Role of Straight (Non-Negotiable) Bills of Lading.....	284
CONCLUSIONS.....	289

ABBREVIATIONS

<i>Abbreviation</i>	<i>Meaning</i>
A	Atlantic Reporter
A2d	Atlantic Reporter Second Series
AC	Appeal Cases
AJCL	American Journal of Comparative Law
All ER	All English Reports
AMC	American Maritime Cases
Asp MLC	Aspinall's Reports of Maritime Law Cases
Aust LJ	Australian Law Journal
B & AD	Barnwall & Adolphus
BY I L	British Yearbook of International Law
C L J	Cambridge Law Journal
C L R	Commonwealth Law Reports
C M L R	Common Market Law Review
C P	Common Pleas
C P D	Common Pleas Division
Calf L R	California Law Review
Ch	Chancery Division
CJS	Corpus Juris Secundum
CL & Fin	Clark & Finnelly
Col J T L	Columbia Journal of Transnational Law
Col L R	Columbia Law Review
Com Cas	Commercial Cases
E & B	Ellis & Blackburn
E E D	Epitheorisis Emporicou Dikaiou
E M L	Epitheorisis Maritime Law
E R	English Reports

<i>Abbreviation</i>	<i>Meaning</i>
FN	Footnote
F	Federal Reporter
F Sup	Federal Supplement
F2d	Federal Reporter Second Series
F3d	Federal Reporter Third Series
Geo M ULR	George Mason University Law Review
Harv L R	Harvard Law Review
I C L Q	International Comparative Law Quarterly
I L M	International Legal Materials
J B L	Journal of Business Law
J M L C	Journal Maritime Law And Commerce
J W T	Journal of World Trade
K B	King's Bench
L M C L Q	Lloyd's Maritime and Commercial Law Quarterly
L Q R	Law Quarterly Review
Led	Lawyer's Edition
Led2d	Lawyer's Edition Second Series
Ll.L.R	Lloyd's List Reports
Lloyd's Rep	Lloyd's Reports
M & W	Meeson & Welsby
M L R	Modern Law Review
N E	North Eastern Reporter
N Y	New York Reporter
N Y S	New York Supplement
N Z L R	New Zealand Law Reports
NE2d	North Eastern Reporter Second Series
P	Probate Division
P2d	Pacific Reporter Second Series
Q B D	Queen's Bench Division
QB	Queen's Bench

<i>Abbreviation</i>	<i>Meaning</i>
S E	South Eastern Reporter
S W	South Western Reporter
S W 2d	South Western Reporter Second Series
Sc R R	Scots Revised Reports
Ses Cas	Session Cases
SO2d	Southern Reporter Second Series
Term Rep	Term Reports
U C C	Uniform Commercial Code
U N C T A D	United Nations Conference on Trade and Development
U S	United States Reports
U S C	United States Code
V U W L R	Victoria University of Wellington Law Review
WLR	Weekly Law Reports
Yale L J	Yale Law Journal

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Greek Law

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<i>Court of First Instance of Piraeus 3242/1963</i>	1964 EED 226
<i>Polimeles Court of Piraeus 524/1969</i>	1969 EED 407
<i>Court of Appeal of Patra 112/1970</i>	1971 EED 87
<i>Court of First Instance of Athens 3499/72</i>	2 EML 412
<i>Court of Appeal of Athens 2253/1973</i>	1973 EED 248
<i>Court of Appeal of Athens 4558/ 1973</i>	28 Armenopoulos 112
<i>Polimeles Court of Piraeus 2493/1975</i>	1981 Piraiki Nomologia 194
<i>Court of First Instance of Piraeus 970/75</i>	3 EML 177
<i>Polimeles Court of Piraeus 816/75</i>	3 EML 394
<i>Court of Appeal of Athens 4466/1978</i>	1979 EED 408
<i>Polimeles Court of Piraeus 2073/78</i>	7 EML 398
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<i>Court of Appeal of Athens 4466/1978</i>	27 Nomiko Vima 227
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<i>Polimeles Court of Piraeus</i> 524/85	1989 Nomiko Vima 1340
<i>Polimeles Court of Piraeus</i> 1440/85	1989 Nomiko Vima 1340
<i>Supreme Court</i> 2164/86	1989 Nomiko Vima 1342
<i>Court of Appeal of Thessaloniki</i> 1505/87	1989 Nomiko Vima 1342
<i>Court of Appeal of Athens</i> 6732/1989	1990 EML 497
<i>Polimeles Court of Piraeus</i> 712/1990	1990 EML 460
<i>Court of Appeal of Thessaloniki</i> 913/1990	1990 EML 449
<i>Court of Appeal of Piraeus</i> 1156/91	1991 EED 429
<i>Polimeles Court of Piraeus</i> 10/1991	1991 Armenopoulos 1002
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United States Law

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<i>Booth v New York Cent</i>	112 A 894
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<i>Caterpillar Overseas v Marine Transport Inc</i>	900 F2d 714
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<i>Farbwerke Hoeschst A G v M/V Don Nicky</i>	589 F2d 795, 797
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<i>Frontier Nat Bank of East Port v Salinger</i>	126 NE 40
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<i>The Caroline Miller</i>	53 F 136, 138
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INTRODUCTION

While there is express data of the use of a document similar to the bill of lading in ancient times, it can be said that the modern bill of lading was born in the eleventh century. The earliest law widely accepted as the first of recorded maritime codes was that of the island of Rhodes. This Greek island lies in the Aegean sea.

In modern days this document started to be used as a register in the book of loading and after years of practice has been established as a new document. A bill of lading is basically a fundamental and vital document of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. A bill of lading has commonly been said to have three characteristics: 1). a contract for the carriage of the goods 2). an acknowledgement of their receipt and 3). documentary evidence of title.¹

The aim of this thesis is the comparative examination of the contractual role of the bill of lading in Greek, United States and English law. First of all, the principles of law which have created the bill of lading either as the contract or as evidence will be investigated. Moreover, the axis of the development of the thesis will be the analysis of how and why the issued and accepted bill of lading becomes the contract of carriage. The recent efforts to pass from a paper bill of lading to an electronic one makes more important the establishment of a uniform contractual characteristic and function of the

¹ C McLaughlin "The Evolution of Ocean Bills of Lading" 35 *Yale L J* 548 p. 555, p. 556 "When became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract ... Accordingly, the view that a bill of lading does not constitute the contract, but is evidence of it, would seem to be unsound and it may safely be said that since the bill of lading involves a promise to perform on the part of the carrier in both ocean and railway shipments, it is a contract." (Stress added)

bill of lading. The creation and transfer of a bill of lading through the parties' computer brings forward the need to have a standard format of a bill of lading contract where the detailed terms of carriage will be stated and more important to have a uniform and harmonised function.

However, there is an uncertainty and dispute about its contractual nature.² A legal term has to be used to express the proper meaning of its language and, therefore, every legal term used internationally must have the same substance regardless of the type of the legal system. Hence, the term "bill of lading contract", taking into account the frequent circulation of the bill of lading in the three countries and its general circulation in international trade, should mean that the bill of lading is a contract in the three systems or that it is not to be used as such and that it is not contract in one and merely memorandum or receipt in the other.

The bill of lading is a commercial document. It is issued in one jurisdiction and the delivery of the goods, under its terms, is completed in another, while any resulting dispute is litigated in a third jurisdiction. Hence, it cannot be treated as any other ordinary document which is only issued for circulation within the territory of a single legal system. Stability which arises out of a uniform legal functioning of a bill of lading is the primary concern of merchants. At the beginning there was a bailment receipt for goods. Later, this has been developed into a receipt containing the contract of carriage and acquired in time the third characteristic, that of a negotiable document of title.³ Consequently, the bill of

² *Scrutton on Charter-parties and Bills of Lading*, 1984, Sweet & Maxwell p. 55 "The bill of lading is not the contract". L Curzon "*Dictionary of Law*", 1996, Pitman, p. 41 "It ... **is evidence of the contract for their carriage**" (Stress added). J Rosenberg "*Dictionary of Banking and Financial Services*", 1985, John Wiley & Sons p. 7-6 "**Bill of lading: a statement whereby the carrier acknowledges receipt of freight, identifies the freight and sets forth a contract of carriage**" (Stress added). *Oxford Dictionary of Law*, 1997, Oxford University Press p. 47 "**Bills of lading it summarises the terms of the contract of carriage**" (Stress added). *Collins Dictionary of Law*, 1996, Harper Collins Publishers p.44 "**A bill of lading is used both as a contract of carriage and a document of title**"(Stress added).

³ UNCTAD "*Bills of lading Report*", 1971, United Nations, New York p. 23 "Beginning as a bailment receipt for goods, it has developed into a receipt containing the contract of carriage and acquired in time a third characteristic, that of a negotiable document of title". A Knawth "*The American Law of Ocean Bills of Lading*", 4th ed, 1953, American Maritime Cases Inc. Baltimore p. 134 "Beginning as a

lading has completed its metamorphosis, concerning its functions, through its mercantile usage. If the bill of lading being a contract is of no importance, then why has the historical mercantile usage internationally transformed the bill of lading from being merely a receipt into a receipt and contract, regardless of civil law or common law system? The protection of the shipper was the main reason of the incorporation of the terms of the contract in the bill of lading. Can the uncertainty regarding the terms of the contract under the ordinary principles of the different national laws of contract be applicable in the case of the bills of lading and the carriage of goods by sea? Has the use of the bill of lading changed in the three legal systems since its introduction in order to be attributed to a different contractual function? It is supposed that the contract is consummated when the goods are delivered by the shipper to the carrier and the bill of lading is issued.⁴ Has this view been accepted in the three legal systems? Taking into consideration the legal history of the bill of lading, the establishment of a single contractual role is fundamental, not only for its commercial use, but also for its definition as a legal document.

On the one hand, Professor D Powels⁵ stated that the bill of lading is evidence of contract of carriage. On the other hand, Professor J Spanogle⁶ and F Potamianos⁷ said that the bill of lading is a contract with the carrier. Taking into account that the bill of

bailment receipt for goods to be carried on common law terms, it developed into a receipt plus a contract of carriage ...". C. Powers "*A Practical Guide to Bills of Lading*", 1966, Oceana Publications Inc., p. 3 "The bill of lading was primarily a bailee's receipt for the merchandise to be delivered to the bailer or his designated agent, later it became a contract between shipper and carrier" (Stress added).

⁴ Notes "Ocean bills of lading and some problems of conflict of laws" 1958 *Columbia LR* 212 p. 217

⁵ D Powels, S Hazelwood "Maritime Fraud" 1984 *JBL* 31 p. 33.

⁶ J Spanogle "Incoterms and UCC article 2: Conflicts and Confusion" 1997 *International Lawyer* 111 p.125. W Tetley "Sea Way-bills: The Modern Contract of Carriage of Goods By Sea" 1983, *JMLC* 465 p. 465 "'The bill of lading' or 'bill of loading' is the classic contract of carriage of goods ... The bill of lading is a contract in respect to the goods, the charter-party is a contract in respect to the ship" p. 466 "The bill of lading is one of the earliest forms of contract of adhesion ... The bill of lading has three characteristics: it is a receipt, a contract of carriage and a negotiable document of title". W Tetley "*Marine Cargo Claims*", 3rd ed, International Shipping Publications, p. 215 "**Bills of lading ... have existed for centuries and are one of the oldest and most international forms of contract under the common law and the civil law** ... A bill of lading is not merely a contract of carriage". (Stress added).

⁷ F Potamianos "*The Contract of Carriage by Sea*", Vol. 1, 1962, Athens pp. 40-44.

lading is issued and used in the same way in the three systems, there come about a different understanding regarding the contractual nature of the bill of lading. Is the different contractual function which is attributed to bills of lading merely a matter of phraseology or does the different contractual function mean that the Act may or may not be applied and simultaneously the application of different terms of contract from those contained in the bill of lading? The aim of this analysis, based on the legal background of the three systems and with reference to the contractual function of the bill of lading, will be the establishment of a definition of the bill of lading contract which will address its function in the modern trade and its future transformation into a paperless document. The bill of lading must be seen either as the contract of carriage, regardless of who its holder is, or merely as evidence of it. The analysis of the subject is based on the fact that the bill of lading contract differs from other contracts in the way that the original parties to a contract of carriage do not have autonomy since they must adhere to the bill of lading issued by the carrier. Besides, the bill of lading represents physical cargoes rather than abstract claims on corporate earnings or contracts for the delivery of a commodity.

The analysis of the contractual function of bills of lading will be based on the investigation of the relevant national statutes and International Conventions, court decisions and the views of scholars and will focus only on its contractual or evidential role. Reference to the other two functions of the bill of lading will be made on only when it is necessary for the analysis of its contractual role.⁸ The consequences of the bill of

⁸ The significance and the use of a bill of lading as a document functioning as a receipt or as a document of title will not be examined. The aim of the thesis is not the examination of the status and the use of bills of lading as receipts and documents of title. Therefore, all the relations developed between the contracting parties concerning these functions will not be investigated. Hence, comparisons of these two functions in the three legal systems are not relevant. The analysis of the role of different documents which are issued prior to the issue of a traditional such as a mate's receipt or the issue of a different kind of bills of lading such as through bills of lading will not be examined either. The effect which oral agreements or documents issued prior to the issue of a bill of lading have upon their contractual role will be examined in the relevant parts of the thesis. The thesis does not investigate the liabilities or duties of the contracting parties if the bill of lading is the contract. The issues which arise between the parties when the bill of lading is their contract of carriage or their memorandum will not be investigated. The creation of a contract of carriage other than the bill of lading contract according to the general rules of the law of contracts cannot be ruled out but it is out of the scope of this thesis.

lading as the contract or evidence of it will be analysed. The investigation will be focused on the analysis of the factors which have created and established the bill of lading as the contract. For instance, in a case of deviation, it will be investigated if the contract of carriage was the bill of lading. As a result, the effect on the terms of the contract will be examined rather than the approach of the court regarding the deviation itself.

In practice, the establishment of the contractual function of bills of lading is very important because of the application as mandatory law of the national Acts. If the bill of lading is the contract between the contracting parties, then the rights and liabilities attributed by the national Acts are applicable. For example, the Carriage of Goods by Sea Act 1936, in the United States, does not apply if the bill of lading, which functions as the contract of carriage, is nullified.⁹ The international rules are applicable only to a bill of lading contract and not to a charter-party contract. The bill of lading is an integral part of many contracts such as CIF¹⁰ and FOB contract which form the bedrock of international trade, as a result, its functions and terms must be precisely defined.¹¹ Goods can be insured by an insurance company if the bill of lading is the contract of carriage.¹² The insurance premium for the shipper and the carrier is based on the standard terms in the bill of lading. Thus, this is another factor which necessitates the clarification of the contractual role of a bill of lading. Moreover, a bill of lading is a very important document which a bank demands in order to issue a letter of credit. In English law, only the bill of lading contract creates privity between the parties involved in the transaction.

⁹ *Unimac Company Inc v C F Ocean Service Inc* (1995)43 F3d 1434 p. 1437 “COGSA does not apply because the bill of lading, which acts as the contract of carriage, is nullified”.

¹⁰ fn 3 Klawth p. 117 “The device of the ‘CIF’ contract of sale and purchase: C. being the cost or invoice; I. The insurance policy accompanying the goods; and F. being the freight or price paid the carrier for transport and the terms of the contract of carriage as expressed in the bill of lading has become the supreme instrument of international buying and selling”.

¹¹ *SIAT v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53 p. 63 “The buyer is not under any obligation to speculate or to investigate, or to accept assurances outside the bill of lading. The bill of lading ... is entitled to look as being definitive of the contract of carriage ... ” *Ducan, Fox & co v Scheremphf & Bonke* [1915] 3 KB 355. J Ramberg “*Guide to Incoterms 1990*”, 1991, ICC Publishing SA pp. 30-36.

¹² *Leduc v Ward* [1888] 20 QB 475 p. 481 “How could the goods be insured, if it was not known or what voyage they were to be insured ... To suppose that there is no contract for a particular voyage in the bill of lading seems to me to be to disregard the whole course of mercantile business”.

Besides, the bill of lading as a memorandum does not create privity between the contracting parties. Any party to the transaction gets title to sue the carrier if the bill of lading is the contract of carriage and if the prerequisites for the transfer of the property stated by the Bills of Lading Act 1855 have been fulfilled. Hence, the establishment of the contractual role of bills of lading between the parties comes first before any further rights and liabilities are implied.

It is not feasible for an electronic bill of lading to be merely a memorandum of the contract when all the transactions and negotiations take place through the parties' computers. The bill of lading contract or any contract can be endorsed or assigned respectively as such. It will be investigated if a receipt or a memorandum of a contract can be assigned or endorsed as a contract, according to the principles of endorsement and assignment. Furthermore, it will be analysed if a bill of lading as merely a memorandum can be endorsed as the original contract of carriage. The application of the parol evidence rule depends on the bill of lading being a contract. It will be examined to see whether under the three legal systems the accuracy of the terminology and the application of the principles of law can be bent in order to achieve practical solutions through the use of judicial inventory. All these matters will be answered in order to highlight the importance of the bill of lading being the contract regardless of the legal system.

A shipper who has shipped the same kind of cargo with the same carrier in the territory of the application of the US, English and Greek laws will expect the accepted bill of lading to have the same contractual nature. Hence, in the case that there is a differentiation in the contractual status of the bill of lading, then the carriage will be hampered because the shipper has to investigate the conclusion of the contract of the carriage under the three national principles of the law of contract.

The contractual function of bills of lading as it is pictured by the International Conventions and reports will be the subject of development in the first chapter. The

contractual role of bills of lading issued by a common carrier will be investigated in the next four chapters before any analysis of its further contractual use takes place, in order to have a spherical view of this role. Three of these chapters will be devoted to the investigation of the establishment of the contractual or the evidential characteristics of bills of lading as they stand in Greek, United States and English law respectively. The drawing of conclusions relating to the contractual function of bills of lading among the three legal regimes will be the goal of the comparative chapter. Furthermore, the negotiability and the contractual role of bills of lading will be examined in the following chapter. The influence which the characteristic of the bill of lading as a negotiable document has on its contractual role will result from the examination. The analysis of the contractual function of bills of lading under charter-parties compared with bills of lading in common carriage will be investigated in the seventh chapter. The examination of their contractual role on matters of conflict of laws will follow in the next chapter. The scope of the investigations carried out in the previous three chapters will be the emergence of the practical usage and the functioning of a bill of lading in specific cases either as a contract or as evidence of it. New developments in the way of transferring data have made necessary the introduction of the electronic bills of lading in international trade. Thus, the investigation of their contractual function will be part of this dissertation and the subject of the ninth chapter. Bills of lading are issued either in a negotiable or in a non-negotiable form. The analysis of the contractual role of the non-negotiable bills will be developed in the next chapter. The conclusive chapter will contain all the deductions which have been drawn by the analysis, in order to show the necessity of the establishment of a common role either as a contract or as merely evidence of it.

CHAPTER I

The Contractual Role of Bills of Lading under International Conventions and Reports

1.1 Introduction

Bills of lading had been in use a long time before the first attempts for the standardisation of their terms occurred.¹ Their utility as legal documents was recognised after they have been circulated and used in international trade for some time. More clauses purporting to absolve the carrier from liability were introduced in the content of the bill of lading. A formula for the establishment of minimum liability of the carrier was adopted by a series of conferences after the first world war, in order to stop the practice of contracting in ways which would unduly favour the carrier. The whole effort has resulted in the emergence of the International Convention 1924 for the unification of certain rules relating to bills of lading. The significance of the establishment of the contractual role of bills of lading based on the necessity that any contractual party should know the final terms of the contract upon which the terms of the International Conventions will be implied. Contractual terms must not be different from these stated by the International Conventions. Is the bill of lading the contract of carriage upon which the terms of the International Conventions are implied? In this first chapter, it is proposed to investigate the contractual role of bills of lading as it has been perceived in the different International Conventions. The analysis will be based more on arguments which have arisen from the content of the Conventions themselves, than on investigations of the

¹ C McLaughlin J R “The Evolution of the Ocean Bill of Lading” 35 *Yale L J* 548, D Murray “History and Development of the Bill of Lading”, 1983, 37 *University of Miami Law Review* 689.

national Acts which were introduced in order to implement the International Conventions. Reference to other sources, such as court decisions or views of various scholars, will be made in case there should be a straight relation with the interpretation of the Conventions themselves. The main intention is to find out how the international practice is reflected in the writing of the Conventions.

1.2 The Hague Rules

The first International Convention (Hague Rules) regarding bills of lading was signed at Brussels on 25th August 1924.² The Convention is lacking in detailed provisions concerning the contractual role of bills of lading. However, the international conception of bills of lading as contracts of carriage is outlined in some of its articles. Article 1(b) states that:

“Contract of carriage applies only to contracts of carriage covered by a bill of lading, ... in so far as such document relates to the carriage of goods by sea; ... any bill of lading ... issued under or pursuant to a charter-party from the moment at which such instrument ... regulates the relations between a carrier and a holder of the same”.³

What emanates from the language used in the article is, first, the existence of different kinds of contracts of carriage regardless of the way in which they were created or concluded and, second, the fact that the drafters of the Convention have decided that the Act applies and regulates only contracts which have been covered by a bill of lading. Neither the identification of the terms of the contract of carriage nor the definition of bills of lading are specified in the Convention. What has been declared is that the contract has

² Chia J Cheng “*Basic Documents on International Trade Law*”, 1986, Martinus Nijhoff Publishers p. 263.

³ *ibid.* p. 263

to be covered by a bill of lading. The exact meaning of the term “covered by” is not answered by any of the provisions of the Convention. Therefore, the term “covered” should be understood within the concept of the scope and aim of the Convention as a whole. Does “covered by” mean that the bill of lading is merely one document among others which governs the relationship of the contracting parties or part of the relation and which has been issued because a provision of the contract of carriage had been provided? The standardisation of the terms of the contract of carriage of goods by sea is an aim of the Convention. Its provisions should be regarded as contractual terms which are implied in the contract of carriage. Thus, the contract upon which the provisions of the Convention are implied must be identified. According to the drafters of the Convention, the bill of lading is the document which plays this role. It is submitted that the Convention covers the contract of carriage when and if it has been issued in the form of a bill of lading. Accordingly, Tetley, referring to the Hague, Hague-Visby and Hamburg Rules, stated that:

“... *the bill of lading as a free contract* has been circumscribed by legislation”⁴ (Italics added).

However, according to Ramberg's view, the mandatory regime of the Hague Rules “does not cover the contract of carriage as such but only the legal relationship between the bill of lading holder and the carrier”.⁵

It is submitted that the relation of the holder of the bill of lading and the carrier must be contractual in order to be covered by the Hague Rules and, therefore, the bill of lading has to be the contract of carriage. Moreover, it is suggested that the mandatory regime of the Hague Rules does not apply to the contract of carriage but to the negotiated bill of lading.⁶ The Convention applies to the negotiated bill of lading because it is the

⁴ W Tetley “*Marine Cargo Claims*”, 3rd ed, International Shipping Publications p. 228

⁵ J Ramberg “Freedom of Contract in Maritime Law” 1993 *LMCLQ* 178 p. 179

⁶ J Ramberg “Charter-parties: Freedom of Contract or Mandatory Legislation” 1992 *Il Diritto Marittimo*

contract of carriage and not because it is a negotiated bill of lading. Hence, the demand for the existence of a contract of carriage in the form of a bill of lading is translated as an application of the rules to the contract as such. Thus, the negotiated bill of lading has to be a contract by its issue in order to be transferred as such. The contractual relations of the holder of the bill of lading, regardless of the original shipper or a consignee, are governed by the Hague Rules. Additionally, the bill of lading covers the contract of carriage as the charter-party covers the contract of affreightment.⁷ If it is suggested that the charter-party covers the contract of affreightment under the meaning that it is issued as evidence, then the charter-party is not the contract of affreightment. Besides, it is well established that the charter-party is the contract. Therefore, both the documents must cover the underlying contract in a similar way, which means that both should be contracts as such. Actually, the contractual terms of a bill of lading are not created by the end of the negotiating process, as happens with other kinds of contracts, but many of the terms of the bill of lading have been created through practical usage⁸ rather than the real agreement between the contracting parties involved in the specific transaction. Hence, the terms printed on the bill of lading are regarded as the agreed terms of the contract of the carriage. Consequently, the contract has been concluded under the terms of the bill of lading, regardless of the time at which the bill of lading was issued. The authorisation of the bill of lading occurs after the loading because of its threefold character.

The interpretation of the meaning of the term “covered by” under the national laws of Greece, England and United States will be examined in the following chapters. Articles 4(5) and 3(7) of the Convention refer to bills of lading in which the various

1069 p. 1070

⁷ *ibid.* p. 1078 T Scrutton “*Charter-parties and Bills of Lading*”, 1948, Sweet & Maxwell p. 2 “The contract ... may also be expressed in a charter-party.”

⁸ C Gilmore & C Black “*Law of Admiralty*”, 1975, The Foundation Press Inc., New York p. 15 “which is to say that most of their terms, other than time, price and a few other variables, are worked out by industry consensus or invariant practice long before—in some cases centuries before—the parties <bargain>. The formation of the contractual relationship requires no more than the filling in of blanks in printed forms”.

clauses and conditions of the carriage are incorporated. Besides, article 3(8) refers to the contract of carriage in which the clauses and conditions of the carriage are stated, which means that those two terms must be identical, otherwise there will be a contradiction and inconsistency concerning the contract in which the clauses and provisions of the Convention are incorporated. Thus, it seems that the bill of lading and the contract of carriage are the same thing.

Besides, the Convention applies to bills of lading under charter-parties when the bill of lading becomes the contract of carriage. Therefore, to that effect it would be inconsistent to be regarded that in the case of the bill of lading under charter-party, the drafters of the Hague Rules considered the bill of lading as the contract of carriage in which the Convention is applicable, and on the contrary, in the case of common carriage, regard the bill of lading as a mere evidence of a percentage of the contract of carriage. Consequently, the bill of lading has to be perceived under a uniform sense, which means that the bill of lading must be either the contract of carriage, regardless of who the holder is, or merely an evidence of it. The Convention definitely states that its mandatory rules apply if and when the bill of lading is the contract of carriage, taking into account that bills of lading under common carriage and bills of lading under charter-parties should be regarded as being the same kind of documents. It is fundamental to identify an internationally standard contractual role for bills of lading, because uncertainty about the role of any document used in any transaction will lead to slow circulation and cause problems in the implementation of its role. To the extent that the establishment of the bill of lading as the contract will bring certainty regarding its role and, consequently, confidence in the customers, there will be increased circulation and fewer problems in the international carriage of goods by sea. People involved in carriage of goods by sea should know with certainty the terms under which they contract and also their liabilities. It seems that by “covered by a bill of lading” has meant that the bill of lading is the contract of

carriage and that is why the contract is covered by the bill of lading.

The Hague Rules regulate the aspects of the bill of lading as a receipt and as a contract of carriage.⁹ They extend their effect to negotiated bills of lading issued under a charter-party.¹⁰ Hence, both bills of lading have the same contractual function as being the contracts of carriage. It is submitted that in both cases (common carriage and carriage under charter-party) the Hague Rules apply to the bill of lading contract. Do the Hague Rules apply as mandatory law to an oral contract of carriage or to a contract concluded and contained in another form rather than a bill of lading? The Hague Rules are automatically applicable when the contract of carriage is included in a bill of lading¹¹ and therefore the contract of carriage has to be in the form of a bill of lading. If it is suggested that by “included in the bill of lading” means that the contract of carriage is something else or that it can be in any kind of form and it is merely incorporated in the bill of lading, then it was not necessary to restrict the application of the Rules to bills of lading under charter-party solely when and if the bill of lading is the contract between the parties. The Rules should have been applied to any contract as such, regardless of its form or documentation. If the Rules apply to the contract of carriage, regardless of its form, then the Rules should have applied to a charter-party contract which is a contract as well. Accordingly, Tetley¹² considered that the Hague Rules apply when the bill of lading is the binding contract of carriage. Hence, the contract of carriage in the form of a bill of lading is defined and regulated as the contract of carriage under the Hague Rules.

On the one hand, Clarke¹³ states that the Hague Rules govern bills of lading and

⁹ A Knauth “*The American Law of Ocean Bills of lading*”, 1953, American Maritime Cases Inc. p. 135

¹⁰ E Rabel “*The Conflict of Laws*”, 1964, Vol. 3, by H Bernstein The University of Michigan Press p. 244
“The Brussels Convention on bills of lading also distinguishes this latter contract although it extends its effects to negotiated bills of lading issued under a charter-party”.

¹¹ L Gorton, R Ihre and A Sandevam “*Shipbroking and Chartering Practice*”, 1990, Lloyd's of London Press p. 58.

¹² W Tetley “*Marine Cargo Claims*”, 1978, Butterworths p. 78 “It should be remembered that whenever a **bill of lading is the binding contract**, then the Hague Rules apply”. (Stress Added)

¹³ M Clarke “*Aspects of the Hague Rules*” 1976, M Nijhoff, Hague p. 24

not contracts of carriage as such. On the other hand, the Convention itself states that its Rules apply to the bill of lading contract. Hence, it seems that the Rules apply to the bill of lading contract as such and not to any other kind of contract which does not mean that the Rules are not applicable to the bill of lading contract as such. However, Clarke¹⁴ said that the problems which mobilised the international society in order to harmonise the law could be dealt with by rules applicable to international and national contracts. If the international society has been mobilised to harmonise the rules of the contract of carriage, then the whole effort of harmonisation must result first of all in the confirmation and naming of the contract of carriage upon which the Rules are applicable.

It is said that the Hague Rules are implied to the contract of carriage of goods by sea evidenced by a bill of lading.¹⁵ According to this view, it is not clear if the Hague Rules apply to the contract of carriage as such, regardless of whether it happens to be merely evidenced by the bill of lading or whether it is necessary for the contract to be in the form of a bill of lading in order that the Rules can be implied. In contrast, Greer LJ¹⁶ in the Court of Appeal, concerning the Hague Rules, stated that:

“In 1923, as the result of various conferences, ... a Convention was arrived ... securing a certain amount of uniformity in the contracts of carriage *which were made by bills of lading*”. (Italics added).

It is not only stipulated that the Hague Rules should be applied to the bill of lading contract, but also that the contract should be made by and with the issue of the bill of lading. The bill is not mentioned as a contract but it is treated as such in the case. The Convention applies to the contract of carriage which is in the form of a bill of lading. Consequently, any other kind of contract is outside the mandatory scope of the Hague

¹⁴ *ibid.* p. 16

¹⁵ R Colinvaux “*Carver's Carriage by Sea*”, 1971, Vol. 1, Stevens & Sons p. 191 “As set out in the rules scheduled to the Act, they become, by law, part of the terms of contract for the carriage of goods by sea evidenced by bills of lading”.

¹⁶ *The Torni* [1932] P 78 p. 86

Rules. The aim of the Rules is to bring uniformity into the bill of lading contract which is the contract of carriage regulated by the Rules. Accordingly, Megaw LJ,¹⁷ in the Court of Appeal, stated that:

“The Hague Rules, accepted as a result of international agreement, were expressly and deliberately restricted to *bill of lading contracts*”. (Stress added).

The bill of lading has been seen as the contract of carriage. Finally, it could be said that the Hague Rules apply to the bill of lading contract. The Rules have failed to identify and establish as a principle that the contract of carriage governed by the Rules is a contract for the transport and delivery of an identified loaded cargo and that it has to be in the form of a bill of lading. The whole speculation, which has occurred since then, in regards that an oral contract of carriage can be concluded prior to the formation of the bill of lading contract could be avoided.

1.3 The Hague-Visby Rules

The Protocol which was signed at Brussels on 23 February 1968 amended the Hague Rules.¹⁸ Article 5 of the protocol states:

“The provisions of this convention shall apply to every bill of lading relating to the carriage of goods ... the contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract”.¹⁹

The use of “contained in” and “evidenced by” create an ambiguity about the

¹⁷ *Coast Lines Ltd v Hudic & Veder Chartering N.V* [1972] 2 QB 34 p. 48, p. 47 “But different considerations apply to the two types of contract, charter-party contracts and bill of lading contracts, as is indeed evidenced by the Hague Rules”.

¹⁸ fn 2 p. 278

¹⁹ fn 2 p. 280

contractual character of bills of lading. It seems that bills of lading are perceived under a changeable contractual role. According to the language of the article, the scale of the contractual function of the bill of lading extends from being an unspecified percentage of evidence of the contract of carriage and reaches its zenith when the contract is contained in the bill of lading. Besides, in the case of bills of lading under charter-parties the Rules apply when and because bills of lading are contracts of carriage themselves and not evidence of them. Do the Rules attribute a double contractual role to bills of lading? There is no explanation in the Convention about this double contractual function of bills of lading. However, the Hague or Hague-Visby Rules apply to the bill of lading contract.²⁰

Is the contract of carriage covered by a bill of lading when the contract is evidenced by or when it is contained in the bill of lading? The term “covered” has to be perceived under a single meaning and therefore by “covered” it is meant that either the contract is contained in or is evidenced by a bill of lading. Besides, the former conception has been accepted rather than the latter one. Hence, the Rules are applicable only to the bill of lading contract and not to a bill of lading as merely evidence of it. Additionally, the definition of the contract of carriage is not amended by the Protocol and, therefore, the contract of carriage is covered by a bill of lading. Consequently, the contractual function of bills of lading, as it has been perceived by the Hague Rules, must be transplanted into the Hague-Visby Rules too. Hence, all the views about the contractual role of bills of lading, which are stated above, are applicable to the Hague-Visby Rules as

²⁰ P Todd “*Modern Bills of Lading*”, 1990, Blackwell Scientific Publications p. 92 “The Hague or Hague-Visby Rules apply to the bill of lading contract”, F Berlingeri “The Hague-Visby Rules and actions in tort” 107 *LQR* 18 p. 19 “The Hague Rules were intended to govern the relations between the parties to the bill of lading contract”. *The Nerano* [1996] 1 Lloyd’s Rep 1 pp. 3-5 “The bills of lading contract was subject to the Hague-Visby Rules”. *The Mahkutai* [1996] 2 Lloyd’s Rep 1 p. 9 “Most bill of lading contracts incorporate the Hague-Visby Rules”. D. Faber “Electronic Bills of Lading” 1996 *LMCLQ* 232 pp. 238-39 “Those measures do not provide certainty on the issue of whether the Hague, Hague-Visby and Hamburg Rules will be treated as incorporated into a computerised bill of lading contract”.

well. The Comité Maritime International²¹ stated that the Hague-Visby Rules apply only to bills of lading and the contract of carriage is covered by a bill of lading, in other words, the bill of lading is the only contract in which the Rules are applicable. As a result, a definite concept about the contractual nature of bills of lading under the Hague Visby Rules could be achieved if the term “evidenced by” is considered to be analogous with “contained in” under the perception that the bill of lading is the contract. Because if a strict interpretation of the exact meaning of the words is followed, then we will have the bill of lading being a contract of carriage, or merely evidence of it or simply a receipt. Finally, it is submitted that the Convention applies to the bill of lading contract.

1.4 UNCTAD Reports

The conception of the contract of carriage is shaped through its historical changes and developments. The contract of carriage has been enveloped in a suitable form in order to be able to serve at the same time the three functions of being a receipt, a contract and a document of title. The contract of carriage is a contract of transport and delivery of the loaded cargo. Hence, the contract of carriage must be formed by and with the receipt of the cargo. On the one hand, in the report of UNCTAD on bills of lading 1971, it is stated that:

“What is meant by the expression contract of affreightment? In my opinion, to satisfy the requirements with reference to contract of affreightment, *the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer* and which when transferred will give the buyer two rights: a). a right to receive the goods, and b). a right against the ship owner, who carries the goods,

²¹ Paris Declaration on Uniformity of the Law of Carriage of Goods by Sea, 1990 *Il Diritto Marittimo* 811 p.824 “The Rules apply only to bills of lading and similar documents of title”.

should the goods be damaged or not delivered”.²² (Stress added).

The fundamental element which springs out of this statement is that the embodiment of the contract of carriage in a document capable of being transferred to any consignee or endorsee is the result of the internal dynamic legal nature of the contract of carriage. Do contract of carriage and bill of lading appear at the same time? If the contract of carriage is concluded earlier than the document which represents it, then the document merges all the contractual terms as the final writing of them. According to this statement, the time of the issue of the document does not play any important role regarding its function as the contract of carriage. The solid employment of the document as the contract of carriage is clearly recognised and the referring document is none other than a bill of lading. The terms of the contract, as embodied in the document, are the legal background for the documentary function of the bill of lading. The loaded cargo is transported and delivered under the contractual terms expressed in a bill of lading, which validate the bill of lading as a document of title.

The bill of lading by customary usage and mercantile employment has become the contract of carriage.²³ The customary usage of the bill of lading as the contract of carriage is a key element distinguishing the unique character and creation of bills of lading as contracts of carriage, in comparison with the creation of the ordinary contracts where the general principles of the law of contract²⁴ must apply in order to have a concluded contract.

On the other hand, the report stated that:

“The bill of lading is not considered to be the contract itself but evidence of its terms after it has been accepted by the shipper. The

²² UNCTAD, *Report on Bills of Lading*, 1971 p. 7 Footnote 27

²³ *ibid.* p. 23 “beginning as bailment receipt for goods, it has developed into a receipt containing the contract of carriage and acquired in time a third characteristic, that of a negotiable document of title”, p. 52 “If the bill of lading is treated as a contract of carriage”, “Frequently the charter-party is not at hand when *the bill of lading contract is concluded*”. (Stress added).

²⁴ G Treitel “*An Outline of the Law of the Contract*”, 1989, Butterworths, Chapter 2

actual contract usually comes into being when shipping space is reserved, before the bill of lading is signed by the carrier, and its terms must be inferred from the carrier's sailing announcements and the arrangements made before the goods are shipped".²⁵

Firstly, the contradiction is obvious between the views, about the contractual character of bills of lading, expressed in the above mentioned statement, which is contained in the same report and this statement in which the bill of lading is referred to as merely evidence of the contract of carriage. Secondly, it is suggested that the terms of the contract have to be inferred from the carrier's announcements. The announcements are not regarded as proposed terms of the contract but simply as an invitation for further negotiations in order to conclude the agreement at a later stage. Thirdly, it is not taken into account that the carrier's printed bill of lading is exposed for inspection a long time before any bargain starts, and the shipper can buy the bill in a stationers' office.²⁶ The shipping space is always booked under the consideration of the terms of the carrier's bill of lading, which are, at the same time, the terms under which the carrier receives and transports the cargo of every potential shipper.²⁷ Additionally, the shipper consents to those terms by accepting the bill of lading. Thus, the final terms of the contract have to be those contained in the carrier's bill of lading. Fourthly, the booking of space is an agreement but not the final contract of carriage of goods by sea. On the one hand, if the carrier does not keep the booked shipping space, then the contracting party will sue him

²⁵ fn 22 p. 7

²⁶ *Heskell v Continental express* [1950] 1 All ER 1033

²⁷ W Tetley "*Marine cargo claims*", 1991, International Shipping Publications p. 985, *Quigley v Wiley* 179 A 206 p. 207 "The contract under which it was received for transportation was the uniform bill of lading known as an 'order bill of lading' ", R Cleton "*Contractual Liability for Carriage of Goods by Sea*" in Hague-Zagreb Essays 3, 1980, TMC Asser Institute - The Hague p. 4 "Especially in the liner trade, where the carrier only accepts cargo on fixed terms, there is no room for bargaining between the shipper and the carrier". L Kendall "*The Business of Shipping*", 1986, in M Dockray "*Case and Materials on the Carriage of Goods by Sea*", 1987, Professional Books p. 9 "A liner service company issues a standard (or uniform) contract of carriage or bill of lading. Regardless of the size of the shipment ... the provisions of the contract apply equally to all shippers who use any one vessel. These provisions are not subject to negotiation, but are unilaterally imposed by the carrier".

for the breach of this agreement in which there is not included any real misdelivery and failure to transport the received or/and shipped goods. On the other hand, the real sense of the contract of carriage is the transport and delivery of the loaded cargo²⁸ and, therefore, the booking of space cannot be perceived as this kind of contract of carriage. It is, therefore, doubtful if the booking of space could be regarded as the final contract of carriage. To support the argument that the contract of carriage is finally expressed by the bill of lading, there is the following statement from the same report:

“When a bill of lading has been issued, it is to be taken as the expression of the contract governing the entire transaction”.²⁹

Once again, the bill of lading is stated as the contract of the whole transaction, regardless of the time of its issue. The language of the statement shows especially that the contract of carriage has been concluded under the terms of the bill of lading despite the issue of the bill in a later stage.

Courts have interpreted bills of lading as ordinary contracts and only ambiguous terms have been construed against the carrier.³⁰ A document which is interpreted under the general principles of the law of contract has to be a contract itself. Hence, it is another indication that bills of lading belong to the category of the contractual documents. The interpretation of ambiguous terms of any contract does not indicate that the interpreted contract is not a contract.

Additionally, it is worth mentioning that in the ALAMAR bill of lading, which is illustrated in the report, it is stated that the contract of carriage is contained in the bill of lading.³¹

²⁸ fn 2 article I (e) p. 263

²⁹ fn 22 p. 7

³⁰ fn 22 p. 7 (fn 27) “bills of lading are interpreted by the courts in the same manner as other contracts but any ambiguity or doubt raised by their terms is usually interpreted against the carrier”

³¹ fn 22 p. 55 [ALAMAR] Latin American Ship Owner Association “the contract of carriage documented in this bill of lading is, by agreement between the two parties, the carrier and the shipper, subject to the stipulations and conditions appearing on the observe side and to the following clauses”.

The sense under which the term “contained in” has been perceived is stated in the report itself.³² The contract of carriage is contained in the bill of lading in the same way as in the case of a charter-party and, consequently, the bill of lading is a contract like the charter-party. Finally, it seems that there is no clear view about the contractual role of bills of lading in this report of UNCTAD. It is submitted that the lack of a uniform approach which is illustrated in the Hague and Hague-Visby Rules has been inherited. Thus, the bill of lading being the contract of carriage should be regarded as the prevailing view. There is no authentic argument which establishes the bill of lading as merely evidence of the contract.

In a later report by the secretariat of UNCTAD about charter-parties, the bill of lading has a dual contractual role. Hence, on the one hand, the bill of lading is either the contract itself or evidence of the contract, but there is no argument to the extent that on some occasions the bill of lading is the contract and on other occasions it is merely evidence of it.³³ On the other hand, as it is stated above, the bill of lading has one contractual characteristic, namely that of being the contract in which the provisions of the Rules are implied and, thus, the contract is covered by the bill of lading.

According to the report, the bill of lading under charter-party is evidence of the contract of carriage between the carrier and the third party holder of the bill, but it is well established under the national systems of the countries under investigation that the bill of lading in the hands of a third party is the contract itself and not merely evidence of it.³⁴ Thus, the use of the term evidence is inadequate.

³² fn 22 p. 6 “When the agreement is for the carriage for a complete cargo of goods ... the contract is almost always contained in a document called a charter-party”.

³³ Report by Secretariat of UNCTAD on Charter-parties, 1974, New York In M Dockray “*Cases and Materials on the Carriage of Goods by Sea*”, 1987, Professional Books p. 6 “Although a bill of lading may itself be a contract (or evidence of a contract) of affreightment, there is in practice no rigid distinction between operations governed by charter-parties and those in which a bill of lading makes an appearance.” p. 7 “When it is issued in respect of a shipment made under a charter-party, the bill of lading will, in general, only acquire the function of evidencing the contract of affreightment if it is held by a third party”. UNCTAD *Report on Charter-parties* TD/B/C.4 ISL/ 55, 27 June 1990

³⁴ *Benjamin's Sales of Goods*, 1992, Sweet & Maxwell p. 924, 954, *Ameranda Hess Corp v SS Philips Oklahoma* 558 Fsup 1164 p. 1166.

In one of the reports of the Economic and Social Commission for Asia and the Pacific, concerning the contractual role of bills of lading, it emerges that the bill of lading is a contract which is not signed by the shipper.³⁵ The absence of signatures of both contractual parties is not regarded as an indicative factor showing absence of any conclusive contractual agreement contained in the document.³⁶ However, in many cases a booking agreement might exist prior to the issue of the bill of lading and therefore, the report stated that:

“This is why the bill of lading strictly legally speaking is said to be evidence of a contract of transportation. For practical purposes, it may, however, be said that the bill of lading is the contract of transportation”.³⁷

It emerges that the bill of lading is not, in legal terms, the contract of carriage but for practical purposes the bill of lading is the contract of carriage. No practical use or quality can be attributed to a document if it is not legally accurate and it has been legally accepted as such. Practical usages and purposes have transformed bills of lading into

³⁵ Economic and Social Commission for Asia and the Pacific “*Use of Maritime Transport a Guide for Shippers, Freight Forwarders and Ship Operators*”, United Nations, Vol. 1 (ST/ESCAP/516) p. 100 “In liner shipping the bill of lading is the transport contract similar to a charter-party, although the shipper has not signed it”, p. 310 “The transportation contract is for all practical purposes embodied in the bill of lading”

³⁶ *Insurance Company of North America v S/S American Agrosy* 732 F2d 299 p. 303, “The district court relied on a line of cases holding that a ship, by setting sail with the goods on board, may be deemed to have ratified a bill of lading that was neither issued nor authorised by its master”. *Samson Plastic Conduit and Pipe Corp v Battenfeld GMBH* 718 Fsup 886 p. 890 “It is a widely accepted principle of contracts that one who signs or accepts a written instrument will normally be bound in accordance with its written terms”. *Watkins v Rymill* [1883] LR 10 QBD 178 p. 188 “A great number of contract are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its content or not”. *Parker v The South Eastern Railway Company* 2 CPD 416 p. 421 “The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it”.

³⁷ fn 35 p. 312 “Secondly, the bill of lading contains a promise of transportation. As indicated above, usually there will be a booking agreement prior to the actual shipment and issuance of the bill of lading. And the bill of lading should of course, be in conformity with the agreement”. E Hardy Ivamy “*Dictionary of Shipping Law*”, 1984, Butterworths p. 9 “**In practice, the bill of lading is regarded as the contract**” (Stress Added).

contracts of carriage. Hence, any contract of carriage in liner trade is made under the terms of the carrier's bills of lading. The bill of lading does not conform with the booking agreement, but the booking agreement conforms with the pre-existing carrier's bill of lading. Besides, the booking note does not bind even as a simple agreement.³⁸ Moreover, as it is indicated by the Commission, the acceptance of the bill of lading by the shipper means ratification of the bill as the contract of carriage.³⁹ Thus, the final expression of the contract is that contained in the bill of lading. Furthermore, it could be said that the prevailing principle which comes out from this report is that bills of lading have been imposed by practical usage as contracts of carriage.

1.5 The Hamburg Rules

The United Nations Convention on the carriage of goods by sea (the Hamburg Rules) introduces a new approach to the contract of carriage. The new element is the application of the Rules to different kinds of contracts of carriage and not only to contracts covered by a bill of lading, but also to their part referring to the carriage by sea. Ramberg⁴⁰ considers that the Hamburg Rules apply to the contracts of carriage as such.

In article I it is stated that :

“Bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier and by which the carrier undertakes to deliver the goods

³⁸ fn 35 p. 311 “For these and other reasons a more or less deep rooted conviction may exist that the booking note is not binding”, *Hellenic Lines Ltd v Embassy of Pakistan* [1973] 1 Lloyd's Rep 363 p. 364, A Branch “*Elements of Shipping*”, 1981, Chapman and Hall p. 223

³⁹ fn 35 p. 311 “by receiving the bill of lading the shipper is, however, deemed to have accepted the terms contained in the bill of lading”, *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 p. 440 “When a shipper receives a bill of lading issued in the due course of trade he will ordinarily be bound by its terms and conditions”.

⁴⁰ J Ramberg “The Vanishing Bill of Lading & The Hamburg Rules Carrier” 1979 *AJCL* 391, fn 6 p.1070 “Mandatory rules for carriage of goods by sea apply to the contract as such and this is also the principle of the 1978 UN Convention for the carriage of goods by sea (The Hamburg Rules)”. fn 5 p. 180

against surrender of the document ...”⁴¹

The bill of lading is considered to be evidence of the contract, a receipt and a document of title. Besides, the Hamburg Rules do not apply to charter-parties, which means that they do not apply to the contract as such. Additionally, in accordance with article 2(3) of the Rules “Where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer”.⁴² Thus, the Rules do not apply when the bill of lading is issued to the charterer and remains in his hands. Hence, there are two occasions where the Hamburg Rules have expressly denied application to the contract of carriage as such.⁴³ Furthermore, the bill of lading is defined as the contract of carriage which governs the relations between the carrier and the holder of the bill of lading (except the charterer). There is an inconsistency regarding the contractual role of bills of lading under the Hamburg Rules. Therefore, it seems that the bill of lading is not even evidence in the hands of the charterer. Hence, we have the bill of lading being a contract of carriage or merely evidence of it or none of them. The Rules have not attributed a single contractual function to bills of lading as legal documents. On the one hand, the term that the contract of carriage is covered by a bill of lading has been omitted from the Rules. On the other hand, the contract of carriage is covered by a bill of lading in the same sense since the Hague Rules have come into force. Hence, it should be considered that the bill of lading is still the contract in which the Rules are implied, regardless of the fact that those Rules can be applied to any kind of contract as well. The different approach, regarding the contractual role of bills of lading, introduced by the Hamburg Rules is not in compliance with the practical usage of bills of lading. It is submitted that the Hamburg rules apply to the bill of lading contract. Accordingly,

⁴¹ “The United Nations Convention on the Carriage of Goods by Sea 1978” 1979 *AJCL* 421 p. 421

⁴² *ibid.* p. 422

⁴³ A Waldron “The Hamburg Rules. A Boondoggle for Lawyers?” 1991 *JBL* 305

Tetley⁴⁴ stated that “Under the Hamburg Rules, the bill of lading is not the only possible contract of carriage”. However, by applying the Hamburg Rules to any kind of contract, it has not avoided the inconsistency and absence of a firm conception about the contractual role of bills of lading.

1.6 Deductions

In the end it could be said that there is no clear and uniform definition of bills of lading and their contractual character in the International Conventions. The International legislator made the distinction between charter-party contracts and bills of lading contracts. The application and the definition of the kind of the contract of carriage upon which, as a mandatory law, the Rules are implied has been decided by the International Legislator. The International Conventions are not applicable, as a mandatory law, to charter-party contracts. Besides, the identification of the contract of carriage that the International Conventions regulate, brings security and efficacy of International Trade. Parties must know the exact terms of their contract and not merely some evidence of it, in order to contract quickly and save time which means less cost and more stability. On the one hand, in the Hague Rules the contract is covered by a bill of lading under the meaning that the bill of lading is the contract of carriage. On the other hand, in the Hague-Visby Rules not only the contract is covered by a bill of lading, but also bills of lading are regarded as contained in or evidence of the contract of carriage without any explanation about the differentiation in the conception of the contractual role of bills of lading. However, both Rules, as mandatory law, are implied to the bill of lading contract and not to every kind of contract of carriage. In the Hamburg Rules bills of lading are considered as being evidence of the contract without any further explanation of why or

⁴⁴ W Tetley “*The Hamburg Rules-Good, Bad and Indifferent*” in *The Speakers Papers for the Bill of Lading Conventions Conference, 1978*, Lloyd's of London Press p. 2.

how bills of lading lost their contractual quality as contracts of carriage as stated by the Hague and the Hague-Visby Rules. The application of the Hamburg Rules to every kind of contracts of carriage cannot influence the contractual nature of bills of lading. Besides, the bill of lading is a specific kind of written contract to which the rules are implied. Moreover, in practice, the bill of lading has been established as a standard form of contract that is not reflected by the rules of the Conventions. It does not follow from the Rules that the conception of the contract of carriage is a contract for the transport and delivery of the received and loaded cargo. Additionally, in all the International Conventions bills of lading under charter-parties should be contracts of carriage themselves to which the Rules are implied. Hence, it should have defined a single contractual role for the bill of lading in common carriage as well. It should be taken into account that both bills of lading in common carriage and under charter-parties should be seen as the same kind of bills of lading. In contrast, it seems that there is not yet a clear and solid international conception about the contractual nature of bills of lading. The absence of a uniform approach regarding the contractual role of bills of lading, has been inherited in the UNCTAD Reports as well. However, scholars and courts seem to have a clear opinion about the contractual role of bills of lading, because they clearly state that the bill of lading is the contract to which the Rules apply. Uniformity on the matter can be achieved by the acceptance that the used expression “evidence of the contract” has to be interpreted as analogous of the term “contract contained in” the bill of lading. Otherwise, the bill of lading will be identified as being either contract of carriage or evidence of it or neither of them. Besides, the contract of carriage in the form of a bill of lading remains the same from the commencement of the transaction until the delivery of the goods and, therefore, the contract of carriage has to be identified under one form. In the next chapter the contractual character of bills of lading under the national law of Greece will be analysed.

CHAPTER II

The Contractual Role of Bills of Lading under Greek Law

2.1 Introduction

Although Greece is not a party to the Brussels Convention of 1924 on bills of lading (Hague Rules), a major part of its substantive provisions has been incorporated in title 6 of the Code of Private Maritime Law, which was introduced by Law 3816 in 1958.¹ The Hague and The Hague-Visby Rules have recently become part of the Greek system by law 2107/1992.² The contract of carriage of goods by sea is regarded as a kind of the general contract of affreightment³ (charter-parties). Scholars have clearly expressed in favour of the regulation of both kinds of contracts under the same provisions. Thus, the former (contract of carriage) is governed by the same provisions as the latter (charter-party).⁴

Potamianos⁵ and Avrameas⁶ have articulated a different argumentation supporting

¹ N Deloukas "Maritime Law", 1979, Sakkoulas Athens p. 43, E Skalidis "Commercial Code", 1985, Sakkoulas Thessaloniki p. 461

² A Kiantou-Pampouki "Introduction of the Hague-Visby Rules and the Law of Affreightment" 1993 *EML* 287

³ Article 107 states that "The subject-matter of a contract of affreightment shall be, for consideration: a. the use of the ship in whole (whole charter) or in part (part charter) in order to effect a carriage by sea. b. the carriage of goods by sea (contract for carriage of goods)". T Karatzas, N Ready "The Greek Code of Private Maritime Law", 1982, M Nijhoff Publishers p. 32, Ibid. Skalidis p. 489. A Kiantou-Pampouki "Maritime Law", 1992, Sakkoulas Thessaloniki p. 252. D Kambisis "Private Maritime Law", 1982, Sakkoulas Athens-Komotini p. 331. Staurooulos "Interpretation of the Commercial and Maritime Code", 1978 p. 378. Introductory Statement on Amendment of Provisions of Code of Private Maritime Law in *Hellenic Association of Maritime Law Memory D Markianos*, 1988, Athens p. 384

⁴ Polimeles court of first instance of Piraeus 524/1969 1969 Epitheorisis Emporicou Dikaiou (EED) p.407
The cases of Greek courts are published with first mentioning the kind of the court and after the number of the case and the year of its publication.

⁵ F Potamianos "The Contract of Carriage by Sea", 1962, Vol. 1, Athens

⁶ P Avrameas "Le Transport sous Connaissance en droit Grec", 1966, Paris p. 18

a contract of carriage by sea with its individuality. Particularly, Potamianos bases its identity upon its purpose and content. The bill of lading contains an agreement for the transport of a certain load and not for the hire of the ship, regardless of whether or not the ship can be used to transport goods. The issue and circulation of the bill of lading creates new relations, which are the spine of the contract of carriage, resulting in an autonomous statute (thesmos). He says:

“It is obvious that the autonomy of the relations which have arisen from the bill of lading has resulted as the main separating element between affreightment and carriage of goods by sea”.⁷

It is submitted that the philosophy of Potamianos based on the thought that the whole scale of relations developed under and by the bill of lading are a part and the aim of the contract of carriage. Thus, the whole scale of relations which have been developed by the receiptual and documentary usage of the bill are goals of the contract of carriage as well. As a result, they characterise the contract of carriage and without the issue of the bill of lading these relations cannot be created and, therefore, the contract of carriage has to be in the form of a bill of lading. This is the sense of the contract of carriage as it has been perceived and expressed in the International Conventions according to Potamiano's view and on this account he states that the contract of carriage is the bill of lading. He considers that the contract of carriage is concluded by and with the issue of the bill of lading. The bill of lading is the cornerstone embodying all those relations which actually form the whole concept of the contract of carriage.

As it is explained above, because there is no distinction between the different kinds of contracts, all of them belong to the general category of the contract of affreightment. To that extent the provisions of the Private Maritime Code of Greece apply

⁷ fn 5 p. 14 (The translation of the quotations has been done by the author of the thesis.)

to all kinds of contracts of affreightment indiscreetly if a charter-party, a bill of lading, both of them or none of them had been issued.⁸ However, the newly introduced Hague and Hague-Visby Rules are applicable to a contract of carriage covered by a bill of lading, which means that these rules prevail over the provisions of the Maritime Code when the contract of carriage is in the form of a bill of lading.⁹ The contract of carriage is not regarded as being a special kind of contract or as being issued in a special form in order to be regulated by the Code. Supplementary, provisions of the Civil Code are applied to regulate situations which are left out of the range of the Maritime Code.¹⁰

The main objection in the common regulation, as it stands in Greek law, focuses on the idea that, practically, the contract of carriage of goods by sea serves a much more specific object than the contract of affreightment which embodies a variety of objects as terms relating to the hire of the ship and the crew etc. The main task of the contract of carriage of goods is the carriage of a certain load by a named ship to a known destination. The surroundings of the apprehension of the contract and the negotiation of the terms belong to a different procedure in liner shipping than in charter-party agreements.¹¹

The formation of the contract of carriage of goods will be examined in the light of the investigation of the contract of affreightment. The whole analysis of the contractual perception of bills of lading under Greek law will be generally based on Greek literature. The analysis will commence by examining the contractual role of bills of lading under the articles of the Private Maritime Code of Greece, which is the best way to start whatever kind of investigation concerning civil law systems because of their codification.

⁸ I Sxinas “*Sources of the Uniform Law of the Carriage of Goods by Sea*” PHD Thesis, 1977, Athens pp.198-99

⁹ According to the Greek Constitution 1975 Art 28 the international conventions by becoming part of the national law are prevailing over it.

¹⁰ fn 3 Pampouki p. 256, Article 144 of the Code states “reserved the general provisions for failure in performance”. It is a direct reference to the principles of the Civil Code Articles 335-348 [Civil Code, Legal Library 1988 Athens]. Markianos has argued against the regulation of charter-parties under the same provisions as the carriage of goods D Markianos 1959 *EED* p.126

¹¹ *Report by the Secretariat of UNCTAD on Charter-parties*, 1974, United Nations, New York

2.2 Contractual Role of Bills of Lading under the Private Maritime Code of Greece

Article 108 of the Private Maritime Code states:

“A contract of affreightment shall be evidenced by writing (charter-party). In the case of a contract for the carriage of goods, the bill of lading or a document evidencing the receipt of the goods for loading may be substituted for the charter-party ... ”¹²

In the first place the article refers to the contractual role of charter-parties. Hence, the charter-party is regarded as evidence of the contract and it could be said that part of the contract and not the whole contract itself is incorporated in the charter-party. The real conception of the contractual role of charter-parties and consequently the accuracy of the wording of the article will be examined in the appropriate place. The following passage from the introductory statement of the constituent committee makes clearer the intention and the sense of the article. The statement says that:

“we remain in the *solo consensu* formation but with a document (except of small coasting services) evidence of the contract of affreightment ... in contracts of carriage of goods the charter-party may be replaced by a bill of lading and the practical significance of it mainly arises only *ad probationem*”.¹³

According to the statement, a document is not required in order to have a concluded contract of carriage. The issue of the document is regarded as containing the evidence of the contract. It is not stated whether the document is merely evidence or with evidence meaning conclusive incorporation of the terms of the contract in the document and

¹² fn 3 Kambisis p. 336, fn 1 Skalidis p. 489. T Karatzas, N Ready “*The Greek Code of Private Maritime Law*”, 1982, Martinus Nijhoff Publishers p. 32

¹³ A Antapasis “*Code of Private Maritime Law and Related Provisions*”, 1989, Sakkoulas Athens-Komotini pp. 178-180

subsequently in the case of carriage of goods by sea in the bill of lading. Furthermore, the statement does not exclude an issued bill of lading as being the contract of carriage itself or as becoming the contract of carriage in the process of the transaction. The reference of the introductory statement of the constructive committee for the amendment of the code should show the line of thought followed nowadays. It is stated:

“In article 108 the section b is amended in order to be elucidated that the affreightment may be evidenced not only by a charter-party or a bill of lading but also with every document used in the nautical practice (as booking note) as well as telegraphs and telex”.¹⁴

This statement adds very little about the contractual character of the bill of lading or the meaning of the term evidence. Therefore, under the new statement, both bills of lading and charter-parties are only evidence of the contract and not the contract itself.

The language of the article indicates the legislator's will for evidence of the contract in writing. However, the need to have evidence in writing creates uncertainty as to what the contract is and how it can be formed. The statement outlines the *solo consensu* formation of the contract. It seems that a contract of affreightment and a contract of carriage of goods by sea can be simply formed by the meeting of the parties' mind. This does not mean that the contract of carriage cannot be concluded under the terms of the bill of lading. Additionally, the demand for evidence in writing excludes from the content of the contract any orally agreed terms which have not been incorporated in the written document. Furthermore, it has not ruled out the formation of the contract by and with the issue of the bill of lading. Stauroopoulos complying with the wording of the article 108 of the code states that:

“... even if a document has not been formed for the affreightment

¹⁴ *Hellenic Association of Maritime Law Memory D Markianos*, 1988, Athens p. 384

(charter-party), the contract is regarded existing by the moment it

has occurred an agreement about it”.¹⁵

It is submitted that the issue of a charter-party is not necessary for the conclusion of a contract of affreightment which does not mean that the charter-party is not the contract of affreightment. Hence, it could be said that the contract of carriage can be formed without the need to be expressed in a document.¹⁶ Therefore, a contract of carriage can be concluded at the moment the minds of the contracting parties have met. It is not assumed that when a document, containing the terms of the contract, has been issued and has been accepted by both parties it cannot be the contract of carriage.

The statement highlights the practical existence of the document as *ad probation* which means that the contract exists without the document. This rule applies firstly to charter-parties and, consequently, to bills of lading as well. The legislature remains constant in the fundamental rule of the General Principles of the Civil Code of Greece outlined in article 158 which states “the use of form in any legal dealing is needed only where the law declares so”.¹⁷ Therefore, in compliance with article 159 which states that “a legal dealing for which the form demanded by law is not kept, if the opposite is not mentioned, is invalid, null and void”¹⁸, every contract of affreightment can be formed without any form because the law declared so in article 108.

There is a great deal of controversy concerning the contract of carriage contained in the bill of lading.¹⁹ In 488/1988 decision, the court of first instance of Piraeus stated that:

¹⁵ fn 3 Stauroopoulos p. 381

¹⁶ fn 3 Pampouki p. 260 “This means that the contract can be formed and function and without a document”, fn 1 p. 261 N Deloukas states “The contract of affreightment ... receives foundation by simply the consent of the parties”

¹⁷ *Civil Code*, Legal Library, 1988, Athens p. 18.

¹⁸ *ibid.* p. 18

¹⁹ A Loukopoulos “*Ocean Bills of Lading*” In Association of Greek Commercial Lawyers Afieroma to K Roka, 1985, Athens, Sakkoulas

“the bill of lading incorporates the contractual right of the holder of the bill of lading to receive the goods which are represented by the bill of lading”.²⁰

A clear and sound indication that the contract of carriage has to be incorporated in the bill of lading. It is clear that when a document has been issued *ad probationem*, the issue of the document is not condition and starting point for the legal life of the agreement contained in it. Thus, the charter-party does not necessarily form the contract of affreightment. The investigation should be directed towards examining whether the issued document incorporates the contract or not. What does the legislature mean by evidence in writing? Before any further reference to court decisions concerning the contractual character of bills of lading takes place, it should be very useful for any reader unfamiliar with the Greek law to get the basic legal background of the demonstrative value of documents issued as evidence of a transaction.

2.3 Demonstrative Value of Documents Issued as Evidence of a Transaction

The law of evidence covers the uncertainty left behind by the language of article 108. Article 393 of the Code of Civil Procedure²¹ states that no evidence by witness for additional agreements made before or after the legal dealing was constructed in writing is allowed, even if it is not against the content of the document. Article 394 of the same code declares²² the use of witness:

“if there is a principal of written evidence emanated from a document having power of evidence”²³

²⁰ 1988 Legislation of Courts of Piraeus 443 p. 448

²¹ *Code of Civil Procedure*, 1985, Sakkoulas p. 150

²² *ibid.* p. 150

²³ P Styfaliadis “The Meaning of the Principle of Written Evidence” 1974 *Nomiko Vima* 753 p. 753

The principle of written evidence exists in the case that a document constructed according to a demonstrative form which makes possible but not completely evidenced the proposed. In paragraph 2 of article 394 it is stated:

“in no case where by law or by agreement the document of the legal dealing is determined either as constructive or as demonstrative form is the evidence by witness permitted”.²⁴

Hence, even if the document is regarded as a prerequisite for the legal existence of the contract, the same evidential rules apply to the contract as when the document is regarded as demonstrative of the existence of it.

In 487/1982 decision, the supreme court decided that:

“... from the combination of articles 393 and 394 of the Code of Civil Procedure it transpires that the existing principle of written evidence, regarding a document which is constructed in writing and having demonstrative power, allows evidence with witness of additional agreements, previous, synchronous or posterior of a legal dealing even if they are opposed with the content of the document, except if the legal dealing has not only constructed in writing but the document has been declared by law or by agreement of the parties either as constructive or as demonstrative form”.²⁵

In combination with articles 108, 393, 394 and the decision of the supreme court it is made clear that no oral agreements are allowed, which are evidenced by witness, to supersede any term of a document, such as the bill of lading, declared by law as the demonstrative form of the contact of carriage of goods. There are some cases where the

²⁴ fn 21 p. 150

²⁵ 1983 Nomiko Vima pp. 58-59

courts have accepted oral testimony against written terms of the document.²⁶ In 1533/1981 case, the court of appeal of Piraeus stated:

“... that means if a document has not been issued then the contract could not be evidenced by witness but only by the means of oath and admission”.²⁷

Hence, it transpires the conclusive evidence of the document as it is illustrated in 2147/78 decision of the court of appeal of Athens either.²⁸ In the absence of a document the contract can be evidenced by the means of oath and admission.²⁹ Thus, when a document has been issued, any further evidence is inappropriate. The prohibition of evidence by witness refers only to the construction of the contract and not to the real events as the receipt and the loading of the goods.

The arguments which are illustrated above make clear that with evidence in writing means conclusive evidence. In other words, there is a conclusive incorporation of the terms of the contract into the issued document. Therefore, it can be said that the document is treated as the contract. The most important element which has arisen from the articles and the courts' decisions is that both the constructive and demonstrative forms of a legal dealing have been put under the same principle regarding the document as the expression of the terms which result from the conclusion of the agreement. It could not be used as an argument that the contract is not contained in the bill of lading because it can be evidenced by the means of oath and admission as well when the same rule

²⁶ Court of First Instance of Piraeus 970/75 3 Epitheorisis of Maritime Law (EML) 177, Court of First Instance of Athens 3499/72 2 EML 412. Court of Appeal of Piraeus 1156/91 1991 Piraiki Nomologia 740

²⁷ Court of Appeal of Piraeus 1533/81 1982 EED 438 p. 439, In 112/1970 decision of the Court of Appeal of Patra stated “... because the law means document which is a conclusive evidence and not making possible the event permitted only the means of evidence of oath and confession” 1971 EED 87, Court of Appeal of Athens 2253/1973 1973 EED 248

²⁸ 7 EML 273

²⁹ fn 1 Deloukas p. 262, Court of Appeal of Athens 6732/1989 1990 EML 497, Polimeles Court of First Instance of Athens 13479/1983 1984 EML 362

applies to constructive documents, which are supposed to be *ad solemnitatem* of a contract. It is noteworthy to state that all the above mentioned principles about the accepted means of evidence against the document apply first to charter-parties and then consequently to bills of lading.

It is an option for the parties to have a document in writing which expresses their contract of carriage. If a document has been issued, then the document has become the contract incorporating its legal terms. Two paths of expression of the contract of carriage are supposed to exist. First, the oral expression which uses as means of evidence the oath and the admission. Second, the written expression which regards as a conclusive means of evidence the written document, which in the case of carriage of goods is the bill of lading. However, the compliance with the legislator's request for conclusive evidence in writing, even as an option, diminishes the existence of the oral contract only in the field of literature and legal theory, when practically it is not possible for, any oral contract of carriage of goods to be evidenced by any oral means of evidence except those mentioned above. It is not realistic to expect the contracting parties to admit facts which are against their own interests. Taking into account that even if the code had declared the document as the contract itself, then the same rules of evidence against the terms of the contract could be applied. Consequently, the use of others means of evidence, as that of oath and admission, could not be used as an argument against the recognition of the document of bills of lading as the contract of carriage. The immaterial thought always comes before the writing but the writing materialises the thought. It is assumed that a contract of carriage of goods fulfilling and incorporating capacities of document of title can be formed and evidenced by and with the issue of the document (bill of lading). Otherwise, it is formed a contract of carriage unable to have the quality by its terms to serve as a document of title. The main principal emerging from the analysis is that by "evidence" is

meant conclusive incorporation of the contract into the document. The following analysis of the contractual character of charter-parties will highlight the accuracy of the wording of article 108 of the Greek Maritime Code.

2.4 The Charter-Party as the Contract of Affreightment

Is the charter-party the contract of affreightment or evidence of it? If the language of article 108 is strictly followed, then the charter-party has to be evidence of the contract and not the contract. Therefore, the contract had been concluded when the charter-party has been signed by the parties as evidence of their contract. In paragraph 2 of article 170 stated that:

“As regards the relationship between the carrier and the freighter, the terms contained in the contract of affreightment, as evidenced by the charter-party, shall prevail.”³⁰.

The article following the general line of the legislator talks about evident agreements in the charter-party and not about agreement contained in the charter-party which is the contract of carriage itself.

In contrast, Potamianos' opinion is as follow:

“the contract of affreightment is formed and evidenced by the charter-party made up between the charterer and the shipowner”.³¹

Thus, it is stated that the contract is contained in the charter-party instead of being merely evidence of it, and, additionally, it is formed by and with the issue of the charter-party. In support of this comes the 618/70 decision of the supreme court where it is declared that the booking form, which has been signed by both parties, was the charter-party and, therefore, “a contract of affreightment between the above mentioned parties has been

³⁰ fn 1 Skalidis p. 506

³¹ fn 5 p. 13

formed ”.³² Therefore, the charter-party is not evidence of the contract but the contract itself, which means that the language of Article 108 of the Code is inadequate concerning the contractual status of charter-parties and, consequently, the contractual status of bills of lading. Loukopoulos states that:

“the bill of lading, as is well known, is not the document of the contract of carriage (that is the charter-party) but the written evidence of the event of loading of the goods from which it has taken the name”.³³

His statement does not mention what happens in the carriage of goods where a charter-party has not been issued as the contract of carriage. It is obvious that it has to be considered that the bill of lading is the contract of carriage itself. In accordance with Kambisi's opinion,³⁴ the contract of affreightment (charter-party) is concluded and evidenced by the charter-party. In case of carriage of goods by sea, the charter-party is substituted by a bill of lading. Consequently, it is submitted that the contract of carriage is concluded and evidenced by the bill of lading as well. However, as it is explained above, by “evidence” is meant that the whole contract is contained in the bill of lading. Therefore, the contract is contained in the bill of lading and it could be said that the bill of lading is the contract itself.

Furthermore, T Karatzas and N Ready ³⁵said that:

“Article 108 contains the fundamental provision that a contract of affreightment must be evidenced in writing by a charter-party. In the

³² 1971 EED 86 p. 86, Court of appeal of Athens 6732/89 1990 EML 497, *Trade Arbed Inc v Sb Ellispointos* 482 F Supp 991, *Marathon International Petroleum Supply Co v Iti Shipping SA* 766 FSupp 130, *Cargill International SA v M/T Pawel Dybenko* 991 F2d 1012 p. 1014 “charter-party is just a species of contract, subject to same rules of interpretation as any other binding agreement”. In English law P Todd “*Modern Bills of Lading*”, 1990, Blackwell Scientific Publications Chapter 7, p. 90 “... unlike a charter-party, which is the contract of carriage”.

³³ fn 19 p. 17

³⁴ fn 3 D Kambisi p. 464

³⁵ fn 12 karatzas p. 30

case of the carriage of goods the charter-party may be replaced by the bill of lading”.

Does it mean that the contract of carriage has been concluded prior to the issue of the charter-party so as to be said that the charter-party is merely evidence of it? It is shown above that there is no contract, in the form of a charter-party, which has been concluded prior to the issue of the charter-party, which means that the contract of carriage is concluded by and with the issue of the charter-party itself. The writing is necessary for the formation of the contract. Consequently, in an equivalent way the contract of carriage is concluded by and with the issue of the bill of lading in all cases where the charter-party is substituted by a bill of lading. As a result, an oral contract is superseded by and with the issue of the charter-party, even if it is suggested that this oral contract is concluded prior to the issue of the charter-party.

Finally, when a charter-party has been issued the contract is contained in the charter-party. The charter-party is the contract itself and not merely evidence of it. Hence, because of the analogy of the application of the same article to bills of lading, the bill of lading has to be regarded as the contract of carriage as well. Therefore, the wording of article 108 is inaccurate.

2.5 The Bill of Lading under the Contract of Carriage of Goods

In contracts of carriage of goods by sea the only issued document is the bill of lading.³⁶ In nautical practice there are cases where a charter-party has been issued as well.³⁷ The scholars have interpreted as false the mention of article 108 for issue of charter-party in contracts of carriage of goods by sea.³⁸ It is submitted that it is an indirect

³⁶ fn 3 Pampouki p. 263, fn 1 Deloukas pp. 262-63, fn 5 Potamianos p. 13

³⁷ Court of Appeal of Athens 4466/1978 1979 EED 408

³⁸ fn 1 Deloukas p. 263

expression of the legislature that the bill of lading should substitute the charter-party as the contract of carriage in the case of carriage of goods by sea. The acceptance of the issue of charter-parties in cases of carriage of goods by sea indicates the recognition of charter-parties as being contracts of the carriage of goods by sea and no mere evidence of them. Consequently, the substitution of charter-parties by bills of lading has resulted in the recognition of bills of lading as contracts of carriage as well. In the case of carriage of goods by sea, if it is suggested that the contract of carriage has been concluded with the booking of space, then the charter-party which has been issued instead of the bill of lading must be evidence of the contract of carriage. On the contrary, as mentioned above, the charter-party is always the contract and not merely evidence of it.

Some definitions of the bill of lading could open the horizon of our understanding about bills of lading. First of all, it is a document, which began as a simple receipt given by a clerk to the shipper. According to Professor A Kiantou Pampouki:

“The bill of lading is evidence that the goods described in it have been delivered to the carrier ... It incorporates, as well, a promise of the carrier that he will transport and deliver those goods to the holder of the bill of lading in the port of destination”.³⁹

It is a clear confirmation that the bill of lading incorporates the contract of carriage and that the goods have been shipped and transported under the terms of the bill of lading. The bill of lading is issued as the contract for every holder of the bill of lading. There is no distinction whether the bill of lading is not contract for the original shipper.

Moreover, Loukopoulos says that:

“the bill of lading as a document of title incorporates only the claim

³⁹fn 3 Pampouki p. 311, *ibid.* p.405 N Deloukas referring to bills of lading says “the bill of lading is evidence of the loading of certain goods and a promise to transport them”. So the bill of lading is not evidence of the promise to transport but it is the promise itself which means that it is the contract of carriage.

which referred to the receipt and therefore only the claim for delivery of the load, not the obligation for transport ... the claim for transport incorporated in the charter-party and the claim to delivery to the bill of lading”.⁴⁰

It is obvious that he has in his mind bills of lading under charter-party where the bill emerges shortly after. He considers that the bill of lading has nothing to do with the terms of the transport of the cargo. It seems to be understood as being merely a receipt. Besides, the goods are transported and delivered to the consignee according to the terms of the bill of lading and not according to the terms of the charter-party. Moreover, every consignee looks at the bill of lading as the contractual document. The relation between the shipper-charterer and the carrier will be examined in another chapter. As it is referred to in Loukopoulo's article Scorza, an Italian scholar, declared that:

“the party signing the bill of lading is not only obliged to deliver but also to transport the load”.⁴¹

Therefore, it is ascertained that the bill of lading states the terms of the contract of carriage.

However, the implementation of the contract of carriage is the essential content of the bill of lading⁴² and, therefore, the contract of carriage can be found in the bill of lading. It could be said that the office of bills of lading is to accommodate the contract of carriage. The presentation of the views of scholars has resulted in the recognition of the incorporation of the contract in the bill of lading. Transport and delivery of the cargo takes place under the terms of the bill of lading which have to be the terms of the contract of carriage as well. Every further function of the bill of lading is based on the contract of

⁴⁰ fn 19 p. 19

⁴¹ *ibid.* p. 28

⁴² K Georgacopoulos “*Commercial Papers*”, 1985, Sakkoulas p. 170 “Essential content of bills of lading is promise for implementation of a contract of carriage.”

carriage which is embodied in the bill.

Is the bill of lading the contract of carriage or evidence of it? First of all, we will examine the relation between the shipper and the carrier. Secondly, when can the contract of carriage, regulated by the Private Maritime Code, be concluded? The Code demands evidence in writing, so, part of the agreement could be the writing of the contract and the demand for the final writing of the contract would be seen as a term of the contract necessary for its conclusion.

Could the contract be concluded before the loading of the goods? At what moment in time does the cargo become specifically identified with an ascertained amount to a received cargo which the carrier has to transport? The loading time is the eventual time for identification. It is different the problem when an ascertained bulk is transported under a number of bills of lading. Even then, the ascertained bulk has been identified as that. Exchanged information before the loading is just a draft of the main terms of the contract. From the combination of articles 192 and 195 of the Civil Code it is totally clear that the conclusion of a contract came upon the presumption that between both sides there was agreement on all points of the contract.⁴³ If the parties have not agreed on all the terms the contract has not been concluded yet, and the agreement on a plan including the substantial terms is not enough. In 1303/1988 decision, the Polimeles court of first instance of Piraeus stated:

“the law has not made distinctions in the importance of different terms of contract”.⁴⁴

As a result, if there is no agreement in any term of the contract then the contract is not concluded.⁴⁵ The delivery of the goods always takes place according to the terms of the

⁴³ fn 17 p. 20

⁴⁴ 10 Legislation of Courts of Piraeus 490 p. 492, Court of first instance of Piraeus 1210/88 1988 Legislation of Courts of Piraeus 625

⁴⁵ Court of Appeal of Thessaloniki 2429/1991 1993 EED 127

bill of lading. The terms of delivery are part of the contract of carriage. These terms, as they are expressed in the document itself, come into existence by and with the issue of the bill of lading. For that reason only the complete bill of lading containing all the details of the received goods could be regarded as the final offer for acceptance. However, according to 168 paragraph 2 article of the Maritime Code:

“A copy of the bill of lading, signed by the shipper, shall be delivered to the carrier”.⁴⁶

The delivery of the signed copy to the carrier by the shipper could be seen as a further approval of the bill of lading as the expression of their contract of carriage. Thus, it could be said that the bill of lading has been superseded some prior oral contract.

There are cases where the bill of lading is prepared in the office prior to the loading with the shipper's co-operation, which means the contracting parties had knowledge of its terms before its issue. But it has to be issued after the loading when the contract has been concluded.⁴⁷

According to professor A Kiantou Pampouki's opinion, in the case of the contract of carriage of goods, the bill of lading not only evidences the formation of the contract but also the terms of the contract. She considers that:

“in the contract of carriage of goods, however, where the bill of lading evidences the contract and its terms, the issue of the bill of lading is imposed without the demand of the shipper or the charterer, in the same sense that the construction of the charter-party is imposed in the affreightment”.⁴⁸

First of all, the formation and the incorporation of the contract by and in the bill of lading

⁴⁶ fn 1 Skalidis p. 505

⁴⁷ fn 1 Deloukas p. 412, B Kiantos “*Maritime Law*”, 1974, Sakkoulas p. 18, fn 3 Pampouki p. 314

⁴⁸ fn 3 Pampouki pp. 312-13

is recognised merely as evidence of it. Secondly, in comparison, the bill of lading and the charter-party function as contracts. The compulsory issue of the bill of lading by the carrier in the same sense as the charter-party is ascertained. The charter-party, as it is mentioned above, is the contract of affreightment. That means the bill of lading is issued compulsory as the expression of the contract of carriage of goods. The use of the word “evidence” suggests an understanding that the contract is not only the bill of lading but something else or something more than the bill. If it is accepted that the bill of lading is merely evidence of the contract, then the charter-party has to be merely evidence of the contract as well.

However, according to Potamiano's view, which is mentioned above, the contract of carriage is formed by the issue of the bill of lading and, therefore, the contract is evidenced by the bill of lading. He states that:

“With the issue of the bill of lading, the contract of carriage of goods, which is governed by the special rules, emerges”.⁴⁹

Potamianos has clearly stated that the bill of lading is the contract of carriage and not only that, but the bill of lading is *ad solemnitatem* form for the contract. This view is repeated in a work of Sarlis.⁵⁰ I agree with Potamianos because he shows what the Greek legislature failed to figure out that the bill of lading is not a document unrelated to the contract of carriage of goods and it is not just an implementation of a term of the contract. But it is the document which creates the capacities of the contract of carriage of goods with the meaning that the incorporation is necessary in order to envelop and express all the capacities of the contract (negotiability, documentary function). The contract can be concluded under the terms of the bill of lading before its issue. The contract is concluded by the receipt of the goods under the carrier's bill of lading. The

⁴⁹ fn 5 p. 40

⁵⁰ P Sarlis 1969 EED 407 p. 412

authorisation of the bill and the issue of the document commence the full legal life of the contract of carriage. In the case that a bill of lading is not issued, then the relations of the contract of carriage which are related to the documentary function of the bill of lading cannot be created and, therefore, neither the contract. The contract of carriage cannot be transferred by endorsement or assignment. Consequently, these relations cannot be evidenced by the means of evidence of the oath and admission.

Perdicas⁵¹ recognises the quality of the bill of lading as the contract of carriage. He points out the co-operation of the shipper in the preparation for the issue of the bill, which shows that the contract could not be concluded before at least the co-operation of the shipper, concerning the issue of the bill of lading, has been completed.

In accordance with Stauropoulo's⁵² view, the bill of lading as a mean of evidence is a substitute for the contract of affreightment, in the case that a charter-party has not been issued. In fact, the bill of lading becomes the contract when a charter-party has not been issued, which is the common practice in carriage of goods by sea, because, as is shown above, the charter-party is the contract itself and not merely evidence of it.⁵³ The word "evidence" is used because of the twofold expression of the contract, as it is declared by the legislature. Thus, the term "evidence" means incorporation.

Judge Stilianneas states:

"the bill of lading first of all does not present or incorporate the contract of carriage of the referring load because it usually come before the issue of the bill of lading".⁵⁴

⁵¹ P Perdicas "*Commercial Law*", 1960, Vol. 1, Athens p. 547 Perdicas referring to the legal nature of the genesis of the title states "the legal nature of the genesis of the bill of lading is therefore in relation with the above mentioned a contract", E Georgantopoulos "*International Sea Transportation*", 1953, Piraeus p. 244 "In case that there is not an issued charter-party, the contract of carriage is evidenced in the bill of lading".

⁵² fn 3 Stauropoulos p. 433

⁵³ fn 3 Kambisis p. 471

⁵⁴ Stilianneas "The Function of the Bill of Lading as Evidence and the Hague Rules" 1976 *EML* 319 pp. 320-22. The same ideas are expressed in his article "Special Clauses in the Bill of Lading", 1987,

He bases his opinion on bills of lading issued under charter-party and he follows the English literature. Twenty four of his twenty nine footnotes are referred to the works of Scrutton and Chorley and Giles. He gives little importance to the fact that even the charter-party under Greek law is regarded as evidence, but under English law it is regarded as the contract itself. He has not taken into account the interrelation concerning the contractual status of charter-parties under the Greek law which has been explained above. His strict opinion is contradictory. On the one hand, he states that the bill of lading has exclusive demonstrative power, however, on the other hand, he has suggested that the bill of lading does not incorporate the contract of carriage. His article highlights the practical background in which the contract of carriage of goods is formed. He figures out the shipper's knowledge of the terms of the bills used in their field of business. Shippers either fill in the printed shipper's bills of lading or they deliver them for signing to the captain. The parties are contracting under the known terms of the bill of lading which is issued after the loading. Shippers are not ignorant of the terms of the standardised bills of lading of the carriers and they are contracted under them. Hence, any oral agreements prior to the issue of the bill of lading have to be incorporated in the content of the document in order to be regarded as part of the contract. Otherwise, they should be seen as part of the negotiation process.

In 488/1988 decision, the Polimeles court of first instance of Piraeus states:

“... in the case of the transfer of the bill of lading by the charterer as first shipper to a third party or when the first shipper is a third party (beyond the charterer and the shipowner of the ship) is applicable the principle that the bill of lading must be regarded as incorporating the contract of carriage for the third party”.

In another passage it is stated that:

“... the contract of carriage of goods is embodied in bill of lading”.⁵⁵

It is clearly recognised that in common carriage the bill of lading is the contract of carriage itself, except in carriage under a charter-party and in regards the relationship between charterer and shipowner. The bill of lading is always issued as the contract between the shipper (who is not a charterer) and the carrier. The court has a different view from that expressed by the Code. The bill of lading is not simply conclusive evidence of the contract, but the contract of carriage is expressed by the bill of lading. The bill of lading is not the contract of carriage in relation to shipper and carrier only when a charter-party has been issued as the contract of carriage.⁵⁶ It is submitted that otherwise the only contract of carriage is the bill of lading. Once again, the word “evidenced” should be substituted for “incorporated”. Thus, in the case of the ship being employed as a general ship, then the contract of carriage is contained in the bill of lading.

In contrast, in 712/1990 decision, the Polimeles court of first instance of Piraeus⁵⁷ states that the contract of carriage between the carrier and the shipper of the load is incorporated and evidenced by the bill of lading. It seems that the wording of the Maritime Code is followed in this case, yet, there is no doubt that there are no contractual terms outside the content of the bill of lading. Hence, the bill of lading is established as being by its nature a contract and it is issued as such. Moreover, the bill of lading is the final writing of the contract which has to be in the form of a bill of lading as well.

Professor N Deloukas referring to the legal nature and function of the bill of lading states that:

“in contract of carriage of goods by sea ... the carrier's obligation

⁵⁵ fn 20 pp. 447-48

⁵⁶ Court of Appeal of Athens 4466/1978 1979 EED 408 p. 408

⁵⁷ 1990 EML 460 p. 461, Court of First Instance of Piraeus 1486/82 1983 EED 311

from the contract of carriage and his obligation from the bill of lading contract concur so much with their genesis as much as with their putting off”.⁵⁸

The most positive element arising from Deloukas is that he recognises the genesis of the contract of carriage of goods by and with the issue of the bill of lading. A conflict exists when it is not recognised that the capacities of the bill of lading, which are embodied in the same document, are the expression and capacities of the contract of carriage of goods by sea. The bill of lading is recognised as being the contract of carriage itself. It would be illogical to understand the contract of carriage and the bill of lading contract as different perceptions. Therefore, the contract of carriage in the form of a bill of lading should be the only contract between the shipper and the carrier. If the contract of carriage and the bill of lading contract are regarded as being different things, then they cannot be formed at the same time as contracts for the transport of the same cargo and be implemented at the same time as well.

2.6 Bills of Lading as Contracts of Adhesion

In 4466/1978 decision, the court of appeal of Athens states that:

“the bill of lading constitutes a document of title being capable in contracts of carriage of goods to substitute the charter-party which binds the charterer shipper from its issue”.⁵⁹

It is an indirect recognition of the bill of lading as the contract of carriage. In the same case, it is mentioned that the bill of lading is a contract of adhesion in which the shipper enters by accepting the standard terms incorporated in it, which become the terms of the contract. The contract of carriage in the form of a charter-party is still an individual

⁵⁸ fn 1 Deloukas p. 427

⁵⁹ 1979 EED 408 p. 408

contract⁶⁰ which means its terms can be negotiated. However, the contract of carriage of goods by sea is always a contract of adhesion.⁶¹ Moreover, as it is shown above, the bill of lading is the contract of carriage. Thus, the bill of lading is a contract of adhesion.

It has been established that bills of lading are contracts of adhesion in contrast to charter-parties which are basically individual contracts despite that, in practice, standard types of charter-parties, as the Baltimore, have been introduced.⁶² That means that the two kinds of documents, which are considered by Greek law as evidence of the same kind of contracts, have totally different natures. Every future shipper knows that when he enters a contract for carriage of goods by sea, he also enters into a contract of adhesion which is incorporated in the bill of lading. The conclusion of a contract of carriage other than the bill of lading is eliminated. Hence, the parties contract under the terms of the bill of lading. Their wills are met upon the terms of the bill of lading, which means ratification of the bill of lading contract at the moment that all the terms of the contract have been defined and agreed by the parties. The absence of the signature of the carrier does not mean that the bill of lading is not formed as the contract. The bill of lading should be seen as being a real bill of lading by the meeting of the contracting parties' mind, on the hypothesis that the bill of lading will be signed in due course. The signature will have retroactive force from the time of the conclusion of the contract. It is submitted that the legislature failed to comply with this reality. Keeping in mind that the Code was introduced in 1958, unfortunately the Committee for the amendment of the Code appointed in 1986 followed the same philosophy as it is mentioned above. The need to

⁶⁰ fn 3 Pampouki pp. 264-265 "the contract of affreightment (charter-party) were a charter-party has been issued is in general an individual contract, in contrast with the contract of carriage of goods by sea in which as it is mentioned usually only a bill of lading has been issued it is always a contract of adhesion", Mixailidis-Noyaros "*Law of Contracts*", Sakkoulas Thessaloniki pp. 62-63, Stathopoulos-Georgiadis "*Law of Contracts II*", 1983, Athens p. 62, Saleilles "*De la Declaration de Volonte*", 1901 p. 129.

⁶¹ fn 1 Deloukas p. 257

⁶² fn 1 Deloukas p. 257, fn 3 Pampouki p. 265

standardise the terms of the contract of carriage as a means of harmonisation and a more adequate way of contracting should point to a clear statement that the bill of lading is the contract of carriage, which will come to terms with the practical usage where it issues the carrier's bill of lading and nothing else.

2.7 Bills of Lading in the Hands of Third Parties

The use of the bill of lading in the hands of third parties as a receipt and a document of title will not be examined. Is the bill of lading in the hands of a third party the contract of carriage or evidence of it? N Deloukas⁶³ states that:

“the bill of lading contract is formed between the shipper and the shipowner or the carrier with the delivery of the bill of lading by the latter to the former. It is a contract formed in re and constitutes contract on behalf of a third party, with the meaning of article 410 of the Civil Code and the holder of the bill has a self-existing right, independent from the shipper's right”.

Therefore, the contract of carriage is formed on behalf of the third party by and with the issue of the bill of lading, which has to be the contract of carriage for the shipper vis-à-vis the carrier as well. When the bill of lading is issued in a non-negotiable form in the name of the shipper, it is not a contract on behalf of third party but the holder of the bill is the assignee of the rights of the shipper and in accordance with articles 455-470 of the Civil Code.⁶⁴

Article 170 declares that the charter-party regulates the relation between shipper and carrier and in the first paragraph confirms that in the relation between carrier and

⁶³ fn 1 Deloukas p. 427

⁶⁴ fn 17 p. 34

third parties the terms of the bill of lading prevail.⁶⁵ Additionally, it is stated that the bill of lading is evidence regarding the relations between the parties interested in the cargo. Actually, the bill of lading is the contract of carriage for the third party holder. The article refers to the contractual function of bills of lading in comparison to charter-parties. Thus, there is not a clear reference to the contractual role of bills of lading in common carriage. It is not explained how one document, which does not contain any contractual terms is transformed suddenly into a contract of carriage. Professor Loukopoulos⁶⁶ states:

“the first contracting party (shipper) had expressed the will to contract on behalf of the third party, and when the ship will have arrived at its destination, the third party will present the bill of lading claiming the delivery of the goods”.

Thus, it is clear that the bill of lading is accepted as a contract itself from its creation.

In 1046/1981 decision, the court of appeal of Piraeus⁶⁷ states that the bill of lading is issued as the contract of carriage for the receiver of the cargo. So, the court established the bill of lading as the contract which is transferred to every endorsee. The holder of the bill of lading exercises individual contractual rights against the carrier.⁶⁸ The holder has individual rights because the bill of lading is the contract of carriage which is endorsed in his favour. There is no doubt from the analysis that the bill of lading is regarded as the contract of carriage for the third parties and a contract of adhesion.

2.8 Deductions

Under Greek law the contract of carriage of goods is regarded as a species of the

⁶⁵ fn 12 Karatzas p. 46 Art 170 “A lawfully issued bill of lading shall constitute evidence as between all persons interested in the cargo” H Anastasiadis “*Greek Commercial Law*”, 1937, Kiriakoulis p. 224.

⁶⁶ fn 19 p. 25

⁶⁷ 1982 EED 416

⁶⁸ Court of Appeal of Thessaloniki 913/1990 1990 EML 449

contract of affreightment. Charter-parties and bills of lading are regarded, according to the wording of the provisions of the Greek Private Maritime Code, as conclusive evidence of the contract. As it is shown above, the language of article 108 is inaccurate, because the charter-party is the contract of carriage instead of being evidence of it. The contract of carriage of goods by sea is considered to be a contract of adhesion made on behalf of a third party and, consequently, bills of lading are considered to be contracts of adhesion made on behalf of third parties as well. The contract of carriage can be formed by the *solo consensu* of the parties. The question is, when a bill of lading is issued then is the contract of carriage of goods the oral agreement or the bill of lading? In situations where the document is needed only as a demonstrative form of the contract, it could be said that the contract is the oral agreement. Additionally, the contract has to be in the form of a bill of lading in order for the Hague-Visby Rules to be applied. But if the parties know from the beginning that the contract will be incorporated in a specific document, which by mercantile usage has always been issued, then their minds meet under the knowledge that the issued document will be the expression of their contract. The *solo consensu* applies when the parties create an oral agreement and afterwards decide the incorporation of their agreement in a document to be mere evidence of it.

However, the obligation to comply with the demand to incorporate the contract in a bill of lading guides the contracting parties to conclude their contract under the terms of the bill of lading offered in the particular trade. Moreover, the content of the bill of lading is the final offer because the terms of the bill of lading are the terms under which the cargo is delivered to its destination as well. The contract of carriage is a contract for the transport and delivery of the received cargo. The identification of the loaded cargo which will be delivered is the main factor for the conclusion of the contract. There is a silent agreement of compliance with all the provisions of the Code. The contract can be

concluded by the time all the terms of the contract have been defined and taking into account that many terms contained in the bill of lading are never negotiated, then the meeting of the contracting parties' mind has occurred upon all the terms of the contract by and with the issue of the bill of lading. Therefore, the final offer for the conclusion of the contract of carriage is the bill of lading which has to be accepted by the shipper. The signing of the bill of lading in a later stage is just a typical action which is imposed by the mercantile usage and the threefold character of the bill of lading. The shipper has a duty to sign a copy of the bill of lading contract which confirms its approval of the bill of lading contract as well. Hence, the bill of lading is the final expression and transfer to writing of the contract.

CHAPTER III

The Contractual Role of Bills of Lading under United States Law

3.1 Introduction

The legal ramifications of the bill of lading continued to develop in the nineteenth century in the American Law.¹ The bill of lading and the implications of its issue began to be reported in many cases as early as the beginning of the 19th century.² The leading cases of *Delaware*³ and *Pollard v Vinton*⁴ before the supreme court of the United States illustrate the position occupied by the bill of lading from its first steps in the world trade under the interpretation given by the American courts.

The principal law governing bills of lading issued in the United States is the Bills of Lading Act 1916.⁵ The carriage of goods by sea is regulated by the Carriage of Goods by Sea Act (COGSA) 1936 which incorporates the Hague Rules 1924 as they are transformed into the domestic law of the United States.⁶ It is worth mentioning that the COGSA 1936 applies to all contracts for carriage of goods by sea to and from ports of the United States in interstate and foreign trade. The contract must be covered by a bill of lading as it is specified in article 1301, paragraph b: “the term contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title”.⁷

¹ C McLaughlin JR “The Evolution of the Ocean Bill of Lading” 35 *Yale L J* 548, D Murray “History and Development of the Bill of Lading” 37 *University of Miami Law Review* 689

² *The Phebe* [1834] Fed Cas 11064 *Dows v Perrin* [1857] 16 NY 328 *Grace v Adams* [1868] 100 Mass 505

³ 20 Led 779

⁴ 26 Led 998

⁵ 49 USC 81-124, *Vimar Securos Reasegueros v M/V Sky Reefer* (1994) 29 F3d 727 p. 728

⁶ 46 USC 1300-1315, *Gamma 10 Plastics Inc v American President Lines Ltd* (1994) 32 F3d 1244 p. 1249

⁷ *ibid.* 1301, b

Hence, a bill of lading issued as the contract of carriage is a prerequisite for the application of COGSA between the parties. The necessity for the real issue of the document or merely the intention of the issue of it in due course for the application of COGSA will be examined. It is observed that the exact wording of the Hague Rules has been transplanted into COGSA.

A question which arises from the language used in the article 1301 is what is meant by “contracts of carriage covered by bills of lading”. Does it mean that the bill of lading is the contract of carriage? The position of the American Legislation will be established in the end of the following analysis. It is submitted that the term “covered” means that the whole contract is incorporated in the issued bill of lading. Otherwise, if the legislator wanted only the incorporation of some terms, he should have used words such as “indicated in” or “quasi-covered”. Professor T Schoenbaum states that:

“Thus COGSA governs the relationship between the parties where a bill of lading is issued as the contract of carriage, ... To this extent Congress has limited the parties' freedom of contract and recognised that bills of lading are contracts whose terms are not subject to bargaining or negotiation”.⁸

The contract of carriage has to be in the form of a bill of lading, despite the fact that the bill of lading is stated as being evidence of a contract.⁹ Additionally, it is confirmed that the terms of the contract of carriage have been standardised. Therefore, the contracting parties simply enter into a contract under the pre-existing terms as they are incorporated and expressed in the bill of lading. Professor W Tetley, regarding the word “covered”, says that:

“the word covered indicates that the bill of lading can be issued

⁸ T Schoenbaum “*Admiralty and Maritime Law*”, 1987, West Publishing Co. St Paul Minn p. 315

⁹ 46 USC 1300 “Every bill of lading ... which is evidence of a contract for the carriage of goods ...”

after carriage has commenced”.¹⁰

The question is what is included in the meaning of the word covered? It is submitted that “covered” could mean the issue of the bill of lading after the carriage has commenced, because the important element is not when a document has been issued as a technical form but the time of the legal binding of the incorporated terms of the document. However, if the document has retroactive power, the time of the issue of the document is meaningless. The retroactive force of the bill of lading, if there is one, will be investigated. In order to find out if the bill of lading is functioning as a contract of carriage or merely as evidence of the contract, the contractual role of the bill of lading between shipper and carrier, and, its contractual character between third parties and carrier will be analysed. It has to be pointed out that the bill of lading will be examined under common carriage in International Trade. The whole scale of developments regarding the contractual character of bills of lading will be illustrated by various court decisions. The investigation will be carried on through the analysis of cases concerning the bill of lading contract. The judges present in their argumentation the principles of law and their interpretation of the contractual status of bills of lading upon which they base their decision. The investigation of the case of bills of lading under a charter-party will be considered in the precise chapter. The next step of the investigation is to clarify the conception of common carriage and the possible relation with the contractual role of bills of lading.

3.2 The Common Carrier under the American Law

Where there are two or more independent cargoes on a vessel, the ship is engaged in the common carriage of goods. A ship which is engaged in commercial transport,

¹⁰ W Tetley “*Marine Cargo Claims*”, 1978, Butterworths p. 5

internal and foreign, and whose owners regularly solicit business from the general public is a common carrier.¹¹ The variety of shippers and cargoes makes the carrier a common carrier.¹² The terminology “general ship” which means common carriage is endorsed. Additionally, the interconnection between general ship and bill of lading is characterised by the emergence of the bill as the contract of carriage of the goods which are carried by the general ship. In *The Liverpool and Great Western Steam Company v Phoenix Insurance co.*¹³, the supreme court clarified the elements which transform a ship to a general ship. These elements are the regular service between two ports and the carriage of goods shipped by various shippers. The issuance of a negotiable bill of lading does not signify common carriage. The rights and obligations of a private carrier are determined by the contract of affreightment which may include a bill of lading.¹⁴ However, the common carrier becomes a private one, if and when it contacts business out of its regular schedule, which means that it has to be examined whether the ship in every present case was used as a general ship or not.

Special agreements are not adequate to divert a common carrier to a private one, only the real engagement in transportation of cargoes outside the regular contact of the ship can be admitted as diverging factors.¹⁵ As it is shown in the analysis, the importance of the distinction between private and common carriage is focused on the different ways of commencing business, which is reflected in the documentation which envelopes those transactions. In the case of common carriage the contract is in the form of a bill of lading.

¹¹ *SSA & J Faith* 252 F Supp 54

¹² *The City of Dunkirk* 10 F2d 609 p. 611 “The city of Dunkirk was a general ship taking cargo at various points from various shippers and issuing bills of lading to the several shippers ... The contract sued on in the instant case is the bill of lading and not the charter-party”.

¹³ 32 Led 788

¹⁴ *J Aron & Company v Cargill Marine Terminal* (1998) 998 Fsup 700

¹⁵ *Vera Long v Illinois Power Company* 543 NE2d 525 p. 535 Mr Justice Spitz stated that “A common carrier cannot become a private carrier merely by some special agreement with the persons arranging the transportation but this can occur if a common carrier transports something which would not ordinarily be carried in his business”.

3.3 The Bill of Lading as the Contract of Carriage

At the very beginning of the investigation, regarding the contractual role of bills of lading, it is noted that the spirit under which the conception of the bill of lading contract will be construed is that expressed in the *German Am Sav Bank v Graig*.¹⁶ Bills of lading have been in common use from time honoured and they have their foundation in trade usages and customs. The law in respect of them should be interpreted in the light of those customs and usages as generally conceived by those conducting business to be in accordance with them.

As early as 1856 the supreme court of the United States engraved the picture of the contractual role of bills of lading in the *Rj Verderwater v E Mills*¹⁷ where Mr Justice Grier stated that the terms of the contract are set forth in the bill of lading. The statement is not so positive about the contractual role of the bill of lading, but the incorporation of the terms of the contract in the bill of lading is simply indicated. Thus, there is no mention if another contract is concluded and the bill of lading merely sets the terms of this contract. Besides, the supreme court¹⁸ pointed out that there is a written contract contained in the bill of lading. The custom cannot affect or alter the terms of the contract contained in the bill of lading as long as the terms of the contract are definite, although there is no distinction whether the bill of lading is something other than the written contract which it represents. However, there is no mention of a contract of carriage being concluded prior to the issue of the bill of lading. Likewise, the inability of customs and usages to change positive terms of the contract expressed in the bill of lading indicates that the bill of lading is the final contract. In both cases the identification of the kind of

¹⁶ 96 NW 1023-1025, 70 Neb 41

¹⁷ 15 Led 554 p. 556 "The bill of lading usually sets forth the terms of the contract and shows the duty assumed by the vessel", *The Schooner Freeman v A Buckingham* 15 Led 341

¹⁸ *O Garrison v The Memphis* 15 Led 656, p. 658 "the custom could not affect or in any wise alter the written contract of the parties as contained in the bill of lading as the language had a definite legal meaning which this custom could not change"

contract existing between the parties was the main concern of the judges, in order to decide what kind of relations have been developed between the parties. On the one hand, different contracts impose different duties and liabilities upon the parties. On the other hand, a bill of lading, whether it is a contract or not, implies, as mandatory law, the application of different Acts. Beyond the judges' views lies an understanding that in case the parties base their contractual relation on this kind of document then this document has been enveloped with the referred characteristics. Accordingly, Mr Justice Davis¹⁹ in the supreme court considered that "in so far as a bill of lading is a contract, it cannot be explained by parol". The court deals with the doctrine of parol evidence against terms of a written document declaring the inadmissibility of parol evidence and, therefore, confirms the bill of lading as the contract. The existence of any other contract of carriage is not rejected, but the bill of lading, when it has been issued, seems to represent the contract.

What appears to be the first decision which pictures the whole understanding about bills of lading is the *Delaware* before the supreme court of the United States. The libel in this case was filed in the district court by the appellees, for the recovery of \$5000 damages, for the non delivery of seventy five tones of pig-iron, laden on board of the bark Delaware at Portland to be carried to San Francisco at a freight of \$4.50 per tone. The bill of lading was in the usual form. Mr Justice Clifford²⁰ delivered the opinion of the court where it is stated that:

"Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the

¹⁹ In *The Lady Franklin* 19 Led 455 p. 457

²⁰ *The Delaware* 20 Led 779 pp. 781-784. *Pollard v Vinton* 26 Led 998 p. 999. C'oHare "Shipping Documentation for the Carriage of Goods and the Hamburg Rules" 52 *Aust L J* 415, *Corpus Juris Secundum* (CJS), 1975, West Publishing Co Vol. 13 Carriers p. 233 "A bill of lading is twofold in its character ... and a contract to transport and deliver the goods to the consignee or other person therein designated on the terms specified in such instrument". Vol. 80 (CJS) Shipping p. 912.

correct one appears to be that it is a written acknowledgement, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated ... Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped as, if they are received on the wharf ... it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed ... but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing and cannot be contradicted or varied by parol evidence ... Verbal agreements, however, between the parties to a written contract made before or at the time of the execution of the contract, are, in general, inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract ... Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck ... But

evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage”.

This long passage from the Delaware decision establishes the bill of lading as the contract of carriage nearly from the beginning of its legal life in the United States. The judge investigates all the occasions in which the bill of lading becomes the contract of carriage. In the first paragraph the court uses the word “evidence” of a contract which may be taken as an indication that the court recognises the bill of lading as merely an evidence of the contract. But in the same sentence it is crystallised which shows that the contract is incorporated in the document, and means that the bill of lading cannot be merely evidence of the contract. Thus, it is submitted that the word “evidence” is used with the sense that the contract of carriage is totally incorporated in the bill of lading. Therefore, the contract is evidenced in the bill of lading in the same way in which the content of every document is evidenced in the document itself. In the next paragraph of the case it is stated that the bill of lading is the contract of carriage. The case of the issue of the bill before the loading is examined in the case and the view of the court is that the bill is still the contract of carriage. Parol evidence is inadmissible to supersede terms of the bill of lading contract which means that the bill of lading is the written contract. Additionally, it is stated that parol evidence is not allowed to modify the bill of lading evidence of the contract which indicates that by “evidence” is meant that the bill of lading is the contract itself. If it is suggested that the bill of lading is merely evidence of the contract, then the parol evidence rule is inapplicable and the bill of lading can be modified by any means of evidence. It is admissible evidence of trade custom which clarifies the way of stowage when there is no mention in the bill of lading but not to alter positive stipulation of the bill. Customary usages are part of the contractual terms of the bill introduced by practice

in the same way that the bill has been introduced as the contract.²¹

The issue of a bill of lading without a real delivery of goods in the custody of the carrier, as it is declared in the case, releases the carrier from the liability which hints that there is no contract without delivery of goods to the carrier by the shipper. Hence, the delivery of the goods could not be seen as an execution of a prior concluded contract, but as a necessary step for the conclusion of a contract in the form of a bill of lading.

Elements which are declared in the decision are: first, the definition of bills of lading as the document which incorporates the terms of the carriage of the received goods. Second, the contract of carriage is incorporated in the bill of lading with the sense that the bill of lading becomes the contract itself. Third, it is declared that the bill of lading is the contract even if it has been issued before the loading, which illustrates legal existence and force from the conception of the contract. Is the conception of the contract something different from the conception of the bill of lading? The customary course of business indicates the issue of a bill of lading although it is not essential in order to create a contractual relation between shipper and carrier. It is spelt out in the *Mobile & Montgomery Railway Company v Jurey*²² that no particular form is required for a contract of a common carrier to ship goods. It may be by parol or it may be in writing, in both cases it is equally binding. Since the contract of carriage may be oral or written, it seems, from first sight, that there is no differentiation in the two conceptions. It is mentioned above that the conception of a contract incorporated in the bill of lading is the required condition in order to apply the COGSA, which means that the legislator looks at the bill of lading contract as the regulated contract of carriage. That leaves the parties

²¹ *Nebco International In v M/V National Integrity* 752 F Supp 1207 Action against carriers based on their failure to deliver fabric by presentation of original bills of lading. p. 1221 “Bills of lading are presumed to have been issued subject to industry custom”, *The Ingersoll Milling Mach Inc Co. v M/V Bodena* 829 F2d 293, *Naviera Neptuno Sa v All International Freight Forwarders* 709 F2d 663, *Farell Lines Inc. v Highlands Inc. Co.* 696 F2d 28, *Encyclopaedia Britannica Inc. v SS Hong Kong Producer* 422 F2d 7.

²² 28 Led 527

with the possibility of having an oral contract of carriage but different from the contract of carriage standardised by his legislature's intervention. This approach is in line with the policy introduced by the International Legislator, as it has been expressed in the various International Conventions mentioned in the first chapter, whose intention was the standardisation of the contractual terms of the bill of lading contract. Fourth, the bill of lading contract supersedes all other oral agreements or contracts in writing made before its issue and constitutes the contract of carriage. This point is crucial for the life of bills of lading, as the contract of carriage, and it shows that any agreements concluded prior to the issue of the bill of lading are preliminary agreements unable to constitute the contract of carriage as it is established by the customary entrance of the bill in the International Trade and approved by the Legislator. The doctrine that every single agreement before the issue of the bill is matched and incorporated in the bill of lading is established. The reason for that lies in the conception that every agreement made before the issue is either inconclusive, because some terms are left out, or inadequate to stand alone as a contract. Fifth, the use of custom in order to specify the meaning of some terms of the bill of lading is admissible as long as it does not vary the plain terms of the bill of lading. The creation of terms of bills of lading by customary usage shows that the bill of lading contract follows a slightly different path from the ordinary contracts, where the doctrine of the freedom of contracting prevails. It is an indirect confirmation of the contractual role of bills of lading. The bill of lading is supposed to be a contract, in order for the customary terms and conditions to be implied as contractual terms.²³ Sixth, the non-delivery of goods on board settles the absence of a contract of carriage which leads to a non-liability of the carrier. The delivery of the goods specifies the cargo which will be transported, so the contracting parties can finalise their offer and acceptance. The bill is

²³ *D Hostetter v W Park* 34 Led 568, *Convoy's Wheat* 18 Led 194

issued after the loading as the expression of the contract under which the goods are delivered for the carriage to their destination. Those elements put on the table by *the Delaware* case will be investigated if they are approved by the courts.

The supreme court of the United States delivered its decision in *The Thames*,²⁴ where it has consolidated the incorporation of the contract of carriage in bills of lading, the term “contained in” means that the bill of lading is the contract. Any kind of agreements are superseded by the contractual nature of bills of lading. Hence, even if there was an agreement written in a letter between the contracting parties which could be accepted as being a contract by itself, it was nevertheless superseded by the bill of lading.²⁵ The bill of lading, by its nature, when it is issued and accepted, arises as the contract of carriage. It has to be construed under the same general rules which apply to contracts between individuals.²⁶ A written contract as a bill of lading can be modified orally.²⁷ Is there any other document than the bill of lading issued in common carriage as the contract of carriage? The bill of lading is the underlying contract between the shipper-consignor and the carrier.²⁸ So far as it contains the terms of the contract it is not to be

²⁴ 20 Led 804 p. 805 “the contract between the ship and the shipper is that which is contained in the bills of lading delivered”

²⁵ *West India Industries Inc v Tradex, Tradex Petroleum Services* 664 F2d 946 In a case by the shipper against the carrier regarding the amount to be paid for the carriage. p. 949 “The bill of lading is also a contract of carriage ... We need not expatiate on the effect of the October letter between Colbury and Howell. Even if as West India argues, it was a contract, it was nevertheless superseded by the bill of lading”, *Brockway Smith Co v Boston and Maine Corp* 497 F Supp 814 Action was brought by buyer and its insurer against carrier to recover for interstate freight damage to shipment of frames, *Transcon Lines v Lipo Chemical Inc* 474 A2d 1108 Carrier brought action to recover freight charges from reconsignee, *Berisford Metals Corp v S/S Salvador* 779 F2d 841. *Pennsylvania R Co v Greene* 173 F Supp 657, *Asbestos Corp Ltd v Compagnie De Navigation* 345 F Supp 814.

²⁶ *Transport Clearing Northwest v Bardahl Co* 589 P2d 1242

²⁷ *Wabco Trade co. v SS Inger* 482 F Supp 444 Shipper brought action against carrier king damages arising out of the loss of goods shipped. In *Gass v Astoria Veneer Mills* 118 NYS 982,984 “a bill of lading in the first instance represents the contact between the shipper and the carrier”. In *Tokio Marine & Fire Insurance Co. v M/V Jalnbert* 624 F Supp 402 p. 407 “A bill of lading for ocean carriage ... embodies the contract of carriage for those goods”. In *Hogan Transfer and Storage Corporation v J Maymire* 399 NE2d 779 p. 784. “It is a contract by which the carrier agrees to transport the goods ... under the terms and conditions set out in the written instrument”

²⁸ In *B Elliot ltd v John Clark & Sons Inc.* 704 F2d 1305 Consignee of cargo brought a damages action against stevedoring firm for damage to cargo allegedly incurred while in the custody of firm following its discharge from the vessel. p. 1307 “A bill of lading ... constitutes the contract for carriage and delivery of goods between the shipper and carrier”, *Southern Pacific Co. v Commercial Metals Co.* 72 Led2d 114 p. 120. *Texas & Pacific Co. v Leatherwood* 63 Led 1096. *United Video Buyers Ass v North*

modified by parol evidence. The acceptance of a bill of lading means making a contract in the form of a bill of lading. The judges accepted that the delivered bill of lading was the final expression of the contract of carriage. There is no difference between the language in which the judges have couched the contractual role of bills of lading and the contractual role of bills of lading in the presented cases. The judges have expressed as the *ratio decidendi* that the bill of lading is the contract of carriage.

It has not ruled out the creation of any kind of contracts of carriage orally or in a written form, which are regarded as equally binding.²⁹ Which is the contract of carriage upon that the American Legislator has decided to apply the mandatory rules of carriage of COGSA? Has the bill of lading been evidence or the contract itself? The rules of COGSA can be applied to other written or oral contracts as a matter of contractual terms incorporated in the contract by the introduction of a clause, but not as mandatory rules, because this kinds of contract is not regarded as the one regulated by COGSA.³⁰ The contract has not only to be in writing but also in the form of a bill of lading. Merely an assumption by a judge that a bill of lading might be evidence or contain a contract is not enough for the application of COGSA. The bill of lading has to be issued as the contract. The receipt of the goods for transportation lays the foundation of the contract as it is mentioned above,³¹ and the delivery of goods to carrier is a prerequisite for the issue of

Penn Transfer Inc 497 A2d 935, *Hartford Fine Insurance v M/V Savannah* 756 F Supp 825, *Larsen v A C Carpenter Inc* 620 F Supp 1084. *Vanderbuilt v Ocean SS Co.* 215 F 886 p. 888. *The Arctic Bird* 109 F 167 Proceedings was commenced by the owners of the steamer Arctic Bird and a certain barge to obtain the judgement of the court that they are not liable for any damage caused by the sinking of the barge referred to, and the loss of goods and merchandise carried thereon at the time. p. 172 “When goods are delivered to a carrier for transportation, and a bill of lading ... is delivered to the shipper, he is bound to examine it and ascertain its contents and if he accepts it without objection he is bound by its terms and resort cannot be had to prior parol negotiations to vary them” *Hundai Corp v The Hull Insurance Proceeds of M/V Vulca* (1992) 800 FSup 124 Shipper brought action against charterer to recover for loss of cargo. p. 127 “A bill of lading ... provides a contract of carriage between the shipper of cargo and the carrier of the cargo”.

²⁹ *American Jurisprudence 2d*, Vol. 13 p. 740. CJS, Vol. 80 p. 885.

³⁰ *PPG Industries Inc v Ashland Oil Company* 527 F2d 502 An appeal by the shippers for damage to goods in transit p. 505 “In addition, we are not dealing with a contract of carriage as defined by COGSA since it is not covered by a bill of lading”.

³¹ *Arthur v Texas & R Co.* 139 F 127, 133, *St Louis & R Co. v B Knight* 30 Led 1077.

the bill of lading.³² The bill of lading becomes effective when it has been signed by the carrier and accepted by the shipper.³³ Hence, COGSA applies if the bill of lading serves as the contract for carriage.³⁴ Finally, the terms of the bill of lading as the contract of carriage contemplate ocean carriage and the applicability of COGSA.³⁵ Therefore, the term “covered by a bill of lading” has been perceived under the meaning that the bill of lading is the contract of carriage and not evidence of it. Which is the role of bills of lading when a prior oral agreement has been taken place? In order to have a better grasp of the contractual role of bills of lading, the contractual relation of the parties before the issue of the bill of lading should be investigated first.

3.4 The Contractual Relation between the Parties Prior to the Issue of Bills of Lading

In 1886, Mr Justice Gray of the Supreme Court of the United States in *Phoenix Insurance Company of Brooklyn v Erie and Western Transportation Company*,³⁶ and in an action by an insurance company which had insured the owners upon the goods carried against a common carrier, held that:

“it is also clear that the bills of lading were but a putting in form of the oral agreements made on the 24th and took effect as if they had been delivered and accepted on that day”.

The lading of the goods on board was not completed until the evening of the 24th July. The vessel departed on her voyage about midnight. The bill of lading was not delivered

³² *The Caroline Miller* 53 F 136,138

³³ fn 83 Kendall p. 243, *American jurisprudence 2d*, 1964, Vol. 70 p. 926, *Van Etten v Newton* 31 NE 334. *US v US Steel Products Co* 27 F2d 547.

³⁴ *Sucrest Corporation v M/Y Jennifer* 455 F Supp 371, *General Electric Company v Inter-Ocean Shipping* (1994) 862 FSupp 166 Shippers sued carrier and contractors hired to load cargo and supervise its stowage after carrier capsized and lost all its cargo. p. 168, *Sun Company Inc v SS Overseas Arctic* (1994) 27 F3d 1104 p. 1108

³⁵ *Atlantic Mutual Insurance Company v M/Y President Tyler* 765 F Supp 815

³⁶ 29 Led 873 p. 878

by the carrier to the shippers before the departure. The bills of lading were not delivered until the 25th. When is the content of the bill of lading contract concluded? The content of bills of lading is concluded simultaneously with the conclusion of the agreement despite the issue of the bill of lading in a second stage. Thus, it could be said that the content of the oral agreement is that of the bill of lading and consequently, the bill of lading is the contract itself. Moreover, the bill of lading as a document is accepted as being in force at the moment of the oral agreement. The oral agreement means ratification of the bill of lading as the parties' contract of carriage. It could be said that the bill of lading as a document comes into existence regardless of the actual signature of it by the carrier at a later stage. Hence, the bill of lading stands as such at the time of the oral agreement between the shipper and the carrier. The meeting of the contracting parties' mind is under the terms of the bill of lading. The signed bill of lading has retroactive force from the moment of the parties' oral agreement. Therefore, the only contract which is concluded is that of the bill of lading and could not be merely evidence of it.

A common understanding³⁷ has arisen from business experience that a carrier will issue its customary bill of lading prescribing liability, and the shipper is bound by its provisions. Therefore, it must be presumed that the bill of lading will be issued as the contract. Shippers³⁸ must know that the terms and conditions on which their goods are received and transported will be contained in a bill of lading to be issued in due course. Can a memorandum be regarded as the contract of carriage? A memorandum which acknowledges the receipt of the goods it is not purported to be a contract. The regular carrier's bill of lading is established as the contract of carriage from the commencement of the contractual relation of the parties regardless of its later issue. It has become common knowledge for everybody involved in the carriage of goods that the terms of the

³⁷ In *the Orizaba* 33 F2d 326 p. 328

³⁸ *Vanderbuilt v Ocean SS Co.* 215 F 886

contract of carriage are illustrated in the bill of lading used in the particular kind of transaction. The issue of the bill of lading at a second stage does not affect the conclusion of the contract under the carrier's bill of lading. The bill of lading as the contract comes into force at the time of the conclusion of the contract with the meeting of the minds of the contracting parties. The consensus cannot be achieved at least before the goods are received into the carrier's custody.

Furthermore, it is decided that the parties are bound³⁹ by the terms of a bill of lading accepted by the shipper, though after the shipment has been made under a booking agreement. Hence, the delivery of the goods under a booking agreement does not mean acceptance of the bill of lading which will be issued in due course. Therefore, it could be said that the booking agreement is the contract of carriage if the issued bill of lading is not accepted. The contradiction between the prior referred cases is obvious where it is declared that the delivery of goods for shipment means the ratification of the customary bill of lading of the carrier which is expected to be issued. There is no case law in favour of Neterer's view. In fact, it is specified that the accepted bill of lading supersedes a contract which has been concluded by a booking agreement. Actually, in contrast with what the supreme court says, a booking agreement should be regarded as a contract of carriage as well.

Even if the cargo has not been delivered, it is covered by the terms of the bill of lading from the time of receipt of the cargo for transport.⁴⁰ The bill of lading has already been ratified as the contract of carriage. In fact, it is stated that the contract of carriage

³⁹ In *the Henrys Grove* 292 F 502 p. 502, 504 Neterer district judge said that "The parties are bound by the terms of a bill of lading accepted by the shipper, though after the shipment has been made under a booking agreement ... The mere booking stipulations do not preclude the issuance or acceptance of a bill of lading by the shipper as expressing the terms of the agreement between them and when this is done both the parties are bound by its provisions". fn 25 *West Case* p. 949 (fn 3) "The pre-bill of lading agreement at issue in *The Henry Grove* was a confirmation letter similar to the October letter in this case"

⁴⁰ *Caterpillar Overseas v Marine Transport Inc* 900 F2d 714 p. 719

evidenced by bills of lading was authorised simply by accepting the plaintiff's cargo.⁴¹ There is a contradiction regarding the contract of carriage which is ratified by the acceptance of the cargo. Here the contract of carriage is ratified by the acceptance of the goods only as it is evidenced by the bill of lading and not as contained in the bill of lading. Hence, it could be said that it is a dissenting case, but it is mentioned above that the term "evidence" is used some times with the sense that the bill of lading is the contract of carriage and the contract is expressed in the bill itself. Additionally, there is no further explanation as to which is the whole contract of carriage, if it is suggested that the bill of lading is merely evidence of a part of the contract. Moreover, the whole contract of carriage and not simply the part which is evidenced by the bill of lading is ratified. Thus, the terminology which has been used is inaccurate, because it means the contract is fully incorporated in the bill of lading.

The duty of the carrier to transport and of the shipper to pay for the carriage appears when the goods are delivered to the ship.⁴² Terms and conditions regarding the transport are fixed by the bill of lading. If a vessel sails before the bill of lading has been issued, the document which is eventually issued is the contract covering the project from its commencement. Even if the ship is lost with its cargo before the bill has been issued, the bill of lading which would have been issued is the contract of carriage. Thus, it could be said that the bill of lading has been accepted at that time regardless of whether or not it has been really issued and delivered at that moment. The retroactive force of the bill of lading is ascertained.

Is the shipper who delivers his load to the carrier obliged to accept the carrier's

⁴¹ In *Dow Chemical Pacific Ltd v Rascator Maritime SA* 594 F Supp 1490 Shippers filed suit seeking to recover the costs of transshipment of their cargo. p. 1498. *Demsey & Associates Inc.* 461 F2d 1009 p.1015 "Although the master did not sign the bill of lading, the sailing of the Seastar with the coils aboard constituted a ratification of the bills of lading". *The Muskegon* 10 F2d 817, *United Nations Children's Fund v S/S Nordstern* 251 F Supp 833.

⁴² *National Steam Nav Co. Limited of Greece v International Paper Co.* 241 F 861 p. 863

bill of lading or has he the right to reject it? The shipper must have known that the terms, under which his goods are shipped, are those contained in the bill of lading issued later on. Even if only a dock receipt was signed, the parties have entered into the bill of lading contract which has to issued at the time the goods are loaded.⁴³ It could be said that in every delivery of goods for shipment the parties entered into a contract as it is expressed by the customary carrier's bill of lading.

3.5 Bills of Lading Issued Prior to the Loading of the Goods

What happens when the bill of lading has been issued before the loading of the goods? The issue of the bill of lading before the loading makes no difference to its contractual character.⁴⁴ The ratification of the bill of lading as the contract of carriage commences from the time the goods are loaded despite the fact that the bill has been issued before the loading has taken place. Therefore, a signed bill of lading is not the contract of carriage until the real acceptance of the cargo.

The office of a bill of lading is to embody the contract of carriage and evidence the receipt of the goods.⁴⁵ When the shipper accepts the bill of lading without objection before the goods have been shipped and permits the carrier to act upon it by proceedings with the shipment, it is to be presumed that he has accepted it as containing the contract and that he has assented to its terms. Hence, if the bill has been issued before loading,

⁴³ *Baker Oil Tools v Delta Steamship Lines* 562 F2d 938 A shipper brought action against the carrier and port authority to recover for market value of cargo which disappeared while awaiting transport. p. 940 "The district court found from these essentially undisputed facts that initially Baker and Delta had entered into a contract for the shipment of the goods and that the terms of the contract were those embodied in the bill of lading that Delta was to issue when the goods were loaded aboard ship"

⁴⁴ *Gunard SS Co. v Kelley* 115 F 678 In an action at law for failure to deliver at Boston 53 bales of goatskins alleged to have been delivered to the Gunard steamship company. p. 679, 682 "A bill of lading is both a receipt and a contract of carriage ... Its acceptance of goods aboard ship was at best a ratification of the written contract of carriage ... The contract of carriage if ratified is still conditional upon the actual delivery of the goods ... *the Idaho* 23 Led 978 ...". p. 682 "A delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery".

⁴⁵ *The Central R & Banking Co. v Hasselkus* 17 SE 838

then the shipper has the right to reject it. Furthermore, the bill of lading as a legal document contains the contract of carriage. Thus, it could be said that by its genesis the bill of lading incorporates the contract of carriage and it is not necessary for the bill of lading to be declared as the contract of carriage between the involved parties in the transaction. Additionally, it becomes clear that it has become common knowledge that the bill of lading, whenever is issued prior to the loading or after it, is the contract which covers the transaction from its commencement.

The process of the investigation of the contractual employment of the bill subsequently has to look at what happens to possible oral sub-agreements made before the issue of the bill of lading.

3.6 Oral Agreements Concluded Prior to the Issue of Bills of Lading

A bill of lading in addition to being a receipt is a contract of carriage and foregoing negotiations and parol agreements between parties are conclusively supposed to be merged therein.⁴⁶ The bill of lading is not simply a receipt for goods shipped but is also the contract under which they are delivered, and the terms thereof cannot be altered by extrinsic evidence of another prior contract in relation thereto.⁴⁷ The two basic findings are matched because if the bill of lading is the contract, all the prior negotiations have to be transplanted into the bill, otherwise the bill of lading is not the contract but simply a non- conclusive evidence of it. Every bill of lading as a contract has to be construed in accordance with its terms. In the absence of fraud or mistake it is presumed that parol negotiations concerning its terms are incorporated therein and, therefore, it forms the final agreement.⁴⁸

⁴⁶ *Jean Jadot* 14 F Supp 161

⁴⁷ *Dorff v Taya* 185 NYS 174

⁴⁸ *Alabama Creat Southern v Norris* 52 SO 891, *Universal American Corp v SS Hoeqh Drake* 264 F Supp. 747 In *Southern Exp. Co. v J Dickson* 24 Led 285 p. 287 “We base our judgement upon the bill of

In contrast, there is a view that by the custom of the shipping industry the bill of lading does not merge the terms of any prior agreement.⁴⁹ Therefore, the bill of lading does not supersede a booking note. Hence, the contract has been concluded by the booking note. There is not a new contract in the form of a bill of lading. Besides, it is manifestly shown in the cases mentioned above that the terms of the contract are merged in the bill of lading, which supersedes all prior agreements and it is the contract itself.⁵⁰ Thus, any terms left out of the content of the bill of lading are not regarded as part of the contract. It is a dissent case which does not establish the rule. Additionally, it becomes clear once again that a booking note might be seen as a contract of carriage. Hence, the bill of lading does not directly arise as the contract of carriage but it supersedes another oral contract.

In 1889, the supreme court of Indiana in *Louisville E & St LR v Wilson*⁵¹, a case about the amount of charges to be paid in the absence of an express stipulation in the bill of lading, Mitchell J, stipulated his opinion about the contractual role of bills of lading. He said that:

“The bills of lading must be regarded either as complete contracts,
into which all the oral negotiations of the parties are merged, or

lading and its legal results, adopting the fifth point of the plaintiff in error, that any antecedent agreement or understandings was merged therein and extinguished thereby” *Show v Indiana B & W Co* 9 NE 702, *The Lady Franklin* 19 Led 455. In *Transmarine Corporation v Charles H Levitt* 25 F2d 275 The shipper plaintiff contracted orally with the defendant in September, 1920, for the carriage of 75 of these cases by the steamship *Surailo* from Newark to Havana. p. 277 “We agree that the bill of lading was the only contract between the parties, and that it took the place of the prior oral contract as the final memorial of the parties obligations”

⁴⁹ *Hellenic Lines Ltd v USA* 512 F2d 1196 p. 1208

⁵⁰ *Wiener v Compagnie Generale Transatlantique* 61 F2d 893 p. 895 “Even a provision that there shall be no modification of an existing contract may be revoked by a new agreement between the parties which contradicts it”

⁵¹ 21 NE 341 p. 342 “but as a contract, expressing the terms and conditions upon which the property is to be transported, it is to be regarded as merging all prior and contemporaneous agreements of the parties, and, in the absence of fraud, concealment, or mistake its terms or legal import, when free from ambiguity, cannot be explained nor added to by parol. It becomes the sole evidence of the undertaking, and all antecedent agreements are extinguished by the writing”. Vol. 13 *CJS* p. 240. “Where a bill of lading is silent as to route, its effect is the same as if there was a provision therein giving the carrier a right to select any usual route, and such provision thus inserted by law is as unassailable by parol evidence as any express term of the contract”. Vol. 80 *CJS* p. 913.

they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported ... ”.⁵²

In this decision the following points are clarified: First, it rejected the idea of having the bill of lading half contract of carriage or maybe two-thirds of the contract and the rest of them could be found in oral agreements. The court found itself unable to see any reason to approve the existence of terms of the contract outside of the content of the bill of lading. Therefore, the court is of the view that there is only one contract of carriage which finally takes the form of a bill of lading. Thus, it must be in writing and, therefore, it cannot be an oral contract which has been concluded prior to the issue of the bill of lading. The judge investigates the use of having a bill of lading merely as evidence of a contract when a contract of carriage already exists but not in the form of a bill of lading. The view that the bill of lading is merely evidence of it is rejected. Second, all the prior negotiated terms are embodied in the bill of lading contract. Third, it cannot be explained by parol evidence and it has to be interpreted like all the other kinds of contracts, even if an oral agreement made synchronously with a written contract is regarded as void.⁵³ Hence, agreements made prior to the issue of the bill of lading are merged in the bill otherwise they are not regarded as part of the agreement.

3.7 Bills of Lading as Contracts of Adhesion

Is the bill of lading a common kind of contract or a standard form contract?

Hays⁵⁴ and Meskill⁵⁵, circuit judges, considered that bills of lading are contracts of

⁵² *ibid. Louisville* p. 343 “As a contract, a bill of lading, like other written contracts is presumed in the absence of imposition or mistake, to embody the entire agreement of the parties”, *American Jurisprudence 2d*, 1964, The Lawyers Co-operative Publishing Company, Vol. 13 p. 795 (fn 3).

⁵³ *R Thompson v Knickerbocker Company* 26 Led 765 p. 768 “Parol agreement inconsistent with a written instrument made contemporary therewith is void ...”

⁵⁴ *Cabot Corporation v SS Mormacscan* 441 F2d 476 Action by shipper against stevedore to recover for negligent damage to cargo. p. 478, *Mori Seiki Inc. v Mitsui Osk Lines Ltd* (1993) 990 F2d 444 Consignee of precision lathe brought action against ocean carrier, ship, charterer/operator, seaport operator and stevedore services firm for damage to lathe after it was unloaded, but before it was

adhesion which are prepared by the carrier⁵⁶ and, so, any clauses should be construed against their drafters. All terms of the contract are stated by one party and the other enters into the contract by accepting all the terms as expressed in the document. Therefore, oral agreements are eliminated and cannot be seen as part of the contract and, therefore, there is no contract concluded prior to the issue of the bill of lading. It could be said that bills of lading are contracts of adhesion but not contracts of carriage. This suggestion is not likely to be made because if the bill of lading is the contract of adhesion, then there is no other transaction in which the bill of lading is referred than the transport of the goods stated in the bill. The parallel existence for the same transaction of another contract as the contract of carriage eliminates and contradicts the quality of bills as contracts of adhesion. Bills of lading are not only stated as being contracts of adhesion but they are treated as such.

Does the interpretation of ambiguous terms of the bill of lading against the carrier mean that the bill of lading is not the contract of carriage? The bill of lading, by being a contract of carriage belonging to the category of contracts of adhesion,⁵⁷ is drafted mainly by one party (the carrier) and accepted by the other (the shipper). Only ambiguities should be construed against the party who has drafted the document which does not

released from seaport. p. 448 "Although it is true that a bill of lading is a contract of adhesion". *Institute of London Underwriters v Sea-Land Serv Inc.* 881 F2d 761, 767. *C-Art Ltd v Hong Kong Islands America Sa* 940 F2d 530, 532. *Antillean Marine Shipping Corp v La Universal* 359 SO2d 516, *La Salle Mach Tools Inc v Maher Terminals Inc* 452 Fsupp 217

⁵⁵ In *Allied Chemical International Corp. v Companhia de Navegacao Lloyd* 775 F2d 476 p. 477. Further about contracts of adhesion: Kessler "Contracts of Adhesion" 43 *Col LR* 629, Slawson "Standard Form Contracts and Democratic Control of Lawmaking Power" 84 *Harv LR* 529, F Kessler, E Fine "Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract" 77 *Harv LR* 401, Patterson "Compulsory Contracts in Crystal Ball" 43 *Col LR* 731, R Braucher "Freedom of Contract and the Second Restatement" 78 *Yale LJ* 598. T Rakoff "Contracts of Adhesion: An Essay in Reconstruction" 96 *Harv LR* 1174.

⁵⁶ *Scott & Williams Inc. v Pittston Stevedoring Corp* 422 F Supp 40 p. 43, *The Mormaclynx* [1970] 1 Lloyd's Rep 527 p. 534, *Interocean Steamship Corp v Mellon Bank International* 865 F2d 699, *Gamma 10 Plastics Inc v American President Lines Ltd* (1994) 32 F3d 1244 p. 1251 "A bill of lading is a contract of adhesion"

⁵⁷ In *Caledonia* 39 Led 644 *Mitsui Co. v American Export Lines Inc.* 636 F2d 807 pp. 822-23. *Associated Metals & Minerals Corp v M/V Vishva Shobha* 530 F2d 714, 718, Corbin "Corbin on Contracts", 1960, West Publishing Co Sec 559 and 1992 Supplementary Sec 559. *Encyclopaedia Britannica Inc. v SS Hong Kong Producer* 422 F2d 7 p. 15

delete its contractual role. The bill of lading as a contract is subject to the general rules of construction which govern other contracts⁵⁸ and is governed by the intent of the parties.⁵⁹ The intention is construed as it has been expressed by them into the terms of the bill of lading itself. The intention of the parties is introduced as an interpretation parameter which must be taken into account, but it cannot minimise the contractual role of the bill of lading.

3.8 The Contractual Role of Bills of Lading Issued after a Shipment Had Taken Place under an Oral Contract

So far it is stated that every prior agreement has merged in the bill of lading and the issue of the bill of lading in a later stage does not affect its role as the contract of carriage. Is there any other established principle concerning the contractual role of bills of lading in relation to its issue in a later stage? In *Transmarine Co. v Charles H Levitt Co.*⁶⁰ in the court of appeal, L Hand, circuit judge, Swan and A Hand, circuit judges concurring, stated that:

“When the goods have once been dispatched under an oral contract and are beyond recall, the issuance and acceptance of a bill of lading has been treated not to substitute it as the contract”.

According to this view, it seems that the bill of lading has lost its characteristic of being able to substitute any prior agreement or contract. Hence, the acceptance of a bill of lading does not mean that a new contract in the form of a bill of lading is concluded. The

⁵⁸ *Maggard Truck Line v Deaton Inc.* 573 F Supp 1388 p. 1392 “As a contract it is subject to the general rules of construction which govern other contracts”, *Booth v New York Cent* 112 A 894, *Siegelman v Gunard White Star* 221 F2d 189, *The Idefford* 31 F Supp 667, 670, *Northern Co v Wall* 60 Led 905, *Texas & P R Co v Reiss* 46 Led 358, Vol. 13 CJS p. 239. *Pennsylvania R Co v Charles Gibson* 23 F Supp 857, *Amoco Overseas Co v ST Avenger* 387 F Supp 589 p. 594 “The bill of lading ... is the contract governing the rights of the cargo owner vis-à-vis the shipowner. As such it is to be interpreted according to principles of contract law”.

⁵⁹ *Mexican Ligh & Power Co. v Pennsylvania Co.* 33 FSup 483

⁶⁰ 25 F2d 275 p. 277, *Burns v Burns* 131 F 238, *Park v Preston* 15 NE 705, *Guillaume v Gen Transp Co.* 3 NE 489, *American Tobacco Co v The Katingo* 81 F Supp 438.

whole conception that the bill of lading is ratified as the contract of carriage, by the time of the oral agreement of the shipper and the carrier, seems to be rejected. The bill of lading has lost its contractual role merely by the fact that the ship has sailed prior to the issue of the bill of lading. Therefore, the oral contract continued to be the contract of carriage.

When a binding contract for the shipment of goods has been made between the consignor and a common carrier and its execution has begun, delivery of a bill of lading, which contains provisions different to those agreed by the carrier and the consignor, will not supersede the original contract.⁶¹ The authority of the principle is based on the presumption that the goods are dispatched under an oral contract and that they are beyond recall. First of all, as it is mentioned above, the common carrier's bill of lading is the contract under which the goods are delivered.⁶² The dispatch under an simple oral agreement will be covered by the doctrine that the law requires and it must be presumed that a bill of lading will be issued at a later stage, which merges all the prior oral agreements. The acceptance of goods ratifies the bill of lading as the document containing the contract of carriage, because the bill of lading is not only a contract but also a receipt and a document of title. As it is mentioned above, even the sailing of the ship with the cargo on board means ratification of the bill of lading as the contract. A possible occasion where this principle could be valid is when there is a specific agreement that the previous contract will govern the transport, regardless of a latter issue and acceptance of a bill of lading provided that there will be clear mention of it in the bill. The incorporation of a clause stating that the bill is not the contract should be seen as eliminating the possibility of regarding this as a contract for the parties.

⁶¹ *Waltham MFG Co. v New York Co.* 90 NE 550

⁶² *The Edmand Antros* 1925 AMC 1650, *Luckenbach Co. v American Mills* 1928 AMC 558

3.9 Cases Regarding the Bill of Lading as Evidence of the Contract

Although in the majority of the cases, the bill of lading has been established as the contract of carriage, there are some cases where the bill of lading is stated as being evidence of the contract. In the above mentioned case of *Delaware*, the term “evidence” had the meaning of complete incorporation in the bill of lading. Accordingly, Ross C. J.⁶³, in the supreme court of Vermont, held that the bill of lading stands as evidence of the contract between shipper and carrier, but with the meaning that the whole contract has been incorporated in the bill. Thus, parol evidence is inadmissible to vary the terms of the bill of lading contract. It is suggested that the necessity of the bill being accepted in order to qualify as the contract, means that the acceptance of the customary bill of lading of the carrier is granted by the delivery of the goods to the carrier by the shipper. Hence, there is not a contract of carriage different from the bill of lading. The sense of the term “evidence” has been understood under the meaning that there is only one contract of carriage which is evidenced in the bill of lading. Hence, it is not accepted that there is a contract of carriage which is independent and the bill of lading is merely evidence of it.

According to *Hellenic Lines v Embassy of Pakistan*,⁶⁴ in an action by the carrier against consignee to recover damages for detention of its vessels, Bosnal, district judge, declared that:

“Under both American and English law, the bill of lading

⁶³ *Davis v Central Vermont Co.* 29 A 313 p. 314 “bills of lading are contracts or receipts and contracts ... This he delivers to the consignor as evidence of the contract between them. By receiving the bill of lading the consignor assents to the terms of the consignment contained in it, and becomes bound thereby, so far as the conditions named are reasonable in the eye of the law. But as a contract of carriage of the goods, so far as it is reasonable it is held to be a special written contract, not open to explanation by parol evidence ...”, *Lewis Poultry Co. v New York Co.* 105 A 109 p. 112. *Trade Arbed, Inc. v S/S Ellispontos* 482 F Supp 991 p. 995 “The charter party is a separate contract which terms define the rights and liabilities of only the charterer and the owner ... COGSA would apply only to the relations between cargo and carrier as evidenced by terms of the bills of lading, not to the relations between carriers, as evidenced by terms of the charter party”, *Iligan International Corp v SS J Weyerhaeuser* 372 F Supp 859 p. 859 “Where *contract of carriage was the bill of lading*, the Carriage of Goods by Sea Act applied of its own force, as *the bill of lading was evidence of a contract for carriage*” (Italics added).

⁶⁴ 307 F Supp 947 p. 953

constitutes, or is at least good evidence of the terms of the contract of carriage between the carrier and the shipper ... particularly where, as here, the freight contract or booking note is only a bare memorandum and the bill of lading is a complete form with additional typewritten terms, which both parties have used without objection”.

It is stated that in both American and English law the bill of lading is at least good evidence of the contract. The court said that under the English law, the carrier was not entitled to any damages for detention of its vessel. The case introduces a new understanding of the contractual nature of bills of lading. It seems that the bill of lading has two contractual roles. First, it is the contract of carriage itself which means that in every transaction we have only the bill of lading contract. Second, on other occasions the bill of lading is merely evidence of the contract which means that the contract of carriage is something else and the bill of lading merely accommodates some of its terms. There is not a real explanation how and why the bill of lading has been enveloped with these different contractual functions. It seems that the judges have been influenced by English literature, because the majority of the American case law regards the bill of lading as the contract of carriage. According to the last sentence of the passage quoted, the bill of lading is a complete form which concludes and includes all the terms; this means that the complete contract is incorporated in the bill of lading. Moreover, a booking note or a freight contract is in this case merely a memorandum, but the wording of the case shows that on other occasions they can be seen as contracts of carriage. Additionally, the court founds its decision upon three cases where the bill of lading is stated as being the contract of carriage between the shipper and the carrier rather than merely evidence of it.⁶⁵

⁶⁵ *Dietrich v United States Shipping Co.* 9 F2d 733 An action by plaintiff shipper against carrier to recover damages due to delay in delivery at the port of destination. p. 741, *St Johns Nf* 280 F 553 p. 555, In

Consequently, the use of the word “evidence” should be understood as having the meaning that the bill of lading is the contract of carriage and therefore is evidence of it as well. The acceptance and the use of the bill of lading by the parties should be seen as the factors which have altered the previously concluded contract.

In contrast, Gilbert⁶⁶, circuit judge, in the court of appeal stated that parol evidence can be admitted in order to modify some of the provisions of the bills of lading. The principle that the acceptance of a contractual document, such as a bill of lading, which might contain new terms, can alter a concluded contract is rejected. The carrier has the burden to show that he directed attention to the terms of the bills of lading and that the shipper assented to them. A different approach from the view expressed in the above mentioned cases is outlined here. Hence, there is a doubt about the contractual status of bills of lading. The acceptance of the bill of lading by the shipper seems not to be enough evidence that there is assent to the terms of the bill of lading. But as it is explained above, even the acceptance of the goods for carriage means ratification of the bill of lading as the contract of carriage. Furthermore, even if the ship sails with the cargo aboard and the bill of lading has not been signed, then the bill of lading is the contract of carriage.

There are views⁶⁷ that the terms expressed in the bill of lading are not conclusive because the bill of lading is not contract but merely evidence of it. Any difference between a prior written contract and a bill of lading is resolved in favour of the former. Hence, it seems that contract of carriage and bill of lading are two different conceptions. The bill of lading as a legal document by its nature has not been enveloped with any contractual characteristic. Those views are based on the works of Carver and Scrutton where the bill of lading is stated as being evidence of the contract. Only the positive

Jones v The Flying clipper 116 F Supp 386 p. 388.

⁶⁶ In *Pacific Coast Co. v Yukon Independent Co.* 155 F 29

⁶⁷ *Ambler v Bloedel Mills* 68 F2d 268 p. 268 “Notation of rate on bills of lading is not conclusive, since bill of lading is not contract, but, at best, only evidence thereof, and any irreconcilable repugnance between prior written contract and bills of lading must be resolved in favour of former”

intention of the parties incorporated in the bill itself should be regarded as the factor which transfers the bill of lading into the contract of carriage. There is no case law in support of these ideas.

A totally different approach presented in *John Vittuci Co v Canadian P Co*,⁶⁸ where Neterer, district judge, held that the contract of carriage is reduced to writing in the form of a bill of lading and all oral agreements are merged therein. What a contradiction! The last case is clearly based on American law and that is why the bill of lading is stated as being the contract of carriage. Accordingly, Seaman,⁶⁹ district judge, confirmed that the office of bills of lading is to incorporate the contract of carriage.

It is obvious that some dissenting decisions considering the bill of lading as evidence of the contract cannot modify the majority of decisions which stand by the side of the bill of lading as the contract of carriage. On the one hand, it is a matter of the parties' agreement to regard the bill of lading as merely evidence of the contract. On the other hand, this intention must be incorporated in the bill itself. Conger,⁷⁰ district judge stated that:

“The contract was oral ... and confirmed by a letter”.

It is an exception if and when it is clearly agreed that the contract of carriage is not contained in the bill of lading but in a prior agreement.

3.10 The Contractual Role of Bills of Lading According to the Views of American Scholars

American jurisprudence has established the bill of lading as the contract of

⁶⁸ 238 F 1005 p. 1006 “A bill of lading is a contract to transport and deliver the goods to the consignee upon the terms therein specified. A bill of lading is a contract for the carriage of goods reduced to writing and is the only evidence of the contract. The oral agreement is merged in a written bill of lading for the shipment of the goods”, *Long v New York Co.* 50 NY 76, *White v Ashton* 51 NY 280, *Goepel v Hamburg American Co.* 191 F 744

⁶⁹ *The Roanoke* 59 F 161

⁷⁰ *The Hugh O'Donnell* 62 F Supp 239 p. 243

carriage. The presentation of the view of some scholars should be a necessary step towards the best possible integral examination of the contractual role of bills of lading between shipper and carrier. G Gilmore and C Black⁷¹ state that the contract of carriage is contained in the bill of lading. Therefore, there is no room for any suggestion that there is any contract than the bill of lading. They said that:

“we ought to observe that bills of lading and charter-parties are contracts of a very special kind. They are what have been called ‘type-contracts’, which is to say that most of their terms, other than time, price and a few other variables, are worked out by industry consensus or invariant practice long before - in some cases centuries before - the parties bargain. The formation of the contractual relationship requires no more than the filling in of blanks in printed forms”.⁷²

Those two distinguished writers clearly affirm the quality of the bill of lading as the contract of carriage. Especially, they indicate that the contractual function of bills of lading has been established by invariant practice and customary usage. Therefore, an effort to construe bills of lading strictly under the general principles of contract would be a mistake. Moreover, any suggestion that the contract of carriage is concluded prior to the issue of the bill of lading is invalid, because the fixed terms of the contract are the terms of the bill of lading. So, as a principle it becomes clear that the bill of lading contract is not an ordinary contract. Its terms are not concluded in the end of the negotiations, but they have been fixed in advance. As mentioned in the beginning, the spirit of the

⁷¹ G Gilmore & C Black “*The Law of Admiralty*”, 1975, The Foundation Press Inc. p. 13 “This highly important document serves as a written embodiment of the terms of the contract of carriage, as a receipt for the goods and as a negotiable document”. p. 93 “The bill is a contract of carriage”.

⁷² *ibid.* p. 15. P Peters “*Peter's Commercial Law*”, 1920, South Western Publishing Company p. 152 “It is a contract”. B Williams, J Jester “*Commercial Law*”, 1939, Accredited Schools Supply p. 134 “The contract between the common carrier and his customer is generally in the form of a bill of lading”

introduction of bills of lading in the trade usage has to be taken into account.

T Schoenbaum⁷³ states that the bill of lading contains the contract of carriage. Regarding the merger of prior agreements in the bill of lading, he disagrees by stating that:

“the English rule seems to be the correct one and is consistent with the strict construction of the bill of lading against the party who drafted it”.⁷⁴

He accepts the bill of lading as a contract of adhesion and so its terms can be modified by parole evidence because the bill of lading is drafted by the carrier. It is submitted that interpretation against the party who drafted a document could be justified when there is an imprecise term incorporated in the document. It means interpretation of the imprecise term but not incorporation of prior terms which had been deleted by modification or by the new incorporated terms of the bill of lading.

The bill of lading is the contract of carriage and the international conference in Brussels in 1924 standardised the terms of the bill of lading contract.⁷⁵ The bill of lading has been established as the contract of carriage by the international legislation.

The bill of lading began as a bailment receipt for goods to be carried on common law terms, has been developed into a receipt plus a contract of carriage, and then also in time has acquired a third characteristic as a negotiable document of title.⁷⁶ The historical employment of the document has established the bill of lading as the contract of

⁷³ fn 8 p. 296 “The traditional bill of lading is a document ... stating the terms on which the goods are to be carried”.

⁷⁴ *ibid.* p. 299

⁷⁵ J Donovan “*Existing Problems Under the Hague Rules and the Need for Changes in US Legislation*” in *The Speakers' Papers for the Bill of Lading Conventions Conference* New York, 1978, Lloyd's of London Press p. 1 “Encouraged by the success of the US Harter Act, 1924, European shipping interests held an International Conference in Brussels in 1924, intending to standardise the contractual relationships between carrier and cargo interests by requiring certain obligations and duties of the respective parties to be inserted in the bill of lading which was the contract of carriage”

⁷⁶ A Knauth “*The American Law of Ocean Bills of Lading*”, 1953 p. 134.

carriage.⁷⁷ In common carriage, the term “contract of carriage” has become synonymous with bill of lading contract. Hence, any approach strictly under the general principles of the law of contract should be avoided as inappropriate in order to state the contractual character of bills of lading.

Parol evidence cannot be admitted to modify the bill of lading by showing that the parties had orally agreed either in their negotiations or contemporaneously with the creation of the bill of lading.⁷⁸ Every single oral agreement made before the issue of the bill, not of course if it is contained in it, should be regarded as part of the negotiation process leading to the final statement of the contract as expressed by the bill of lading.

In the process of making a contract,⁷⁹ the parties may express their assent upon individual terms as the negotiation proceeds. These expressions are merely tentative and are inoperative in themselves. There is no contract until the parties express assent to all the terms of the transaction. Consequently, prior minor agreements are considered as part of preliminary negotiations. Therefore, a simple booking agreement could not be regarded as the final contract because many terms of the contract have not been finalised before the delivery of the goods for loading. The booking of shipping space is a minor agreement in the process for the creation of the contract of carriage. Moreover, various announcements of the carrier or terms contained in documents issued in order to facilitate the process up to the final issue of the bill of lading should be regarded as tentative. The final contract is the bill of lading which contains all the final terms of the carriage. It is

⁷⁷ fn 75 J Sweeny “*Review of the Hamburg Conference*” p. 2 “It was a radical interference with the illusory freedom of contract whereby shipowners offered printed form bills of lading, containing many exculpatory clauses, as contracts of affreightment” A Jenner & J Loo “*Bevedict on Admiralty*”, 1989, Vol. 2a, Matthew Bender p. 4-1, 31

⁷⁸ A Squillance & J Fonseca “*Williston on Sales*”, 1974, Vol. 2, The lawyers co-operative publishing Co. p.104 sec 13-15. For more about the parol evidence rule *Corbin on Contract*, 1993 supplement, Vol. 3 sec 572-596 pp. 426-684. *Corbin on Contracts*, 1960, West Publishing Co Vol. 3 sec 573-596 pp. 356-578. B Reams, L Kuttan “*Electronic Contracting Law*”, 1994-95, Edition (CBC) Clark, Boardman, Callaghan pp. 148-150. *Restatement of the Law, Contracts 2d*, Vol. 2 sec 213-14 p. 129.

⁷⁹ A Corbin “*Corbin on Contracts*”, 1960, West Publishing sec 31 pp. 112-124

worth mentioning that advertising and offers which are published in the media are not regarded as the offer for acceptance. They need further expression in order to be closed.⁸⁰ In the case of bills of lading, as is shown above, the contract is concluded under the terms of the bill of lading. The acceptance of the goods by the carrier means ratification of the contract as it is expressed in the bill of lading itself. Chief Justice Traynor⁸¹ states that:

“According to the rule, once the parties have reduced all aspects of their agreement to a final writing, evidence of a prior or contemporaneous oral agreement or of a prior written agreement will not be admitted to vary the written instrument”.

Have the parties reduced all their agreements to the final writing of a bill of lading? All the previous analysis have shown that the bill of lading is the contract of carriage. Moreover, the same answer is given by the Restatement of Contracts⁸² where it is stated that bills of lading are standardised contracts and they are commonly regarded as such by any customer. Any prior agreement which is not contained in the bill of lading is not regarded as part of the contract and it is simply part of the negotiation proceeding. Consequently, any sailing announcements or other advertised conditions should not be considered as final terms of the contract unless they are incorporated in the bill of lading.

⁸⁰ *ibid.* at sec 13-15, in sec 25 pp. 74-75. “Such advertisements are understood to be mere requests to consider and examine and negotiate”. In *Restatement of Contracts 2d* at sec 26,27 and 33, pp. 75-76 “Business enterprises commonly secure general publicity for the goods or services they supply or purchase. Advertisements ... are not ordinarily intended or understood as offers”. K Llewellyn “On our Case Law of Contract: Offer and Acceptance” 48 *Yale LJ* 1.

⁸¹ Notes “Chief Justice Traynor and the Parol Evidence Rule” 22 *Stanford Law R* 547 p. 547, Corbin “The Interpretation of Words and Parol Evidence Rule” 50 *Cornell L Q* 161, Sweet “Contract Making and Parol Evidence Diagnosis and Treatment of a Sick Rule” 53 *Cornell LR* 1036, McCormick “The Parol Evidence Rule as Procedural Device for Control of the Jury” 41 *Yale LJ* 365

⁸² American Law Institute, *Restatement of the Law Contracts 2d*, 1981, American Law Institute Publishers, Vol. 2 sec 211 pp. 120-21 “Standardised agreements are commonly prepared by one party ... The obvious danger of overreaching has resulted in government regulation of insurance Policies, bills of lading ... and other particular types of contracts. The same document may serve both contractual and other purposes and a party may assent to it for other purposes without understanding that it embodies contract terms. He may nevertheless be bound if he has reason to know that it is used to embody contract terms. Insurance policies, steamship tickets, bills of lading and warehouse receipts are commonly so obviously contractual in form as to give the customer reason to know their character”. Dugan “Standardised Form Contracts - An Introduction” 24 *Wayne LR* 1307, Patterson “The Interpretation and Construction of Contracts” 64 *Columbia LR* 833

It is considered common knowledge that, among other kinds of documents, bills of lading are regarded as contracts. So, every contracting party knows that the issued bill of lading is the contract itself. The whole negotiation process is concluded by the emergence of the bill of lading as the contract of carriage.

The bill of lading becomes effective as the contract of carriage when it has been signed and accepted, according to Kendall.⁸³ Certain goods must be accepted for carriage. Hence, the contract concerns those specifically identified goods. Consequently, the certainty of the goods can be achieved only at the time of the delivery of the goods for loading. The contract becomes effective by the acceptance of the bill of lading. The effectiveness is understood to mean that the contract has the form under which the full scale of its functions can work, because the delivery and acceptance of goods ratifies the provisions of the bill of lading as the contract of carriage. Therefore, the bill of lading has been accepted before the acceptance of the authorised document. But the acceptance of the document makes clear that the contract will be the document of the bill of lading from that moment onwards, because the bill of lading does not become a bill of lading *stricti juris* until signed and delivered.⁸⁴ In fact, as it is mentioned above, the bill of lading is regarded as being a bill of lading regardless of the absence of the carrier's signature simply by the acceptance of the goods by the carrier.

The contract of affreightment⁸⁵ can be in the form of a charter-party or a bill of lading. The contract to carry goods which form part of the cargo is in the form of a bill of

⁸³ L. Kendall "*The Business of Shipping*", 4th ed, Cornell Maritime Press p. 243 "The bill of lading, as a contract of carriage, sets forth the terms of the agreement between carrier and shipper under which certain goods are accepted for transportation between named ports at a designated ship with a stipulated sailing date in exchange for a financial consideration. The contract becomes effective when it has been signed by the master and accepted by the shipper"

⁸⁴ *Charles J Webb & Son Inc v Central R Co of New Jersey* 36 F2d 702

⁸⁵ A Zock "Carter parties in Relation to Cargo" 45 *Tulane L R* 733. T Kerr "*Business Law*", 1945, (7th Reprint) J Wiley & Sons p. 146, S Weaver "*Business Law*", 1926, Ally and Bacon p. 139. J Rosenberg "*Dictionary of Banking and Financial Services*", 1985, J Wiley & Sons p. 76.

lading. There is a view⁸⁶ that both in England and American merchandise practice, bills of lading from the 18th century were regarded as contracts of carriage of goods by sea.

The booking of space has not changed the contractual status of bills of lading, according to C McLaughlin JR.⁸⁷ The bill of lading is the only evidence of the contract. If there is no other kind of evidence of the contract then it cannot exist in another form. The establishment in practice of the delivery of the goods and delivery of the bill of lading as simultaneous acts, as it is stipulated in the *Hill v Syracuse*,⁸⁸ results in the establishment of the bill of lading as the contract of carriage, despite the fact that the writer uses the word “evidence” for the expression of the conclusive incorporation of the contract in the bill. Additionally, in accordance with his view, the booking of space is not the contract of carriage.

In contrast, A Murr⁸⁹ states that the bill of lading is evidence of the contract which is incorporated in the bill of lading. Accordingly, Abrahamsson⁹⁰ and Kozolchyk⁹¹ held that the bill of lading is the contract of carriage.

Williston⁹² states that bills of lading in both ocean and railroad shipments are

⁸⁶ M Crutcher “The Ocean Bill of Lading - A Study in Fossilisation” 45 *Tulane LR* 697 p. 703 “there are some generalisations about bills of lading established by reference to the circumstances existing both in England and American before 1800 which deserve attention; a. the bill of lading purports to be a contract of carriage of goods on a particular ship, b. it purports to be a contract for carriage only by water, c. it is in effect a contract with the master as well as the unidentified shipowner”

⁸⁷ C Maclaughlin JR “The Evolution of Bills of Lading” 35 *Yale LJ* 548 pp. 555-56 “A bill of lading has commonly been said to have three characteristics 1) a contract for the carriage of the goods ... When it became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract”

⁸⁸ 73 NY 351

⁸⁹ A Murr “*Export / Import Traffic Management and Forwarding*”, 6th ed, Cornell Maritime Press Inc. p.162 “The bill of lading is the basic document in connection with the carriage of goods and serves 1) ... 2) as evidence of the contract subject to its terms”

⁹⁰ B Abrahamsson “*International Ocean Shipping: Current Concepts and Principles*”, 1980, West View Press/Boulder Colorado p. 83 “The contract used in liner trade is the ocean bill of lading”. A Lowenfeld “*International Private Trade*”, 1981, Matthew Bender Vol. 1 p. 31 “A bill of lading ... to being a contract of carriage between the shipowner, the consignor or his endorsee”

⁹¹ B Kozolchyk “The Paperless Letter of Credit and Related Documents of Title” (1992) 55 *Law and Contemporary Problems* 39 p. 84 “ ... The three main functions of the ocean bill of lading (receipt of the goods, contract of freight, and document of title) ...”.

⁹² *Williston on Contracts*, 1920, Vol. 2, sec 1088 p. 2025. D Pomeroy, M Fisk “*Applied Business Law*”, 1944, South Western Publishing Company p. 277.

contracts. Hence, the bill of lading in order to be a bill of lading has to be first a contract. Finally, it could be said that common factor of all the above mentioned views is the recognition of bills of lading as the contract of carriage itself. So far, it is ascertained that bills of lading are contracts of carriage in relation between shipper and carrier.

3.11 Bills of Lading in the Hands of Third Parties

The next step is the investigation of the relation between the carrier and third parties regarding the contractual character of bills of lading. What is the contractual role of bills of lading in hands of third parties? The use of the bill of lading as a receipt and a document of title in hands of third parties will not be investigated. Is the bill of lading the contract of carriage or evidence of it? In *Internatio Inc. v M/V Yinka Folawiyo*⁹³ Becker, district judge, states that:

“The defendant has, however, attempted to argue that the plaintiff is not a party to the bill of lading in its contractual role and that it therefore has no standing to sue thereunder. This theory is clearly incorrect. The consignee as owner of the goods, always has a right to sue for their damage or loss”.

Any attempt to support the absence of contractual relation between consignee and the carrier is rejected by the court. The contractual role of bills of lading is treated as it is stated by the judge. The court refused to accept any suggestion of privity of contract between shipper and carrier. Thus, the holders of a bill of lading are in contractual relation with the carrier and they are entitled to enforce the contract.⁹⁴ Moreover, the bill

⁹³ 480 F Supp 1245 p. 1252. “In its role as a contract of carriage”. *The North Carolina* 10 Led 653, In *Aetna Insurance Co. v SS Ortiguera* 583 FSupp 671 p. 672 “As between a shipper who has parted with title to goods and a consignee who has not paid for goods even on a CIF contract, consignee generally is proper party to sue the carrier for damage to goods or breach of contract of carriage”, *Farbwerke Hoeschst A G v M/V Don Nicky* 589 F2d 795, 797.

⁹⁴ In *Higgins v Anglo-Algerian Co.* 248 F 386 p. 387

of lading in hands of a third party is the contract of carriage. Furthermore, a negotiable bill of lading under charter-party, which is purchased to a consignee, serves as the contract of carriage.⁹⁵ A bill of lading under charter-party, which is compared with the above cases of a bill under common carriage, shows the similarity in the contractual role of bills of lading in hands of third parties. On the one hand, the ocean carrier's duty to consignee rests on the bill of lading contract and not on any other agreement contained in another document.⁹⁶ On the other hand, any consignee is bound only by the stipulations contained in the bill of lading itself. The common element of the above mentioned cases is the establishment of bills of lading as the contract of carriage in relation with the holder of the bill and the carrier. The most important element which emerges is that the bill of lading is the contract of carriage and it is transferred to the third party as the contract. The bill of lading does not become the contract of carriage between the carrier and the third party, because the third party enters into a contract with the carrier under the terms of the bill of lading at the time of delivery.

Pursuant to COGSA⁹⁷ the bill of lading serves as the contract of carriage between carrier and consignee. R Ward,⁹⁸ district judge, held that the Carriage of Goods by Sea Act 1936 alone would govern the rights of the cargo owner vis-à-vis the shipowner. The same view has taken by Sprizzo,⁹⁹ district judge as well. Under American law there is no any problem for a third party to be regarded as member of the original contract, because

⁹⁵ *Ameranda Hess Corp. v SS Philips Oklahoma* 558 F Supp 1164 p. 1166 "In 1976 Mitsui and company inc. (the Shipper) contracted with defendant by charter party agreement ... Plaintiff became the consignee when it purchased a negotiable bill of lading for the cargo ... Pursuant to COGSA the bill of lading serves as the contract of carriage".

⁹⁶ *Mowinckel v Dewar* 173 F 544 p. 548 "that firm was, in fact, the consignee of the cargo, and as such is bound by the stipulations contained in the bill of lading", In *American Steel Co. of Cuba v Transmarine Corp.* 36 F2d 246 p. 246 "Ocean carrier's duty to consignee of freight rests on bills of lading and not on special provisions of agreement or contract between carrier and shipper".

⁹⁷ 46 USC 1300 et seq.

⁹⁸ *Amoco Overseas Company v S/T Avenger* 387 F Supp 589 p. 594. "The bill of lading, in addition to being a negotiable instrument, is the contract ..."

⁹⁹ fn 95 p. 1166

the existence of contracts on third party beneficiary is recognised.¹⁰⁰ The bill of lading is a classical situation of a contract issued on behalf of a third party - the consignee. It is the fundamental opinion of F Berlingieri¹⁰¹ that:

“The contract of carriage is considered to be the typical contract for the benefit of a third party and, therefore, the consignee, who is indicated by the shipper as the beneficiary of the contract of carriage, becomes a party to the contract when he declares to adhere to the contract”.

The transfer of the contract with the negotiation of the bill of lading will be seen in more detail in the chapter which will analyse the bill as a negotiable instrument. So far it has been established that the third party holder of the bill of lading becomes party to the original contract of carriage, which, as it is stated earlier, is constituted by the bill, if the contract is contained in the bill of lading. It is worth mentioning Tetley's view that:

“The bill of lading contract is thus a tripartite contract involving the shipper, the carrier and the consignee”.¹⁰²

3.12 Deductions

It is inferred from the introduction that in the legal system of the United States, bills of lading are regarded as contracts of carriage. Principles of law which are stated by the judges in their argumentation that they are not a straight matter of dispute in the individual case, where they are mentioned, does not mean that they lose their legal force or applicability. The established principle that the bill of lading has been enveloped with the characteristic of being a contract of carriage is the starting point of consideration for

¹⁰⁰ *Corbin on Contracts*, Vol. 4, sec 826-55

¹⁰¹ F Berlingieri “Cargo Claims under Voyage and Time Charter parties” 1990 *Il Diritto Marittimo* 3 p. 3

¹⁰² W Tetley “*Marine Cargo Claims*”, 3rd ed, International Shipping Publications p. 222. G Getz “*Business Law*”, 1977, Prentice-Hall Inc p. 157 “It is also a contract for shipment of the goods”.

any judge who has to decide a case which involves a bill of lading. Judges have been consistent with the presented terminology and its real understanding. There is a constant conception of their contractual character which has been followed by court decisions, despite the fact that there are some decisions accepting the bill of lading as mere evidence of the contract. The judgement of those decisions is based on English case law because it is the common legal background of the law. Additionally, on many occasions the bill of lading was regarded as the contract of carriage despite the fact that the term “evidence of contract” has been used in order to state it. The bill of lading alone constitutes the contract between shipper and shipowner, unrestricted by preliminary memorandum or oral agreements of the parties respecting the shipment. Additionally, bills of lading have been accepted as being contracts of adhesion which means that the contract of carriage is a contract of adhesion too. By the term covered, it is meant that the bill of lading is the contract of carriage. The bill of lading is regarded as being the contract of carriage in the hands of third parties as well.

The variety of views about the contractual role of bills of lading shows a flexibility in the conception of what is meant by contract of carriage which is regulated by the International Conventions and the contractual nature of bills of lading. The confusion and uncertainty derive from the absence of an internationally accepted definition of the characteristics of bills of lading. The development of the characteristics of bills of lading through practice and usage has resulted in a changeable view about their function as contracts of carriage. There is an uncertainty about the time in which the bill of lading arises as a bill of lading. It is stated that the signature of the carrier is necessary in order to be regarded as being a bill of lading. Besides, the acceptance of the view that the bill of lading is ratified as a bill of lading by the oral agreement between the shipper and the carrier, on the hypothesis that the enumerated goods will be received, is of great

importance. It covers the transaction from its embarkment, but it must be enforceable on the receipt of the goods. The inconsistency regarding its legal existence between the time of the conclusion of the bill of lading contract and the emergence of the bill of lading as a bill of lading after its signature, which takes place sometimes even days after the sailing of the ship will be avoided. So, the signature of the bill of lading in a later stage should be considered as a technical matter without any legal consequences. In some cases the bill of lading is the concluded contract of carriage and in others the bill of lading supersedes a prior concluded contract. The bill of lading should be the finally concluded contract which supersedes minor oral or written agreements which are not in themselves the contract. The whole problem is caused by the absence of any distinction that by “contract of carriage” is meant a contract in the form of a bill of lading. Any other kind of contract should not be regarded as equivalent to a contract of carriage of goods by sea. The misunderstanding among judges and scholars is based on the different sense under which the contract of carriage and the bill of lading contract have been perceived by them. The majority of judges and scholars in the United States considered that the bill of lading is always the contract of carriage in any case in which it is issued or it is due to be issued in due course. As a mandatory rule COGSA, regulates bills of lading contracts. So, in any case a bill of lading should be issued as the controlling contract. Therefore, there is a convergence of the judges and the scholars to the view that the bill of lading is issued as the contract of carriage which supersedes any other previously concluded contract either written or oral. Practically, this is translated into the establishment of COGSA 1936 as the mandatory law which governs the transaction only if the bill of lading is used as the contract of carriage.

Finally, the whole contractual status of bills of lading is pictured in *EF Operating*

*Corporation v American Buildings*¹⁰³ (March 1993), in which the carrier brought action against the consignees seeking to recover freight charges, in the Court of Appeal before Hotchinson, Nygaard and Seitz circuit judges. Nygaard held that:

“The bill of lading operates as both the receipt and the basic transportation contract between the shipper-consignor and the carrier, and its terms and conditions are binding ... As a contract, it is subject to general rules of construction under contract law ... And as a contract of adhesion between the carrier and shipper, it is strictly construed against the carrier”.¹⁰⁴

In the following chapter the contractual role of bills of lading under English law will be analysed.

¹⁰³ 993 F2d 1046. *US v M/V Santa Clara* (1995) 887 F Sup 825 Vessel owner claims against the shippers and consignees seeking contribution and indemnification pursuant to bills of lading. p. 832 “A bill of lading is a contract governing the rights of the cargo owner and the shipowner ... It is well recognized that bills of lading are contracts of adhesion”

¹⁰⁴ *ibid.* p. 1050.

CHAPTER IV

The Contractual Role of Bills of Lading under English Law

4.1 Introduction

The conflict between Britain and its rival the American merchant navy precipitated a movement for the use of model contracts of shipment (carriage)¹ and the standardisation of the liability of international liner carriers by legislative intervention.² The strong shipowners' lobby imposed on shippers the choice either of contracting under bills of lading drafted almost totally on the shipowners' terms or of refusing to contract.³ The incorporation into the document of the terms of the contract of carriage, in order to resolve the disputes which inevitably arose between cargo owners and carrier, was the next development of the function of the bill of lading, taking into consideration that at the beginning the bill of lading was merely a receipt. There is support for the view that the bill of lading, through its use in international trade, gained the characteristic of being the document which incorporates the contractual terms.⁴ Is the bill of lading the contract of carriage or evidence of it in hands of the original parties?

England introduced the Bills of Lading Act 1855⁵ which provides for the transfer of contractual rights to the consignee. The transfer of the contract depended on the transfer of the property of the goods. This interdependence created problems in the application of the Act in many cases, where the property had not passed to the holder of

¹ G Carver "*Carriage of Goods by Sea*", 4th ed, 1905 p. 283

² Harter Act 1893 46 USC 190-195

³ G Humphreys, A Higgs "Way-bills: A Case of Common Law Laissez Faire in European Commerce", 1992 *JBL* 453 p. 454

⁴ M Dockray "*Cases and Materials on the Carriage of Goods by Sea*", 1987, Professional Books p. 511

⁵ 18 & 19 Vict c 111

the bill of lading by reason of endorsement.

The introduction of The Carriage of Goods by Sea Act 1924⁶ replaced the 1855 Act. The new Act vests contractual rights in the consignee regardless of the transfer of the property of the goods. It is proposed to examine the contractual status of bills of lading under the 1924 Act on Carriage of Goods by Sea. Assumptions and opinions, expressed by judges, concerning the contractual role of bills of lading, in cases where the main dispute was not their contractual role, are presented in order to observe how they have been reached and how they relate to basic principles of law. Views of judges, as they are expressed in different cases, form the law and indirectly show that the *ratio decidendi*⁷ of the specific case has been built upon their understanding that the bill of lading is either the contract or evidence of it. On the one hand, the *ratio decidendi* is important because of its obligatory character. On the other hand, *obiter* statements are in themselves reflections of the law because they have been made by judges within the same system. Thus, it could be argued that *obiter* statements are commentaries on the law. However, it is the notion of the *ratio decidendi* which gives the present English system of judicial precedent its relatively strict character. Different terminology is not merely terminology; it carries and brings forward a different concept of a contract of carriage. Diversities in the terminology used by the judges are of great importance when a change in the contractual role cannot be explained by means of principles of law. The views of scholars expressed at the time will be investigated as well. The quotation of parts of various cases combined with the views of scholars is regarded to be the best way to

⁶ *Halsbury's Statutes*, 4th ed, Current Statutes Service 39 Shipping 131, F Reynolds "The Bills of Lading Act: Reform Nearer?" 107 *LQR* 355.

⁷ The *ratio decidendi* of a case may be understood as the statement of the law applied in deciding the legal problem raised by the concrete facts of the case. Not every statement of law in a judgement is binding. Although *obiter dicta* do not form part of the binding precedent of the case in which they occur. They do amount to persuasive authority and can be taken into consideration. The primary sources of English law include not just case law, which is a body of principles derived from court decisions regulated by the doctrine of precedent (*stare decisis*); but also statutes. The key features of the common law tradition are: a) a case-based system of law which functions through analogical reasoning; and b) an hierarchical doctrine of precedent. P DeCruz "Comparative Law in a Changing World", 1995, Cavendish Publishing Limited, Chapter 4 pp 101-108.

illustrate diversities in the wording of the conception of the contractual function of bills of lading.

4.2 The Emergence of the Contractual Role of Bills of Lading in Court Cases Prior to the Bills of Lading Act 1855

The first case referring to the contractual function of bills of lading in its modern form was the *Lickbarrow v Mason* case.⁸ The problem to be examined was the transfer of property and the negotiability of bills of lading. The bill of lading is referred to as the written evidence of the contract.⁹ Does this mean that the contract has been already concluded and the bill of lading is merely the written evidence of it? Lord Loughborough stated that it is of great importance that the nature of the bill of lading should be defined.¹⁰ First of all, there is a reference to the form of the contract and not to the evidence of it, which means that there is neither a final contract concluded prior to the issue of the bill of lading nor a bill of lading superseding an orally concluded contract of carriage. Second, the only contract which can be issued to order is a bill of lading contract. It becomes clear that, even if there are oral agreements, they are not regarded as being part of the contract. On the one hand, the final writing of the contract seems to be expressed in the bill of lading. On the other hand, the case does not clearly establish that the bill of lading is the contract between the original parties. Furthermore, in accordance with the view of Wedderburn,¹¹ the written document has been presumed to express the whole contract, which indicates that the bill of lading might be a contract of carriage.

Rights arising under a contract can be enforced only by the parties to the contract.

To that extent, in 1813, Lord Ellenborough held that:

⁸ *Lickbarrow v Mason* [1775-1802] All ER 1

⁹ *ibid.* p. 7 “A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract, in legal language, is a contract of bailment ... ***in the usual form of the contract*** the undertaking is to deliver to the order or assigns of the shipper” (Stress added).

¹⁰ *ibid.* p. 7 “... it is of great importance that the nature of an instrument so frequent in commerce, **as a bill of lading should be clearly defined**”. (Stress Added)

¹¹ K Wedderburn “Sutton and Shannon on Contracts”, 1963, Butterworths p. 463 fn (u)

“There is a privity of contract established between these parties by means of the bill of lading”.¹²

The case refers to the privity between the original parties in a bill of lading contract. In this case, the goods were shipped by the plaintiffs. The plaintiffs brought an action against the owner of the ship on a bill of lading signed by the master. According to the judge, the bill of lading was the contract which created the privity between the parties, which were the shipper and the carrier, because they were the original contracting parties. At the time of the conclusion of the contract, privity between the consignee, as a third party in the contract, and the carrier could not be created. The doctrine of privity applies only to contractual relations such as those created by the bill of lading contract in this case. It cannot be suggested that a privity of contract is created by means of the bill of lading and the bill of lading should be accepted as merely being evidence of it. Consequently, a bill of lading, by being merely evidence of the contract, could not create a privity of contract; only the contract itself could have created the privity between the contracting parties. Ultimately, the action of the parties depends on the fact that the bill of lading is their contract. This was part of the *ratio decidendi* of Lord Ellenborough.

4.3 The Bills of Lading Act 1855

The common law rules were ineffective in regulating the contract of carriage in the form of a bill of lading and, therefore, the introduction of statute law was necessary in order to overcome the defects of the common law rules.¹³ It is supposed that an operative Act, as the expression of the will of the sovereign legislature, overrides inconsistent provisions of pre-existing law. When passed, an Act takes its place as part of the *corpus*

¹² *Joseph v Knox* 170 ER 1397 p. 1397.

¹³ J Wightman “*Contract: A Critical Commentary*”, 1996, Pluto Press, London-Chicago, p.75 “In some instances the general rules were obstructive: the privity posed problems in relation to bills of lading and negotiable instruments where the commercial desire for enforceability by third parties in often complex networks could not be captured within the rigidities of the bilateral contract form. More often, the general rules and the agreement focus they fostered were simply inadequate”.

juris, or body of existing law. Acts of Parliament or Statutes have come to be of arguably greater significance than the decisions of the courts. On the one hand, judicial precedent is subordinate to legislation as a source of law in the sense that a statute can always abrogate the effect of a judicial decision. On the other hand, even statutes used not to enjoy the absolute authority accorded to them at the present day. There are many instances in which judges refused to apply statutes because they conflicted with common law, which was still regarded as sovereign. Has the Bills of Lading Act 1855 been perceived as authoritative, in relation to the contractual status of the bill of lading in hands of the shipper, in English law or has the common law tradition overshadowed its role? The contractual nature of the bill of lading is referred to in the Bills of lading Act 1855 where it is stated that:

“Every consignee of goods named in a bill of lading ... to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself”.¹⁴

It is stated that the contract is contained in the bill of lading and that the third party becomes a party to this contract. Furthermore, it has been said that the bill of lading expresses the contract of carriage.¹⁵ It could be argued that even if the contract is contained in the bill of lading, the bill of lading is still evidence of the contract rather than simply being the contract. This last argument might not be sustainable because it is clearly specified that the bill of lading is transferred as the original contract to the consignee rather than as the contract which is partly contained in the bill of lading.

¹⁴ 18 & 19 Vict c 111

¹⁵ *Leduc v Ward* [1888] 20 QBD 475 p. 480 “The terms of the Bills of Lading Act show that the legislature looked upon a bill of lading as containing the terms of the contract of carriage”

Additionally, the legislature has not made any distinction between the relation of shipper and carrier or carrier and consignee. It could be argued that the perception of the bill of lading being the original contract of carriage is formulated as the *raison d'être* of the legislature.

According to Carver's view, the objective of the Act is to "give the holders of a bill of lading the right to enforce the contract shown by that document, without reference to the shipper".¹⁶ Hence, in accordance with Carver's statement, it could be argued that the consignee obtains the contract of carriage as it is expressed by the bill of lading regardless of whether or not there are other contractual terms agreed between the shipper and the carrier. On the one hand, if the consignee does not obtain all the contractual rights which the shipper had, then he obtains only the contractual terms which are expressed in the bill of lading. On the other hand, the Act states that the consignee obtains all the rights of the contract as if he has been an original party to that contract which is represented by the bill of lading.¹⁷ If the bill of lading is not the contract of carriage in the hands of the shipper, then the consignee, since he becomes part only to the bill of lading contract, is still stranger to the original contract of carriage. However, in *Phillips v Edwards* it was held that the contract of carriage is concluded at the time of the delivery of the goods to the carrier.¹⁸ It could be argued that the legislature wanted to establish the bill of lading as the only contract needing to be regulated. The legislature probably wanted to introduce a uniform concept of the contract of carriage, in which the provisions of the Act would be implied. This does not mean that a contract of carriage cannot be concluded with an oral offer and acceptance between the contracting parties. Thus, the conclusion of an oral contract of carriage cannot be ruled out. Basically, the Act has not

¹⁶ T Carver "On Some Defects in the Bills of Lading Act 1855" (1890) VI *LQR* 289 p. 289

¹⁷ A Tettenborn "*An Introduction to the Law of Obligations*", 1984, Butterworths p. 140 "By S1 of the Bills of lading Act 1855, for example, the buyer of a cargo at sea who takes a transfer of a bill of lading is bound by (and can enforce) the contract of carriage as if it had been made with him in the first place"

¹⁸ *Phillips v Edwards* [1858] 28 LJ EX 52 p. 54 "...the contract is that which is formed at the time the goods delivered..."

been introduced to establish the bill of lading as the only expression of a contract of carriage. It has to be realised that in order to have a contract in the form of a bill of lading, which can be endorsed to any third party, it must be wholly contained in the bill of lading and it has to be in writing. It could be argued that the bill of lading is not issued in order to be merely an evidential document of the contract along with other means of evidence. Consequently, any orally agreed terms must be contained in the bill in order to be regarded as part of the contract. If the bill of lading, at that time, has been established as not being the contract, then the legislature should have reflected it in the wording of the Act. It is well established that the Acts of Parliament reflect and present the prevailing view concerning the subject regulated by them which, in the case of the 1855 Act, is not only the transfer of the bill of lading as the original contract to any third party but also its establishment as the contract in the hands of the shipper. Hence, it could be argued that the bill of lading should be regarded to be the vehicle for the contract of carriage and that is why section 1 of the 1855 Act gives the right to a third party holder of a bill to sue the carrier under the original contract. In comparison with common law, under a civil law system, such as the Greek system, judges have to follow the language of the governing Act so long as it is clear. This is the case in connection with the 1855 Act: There is, therefore, no need for an interpretation to take place.

Since the introduction of the 1855 Act, in *Glyn v East and West India Dock*¹⁹ regarding the delivery of the goods on the production of bills of lading it was held that the bill of lading was issued as the contract of carriage. It was an action at the suit of the

¹⁹ In *Glyn v East and West India dock* [1882] 7 AC 591 Lord Selborne p. 596 “The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, **is to express the terms of the contract between the shipper and the ship owner**”. (Stress added). *Chartered Mercantile Bank v Netherlands India Steam Navigation* [1883] 10 QBD 521 The plaintiffs shipped goods on board the defendant’s vessel under a bill of lading which contained exceptions. The Court of Appeal held that the defendants had not committed a breach of the contract created by the bill of lading. p. 528 Brett LJ held that “**the contract has been by the consent of the parties reduced into the form of a bill of lading and therefore the whole of the contract is contained in that bill of lading and no terms of the contract outside the bill of lading, can be looked at**”. p. 530 “By the first part of the bill of lading an absolute contract is entered into to carry the goods safely and deliver them safely”. (Stress Added)

endorsee, but turned on the effect of endorsement upon the endorser rather than the endorsee. The judges did not hold that, while the bill of lading is merely evidence of the contract of carriage between the shipper and the carrier, the statute has made the bill of lading a contract between any third party and the carrier. On the one hand, the existence of any other contract, oral or written, prior to the issue of the bill, is not suggested in the *Glyn* case. On the other hand, while the creation of an oral contract of carriage cannot be ruled out, this contract of carriage cannot be in the form of a bill of lading. Has not the 1855 Act been introduced to define the contractual status of the bill of lading in the hands of either the original parties or the endorsees? The judges in the case have accepted that the bill of lading is defined by statute law as the contract of carriage in the hands of the shipper.²⁰ However, in general, the bill of lading contains the terms under which the loaded goods are transported and will be delivered to the holder of the bill of lading.²¹ Have the mercantile law and usage established the bill of lading as the contract of carriage between shipper and carrier or as evidence of it?²² It is worth mentioning that their true explanation should be found not only in the ordinary manner, but also by consideration of their history and business usage. Hence, any holder of a bill of lading is bound by its terms and by the contract of carriage between the shipper and the carrier which is expressed therein. In accordance with the prevailing view which is based upon

²⁰ *Glyn v East and West India dock* [1882] 7 AC 591 p. 614 Lord Watson "... must depended upon the terms of the bill of lading, which contain his contract with shipper...", p. 617 Lord Fitzgerald "... I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery..." B Jacobs "*The Law of Bills of Exchange, Cheques, Promissory Notes*", 1943, Sweet & Maxwell p. 44 "**The bill is also a contract to carry the goods to the place and upon the conditions expressed and to give delivery to them to the consignee on the transfer of the bill**" (Stress added). *Maurice Desgagnes* [1977] 1 Lloyd's Rep 290 p. 293 Mr Justice Dube in the federal court of Canada states as an *obiter* that "It is generally accepted that a bill of lading serves three purposes ... it represents the contract of carriage".

²¹ G Dowdeswell "*A Compendium of Mercantile Law*", 1859, London p. 306 "but the instrument to which reference is generally had for the terms of such a contract is the bill of lading". J Adams, R Brownsword "*Understanding Contract Law*", 1988, Fontana Press p. 30.

²² *Fraser v Telegraph Construction Co* [1872] LR 7 QB 566 In an action from shipper against the carrier and in a dispute about the type of vessel that it should have been used to carry the goods p. 571 Blackburn J held as a general rule that "**the bill of lading ... must be taken to be the contract under which goods are shipped and until I am told differently by a court of error I shall so hold**" (Stress added).

common law rules rather than statute law, the *Glyn v East and West India Dock* case has not established the bill of lading as the contract of carriage between the shipper and the carrier regardless the fact that the judges said so.

Every contract entails a free agreement, but not every agreement results in a contract. A contract to be binding must have four elements. There must be: intention to create legal relations; offer and acceptance; consideration; and certainty of terms. To that extent Mellish LJ²³ and Stephen J²⁴ have taken the view that a person receiving a bill of lading must be bound by all its terms, because the shipper upon receiving the bill of lading knows that the bill of lading contains conditions which the carrier who delivers it intends it to constitute the contract. In *Marlborough Hill* ²⁵ Lord Phillimore held that the bill of lading is ratified as the contract by the receipt of the goods by the carrier. Thus, it could be argued that the understanding of the parties is that they contract under the terms of the carrier's bill of lading. The acceptance of the bill of lading, and the receipt of the goods by the carrier, turn out to be necessary factors for the conclusion of the bill of lading as the contract between the original parties. To that extent, the receipt of the goods could be seen as a factor which is necessary in order to have certainty of terms, because the contract of carriage is referred to the transport of the loaded cargo and, therefore, the cargo is identified by its loading. The notification of the cargo means identification of a term of the contract of carriage which is necessary for its conclusion. The shipper fills in the necessary parts in the carrier's bill of lading before he hands it over to the carrier in

²³ *Parker v South Eastern RY* [1877] 2-3 CPD 416 p. 422, p. 421 "Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract. I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are..."

²⁴ *Watkins v Rymill* [1883] LR 10 QBD 178 p. 189 "They must, from the nature of the case, be as special as those of a contract of lease or **a bill of lading**, and this consideration alone seems to us to establish the conclusion that **the receipt and conditions to which it refers constituted the contract between the parties**". (Stress added)

²⁵ *Marlborough Hill* [1921] 1 AC 444 In a case regarding the function of a received bill of lading p. 50 "it is one whereby the agents for the master put **their signature to the contract**, admit the receipt for shipment and contract to carry and deliver, primarily by the named ship". (Stress added), p. 452 "It is a contract which both parties may well find it convenient to enter into and accept".

order to be signed by the carrier and, therefore, it becomes a bill of lading and a document of title. In fact the judges, as mentioned above, illustrate, as general knowledge, that bills of lading are contractual documents. Additionally, their views are not merely assumptions but a statement of the established mercantile usage as it has been understood by them. It could be argued that part of the *ratio decidendi* of the judges, which is based on statute law, is their acceptance that the bill of lading is this type of contractual document. According to Mellish LJ and Stephen J, the bill of lading as a legal document seems to be transformed from a plain receipt, into a receipt and a contract which is in line with the prevailing opinion in the United States. It could be argued that there is a convergence of opinions, among the above mentioned views, that the bill of lading is a contractual document.

Besides, Lord Bramwell²⁶ in an *obiter dictum* criticised the Bills of Lading Act 1855. He considered that:

“there is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it”.²⁷

Hence, the precision of the 1855 Act is questioned by him. Does Bramwell’s view bring precision into the identification of the contractual nature of bills of lading? The case investigated the effect of endorsement and delivery of the bill of lading regarding the transfer of property, when the endorsement is made by way of pledge. The bill of lading is defined as being a receipt and not a contract, regardless of the fact that in the earlier case of *Glyn* Lord Blackburn²⁸ specifically held that the master enters into a contract with

²⁶ *Sewell v Burdick* [1884] 10 AC 74

²⁷ *ibid.* p. 105.

²⁸ *Glyn v East and West India Dock* [1882] 7 AC 591 p. 610. *Hugh Mack & Co Ltd v Burns & Laird Lines Ltd* [1944] 77 Ll L R 377 Lord Chief Justice Andrews, in an action between shippers and shipowners concerning the operation of COGSA 1924, considered the bill of lading as the only contract between the shipper and the carrier which by custom and the Bills of Lading Act 1855 is transferred to any endorsee. p. 382 “These [bills of lading] were not only contracts of carriage but also documents of title, which, by custom and under the Bills of Lading Act, 1855, passed freely from one person to another”.

the shipper to carry and deliver the goods to the persons named in the bill of lading. It is worth mentioning that Lord Bramwell indicated that his understanding that the bill of lading is not the contract was expressed as an *obiter dictum* in the case but he was looking for precision of expression which, according to his view, is very desirable.²⁹

It is submitted that by the term “contained in it” is meant that the bill of lading is the contract of carriage and that is why his Lordship wanted to argue against it. Moreover, in the same case Lord Blackburn³⁰ and Lord Fitzgelard³¹ accept without any objection the context of the statute, that the contract is contained in the bill of lading, by quoting it in their speeches and, therefore, they recognise the superiority of statute law. Hence, Bramwell's opinion, regarding the contractual character of bills of lading, has to be seen as a minority view. Subsequently, it could be argued that Bramwell's *obiter dictum* has been overruled by the views of the two other Lords expressed in the same case.

Lord Bramwell has interpreted the 1855 Act in such a way that its application can carry on the right legal effect of the transfer of the contract but he argued that the wrong contract is transferred. The basic approach to statutory interpretation is to ascertain the intention of the legislature.³² His Lordship relied upon common law rules in the concept of contract of carriage and disregarded the statutory perception of the contract as it has been introduced by the statute. Since the introduction of the 1855 Act, and in accordance with the interpretation of the statute under the English common law literal rule, the golden rule and the purposive approach, the bill of lading has been introduced as being

²⁹ fn 26 p. 105 “**These distinctions are of a verbal character, and not perhaps of much consequence;** but I am strongly of opinion that precision of expression is very desirable”. (Stress Added)

³⁰ fn 26 p. 91 Lord Blackburn held that “But nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper”

³¹ fn 26 p. 106 Lord Fitzelard stated that “as if the contract contained in the bill of lading had been made with them”

³² F Bennion “*Statutory Interpretation*”, 1992, Butterworths. The principles of statutory interpretation are mechanisms for improving the predictability and uniformity of judicial interpretations of statutes. The golden rule has connections with the literal rule. Both require the judge to begin by looking at ordinary meaning. F Cownie, A Bradney “*English Legal System in Context*”, 1996, Butterworths.

the original contract in the hands of the original parties and it is transferred, as such, to any third party holder of the bill of lading.³³

Additionally, as early as 1845 and before the 1855 Act was enacted, Blackburn defined the bill of lading as “a writing signed on behalf of the owner of the ship in which goods are embarked ... *The bill of lading is therefore, a written contract*, between those who are expressed to be parties to it, on behalf of their principals if they be agents...”.³⁴ (Stress added). Therefore, there is support for the idea that the bill of lading should be regarded as a written contract rather than a memorandum or merely evidence of it. Besides, Potter³⁵ said that the bill of lading contains the contractual terms but is not the contract itself. It is suggested that the term “contained in” means that the bill of lading is evidence of the contract which contains and not the contract itself.

His Lordship Bramwell seems to believe that the contract of carriage is concluded independently from the issue of a bill of lading. The bill of lading is not issued in order to play any contractual role between the shipper and the carrier. The acceptance of a written instrument, such as a bill of lading, has not been seen as an alteration of an oral contract of carriage which is concluded before the issue of the bill of lading. His Lordship Bramwell has not accepted either the definition of Blackburn, which is mentioned above, or the contractual status which has been attributed to bills of lading by Lord Selborne and Lord Watson. The contractual nature of the bill of lading is not such as to supersede any contract concluded earlier. His Lordship failed to explain how the contract under the statute (Bills of Lading Act, 1855), is transferred to the consignee with the consignment of the bill, if there is no contract contained in the bill of lading.³⁶ This should be

³³ W Tetley “*Marine Cargo Claims*”, 3rd ed, pp. 220-21 “While the *various bills of lading statutes* give to the endorsee the rights of action that *the shipper originally had under the bill of lading contract*”. (Stress Added)

³⁴ C Blackburn “*A Treatise on the Effect of the Contract of Sale*”, 1845, W Benning & Co p. 275

³⁵ H Potter “*Chitty's Treatise on the Law of Contract*”, 1947, Sweet & Maxwell p. 940 “except where the shipper is also the charterer, it contains, though it is not itself the contract, the terms of the contract between shipper and ship owner”

³⁶ C Debatista “*Sale of Goods Carried by Sea*”, 1990, Butterworths p. 169. Debatista states that **section 1**

consistent with the principle of endorsement. It has to be taken into account that the principle of endorsement is engaged in the analysis only in the sense of the transfer of the contract under the relevant Acts rather than in the sense of the usage of the principle in the negotiation of Bills of Exchange.³⁷ There is no reference to previous authorities where the contractual role of bills of lading has been investigated. The only reference is to bills of lading under charter-parties, where a contract (the charter-party) made prior to the issue of the bill of lading already exists. Hence, this case is not an ideal example for bills of lading in common carriage. Furthermore, there is no reference to any argumentation, based on the general principles of the law of contract, showing the conclusion of the contract under the shipper's offer and the carrier's acceptance. It is a fundamental principle of contract law that an assignee of a contract takes on the same conditions as those on which the assignor held a contract. Thus, the assignee should obtain the original contract between the shipper and the carrier. In the end a clear divergence between the opinions of the Lords arises. In the first place, according to the views of Lord Blackburn, Lord Selborne, and Lord Fitzlerland, which are based on statute

of the Bills of Lading Act 1855 merely transfers contracts "but it does not create them: If the bill of lading performs no contractual function on its issue, then its transfer can pass no contract where none exists" (Stress Added). J Ramberg "Charter-parties: Freedom of Contract or Mandatory Legislation?" 1992 *Il Diritto Marittimo* 1069 p. 1071 **"One may well ask from a theoretical point how it is that the bill of lading as a mere receipt all of a sudden can be converted into a contract of carriage upon the endorsement and transfer to the consignee"** (Stress Added). The legal techniques for transferring debts and contractual rights are various. Novation involves the substitution of a new contract for an existing one, with the approval of all parties concerned. Strictly this is not the transfer of the original contract, but its extinction and replacement by a new contract. An important difference between novation and assignment is that novation can effect a transfer of an obligation. Assignment results in the transfer from the assignor to the third party assignee of the right to proceed directly against the debtor or obligor. A limitation on assignment is that the agreement between the original parties may prohibit it. In English law, a general prohibition on assignment is effective. *Linden Gordons Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. A second limitation is that the contract to be assigned is personal to the intending assignor and the debtor/obligor. A third limitation on assignment is summed up in the phrase that one can assign the benefit, but not the burden, of a contract. English law recognises that a benefit and a burden of a contract may be inextricably linked - the burden acts as a limitation on the benefit - so that if the assignee wants the benefit it must accept the correlative burden. English law has long recognised the equitable assignment of debts and contractual rights either.

³⁷ For the types of endorsement: endorsement in blank, special endorsement, conditional endorsement, restrictive endorsement and effect of endorsement J Mclouglin "*Introduction to Negotiable Instruments*", 1975, Butterworths pp. 100-107

law, the bill of lading is the contract of carriage for the original parties. It could be argued that the views of so many law Lords that the bill of lading is the contract of carriage in the hands of the shipper, ought to be, at least, a very persuasive precedent. In contrast according to Lord Bramwell, the bill of lading is merely evidence of the contract.

The possibility of concluding a contract by the meeting of the parties' minds regardless of the issue of any document and the issue of the bill of lading after the loading of the cargo or even after the sailing of a vessel could be the reasons of the above mentioned divergence. It could be argued that the circulation and the transfer to any third party of the bill of lading as the original contract instead of any other contract should be a good ground for the endorsement of the view that the bill of lading is the original contract.

4.4 The Carriage of Goods by Sea Act 1971

The Hague Rules were implemented in England by the introduction of the Carriage of Goods by Sea 1924.³⁸ The Act was applicable when the contract of carriage was covered by a bill of lading and the carriage covered the period from the loading of the goods on board until their discharge. The Carriage of Goods by Sea Act 1971³⁹ replaced the 1924 Act in order to introduce the Hague-Visby Rules in England. The Hague-Visby rules, as mandatory law, apply to all bills of lading contracts for goods being loaded from England. Paramount Clauses inserted in the bill of lading state that the legislation is applicable to the contract which is contained in the bill of lading.⁴⁰

³⁸ R Colinvaux "*Carver's Carriage of Goods by Sea*", 1952, Stevens p. 1065

³⁹ *Scrutton on Charter Parties and Bills of Lading*, 1984, Sweet & Maxwell p. 409

⁴⁰ R Colinvaux "*Carver's Carriage of Goods by Sea*", 1952, Stevens p. 1088, F Hopkins, G Watkins "*Business and Law for the Shipmaster*", 1977, Brown & Son & Ferguson Ltd Glasgow p. 493 "All terms, provisions and conditions of the Carriage of Goods by Sea Act 1924, and the schedule thereto, are to apply to the contract contained in this bill of lading...", *The Merak* [1964] 2 Lloyd's Rep 527 A case regarding the incorporation of terms of a charter-party to a bill of lading. p. 537 "This bill of lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to bills of lading contained in the International Convention dated Brussels 23rd August 1924 and which is compulsorily applicable to *the contract of carriage*

Concerning the contract of carriage, the Carriage of Goods by Sea Act 1971 defines that:

“Contract of carriage applies only to contracts of carriage covered by a bill of lading...”⁴¹

It is not made clear what is meant by “covered”. Taking into consideration that the Act applies to bills of lading under charter-parties when bills of lading are the contracts of carriage between the parties, then the contract should be contained in the bill. Therefore, it could be argued that the term “covered by” means that the contract is incorporated in the bill of lading⁴² and this is so whether or not the bill of lading is in the hands of the original shipper or of an endorsee.⁴³ Besides, it cannot be ruled out that we can have an oral contract of carriage. It will be investigated to see if an oral bill of lading contract has been introduced into international shipping.

4.5 Bills of Lading in the Hands of the Shipper

That which distinguishes the bill of lading from any other document is its transferability or negotiability by endorsement and delivery. The contractual role of bills of lading in the hands of the original parties or any third parties will be investigated.

4.5.1 Crooks v Allan Versus Leduc v Ward

After the introduction of the 1855 Act and in an action of the shippers against the

herein contained” (Stress added). C Schmitthoff “*Export Trade*”, 1990, Stevens pp. 567-68 “All the terms, provisions and conditions of the Carriage of Goods by Sea Act 1971 and the schedule thereto are to apply to the contract contained in this bill of lading”. A Gibb, N Walker “*Introduction to the Law of Scotland*”, 1956, W Green & Son Ltd, p. 350 “The incidents of **a bill of lading as a contract of carriage** are now largely regulated by provisions of the Carriage of Goods by Sea Act, 1924” (Stress Added)

⁴¹ fn 39 p. 427

⁴² fn 3 p. 477 “In particular, the CMI argue that the restrictive interpretation placed on Article I(b) of the Hague-Visby Rules, to mean that the only contract of carriage covered by the Rules is one embodied in a bill of lading”. R Temperley and J Rowlett “*Carriage of Goods by Sea Act, 1924*”, 1927, Stevens & Sons p. 11 “In a sense, **such contracts are ‘contracts covered by a bill of lading’, they are contracts of the bill of lading**, as opposed to the charter party type”.

⁴³ C Debattista “The Bill of Lading as the Contract of Carriage: A Reassessment of Leduc v Ward” 45 *MLR* 652 p. 659 “as far as Lord Esher MR was concerned, the terms of a contract of carriage covered by a bill of lading are generally to be found exclusively in the bill of lading, and **this is so whether or not the bill is in the hands of an endorsee or of the original shipper**” (Stress added)

shipowners on contribution to general average, Lush J⁴⁴ stated that:

“a bill of lading is not the contract, but only the evidence of the contract, and it does not follow that a person who accepts the bill of lading which the shipowner hands him, binds ... himself to abide by all its stipulations”

The defendants based their claim to immunity from general average on a clause in the bill of lading. The court decided that the bill of lading does not exempt the shipowner from contribution to general average loss. First, the judge held that the bill of lading is not the contract, and second, the acceptance of the bill of lading does not have any binding effect regarding the relation between the shipper and the carrier. The judge based his view on the general principles of the law of contract that a contract can be concluded by oral agreement. He considered the contract of carriage as an ordinary contract which must not be in a bill of lading form. The judge did not believe that the bill of lading has been attributed, by statute or common law, with the general characteristic of being a contract. The case introduced something beyond the understanding of the legislature and the case law of the time.

It could be argued that the decision in *Crooks v Allan* is questionable for the following reasons: First of all, the judge expressed his opinion without any reference to previous court decisions or the legal literature where, as mentioned above, the judges have supported the idea of the bill of lading being the contract in hands of the original parties. On the one hand, the rule of *stare decisis* provides no indication of how cases for

⁴⁴ *Crooks & co. v Allan* [1879-80] 5 QBD 38 pp. 40-41. *Hayn, Roman and Co v Gulliford and Clark* in the Court of Appeal and in an action by plaintiffs (Shippers) against defendants (shipowners) regarding liability of damaged goods Bramwell LJ in his investigation for the contract states that “if there was a contract between them, it is the one contained in or evidenced by the bill of lading”. 4 ASP MLC 128-129 p. 129, *Wagstaff v Anderson* 4 Asp MLC 290 Plaintiffs (shippers) against defendants (shipowners) and regarding liability for damaged goods pp. 291-92 “it is sometimes said that a bill of lading contains in it a contract and such is the language of the Bills of Lading Act (18 & 19 vict c 111). This statement may in many instances be correct but to say that a **bill of lading contains a contract** which supersedes, adds to or varies the previous contract **contained in the charter-party** is a proposition to which I am entirely unable to assent”. (Stress added).

which there are no judicial precedents ought to be decided. On the other hand, the view expressed in *Fraser v Telegraph Construction Co*, in 1872⁴⁵ was, at least, a persuasive precedent. There is no argumentation stating the reasons for which the bill of lading is not the contract itself. Second, it is admitted that the shipper has the right to suggest that “his goods are received on the usual terms”. Consequently, it could be argued that the judge recognised the fact that the shippers were contracting under the carrier’s terms. He suggested that the shipper had the right to demand a bill of lading containing those terms, which probably means that if the shipper has received the usual carrier's bill of lading, then the bill of lading cannot be regarded as merely evidence of the contract, but as conclusive evidence of it. Third, the newly introduced Bills of Lading Act 1855, where it states that the bill of lading contains the contract of carriage, is not taken into consideration. Fourth, according to the law of contract, the acceptance of a document which incorporates the terms of a transaction supersedes any earlier agreement concerning the same transaction.⁴⁶ The judge has not taken into account that the detailed conditions of carriage are contained in the issued bill of lading. Fifth, the judge has not taken into account that, at that time, it was expressed as a common knowledge that the bill of lading was a contractual document. Sixth, the judge has not taken into consideration the involvement of the shipper in the production of the bill of lading and its impact in the conclusion of the contract of carriage.

In contrast with what Lush J endorsed in relation to the acceptance of the bill of lading, McCardie J,⁴⁷ in an action by shippers as owners of the goods against the

⁴⁵ *Fraser v Telegraph Construction Co* [1872] LR 7 QB 566 p. 571 Blackburn J held as a general rule that **“the bill of lading... must be taken to be the contract under which goods are shipped and until I am told differently by a court of error I shall so hold”** (Stress added).

⁴⁶ *Chitty on Contracts*, 1994, Vol. 1 Sweet & Maxwell pp. 205-227, pp. 1191-94. A Corbin “*Corbin on Contracts*”, 1960, Vol. 3, West Publishing Co, sec 574, p. 371 “Any contract however made or evidenced can be discharged or modified by subsequent agreement of the parties”.

⁴⁷ *Armour & Co v Leopold* [1921] 3 KB 473 p. 477 McCardie J stated that “If therefore he has chosen to receive without protest a bill of lading in a certain form he should ordinarily be bound by it”. Economic and Social Commission for Asia and the Pacific “*Use of Maritime Transport a Guide for Shippers, Freight Forwarders and Ship Operators*” United Nations vol. 1 (ST/ESCAP/516) p. 311 “by receiving the bill of lading the shipper is, however, deemed to have accepted the terms contained in the bill of

shipowners claiming damages for breach of contract, stated that whatever the prior express bargain has been, a shipper is free to accept any bill of lading he chooses. The new element emerging from this decision is the recognition that if the shipper accepts without protesting the carrier's bill of lading, he should be bound by it. Therefore, all prior agreements should be eliminated by the acceptance of the bill. Additionally, McCaemie J expressed the view that the scarcity of authority, concerning the contractual character of bills of lading in the relation between shipper and carrier, is in truth a strong confirmation of the view that it is the contract. In fact, the judge expressed a view that the bill of lading is not conclusive of the true contract, but it is assumed that this view stands if and when it is not followed by an acceptance of the carrier's bill of lading. McCaemie J questioned the view expressed in *Crooks v Allan* case and referred to the result of acceptance of the bill of lading before he expressed his opinion. Moreover, Rogers, Manton and Hand circuit judges⁴⁸ in the court of appeal of the United States referred to the view expressed by Lush J in *Crooks v Allan*. The acceptance of the bill of lading by the shipper is translated into acceptance of the bill as the contract of carriage, in contrast with the statement of the English court. The view that the acceptance of the bill does not mean its acceptance as the contract, expressed in *Crooks v Allan*, has been rejected by this court. The decision of the United States court clearly showed that it had in mind the uniform establishment of the bill of lading as the contract for every one who accepts it either with or without a complete knowledge of all its terms. The view expressed in *Crooks v Allan* could not be sustained in a Greek court either, because the acceptance of the bill of lading means that the bill of lading becomes the contract.

lading", *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 p. 440 "When a shipper receives a bill of lading issued in the due course of trade he will ordinarily be bound by its terms and conditions. **Maritime commerce would suffer severe disruption if any other view were taken**" (Stress added).

⁴⁸ *Dietrich v United States Shipping Corporation* 9 F2d 733 p. 740 "There is nothing in this record to show that the shipper of these goods did not know the contents of the bills of lading when he accepted them".

Besides, the *Leduc v Ward*⁴⁹ case, decided in 1888, was related to an action taken by the endorsees of the bill of lading against the shipowners for non delivery of goods. The plaintiffs were endorsees of the bill of lading to whom the property passed by reason of endorsement. According to the view expressed by Lord Esher MR the writing of the contract is reduced in the bill of lading and the bill of lading is the whole contract. Therefore, any parol evidence to alter or qualify any written terms of it is not allowed. Two of the cases cited by Lord Esher MR in support of his view that the contract of carriage is to be found in the bill of lading were cases against carriers at the suit of shippers rather than endorsees. In accordance with the view of Debattista,⁵⁰ Lord Esher made it clear that the bill of lading is the contract in the hands of either the shipper or any third party. Wilson⁵¹ specifies that Debattista has rightly pointed out that the view of the bill of lading being the contract of carriage is equally applicable to the bill in the hands of the shipper which throws some doubt on the authority of the decision in *The Ardennes*. In other words it could be argued that the view of Lord Esher should be accepted as being a *ratio decidendi* rather than an *obiter dictum*. Lord Esher held that the contract of carriage can be concluded prior to the issue of the bill of lading, but the carrier can reduce that contract into writing in the form of a bill of lading primarily with respect to the shipper

⁴⁹ [1888] 20 QBD 475 pp. 479-80 “Where there is no charter-party ... 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. But, if the goods have been received by the captain, ***it is the evidence in writing of what the contract of carriage between the parties is***; it may be true that the contract of carriage is made before it is given, because it would generally be made before the goods are sent down to the ship: but when the goods are put on board the captain has authority to reduce that contract into writing; and then the general doctrine of law is applicable, by which, where the contract has been reduced into writing which is intended to constitute the contract, ***parol evidence to alter or qualify the effect of such writing is not admissible***, and the writing is the only evidence of the contract ...” (Stress added). About reducing the contract into writing *Petroleum Shipping Ltd v Vatis* [1997] 2 Lloyd’s Rep 314 p. 319 “Firstly, the contract was never reduced to writing in the charter-party”.

⁵⁰ C Debattista “The Bill of Lading as the Contract of Carriage: A Reassessment of *Leduc v Ward*” 45 *MLR* 652 p. 659 “as far as Lord Esher MR was concerned, the terms of a contract of carriage covered by a bill of lading are generally to be found exclusively in the bill of lading, and **this is so whether or not the bill is in the hands of an endorsee or of the original shipper**” (Stress added)

⁵¹ J Wilson “*Carriage of Goods By Sea*”, 1993, Pitman pp. 141-42 “A recent writer has rightly pointed out that this latter argument is equally applicable to the bill of lading in the hands of the shipper and argues that this throws some doubt on the authority of the decision in *The Ardennes*. His thesis is strengthened by the fact that s.1 of the Bills of Lading Act 1855 specifically refers to ‘the contract contained in the bill off lading’...”.

rather than the endorsee. Consequently, any terms left outside the content of the bill are not part of the contract and they should be regarded as part of the negotiating process. However, the bill of lading contract is expressed in writing and we cannot have an oral bill of lading contract. Hence, the bill of lading expresses the whole contract and, therefore, we have application of the parol evidence rule and not application of the exemptions of the rule.⁵² Second, another major element which arises is that the carrier can reduce, finalise and put forward the bill of lading as the final writing of the contract and this has to be seen as the final offer for the conclusion of the contract. Third, the receipt of goods is the starting point for the existence of a contract of carriage contained in the bill. This element destroys every argument that the contract was concluded before and without any real delivery of the goods by merely the booking of space. The receipt of the goods is a distinguished factor, which highlights the peculiarity of the contract of carriage. The object of bills of lading contracts is the transport of the loaded cargo to the port of destination. His Lordship uses the term “evidence” in the sense that the bill of lading becomes the contract itself and, subsequently, the contract is evidenced in the document as well. Under Lord Esher’s view there is, firstly, no need for judicial inventory in order to explain the transfer of the bill of lading as the original contract to any third party, and, secondly, Lord Esher’s view is in compliance with the statute law.

Fry LJ⁵³ and Lopes LJ⁵⁴ endorsed the view that the bill of lading contains the contract of carriage and that parol evidence is inadmissible to contradict the written instrument whatever might have been the case before the statute. Their Lordships

⁵² M Hannesson “*Carriage by Sea: The Nature of Transport Documents, Carriers and Regulation by Mandatory Conventions. A Study in English and Scandinavian Law*” PHD Thesis, 1991, University of Exeter p. 140 “if his Lordship had intended to overrule these exemptions to the rule of parol evidence or to make them inapplicable to the contract of carriage by sea, he would have done so in a clear and unmistakable way”.

⁵³ fn 49 p. 483 “**Here is a plain declaration of the legislature that there is a contract contained in the bill of lading**, and that the benefit of it is to pass to the endorsee under such circumstances as exist in the present case. It seems to me impossible therefore now to contend that there is no contract contained in the bill of lading, **whatever might have been the case before the statute**” (Stress Added).

⁵⁴ fn 49 p. 485

recognised the impact of the Statute law (the 1855 Act) upon the definition of the contractual status of the bill of lading not only in the hands of the third party but also in the hands of the shipper and, therefore, its superiority over any different approach under common law rules. It could be argued that Lord Fry's approach indicates that English legal reasoning should be based on the interpretation of the 1855 Act rather than on judicial precedent. This approach reveals the real intention of the legislature to regulate the contractual function of the bill of lading contract regardless of its holder. The view that the bill of lading is the contract of carriage is part of the *ratio decidendi*⁵⁵ of the judges. Nevertheless, the terms of any contract are evidenced in the document which incorporates them. This does not mean that the document is not the contract itself.⁵⁶

It is worth mentioning here that in English law the view has prevailed that the *Leduc v Ward* case is a representative example of the contractual role of bills of lading between the consignee and the carrier, regardless of the fact that the judges have mentioned that the same contractual status of bills of lading should apply not only in the relation between the original parties but also between the carrier and the third party.

4.5.2. *Margeston v Glynn Case and the Ardennes Case*

The analysis of two cases dealing with the same kind of transport and concerning the relation between shippers and carriers should illustrate the convergence or divergence of legal terms and the practical consequences of the views expressed in relation to the contractual role of bills of lading in hands of the original parties.

In *Margetson v Glynn*,⁵⁷ in the Court of Appeal the shippers brought an action

⁵⁵ fn 49 p. 480 "The primary office and purpose of a bill of lading ... is to express the terms of the contract between the shipper and the ship owner".

⁵⁶ Contracts under Seal Sec 52 Law of Property Act 1925, Similarly, a consumer credit agreement is not properly executed unless a document in the required form, containing the express terms of the agreement, is signed by both parties. Sec 61 Credit Act 1974

⁵⁷ [1892] 1 QB 337 p. 339 Lord Esher said that "A bill of lading is a contract for the carriage of goods on board a ship" (Stress Added) p. 342 Bowen LJ "under the contract to carry which was contained in the bill of lading".

against the shipowners. The goods were shipped under a bill of lading. After oranges had been shipped at Malaga, the ship, instead of going direct to Liverpool, went first to Burinna and afterwards returned and proceed to Liverpool. By reason of the delay the oranges were in a rotten state when they arrived at Liverpool. There was a clause of liberty in the bill of lading. The defendants justified the delay by the term of the bill of lading. The true construction of the terms of the bill of lading does not give liberty on a voyage from Malaga to Liverpool to go to places which constitute another absolutely different and inconsistent voyage. Thus, even if the bill of lading is the contract, its terms can be construed as well. If its terms are vague or inconsistent, then the principles of interpretation of the law of contract are applicable to the bill of lading contract. The plaintiffs were entitled to recover.

The judges interpreted the bill of lading contract. They did not endorse the view that the bill of lading is not a contract between the shipper and the carrier. The House of Lords,⁵⁸ affirming the decision of the Court of Appeal, held that the bill of lading was the contract between the shipper and the carrier which had to be interpreted. The language in which the judges couched the contractual role of bills of lading was in tandem with the way they treated the bill of lading contract.

In *Frenkel v Macandrews & Co*⁵⁹, in the House of Lords, the bill of lading was

⁵⁸ *Glynn v Margetson & Co* [1893] AC 351 p. 357 Lord Halsbury LC "It seems to me that in construing this document, which is a contract of carriage between the parties".

⁵⁹ *Frenkel v Macandrews & Co* [1929] 33 Ll.L.R 191 The ship instead of going from Malaga, where the cargo was shipped, directly to Liverpool called to various ports. Between Malaga and Cartagena the ship encountered heavy weather, with the result that the cargo was lost. The proceedings were instituted by the shippers, claiming damages for the loss. The question was whether or not it was a deviation form the route not permitted by the bill of lading. p. 193 "A bill of lading, like every contract, must be construed in relation to the circumstances in which it was entered into. The court is interpreted the bill of lading contract" p. 201 "I think the same principles of construction apply to bills of lading as to written contracts in general. It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. In the present case the question arises between the original parties to the contract ... so far as construction is concerned that must be the same whether the question arises as between the original parties or their respective assignees". *Hadji v The Anglo-Arabian and Persian Steamship Company* [1906] 11 Cos.Cas 219, p. 226 "No doubt the object of the bill of lading contract is that the plaintiff shall have their goods carried to London ... Yet a bill of lading, such as the one sued on, the shipper ... The shipper gets an advantage in this way ... They are reasonable, and, instead of defeating the object of the

regarded as the contract of carriage between the shipper and the carrier. The appellant, the owner and shipper of 134 barrels of olive oil, was in a dispute about the interpretation of the clause of liberty incorporated in the bill of lading. In this case, Lord Warrington of Clyffe held that, under the Bills of Lading Act 1855, the effect of the endorsement is merely to transfer to the endorsee the rights and interests of the endorser. His Lordship did not indicate that a new contract, rather than the original one, is transferred to the endorsee. In the above cases (*Margetson v Glynn* and *Frenkel v Macandrews & Co*) the judges accepted the contractual role of bill of lading in hands of the shipper as it has been established by statute law (the 1855 Act). Even if the acceptance of the carrier's bill of lading,⁶⁰ where the detailed terms of the contract are contained, means that the shipper must adhere to the bill of lading issued by the carrier, the shipper is still bound so long as he has accepted it without protesting. Hence, it could be argued that bills of lading have been confirmed as contracts by the *ratio decidendi* of the judges.

In a similar manner and in an action brought by a shipper against the carrier, about an arbitration clause contained in the bill of lading, in the supreme court⁶¹ of US concerning the shipment of oranges and lemons from Morocco to Massachusetts where the bill of lading was tendered after the ship set sail from Morocco, the court stated that the contract is a standard form bill of lading. It emerged that the bill of lading was (and is) a contract of adhesion, which the shipper must accept or else find another means to transport his goods. Hence, in similar cases, judges, by relying upon the relevant statutes, in both the English and the US legal systems, expressed the same view regarding the function of the bill of lading in the relation to the shipper and the carrier. Since the bill of

shipper, they enable that object to be attained, in the cheapest, and possibly in the only way”.

⁶⁰ *Connolly Shaw Ltd v A/S Det Nordenfeldske* [1934] 49 Ll.L.R 183, p. 185, 186 “**If two persons each sui juris and the arm's length enter into a contract which puts one of them at a disadvantage vis-à-vis the other, they must abide by it**” (Stress added).

⁶¹ *Vimar Seguros v M/V Sky Reefer* [1995] 132 Led2d 462, p. 483 Justice Kennedy held that “a bill of lading, besides being a contract of carriage, is a negotiable instrument that controls possession of the goods being shipped ... Disuniformity in the interpretation of bills of lading will impair their negotiability”.

lading is regarded as the contract in the hands of the shipper in both cases, the convergence is not limited only to the legal language but is reflected in practical terms within the judgements of the courts.

In contrast in *Ardennes (cargo owners) v Ardennes (owners)*⁶² decided in 1950, exporters of mandarin oranges shipped a cargo of mandarin oranges in the defendant's vessel in reliance of an oral promise by the shipowner's agent that the ship would sail straight to London, Lord Goddard CJ states that:

"It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms ... The contract has come into existence before the bill of lading is signed ... by one party only, and handed by him to the shipper usually after the goods have been put on board . No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term . He is no party to the preparation of the bill of lading; nor does he sign it ... Leduc v Ward on which Sir R Aske so strongly relied, was a case between shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute

⁶² [1951] 1 KB 55 p. 59, [1950] 2 AllER 517

makes it the contract.” (Stress Added).

The goods were delivered under the carrier’s bill of lading where there was a clause of liberty to call at any port on the route to London. It is a case where the contractual function of the bill of lading between the shipper and the carrier is questioned. It is doubtlessly expressed as the *ratio decidendi* in *the Ardennes* case the fact that the bill of lading in the hands of the shipper contains the evidence of the contract. The contract of carriage is concluded before the bill of lading is issued. Lord Goddard has not taken into consideration the views of Lord Esher and Lord Halsbury which were expressed previously in identical cases and which concerned the same matter of deviation on actions brought by the shippers. The carrier had to pay damages because the bill of lading was not the contract and, therefore, the clause of liberty of the bill of lading was not applicable. Besides, if the bill of lading was the contract then the carrier would not have paid damages to the shipper because of the clause of liberty. His Lordship argues that between shipowner and endorsee of the bill of lading the terms are conclusive by virtue of the 1855 Act. Thus, according to Lord Goddard, the 1855 Act defines only the contractual status of the bill of lading in the hands of the third party. In fact, the bill of lading is defined as being the original contract of carriage between the shipper and the carrier which is transferred to any third party. Additionally, the language of the Act does not indicate that the legislature regarded it as being the contract only for the third party holders of the bill of lading.

In accordance with Goddard’s view, the contract of carriage is concluded under the general principles of law without the need for the issue of a document and in any individual case, when and if a contract of carriage has been concluded must be investigated, even if a bill of lading has been issued and accepted. The representation that the ship would sail direct to London would amount to a warranty. It was a promise that the shipowner would not avail himself of a liberty which otherwise would have been

open to him. Hence, where a party has given another a verbal promise not to rely on a term in the general conditions and when that promise has been accepted by the other party, he (the promisor) cannot rely on that term if it would make the verbal promise wholly illusory. Consequently, the oral promise can be an enforceable contractual promise which overrides the relevant term in the printed general conditions.⁶³ In any event, even if the bill of lading is established as being the contract, then the various rules of interpretation of the law of contract are applicable.⁶⁴

The accuracy of the decision is questionable for the following reasons: The lawyers of the shipper were prepared to accept the bill of lading as being the contract of carriage between the original parties and they tried to rely on a collateral bargain basis.⁶⁵ The defendants relied upon the judgement of Lord Esher in *Leduc v Ward*. Mcnair in his reply to the defendant's argumentation clarified that:

“Leduc v Ward is distinguishable, as that case was concerned with a dispute between the endorsee of a bill and the shipowner”.⁶⁶

It is true that in *Leduc v Ward* the case before the court was between endorsee and shipowner but Lord Esher MR held that the bill of lading is the contract between shipper and shipowner and not only between consignee and the carrier. Consequently, the plaintiff's *status quo* as an endorsee was not a precondition to the court's view that

⁶³ C Schmitthoff “*Export Trade*”, 1990, Stevens pp. 97-98

⁶⁴ M Furmston “*Law of Contract*”, 1996, Butterworths. According to the law of contract, the content and meaning of a contract may derive from a variety of sources: The express language of the contract. The court will imply a term where its inference from the language of the contract is such that it can be said to be too obvious to need stating. A term may be annexed to a contract by local custom or trade usage. To be effective such custom or usage must not be contrary to the law, and must be reasonable, generally known or known to the party against whom it is invoked, and consistent with the express terms and general tenor of the contract. A statute may act on a contract not merely by restricting its efficacy or by imposing *ab extra* additional duties on the parties to it, but by importing obligations into the contract itself as implied terms. One way of surmounting the parol evidence rule is to find that statements by a party preceding the contract were distinct promises constituting a collateral warranty or undertaking, the consideration for this being the other party's entry into the main contract. Construction of a contract denotes determination of the total legal effect of the agreement concluded by the parties. This may involve two entirely distinct processes: interpretation of the language used by the parties; and implication of terms where the contract is silent.

⁶⁵ fn 62 pp. 57-8 “**Even assuming that the shippers cannot rely on the collateral bargain and that the bill of lading governs the matter**”. (Stress Added)

⁶⁶ fn 62 p. 59.

contracts of carriage are generally to be found in bills of lading.

It is worth mentioning here that it is the judges in the later cases who actually determine the *ratio decidendi* of previous cases. Moreover, in practice, if a higher court deliberately sets out guidelines with regard to the manner in which a particular matter should be approached, it is highly unlikely that a lower court in a subsequent case will not follow such guidelines, even if technically *obiter*, if the guidelines are considered relevant to the matter before it.⁶⁷ In contrast, Lord Goddard circumvents the whole argumentation of Lord Esher and Lord Fry by a simple reference to the fact that the case was between consignee and carrier and, therefore, the view of the judges was treated as *an obiter dictum*. In fact, Lord Goddard based his view on Bramwell's opinion which was expressed as *an obiter dictum* as well. In contrast, Hannesson⁶⁸ assumed that if Lord Esher's opinion is read literally, it might support Debattista's theory⁶⁹ that the *Leduc v Ward* case decided that ever since the Bills of Lading Act, 1855, the contract of carriage was to be found exclusively in bills of lading, both between the shipper and carrier as well as between the consignee and carrier. Subsequently, the judgement in *Leduc v Ward* that the bill of lading is the contract in the hands of the shipper as *an obiter dictum* rather than a *ratio decidendi* is held in question. Hence, it could be argued that Lord Esher and Lord Fry in the *Leduc v Ward* and all the other judges, whose views are mentioned above, have relied upon the definition of the statute which was regarded as superior to any common law judicial precedent. The idea that the bill of lading is not a contract has been affirmed as an axiom. Besides, it could be argued that the acceptance and the absence of protest by the shipper means that the contract has been reduced into the form of a bill of

⁶⁷ C Manchester "Exploring the Law", 1996, Sweet & Maxwell pp. 3-47. It could be argued that, for a lower court, *obiter* remarks of a higher court could be treated as though they were *ratio*. For instance, In *W B Anderson & Sons v Rhodes* [1967] 2 All ER 850 p. 857 Cairns J stated that "[W]hen all five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists. I think that judge of first instance should proceed on the basis that it does exist ..."

⁶⁸ fn 52 p. 139

⁶⁹ fn 50

lading by the consent of the parties and that the bill of lading is the only expression of the whole contract.

Furthermore, Lord Goddard bases his decision on the thought that the shipper is not party to the preparation of the bill. The court has not taken into account the content of the decision in *Heskell v Continental Expresses Ltd*,⁷⁰ where the procurement of the bill of lading by the shipper was stated, nor the fact that the carrier's bills of lading were in printed forms. It is worth mentioning that the *Heskell v Continental Expresses Ltd* case had been decided only a few months before *the Ardennes* case. At the time *the Ardennes* case was decided, the bill of lading was prepared by the shipper and presented to the carrier for signature. Hence, the shipper knew about its terms long before the bill of lading was signed by the carrier.

Additionally, the bill of lading in *the Ardennes* case was in a received bill of lading form rather than in a loaded bill of lading form, which means that it had been issued even before the goods were loaded. If it is supposed that the shipper had been opposed to its terms, the shipper should have recalled the goods. Besides, the shipper had not protested until the delivery of the goods to their destination. It will be recalled that Lord Phillimore in *Marlborough Hill* stated that the bill of lading in a received form is the expression of the contract. Most importantly, as Mellish LJ⁷¹ said, any person who is ignorant of the characteristic of the bill of lading as the contract of carriage has to pay the consequences of his or her ignorance.

Moreover, Lord Goddard's held that the shipper has not signed the bill of lading

⁷⁰ [1950] 1 ALL ER 1033 p. 1037. *The Heidberg* [1994] 2 Lloyd's LR 289 p. 311 "**A bill of lading, however, is a bilateral contract** ... equal weight must be given to the shipper who normally draws up the bill and presents it to the master for signature".(Stress Added). N Palmer "*Bailment*", 1979, The Law Book Company Limited p. 609 "**This is in practice a standard form document which the shipper (traditionally) completes and hands to the ship owner's agent**" (Stress added). T Howard, B Davenport "English Maritime Law Update 1992" 1993 *JMLC* 425 p. 426 "**The shipper makes the bill of lading contract with the carrier**" (Stress added). G Treitel "Bills of Lading and Third Parties" 1986 *LMCLQ* 294 p. 296 "**The bill of lading is already a contract between shipper and carrier to deliver the goods to the consignee or order**" (stress added).

⁷¹ fn 23 p. 422

and, therefore, the bill of lading could not be regarded as the contract between the contracting parties. The contract shall bind both parties if they assent to the writing, even though signatures are lacking.⁷² Therefore, the absence of a signature could not be taken as a factor which nullifies the existence of the acceptance by both parties of the bill of lading as the contract of carriage.

It is worth mentioning that Wilson⁷³ has reservations about the accuracy of the decision in *the Ardennes* case and more specifically, about the questioning of the judge as to whether the bill of lading is excellent evidence of the terms of the contract. Advocate General Sir Gordon Slynn⁷⁴ delivering his opinion in the European Court of Justice held the following: first, that the bill of lading is the contract subject to whose terms the goods are carried; second, that the question whether a bill of lading ought to be categorised as an oral agreement evidenced in writing rather than as an actual agreement in writing has not been resolved beyond dispute in the UK.

Although in the common law perception, of which Lord Goddards' view is representative, the bill of lading is merely evidence in the hands of the shipper, in statute law (the 1855 Act) it has been established that the bill of lading is the original contract of

⁷² G Treitel "*An Outline of the Law of Contracts*", 1989, Butterworths p. 73 "Many contracts are made without being signed by either party". Corbin "*Corbin on Contracts*", 1992, Supplement Vol. 1 West Publishing Co sec 31 p. 133 "sec 31 has been cited for the rule that a contract will bind both parties if they assent to the writing, even though signatures are lacking". *Corbin on Contracts*, 1960, Vol. 1 sec 31 p. 114 "So far as the common law is concerned, the making of a valid contract requires no writing whatever, and even if there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent". *The Henry-B Hyde* 82 F 681 p. 681 "A bill of lading, when signed by the carrier and delivered to and accepted by the shipper without objection binds the shipper though not signed by him". *Hardwood Package Co v Courtney Co* 253 F 929 p. 931 "But it is equally well settled that an unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both of them". *American jurisprudence 2d*, 1964, Vol. 13, The Lawyers Co-operative Publishing Company p. 777.

⁷³ J Wilson "*Carriage of Goods by Sea*", 1993, Pitman p. 140 "If this statement is correct, two reservations still need to be made. First, the bill of lading will clearly provide prima facie evidence of the terms of the contract of carriage and in many cases it may not be easy for the party challenging its accuracy to discharge the burden of proof". *Cook Islands Shipping Co v Colson* [1975] 1 NZLR 422 In the supreme court of Aukland p. 440 "**Lord Goddard was mistaken if he meant to convey that the shipper is never a party to the preparation of the bill of lading**". (Stress added).

⁷⁴ *Partenreederei Tilly Russ v Haven* [1985] 1 QB 937, p. 946, p. 945 "According to the United Kingdom, a bill of lading not only constitutes a receipt for the goods received by the carrier, but also the contract subject to whose terms the goods are carried and a document of title of the goods."

carriage in the hands of the shipper which contradicts the common law approach. Is the bill of lading a chameleon contract? There is something unique in English law situation where the contractual function of the bill of lading in the hands of the shipper is defined under the common law, but when the bill of lading is in the hands of the third party, it is defined under statute law. It could be argued that there is a conflict between two different sources of law which are accommodated within the English legal system. The contractual role of bills of lading in the hands of the third party has been established by the statute law only because the common law rules were ineffective in establishing such a role. It could be argued that the common law was still regarded as sovereign, regardless of the introduction of statute law and of the fact that the statute has been introduced to remedy the ineffectiveness of the common law. It would be more consistent to endorse the perception which has been introduced by the statute rather than any common law approach.

Coddard's view in *the Ardennes* case could have been unchallenged if the original contract of carriage, which is not the bill of lading, were the one which was transferred to any third party. The third party gets privity to the original contract rather than to the bill of lading contract.⁷⁵ It could also have been unchallenged if the Bills of Lading Act 1855 did not state that the bill of lading is the original contract which is transferred to any third party.

Lord Goddard's decision to accept the bill of lading as a memorandum instead of a standard form contract was based on the following: first, the role of warranties and collateral contracts in common law; second, the loose application of the parol evidence rule by the courts and their tendency to accept any evidence in order to interpret written terms of contracts; and third, the general tendency of the courts to be anxious to protect

⁷⁵ J Wilson "Legal Problems at Common Law Associated with the Use of the Sea way-bill" 1991 *Il Diritto Marittimo* 115 p. 116 "The essence of the doctrine of privity of contract is that only persons who are party to that contract at issue can acquire rights and obligations under it".

the weaker party in situations that manifestly pointed to the stronger party's "covetous passion for undue lucre".⁷⁶

Since the English legal system⁷⁷ is the most traditional common law regime and despite the above arguments that the bill of lading should be the contract of carriage, the Ardennes case, regardless of its shortcomings, has established the bill of lading as merely a memorandum. Therefore, the terms of the contract should be reassembled in accordance with the law of contract.

4.6 Bills of Lading in the Hands of Third Parties and the COGSA 1992

What happens when the holder of the bill of lading is a third party? Is the bill of lading the contract of carriage or is it simply a receipt? English law has customarily been opposed to third party beneficiary contracts. Two parties cannot, by contract, confer rights upon a third who is not a party thereto.⁷⁸ A third party is not entitled to demand the performance of the contract.⁷⁹ Hence, rights arising under a contract can be enforced or relied upon by the parties to the contract. While the Law Commission⁸⁰ has recently recommended the introduction of contracts for the benefit of third parties, the proposed Act shall not apply to contracts covered by the Carriage of Goods by Sea Act 1992.

⁷⁶ *Earl of Chesterfield v Janssen* [1750] 28 ER 82 p. 84

⁷⁷ Smith & Bailey "The Modern English Legal System", 1996, Sweet & Maxwell.

⁷⁸ The function of bills of lading as receipts and documents of title in hands of third parties will not be analysed. J Cooper "Carriage of Goods by Sea Act 1992" Current Law Statutes Annotated, 1992, Vol. 3 Chapters 37-52 p. 50-1 "These problems stem from the doctrine of privity of contract, according to which a stranger to a contract cannot as a general rule enforce any rights thereunder". *Corbin on Contracts*, 1951, Vol. 4, West Publishing Co sec 836 p. 353 "No one but the parties to a contract can be bound by it or entitled under it".

⁷⁹ F Pollock "Principles of Contract", 1936, Stevens p. 195 "a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract", R Kidner "Economic Loss: Anns, Junior Books and Bills of Lading" 48 *MLR* 352, p. 353 "**Accordingly the Act allowed the contract between consignor and ship owner also to be enforced between consignee and ship owner in certain circumstances**" (Stress added).

⁸⁰ The Law Commission Privity of Contract: Contracts for the Benefit of Third Parties No 242 (1996) CM 3329 pp. 140-141 The proposed Act should not apply to contracts covered by the 1992 Act. p. 32 "Where goods to be carried by sea, the shipper will typically enter into a contract of carriage with the carrier, which is evidenced by a bill of lading...a buyer only had a right of action under the bill of lading contract".

The main argument against the recognition of the existence of a contract is the lack of consideration on the part of the third party, and since consideration is the fundamental condition for the existence of the contract, no contract can be said to exist.

Prior to 1855 it was made clear in *Lickbarrow v Mason*⁸¹ and *Dunlop v Lambert*⁸² that, whereas the transfer of the bill of lading was effective to pass property of the goods to the transferee, it did not transfer any right under the contract against the carrier.⁸³ Attempts to enforce the contract between third party and carrier proved unsuccessful unless the parties could show privity of contract. Thus, any action on the contract must be brought in the name of the original contractor.

Contractual rights, being “choses in action”, were not assignable at common law.⁸⁴ The assignment of certain kinds of “choses in action” (Bills of lading) is regulated by statutes.⁸⁵ The introduction of the statute aimed to achieve the transfer of the contractual rights to a third party and not to create new contractual rights with the third party. The Bills of Lading Act 1855 was passed to dispel problems caused by the doctrine of privity. Additionally, the only identified contract is the bill of lading which is transferred by the appropriate mode of transfer.⁸⁶ Consequently, it could be argued that

⁸¹ [1794] 1 Smith LC, 13th ed, 703

⁸² [1839] 6 CL & Fin 600

⁸³ *Sargent v Morris* 106 ER 665 p. 666, *Scrutton Ltd v Midland Silicones Ltd* [1962]Ac 446 *Joseph v Knox* 170 ER 1397

⁸⁴ *Chitty on Contracts*, 1994, Vol. 1, Sweet & Maxwell p. 953 sec 19-001. The only methods of assigning contractual rights at law were by novation, and by procuring the debtor’s acknowledgement that he held for the assignee: both of these required the consent of the debtor. Sec 19-050 “Novation ... There is a new contract and it is therefore essential the consent of all parties should be obtained, in this necessity for consent lies the most important difference between novation and assignment”.

⁸⁵ Bills of Lading Act 1855 - Carriage of Goods By Sea Act 1924. J Adams, R Brownsword “*Understanding Contract Law*”, 1996, Sweet & Maxwell p. 21 “... Without the statutory, modification contained in the Carriage of Goods by Sea Act 1924 (replacing the Bills of Lading Act 1855), the indorsee ... would not be affected by these ... he be able to sue the carrier on the contract of carriage”.

⁸⁶ E R Hardy Ivamy “*Carriage of Goods by Sea*”, 1989, Butterworths p. 122 “The contract transferred is that embodied in the bill of lading”. G Treitel “Bills of Lading and Implied Contracts” 1989 *LMCLQ* 162 p.163 “... transferring rights and liabilities under the bill of lading contract to the transferee of a bill of lading”. C Debattista “*Sales of Goods Carried by Sea*”, 1990, Butterworths, p.309, “but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property”. R Grime “*Shipping Law*”, 1991, Sweet & Maxwell p. 124 “The holder of a bill of lading will be able to sue the carrier on the contract of carriage it represents”. C Cashmore “Title to Sue on a Contract of Carriage in Anglo-American Law” 1994 *Anglo-American Law Review* 488 p. 493.

the bill of lading is the original contract of carriage which is concluded by the shipper for the consignee.⁸⁷

In the first place Treitel⁸⁸ accepted that the bill of lading is the contract with the shipper which is vested in a third party and, so, it is the original contract which is vested in the consignee. Treitel⁸⁹ contradicts himself by stipulating that:

“The benefit of the contract contained in or evidenced by a bill of lading may be transferred”.

Thus, the transferee might get a contract different from the bill of lading. If the bill of lading is merely evidence, then the transferee should get the contract merely evidenced by the bill of lading regardless of the wording of the 1855 Act.

Since it is established that the bill of lading does not contain the contract, the idea is expressed that the consignee enters into a contract under the terms contained in the bill of lading.⁹⁰ On the one hand, novation is a legal technique for transferring contractual rights and, therefore, it could be said that the bill of lading arises as a novation contract for the third party. On the other hand, strictly speaking novation is not the transfer of the original contract, but its extinction and replacement by a new contract. In the first place, the purpose of the introduction of the Act was to by-pass the doctrine of privity and to vest the consignee with the rights under the original contract of carriage rather than to

⁸⁷ A Bell “The Bills of Lading Act 1855 Today” 1985 *JBL* 124 p. 124 “The buyer of goods to sue their sea carrier on the terms of the bill of lading under which his overseas seller shipped them”. G Treitel “Bills of Lading and Third Parties” 1986 *LMCLQ* 294 p. 296 “**The bill of lading is already a contract between shipper and carrier to deliver the goods to the consignee or order**” (Stress added).

⁸⁸ *Benjamin's Sales of Goods*, 1992, Sweet & Maxwell p. 924 “*Mitchell v Ede* was decided before the Bills of Lading Act 1855 under which **the rights of the shipper under the bill of lading contract vest in a consignee**”. (Stress added). R Pennington, A Hudson “*Commercial Banking Law*”, 1978, MacDonald and Evans p. 76 “The benefit and burden of **the original contract of carriage passes to the consignee or endorsee**” (Stress added).

⁸⁹ *ibid.* Benjamin's Sales p. 954. D Glass, C Cashmore “*Introduction to the Law of Carriage of Goods*”, 1989, Sweet & Maxwell p. 161 “It becomes the contract ... and its contents cannot be challenged”.

⁹⁰ O Hare “Shipping Documentation for the Carriage of Goods and the Hamburg Rules” 52 *Aust L J* 415 pp. 416-17, E M Clive “*Jus Quaesitum Tertio and Carriage of Goods by Sea*” in *Comparative and Historical Essays in Scots Law* edited By DC Miller, DW Meyers, 1992, Butterworths /The Law Society of Scotland Edinburgh p. 53 “The obvious solution would be to interpret the contract contained in the bill of lading as if it meant the contract under or pursuant to which the bill of lading is issued or the contract of whose terms or existence the bill of lading provides some evidence”.

allow the consignee to enter into a contract under the terms of the bill of lading.⁹¹ The third party holder of the bill enters into a contract under the terms of the bill of lading at the moment of the delivery of the goods by the carrier, which was the common law approach and the alternative to the doctrine of privity.⁹²

Moreover, in the preliminary note of the Carriage of goods by sea Act 1992⁹³ it is stated that:

“S 2 allows the lawful holder of a bill of lading ... to sue the carrier under the original contract of carriage even though he may not have been party to the original contract”.

The newly introduced Carriage of Goods by Sea Act 1992 does not contain a definition for the bill of lading. The contract of carriage, in relation to bills of lading, is defined as “the contract contained in or evidenced by that bill”.⁹⁴ Since *the Ardennes* case has established that the bill of lading is not a contract, why is the wording of the old Act kept by the legislature in the new Act? The dual perception indicates that there is no single contractual function of the bill of lading applying in the relations between shipper and carrier and third party and carrier. Since the language of the old Act is contained in the new Act, the bill of lading could be the contract between the shipper and the carrier. If it is accepted that the bill of lading is merely evidence of the original contract between

⁹¹ fn 3 G Humphreys p. 462 “The reason for the original intervention of the legislature in regard to bill of lading third party cargo receivers was to overcome the operation of the legal doctrine of privity of contract”, Law Commission No 196 HC 250 p. 5 “The Bills of Lading Act 1855 was passed to remedy a defect arising from the doctrine of privity of contract. The problem was that a buyer ... was unable to sue or be sued on a contract of carriage which had been made between the shipper and the carrier and to which he was not privy”. J Adams, R Brownsword “The Aliakmon and the Hague Rules” 1990 *JBL* 23 p. 28 “however, when the bill is endorsed over, it is as if a contract in the form of the bill of lading had been made with the endorsee”. C Hill “*Maritime Law*”, 1989, Lloyd's of London Press p. 363 “holder of the document was not an original party to the contract evidenced by the bill of lading and eventually contained in it”. p. 363 “A master who signs ... binds his owners to the contractual terms and conditions which are contained in that bill of lading printed form”.

⁹² *Allen v Coltart* [1883] 11 QBD 782

⁹³ Carriage of Goods by Sea Act 1992, *Halsbury's Statutes*, 4th ed, Current Statutes Services 39 Shipping p.131. F White, R Bradgate “The Survival of the *Brandt v Liverpool Contract*” 1993 *LMCLQ* 483 p. 484 “**The Act does not appear to transfer the contract as varied**”. (Stress Added)

⁹⁴ *ibid.* p. 137. R Bradgate, F White, S Fennell “*Commercial Law*”, 1995, Blackstone Press Limited p. 191 “The lawful holder ... as if he had been a party to the contract of carriage”

the shipper and the carrier, then the lawful holder of the bill of lading should become party to this original contract rather than to the bill of lading contract. The wording of section 2(1) of the 1992 Act which says “if he had been a party to that contract” is like the language of the 1855 Act which implies that the original contract had been made between the carrier and the consignee. The legislature makes the holder of the bill of lading party to the already existing original contract and does not provide for the conclusion of a contract under the terms of the bill of lading in which the holder will become part. Thus, the holder of a bill of lading becomes party to the original contract of carriage. The 1992 Act does not seem to transfer new contract as the 1855 Act did either. Hence, the transferee steps into the shipper's shoes as if he had been a party to the original contract of carriage. The holder of a bill of lading becomes party to the contract contained in the bill of lading or to the contract evidenced by the bill of lading. It is well established that the bill of lading is the contract of carriage itself for the holder of the bill.⁹⁵ English law would be more consistent if it accepted that the endorsee becomes part to the original contract of carriage which is not the bill of lading. Does the endorsement of a bill of lading contract, by a third party, to the original shipper, transform the bill of lading into a receipt in common carriage?

It is argued⁹⁶ that under the 1992 Act the lawful holder of a bill of lading evidencing a contract for the carriage of goods can acquire rights under that contract. If the holder takes or demands delivery of the goods he becomes liable under it. Howard and Davenport⁹⁷ said that the lawful holder is entitled to enforce the bill of lading

⁹⁵ *Benjamin's Sales of Goods*, 4th ed, p. 930 sec 18-014 “Thus in the hands of a buyer to whom a bill of lading has been transferred by the seller the bill of lading will normally be the contract of carriage”. *Current Laws Annotated*, 1992, Vol. 3, Chapters 37-52 p. 50-9, *Encyclopaedia of Forms and Precedents*, 1991, Vol. Service, Butterworths p. 102-3, Vol. 39 p. 46 Footnote 1 “... refer to the bill of lading contract”.

⁹⁶ G Treitel “*An Outline of the law of contract*”, 1995, Butterworths p. 272

⁹⁷ T Howard “The Carriage of Goods Act 1992” 1993 *JMLC* 181 p. 188 “The lawful holder of a bill of lading is entitled to enforce **the bill of lading contract**”. (Stress added). T Howard, B Davenport “English Maritime Law Update 1992 “1993 *JMLC* 425 p. 426 “**The receiver was not party to the original bill of lading contract ... The 1992 Act enables any lawful holder of the bill of lading to sue for breach of the bill of lading contract**”. p. 443 “The essence of a voyage charter is the

contract which is the original contract. The combination of views has to result in the same outcome, namely that the holder becomes party to the original contract of carriage. Therefore, taking into account that the bill of lading is always the contract for the holder, then the contract which the bill of lading evidences has to be the bill of lading contract. Under these assumptions, even if it is suggested that there were terms not contained in the bill of lading then those terms are not part of the original contract which has been reduced in the provisions of the bill of lading.

If it is suggested that the bill of lading is not the original contract which is transferred, then the third party may have no knowledge of the terms of the contract which may not be contained in the bill of lading.⁹⁸ This view cannot be reconciled with the fact that bills of lading, on many occasions, are treated as negotiable instruments for the third party holder and, therefore, as formal contracts.

The rights of suit of previous transferees and even of the original party to the contract contained in the bill of lading are extinguished by the endorsement. Therefore, if the original shipper becomes an endorsee, then the bill of lading has to be the contract of carriage rather than evidence of it. Moreover, the original party to the contract remains liable even if the bill of lading has been endorsed. At common law the original shipper remained liable for the bill of lading contract as well.⁹⁹ Hence, if the original party becomes the holder of the bill of lading as a consignee, then its liability is under the contract of carriage contained in the bill of lading. Ultimately, there is a convergence of views regarding the contractual role of bills of lading in the hands of third parties.

obligation of the shipowner to perform the bill of lading contract". B Reynolds "Further Thoughts on the Carriage of Goods by Sea Act 1924 (UK)" 1994 *JMLC* 143 p. 148 "The presenter of the bill at the discharge port will be unable to rely on the contract which it contains".

⁹⁸ B Reynolds "Further Thoughts on the Carriage of Goods by Sea Act 1924 (UK)" 1994 *JMLC* 143 p.152. R Grime "*Shipping Law*", 1991, Sweet & Maxwell p. 124 "Certain contracts contained in documents, may negotiable ... enforceable by whoever has lawful possession of the document which represent it".

⁹⁹ fn 95 *Benjamin's* p. 960. *The Giannis NK* [1994] 2 Lloyd's Rep 171 Owners of the ship sued the shippers of a cargo of ground nuts. An action about shipper's liability. p. 181 Longmore J "The rights under the contract contained in the bill of lading continued in the original shipper". N Gaskell "*Chorley & Giles Shipping Law*", 1987, Pitman p. 255 "The original party to the bill of lading contract does not drop out".

The Law Commission¹⁰⁰ in its report indicated that the new Act has borrowed elements from the practice in the USA and in a number of European countries in allowing the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by the bill, irrespective of whether property in the goods passes upon endorsement. Additionally, the Commission wanted to bring English law into line with the Greek law¹⁰¹ by indicating that a lawful holder of a bill of lading would be entitled to assert contractual rights against the carrier. In fact, both the US and the Greek law state that the bill of lading is the contract of carriage which regulates the relation of all the parties in the transaction. Besides, the bill of lading is merely evidence of the contract in English law and, therefore, it has not achieved the uniformity expected by the Commission, which means that the bill of lading should be treated as the contract in order to have a convergence of the systems. The shipper and the carrier would be better protected if they knew that the terms of their bill of lading contract could not be altered merely by the fact that their case might be tried in another jurisdiction.

4.7 The Retroactive Force of the Bill of Lading Contract

The actual issue of the bill of lading is vital in order to work as the vehicle which incorporates not only the contract but also a receipt and a document of title. As mentioned above, the bill of lading is produced by the shipper to the carrier. Since the terms of the bill of lading are not created at the negotiating time, it cannot be said that the terms of the bill of lading are evidence of the orally agreed terms. It has been stated that the issue of the bill of lading does not mark any stage in the development of the contract.¹⁰² In fact, the bill of lading has already been prepared by the shipper before it

¹⁰⁰ The Law Commission No 196 HC 250 pp. 11-12

¹⁰¹ *ibid.* p. 12 "It is an improvement which brings our law into line with that of a number of our European partners: as we understand it, France, Germany, Holland, Sweden and Greece".

¹⁰² *Pyrene v Scindia Navigation*[1954] 2 QB 402 pp. 419-20 where Devlin J held that "The use of the word covered recognises the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued ... the issue of the bill of lading does not necessarily mark

has been handed over to the carrier. It could be argued that even if the bill of lading has not been signed by the carrier, it emerges as a document contemporaneously with the handing over by the shipper to the carrier. When parties enter into a contract in the expectation that a bill of lading will be issued, they enter into it upon those terms which they know and expect the bill of lading to contain. It has to be taken into consideration that a contract is concluded when there is an agreement of the parties upon all of its terms. Many terms of the bill of lading are never negotiated but they arise as contractual terms at the time of the handing over of the bill of lading by the shipper to the carrier. Since all the terms of the contract are printed in the back of the bill of lading, it could be argued that the bill of lading contract is concluded contemporaneously with the handing over of the bill of lading to the carrier or at the time when they co-operate in its production. Moreover, the issue of the bill of lading marks the emergence of the contract in the form of a bill of lading which can be transferred by endorsement. The authorisation of the bill of lading as a receipt at a later time should not influence its existence as the contract of carriage. It will be recalled that under United States law the mere sailing of the ship with the cargo aboard means ratification of the bill of lading as the contract. In fact, The Hague Rules were applied in *Pyrene v Scindia Navigation* because the bill of lading was the contract of carriage.

What is the use of the paper bill of lading issued merely as evidence when the contract is already in existence? Since the bill of lading is established as being merely evidence of a contract already in existence, the bill of lading cannot be treated at the same time, on many occasions, as a retroactive contract under which everything, with regard to shipment, has been done.¹⁰³ Thus, it could be argued that the accepted bill of lading

any stage in the development of the contract; ... In my judgement, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation covered by a bill of lading, and is therefore from its inception, a contract of carriage within the meaning of the rules and to which the rules apply”.

¹⁰³ *Harland and Wolff Ltd v Burns & Laird Ltd* 40 Ll L R 286 p. 288 “Notwithstanding that the bill is not issued contemporaneously with the conclusion of the contract of affreightment, it is none the less *pars negotii* and usually contains the only express formulation of the conditions of the contract” *Huge Mack & Co v Burns & Laird lines Ltd* [1944] 77 Ll.L.R 377, *Anticosti Shipping Co v Viateur st Armand* [1959] 1 Lloyd's Rep 352. *The Glendarroch* [1894] P 226 p. 229 “We have to treat this case as if the

should be ratified as the contract by the loading of the goods as it has been established in US law.

4.8 Bills of Lading as Standard Form Contracts of Carriage

The legal concept of contract law constantly evolves by expanding or contracting its scope, further differentiating its rules, and revising its basic principle. This evolution is prompted by changes in the social practices of the economy and interactions with other fields of law. The creation of commercial standard form contracts was the first step in the development of law of contracts. Their elaborate provisions created a novel set of legal relations suited to international trade. In many business transactions, the contract will be concluded on the basis of a printed document which purports to contain all the terms of the contract. In some cases the printed document will be signed by both parties, but often it is merely handed over or posted at the time of the formation of the contract. The process resembles an imposition of will rather than mutual consent to an agreement. It makes sense to permit the use of standard forms of bills of lading but to control the content of the terms of the contracts which in the case of bills of lading is achieved through the application of the International Conventions on the carriage of goods by sea. The objective test of consent ensures that normally they count as a contractual agreement between the parties. If you want to send goods by sea, you will have to accept the terms subject to which the bill of lading is issued.¹⁰⁴ These standard terms are statutory, as in the case of those governing contracts for international carriage of goods by sea. The relative abstraction of classical contract law did not permit distinctions to be made

contract were in the ordinary terms of a bill of lading. The contract being one on the ordinary terms of a bill of lading". fn 167 Henderson p. 77 "when, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done".

¹⁰⁴ R Bradgate, F White, S Fennell "*Commercial Law*", 1995, Blackstone Press Limited p. 186 "**On the back of modern standard form bills are detailed the terms and conditions of carriage.**". A Watson "*Finance of International Trade*", 1990, The Chartered Institute of Bankers p. 80 "**The full contract details appear on the back of the bill of lading**". (Stress Added)

between categories of contracts. The law can require a party relying upon a standard form contract, such as a bill of lading contract, to ensure that the principal terms and any usual terms are brought to the other party's notice. The involvement of the shipper in the preparation of the bill of lading, in combination with the fact that they can be bought from stationery, should be enough ground to argue that the original parties (shipper-carrier) get knowledge of the terms of the bill of lading contract before the carrier signs the bill of lading. The test of reasonable expectations appears to be the operative principle in standard form contracts. Courts treated the standard form contract as the necessary evidence of the terms of the contract.¹⁰⁵

The tendency towards the standardisation of its terms has arisen from the early stages of the development of the usage of the bill of lading in international trade.¹⁰⁶ Hence, the terms of the contract which the shipper concludes are fixed in advance¹⁰⁷ rather than formed in the course of the negotiation process. Therefore, a free negotiated contract of carriage is developed into a standard form contract. Are the standardised terms of the contract of carriage incorporated in a standardised bill of lading?

In *Schroder Music Publishing co ltd v Macauloy*,¹⁰⁸ bills of lading are referred to as standard form contracts. In particular, Cooke and Oughton,¹⁰⁹ Sales¹¹⁰ and Richards¹¹¹

¹⁰⁵ H Collins "The Law of Contract", 1997, Butterworths pp. 212-13.

¹⁰⁶ Malynes "Lex Mercatoria", 3rd ed, 1686, p. 97

¹⁰⁷ C Schmitthoff "Export Trade", 1990, Stevens p. 562

¹⁰⁸ *A Schroder Music Publishing co ltd v Macauloy* [1974] 3 All ER 616, [1974] 1 WLR 1308 p. 624, p.1316 In the House of Lords Lord Diplock points out that "Standard forms of contracts are of two kinds ... Examples are bills of lading, charter-parties, ... The standard Clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted ... The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining...", M Trebilcock "The Doctrine of Inequality of Bargaining Power: Post Benthamite Economics in the House of Lords" (1976) 26 *The University of Toronto Law Journal* 359. p. 363 "His lordship said that standard forms of contract are of two kinds ... Examples cited were bills of lading, charter parties and insurance policies". T Thommen "Bills of Lading in International Law and Practice", 1985, Eastern Book Company p. 26 "Bills of lading and charter parties are standard form contracts printed in advance". *The Hollandia* [1983] AC 565 p. 576 Lord Diplock "that by accepting the bill of lading, even though it was a contract of adhesion".

¹⁰⁹ P Cooke, D Oughton "The Common Law of Obligations", 1989, Butterworths p. 318 "charter-parties and bills of lading".

¹¹⁰ H Sales "Standard Form Contracts" 16 *MLR* 318, p. 319 "Standard form contract ... particularly in that

considered that contracts of adhesion (standard form contracts) have a long history and were transplanted into documents such as bills of lading and charter-parties. Therefore, the writing has become necessary for their emergence as such documents, despite the fact that initially they could be found in trade usages. Hence, it could be argued that the parole evidence rule should apply and furthermore the view of Lord Esher as expressed in *Leduc v Ward* could be justified. Bills of lading, therefore, could be seen as standard form contracts similar to charter-parties and, subsequently, if it is suggested that bills of lading are merely evidence of the contract, then charter-parties have to be merely evidence of the contract as well. It could be argued that there is a convergence of the views of the scholars, which has come about as a result of the observance of the practical usage of the bill of lading in international maritime transport, when the bill of lading is seen as a standard form contract rather than as evidence of it as is the case in English law.

As mentioned above, the terms of the bill of lading contract are not subject to negotiation, which means that there is no other contract concluded prior to the issue of the bill, in contrast with what many scholars have suggested. Hence, it is assumed that the only offer for the conclusion of the contract of carriage should be the carrier's bill of lading. In modern shipping practice contracts of carriage are issued on a take-it-or leave-it basis, which has earned them the sobriquet of "adhesion contracts". There is no freedom of offer but merely a choice to contract under the carrier's bill of lading offer or to refuse to do business.¹¹² Hence, the principles of the standard form contract should be applied to

of shipping. Charter parties and bills of lading are still based on ancient forms". P Atiyah "*An Introduction to the Law of Contract*", 1989, Clarendon Press p. 19 "Contracts for the carriage of goods by sea would usually be recorded in a printed bill of lading ... In cases of this nature there might be some room for negotiation and bargaining, but it remained the case that most clauses in such contracts were not negotiated but imposed".

¹¹¹ P Richards "*Law of Contract*", 1992, Pitman p. 8 "Contracts of adhesion, generally, known today as standard form contracts ... Initially they could be found in trade usage, and eventually they were transformed into documents such as charter parties, insurance policies and bills of lading."

¹¹² W Tetley "*Marine Cargo Claims*", 3rd ed, International shipping Publications p. 217, G Treitel "*Standard Form Contracts*" in *The Law of Contracts*, 1991, Sweet & Maxwell, Chap 7 pp. 196-248. M Furmston "*Law of Contracts*", 12th ed, Butterworths pp. 21-23. C Grunfeld "Reform in the Law of Contract" 1961 *MLR* 62 pp. 64-65 "The regulation by the law of imposed standard contracts has paralleled their emergence and growth ... Employment and transport, in particular, have attracted

bills of lading contracts rather than the general principles of the ordinary law of contract.

Despite the citation in the *Schroder Music Publishing Co Ltd v Macauloy* case, there is no endorsement of this characteristic in English law in contrast with the US law¹¹³ where bills of lading have prevailed to be treated as contracts of adhesion.

4.9 Parol Evidence Rule and the Contractual Role of Bills of Lading

It is often stipulated that there is a rule of law that the terms of the contract cannot be modified by parol evidence.¹¹⁴ Therefore, in order for this rule to be applicable to bills of lading, it has first to be shown that the bill of lading is the final written contract of carriage itself.

Where a contract is reduced to writing, the general rule is that neither party can rely on extrinsic evidence to add to, vary or contradict the written instrument. The purpose of the rule is to promote certainty and this happen were the parties have put the terms of their agreement into a formal, detailed written document. There are exceptions to it. Is the bill of lading the kind of document to be seen as a contract reduced to writing? The rule does not apply in the following situations: 1). When the rule relates to evidence as to the contents of a contract. 2). When the written contract may be fully

statutory regulation of contract ... Carriage of Goods by Sea Act 1924". In *The Anwar al Sabar* [1980] 2 Lloyd's Rep 261 Action by the charterers against the shipowners in a dispute about the right to draft the lien on the bill of lading. p. 263 "In the liner trade ... If the shipper does not wish his goods to be carried under such a bill of lading the simply does not ship the goods by that carrier's line. There is no other way he can get them carried by that carrier otherwise than to agree to his standard form".

¹¹³ *Cannon USA Inc v Norfolk Southern Railway Company* (1996) 936 Fsup 968 p. 969 "Bills of lading are contracts of adhesion and any ambiguity must be resolved against carrier-drafter".

¹¹⁴ *Chitty on Contracts*, 1989, Sweet & Maxwell p. 533 "if there be a contract which has been reduced in writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract", 27th ed, 1994 p. 600. *Bank of Australasia v Palmer* [1897] AC 540 p. 545 "Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract". *Goss v Lord Nugent* [1833] 5 B & AD 58 p. 60 Lord Denmon held "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract". *Jacobs v Batania and General Plantations Trust Limited* [1924] 1 Ch 287. C Tapper "*Cross on Evidence*", 1990, Butterworths pp. 695-704

effective at law, but oral evidence may be relied on for the purpose of establishing an equitable defence. 3). When evidence is admissible to show that a term ought to be implied. 4). When extrinsic evidence can be used to show that the written contract has been subsequently varied or rescinded. 5). When evidence can be used to show what the terms of a written document mean. 6). When a document can be rectified and brought into line with a previous oral agreement. This remedy is not available where the parties know that the document is at variance with the terms actually agreed. Any shipper accepting a bill of lading knows if there is any variance of the terms taking into consideration that the shipper co-operates in the preparation of the bill of lading before it is signed by the carrier. The mere existence of some document relating to a contract does not necessarily lead to the conclusion that all the terms of the contract are contained in that document. A distinction must be drawn between informal memoranda and complete contractual documents. In practice, the bill of lading contains the detailed terms of the contract. Taking into account that many of its terms are never negotiated and that they have been formed through practical usage, they are always presented within the content of the bill of lading.

It has been stipulated that the bill of lading belongs to the category of documents which is not intended to be a contract, but merely an informal memorandum of an agreement previously concluded.¹¹⁵ Does not the bill of lading intend to contain all the terms of the original contract of carriage?

According to Crump, the bill of lading has been invented¹¹⁶ as a contract like a

¹¹⁵ *ibid.* Chitty p. 541 sec 857, sec 12-092 p. 607, G Marston "The Parol Evidence Rule: The Law Commission Speaks" 1986 *CLJ* 192, K Wedderburn "Collateral Contracts" 1959 *CLJ* 58 pp. 61-62. Wedderburn states that "Where a charter party or a bill of lading represented only a part of the whole agreement". It seems that both documents are regarded as part of the contract. M Howard, P Crane and D Hochberg "*Phipson on Evidence*", 1990, Sweet & Maxwell p. 1024 sec 37-20 "the bill of lading was not the contract between the parties, evidence could be given to establish the actual terms". The Law Commission No 154 (1986) Cmnd 9700.

¹¹⁶ J Crump "General Average, Salvage and the Contract of Affreightment" 1985 *LMCLQ* 19, p. 19 "It was not until the 14th or 15th AD that merchants are found it necessary **to invent contracts, like bills of lading and bills of exchange**". (Stress Added).

bill of exchange and, therefore, the bill of lading could be considered as being a formal contract. In fact, Mellish LJ,¹¹⁷ Stephen J,¹¹⁸ and many other law Lords, judges and scholars, as mentioned above, stated that bills of lading are contractual documents. It is submitted that the views of the judges are closer to the practical usage of bills of lading. Leading American cases in the supreme court have considered the bill of lading as the contract. In contrast, *the Ardennes* case has taken the view that the bill of lading is not the final written contract.

Furthermore, in Cheshire on Contracts, regarding *the Ardennes* case, it is stated that:

“the practical effect of decisions such as this is to emasculate the parol evidence rule ...”.¹¹⁹

This statement illustrates disapproval of the application of the parol evidence rule in *the Ardennes* case. A party can always get parol evidence before the court by pleading that the contract is not wholly in writing. The courts¹²⁰ now recognise many techniques which remove the force of the parol evidence rule so that rarely will a party to a written contract be prevented from alleging that the terms of the contract were altered by independent oral promises. Hence, it could be suggested that written contracts can be always regarded as not being the whole expression of the contract and, therefore, all contracts in writing can be modified. To minimise the importance and usefulness of written contracts and to embrace all sorts of measures in order to alter their substance does not comply with the new developments and needs of maritime transport and international trade in general. To restore the full vigour¹²¹ of the parol evidence in the

¹¹⁷ fn 23

¹¹⁸ fn 24

¹¹⁹ M Furmston “*Law of Contracts*”, 1986, Butterworths p. 120, 12th ed, 1991 pp. 123-127.

¹²⁰ *Evans & Son v Andrea Mezzarion Ltd* [1976] 1 WLR 1078. The Court of Appeal held that oral promises are intended to be legally enforceable.

¹²¹ J Wilson “*Carriage of Goods by Sea*”, 1993, Pitman p. 142 In his work Wilson said that “to hold the *Ardennes* to be wrongly decided, and to restore the full vigour of the parol evidence rule at this stage, would clearly not conform to the expectations of the reasonable businessman ... In these circumstances

case of bills of lading would bring legal uniformity concerning the contractual status of the bill of lading. A document, in order to be contractual, must be of a class which either the party receiving it knows to contain, or which a reasonable man would expect to contain, contractual conditions. Any reasonable businessman, taking into account its establishment as the contract in many other countries such as USA, Greece and Germany, has full knowledge that he has contracted under the terms of the carrier's bill of lading. The fact should be taken into consideration that there has been a shift from the individualistic version of the objective theory of contract to a concern with the fairness of the outcome. The rules of the common law of contract have to remain as *jus dispositivum*. Freedom of contract is indeterminate in most instances.¹²² Thus, in the standard form contract the trigger of obligation is not the will of the parties but conduct (appearing to agree) and on this basis norms are imported into the law which cannot be based on the parties' will. To keep pace with the constant changing market of maritime transport and commerce, the legal system has to place at the disposal of the members of this market an ever increasing number of typical business transactions and regulate their consequences. For instance, the US legal system¹²³ has already endorsed bills of lading as standard form contracts and, therefore, it keeps up with the new developments in maritime transport. Standardised contracts are "*à prendre ou à laisser*". The increasingly widespread use of the standard form contract can be seen as reintroducing status in place of contract.¹²⁴ In accordance with Treitel's view,¹²⁵ whether or not a document falls into the category of the contractual documents class depends on current commercial practice,

it might seem preferable to regard *the Ardennes* principle as still being good law since it conforms with commercial practice and is in line with the attitude adopted towards the receipt function of the bill".

¹²² D Kennedy "Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power" 41 *Maryland Law Review* 563.

¹²³ J Perillo "*Corbin on Contracts*", 1996, Vol. 3, Revised ed, West Publishing Co pp. 449-455

¹²⁴ F Kessler "Contracts of Adhesion-Some Thoughts About Freedom to Contract" 43 *Col.L.R* 629

¹²⁵ G Treitel "*The Law of Contract*", 1995, Sweet & Maxwell p. 198. A Boulton "*The Making of Business Contract*", 1972, Sweet & Maxwell p. 130 "... Contracts of Carriage in international trade are imposed ready made..."

which varies from time to time. As mentioned above, at the present time, the bill of lading is circulated as a standard form contract in international maritime transport.

4.10 The Contractual Role of Bills of Lading after the Ardennes Case

In an action *in rem* brought by the first plaintiff (shipper) and the second plaintiff (receivers of the cargo) against the owners of the vessel for damage of the cargo, the court issued a judgement for the receivers. Mr Justice Brandon¹²⁶ said that:

“the bill of lading contained or evidenced a contract between the shippers and the shipowners, and it follows that the receivers are entitled, by virtue of s1 of the Bills of Lading Act, 1855 to sue the shipowners upon such a contract”.

What is really the contractual status of bills of lading? The first option, namely that the contract is contained in the bill of lading in the sense that the bill of lading is the contract, contradicts the second one, namely that the contract is evidenced by the bill of lading. If it is suggested that both terms mean that the bill of lading is evidence of the contract, then there is no reason to have the dual reference. It is well recognised that the receivers become parties to the bill of lading contract.¹²⁷ If the dual perception of the contractual nature of bills of lading is accepted, then there is difficulty in identifying not only the offer under which the contract of carriage has been concluded but also in identifying whether there is a concluded contract. In fact, Mr Justice Brandon has investigated the terms of the true construction of the bill of lading contract.

In many cases, where there was no straight challenge of the contractual feature of bills of lading regarding the relation shipper-carrier, the bill of lading was in fact the

¹²⁶ In *Berkshire* [1974] 1 Lloyd's Rep 185 p. 189, *The El Amria* [1982] 2 Lloyd's Rep 28 p. 32 “The only contract of carriage to which the buyer can become a party is that contained in or evidenced by the bill of lading which is endorsed to him by the seller”.

¹²⁷ Hardy Ivamy “*Carriage of Goods by Sea*”, 1989, Butterworths p. 122 “The contract transferred is that embodied in the bill of lading”.

contract which incorporated the Hague-Visby Rules¹²⁸ as well as the choice of law and jurisdiction clause. The bill of lading contract is subject to the Hague-Visby Rules from the time of its issue and not after it has been transferred to the holders. A clause of law provision is contained in the bill of lading contract from the time of the issue of the bill of lading.

The court of Appeal in *Cho Yang Shipping Ltd v Coral (UK) Ltd*¹²⁹ stated that in English law the bill of lading is not the contract between the original parties. The judge referred to *the Ardennes*, as judicial precedent, rather than to statute law. Therefore, it becomes clear that the key to the English legal reasoning still lies in its use of judicial precedent.¹³⁰ In this action the plaintiff shipowners sought to recover freight from the defendant shippers. The bill of lading was issued in Hamburg for a transport of cargo from Hamburg to Dubai. The defendants were the shippers and consigned the goods to their order. The bill of lading was made subject to Korean law and Jurisdiction. Lord Justice Hobhouse said that between the shipper and the carrier it is necessary to find out what the actual contract between them was. The judge accepted that in some cases the bill

¹²⁸ *The Mahkutai* [1996] 2 Lloyd's Rep 1 p. 9 Lord Goff of Chievelley held that "Most bill of lading contracts incorporate the Hague Visby Rules." p. 3 "The main issues arise on the appeal, and are concerned with the question whether the shipowners, who were not parties to the bill of lading contract, can invoke as against the cargo owners the exclusive jurisdiction clause contained in that contract, the bill of lading being charterer's bill issued by their agents to the shippers." *The Nerano* [1996] 1 Lloyd's Rep 1. Lord Justice Saville held that "whether the relevant bill of lading contract contained ... It is also common ground that the contract contained in or evidenced by the bill of lading was made with the true owners ... the covered disputes arising under the bill of lading contract ... It seems to me to be clear that the parties to bill of lading contract ... the bills of lading contract was subject to the Hague-Visby Rules". *The Ines* [1995] 2 Lloyd's Rep 144 p. 148 "Thus, if the bill of lading was signed on behalf of the owners a contract would come into existence between them and the plaintiffs", p. 150 "I have reached the conclusion that the parties to the contract of carriage contained in or evidenced by the bills of lading were the plaintiffs on the one hand and the owners on the other. I have reached that conclusion as a matter of construction of the bill of lading itself". *The Varenna* [1983] 2 Lloyd's Rep 592 p. 594 J Donaldson MR "The starting point for the resolution of this dispute must be the contract contained in or evidenced by the bill of lading, for this is the only contract to which the respondent ship owners and the appellant receivers are both parties". p. 596 Lord Justice Oliver "One then has to see whether the terms are so clearly inconsistent with the contract constituted by the bill of lading".

¹²⁹ [1997] 2 Lloyd's Rep 641 p. 643 "In English law the bill of lading is not the contract between the original parties but is simply evidence of it".

¹³⁰ *Mirehouse v Rennell* [1833] 1 Cl & Fin 527 p. 546 Per Mr Justice Peake "Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents"

of lading can be the contract between the shipper and the carrier.¹³¹ Hence, the agreement of the parties can make the bill of lading their contract. Thus, it could be argued that the acceptance of the bill of lading without any objection could be seen as their agreement that the bill of lading is the contract. Moreover, in every case where there is no objection by the shipper showing his consent, the bill of lading should be seen as the contract. According to the judge, the goods had not been shipped upon the terms which are actually set out in the bill of lading and, therefore, contractual terms can be found out of the content of the bill of lading. Thus, the bill of lading is not the contract created by the shipper and the carrier in order to be transferred as such to the consignee. Besides, as mentioned above, the carriers receive and transport the cargo under the terms of their bill of lading. The judge realised that the contractual status of the bill of lading in Germany is different from that in England¹³² but he has refused to treat the bill of lading as the contract. The bill of lading is a negotiable instrument in Germany and, consequently, a formal contract.¹³³ The bill of lading was actually issued by the carrier as the contract in Germany. The plaintiff did not demand the application of Korean or any other law other than English law because he thought probably that the bill of lading is uniformly regarded as the contract of carriage, taking into consideration the English case law, where the bill of lading is referred to as bill of lading contract. Consequently, the bill of lading is issued and treated as the contract in Germany, but it is treated as merely evidence of it simply because of the fact that the case is tried in England rather than because the parties accepted the bill of lading as merely evidence of the contract.

¹³¹ fn 129 p. 642 “Merely to look at the bill of lading may not in all cases suffice”

¹³² *ibid.* at 643 “The parties have argued this case solely upon the basis of English law. No foreign law has been pleaded nor has any evidence of it been adduced. There is a certain artificiality about this. The shipment was at a German port and the bill of lading was issued in Germany. In German law a bill of lading has a different contractual status. A German court has already considered a similar claim by the shipowners against another shipper, a German company”.

¹³³ R Asariotis “Contracts for the Carriage of Goods by Sea and Conflict of Laws Regarding the contracts (Applicable Law) Act 1990” 1995 *JMLC* 293 p. 297 “In Germany where ... a bill of lading is that of a negotiable instrument”.

The aim of this analysis in demonstrating that the bill of lading has to be seen uniformly as the contract, is justified by the outcome of this case. The commercial utility of the bill of lading is hampered by the fact that it is issued as the contract and is treated as a memorandum simply by the fact that, at a later date, the parties tried the case in a different jurisdiction from the one where the bill of lading was issued. The same case tried in the USA and in Greece or Germany would result in the bill of lading being the contract of carriage between the shipper and the carrier. The judge based his legal reasoning on the fact that the bill of lading is not the contract in English law.

The judge did not investigate the actual acceptance of the bill of lading by the shipper as the contract in Germany. The parties did not make the bill of lading subject to English law. Hence, it could not be said that there was an agreement between the parties that the bill of lading was not the contract or the parties had knowledge that the bill of lading was not the contract. In accordance with the interpretation which is given by the judge to the actual fact that the bill of lading was the contract of carriage for the parties in Germany, it could be argued that if the parties had a different perception of the contractual role of the accepted bill of lading, then there was no conclusion of a contract because there was no *consensus ad idem* between the contracting parties.

Furthermore, the judge in the Central London County court held that the defendant was party to the bill of lading contract and he gave judgement for the plaintiff.¹³⁴

The artificiality of the case is recognised by the judge which should be sufficient reason to regard the bill of lading as the contract as it has been issued by the carrier. Lord Justice Evans¹³⁵ held that the bill of lading “contains and evidences” the terms of the contract. Does it mean that the bill of lading is the contract? The judge explains that the

¹³⁴ fn 129 p. 641 “the shipper of the goods and therefore the party to the bills of lading contracts was Coral”.

¹³⁵ *ibid.* p. 646 “The bill of lading in the traditional phrase ‘contains and evidences’ the terms of the contract”

contract which is contained in or evidenced by the bill of lading is like any other contract. Thus, the contract has not been reduced to writing in the form of a bill of lading. The acceptance by the shipper of the bill of lading containing the detailed terms of the contract, is not regarded as superseding any previously concluded contract. As mentioned above any contract, however, it is made or evidenced, can be modified by subsequent agreement.

Under Lord Justice Hobhouse's reading the perception of the contract of carriage as it is mentioned in COGSA 1992 means that the bill of lading is merely evidence of the contract. On the one hand, the judge¹³⁶ regards the shipper as being party of the bill of lading contract. On the other hand, the bill of lading is not a contract and, therefore, the use of the term bill of lading contract is misleading and it should not be used as such. According to his reading the dual perception means that the bill of lading is merely evidence even if the contract is contained in the bill of lading. Under the reading of this case the third party should become party to the original contract of carriage which is merely evidenced by the bill of lading rather than to the bill of lading contract.

In all the cases mentioned above, the judicial language reflects the way that the judges treat the bill of lading. Their decisions are based on the fact that the bill of lading can be either the contract or merely a memorandum. Hence, even their assumptions could be seen as the background upon which their *ratio decidendi* is formulated.

4.11 Conclusion of the Contract of Carriage under the Terms of the Carrier's Bill of Lading

Can a contract of carriage of goods by sea be concluded by booking a shipping space? The booking of space is an agreement but not the contract of carriage. The

¹³⁶ *ibid.* p. 646 "Coral, and they were rightly named as shippers and as contracting parties to the bill of lading contract".

booking of space or any oral agreements should be seen as an invitation to treat. In order to have a concluded contract the fundamental requirement is that, an agreement in all its details should be reached.¹³⁷ It is also common ground that assent upon individual terms is part of the negotiating process. For instance, telephone conversations or oral agreements do not, and are not, intended to spell out all the terms of the contract. It should be taken into consideration that the terms and conditions of carriage are printed on the back of modern standard form bills of lading.¹³⁸ Is the contract of carriage in the form of a bill of lading concluded prior to the acceptance of the goods? The contract of carriage is concluded with the acceptance of the goods for loading¹³⁹ and, therefore, the contract of carriage is not concluded at the time of the engagement of shipping space. The receipt of the shipper's goods is necessary in order to have a valid contract of carriage.¹⁴⁰ The carrier is unable to assent to the contract before he has received the specific load which is to be transported.¹⁴¹

Any contract is concluded *inter alia* when one party makes an offer which is unconditionally accepted by the other contracting party. Which is the offer in the case of contract of carriage? The carrier's bill of lading which is procured by the shipper is

¹³⁷ J Wilson "*Principles of the Law of Contracts*", 1957, Sweet & Maxwell p. 33 "that contract must be complete in all its details ... Consequently an acceptance will not be effective unless there is complete agreement on all the terms of the bargain"

¹³⁸ fn 104 Bradgate p. 186

¹³⁹ *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 p. 1037 Delvin J held that "A contract of carriage is rarely made with any formality. Sometimes it is done by means of the engagement of shipping space, but in many cases the shipper, having learned from an advertisement or otherwise of a date and place of sailing, sends forward his goods and **no contract is concluded until the goods are loaded or accepted for loading**. It is not the contract, for that has already been made, but it usually - I suppose almost always when there is no charter-party - contains its terms. The different shipping lines have their own forms of bill of lading which can be obtained from stationers in the city, and it is the duty of the forwarding agent to put in the necessary particulars and to send the draft stamped to the loading broker. After shipment he collects the completed bill of lading and sends it to the shipper." p.1041 "Accordingly, in the circumstances of this case, and **assuming the engagement of cargo space to be non contractual**, I think that the contract of carriage would normally be made when the goods were delivered at no 9 shed and accepted there by the ships' agents". (Stress Added)

¹⁴⁰ *Benjamin's Sales of Goods*, 1992, Sweet & Maxwell p. 928 "The mere issue of a bill of lading where no goods have been shipped does not suffice to create a contract of carriage", F Reynolds "*The Law of Agency*", 1985, Sweet & Maxwell pp. 468-469.

¹⁴¹ *Atlantic Banana Company v M V Calanca* 342 F Supp 447 p. 451 "An ocean carrier is required to know the special characteristics of a cargo it accepts".

simply an offer.¹⁴² The acceptance of the shipper's goods is regarded as an acceptance of the offer and, therefore, the contract is concluded at that time under the terms of the bill of lading which is accepted by the carrier. The shipper gets knowledge of the acceptance when he receives the signed bill of lading.

In both common and civil law, under the classical system, a qualified acceptance prevents the requisite matching of *consensus ad idem*. An acceptance has to be, or at least has to be understood by the offeror to be unqualified; an expression of qualified agreement does not operate as an acceptance though it may constitute a counter offer. The issue of a different bill of lading or the acceptance of the bill of lading with some changes by the carrier, should be regarded as a counter offer rather than an acceptance. Thus, it could be argued that the contract is concluded under the terms of the carrier's bill of lading when the shipper accepts the finally offered bill of lading which has been signed by the carrier. On this occasion, the carrier is the party which fires the last shot for the conclusion of the contract. So long as no party makes an unconditional acceptance in words or conduct, a contract never arises. Nevertheless, the bill of lading as a document exists after it has been signed by the carrier.¹⁴³ Besides, it should be established that the acceptance of the goods and the issue of the bill of lading take place simultaneously. Consequently, the bill of lading should be regarded as being ratified as a bill of lading at the moment the carrier accepts the cargo. Hence, the signed bill of lading should be considered as being retroactively in force from the acceptance of the cargo for loading.

Nevertheless, it is stated that the contract is concluded between the shipper and

¹⁴² fn 107 Schmithoff p. 545 (fn 44) "A draft bill of lading sent by the shipper to the carrier is often an offer but the contract of carriage is only concluded when the carrier accepts this offer by receiving the shipper's goods for carriage", L Peyrefitte "*The Period of Maritime Transport: Comments on Article 4*" in S Mankabady *The Hamburg Rules on the Carriage of Goods by Sea 1978* A W Sijthoff p. 129, C Grunfeld "Issue of Bill of Lading: Causation" 13 *MLR* 516 pp. 518-19. *Raymond Burke Motors Ltd v The Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155 p. 155, B Coote "Vicarious Immunity by the Alternative Route" 35 *MLR* 176 p. 178 "an offer incorporating those terms could impliedly be accepted by the act of loading". A Branch "*Elements of Shipping*", 1981, Chapman & Hall p. 223.

¹⁴³ *Charles J Webb & Sons v Central Co of New Jersey* 36 F2d 702

the carrier before the bill of lading is issued and, therefore, terms contained in the bill of lading do not affect a contract already made.¹⁴⁴ This last argument is questionable in the case of bills of lading for two reasons: First the terms of the bill of lading are created a long time before any negotiation takes place. Additionally, the printed carrier's bill of lading is in circulation prior to any bargain taking place. So, the contracting parties' minds meet under these pre-existing contractual terms. The terms of the contract are not created first by the agreement of the parties (*i.e.* standard terms) and, at a later date, they are incorporated in the bill of lading. Second, the acceptance of the shipped goods by the carrier and the issue of a bill of lading which contains the carrier's terms is an indication that there is a new offer replacing the old one and which is accepted by the shipper. Hence, it could be argued that the contract is concluded under the terms as contained in the carrier's bill of lading and the bill of lading is the final contract.

The carrier keeps the loaded cargo on the terms of the bill of lading until the issue of the bill of lading contract. The shipper ships the cargo under the bill of lading contract for delivery to the consignee under its terms.¹⁴⁵ The terms of delivery, which are simultaneously the terms under which the cargo is transported, are ascertained by the issue of the bill of lading. So, the offer is finalised as it is contained in the carrier's bill of lading. The issue of the contract in the form of a bill of lading is necessary, firstly, in order for it to be transferred to any endorsee or transferee and, secondly, to function as a valid document of title.¹⁴⁶

Traditionally, contracts were thought of as resulting from a two-sided process of individualised bargaining; on this paradigm rests much of contemporary contract law's theory and practice. The "contract of adhesion" paradigm emphasises, as mentioned

¹⁴⁴ R Bradgate "*Commercial Law*", 1995, Butterworths p. 618

¹⁴⁵ D Sasson "*British Shipping Laws*", 1975, Vol. 5 Stevens p. 88 "The bill of lading ... stating the terms on which they are to be carried". T Howard, B Davenport "English Maritime Law Update 1992" 1993 *JMLC* 425 p. 426 "**The shipper makes the bill of lading contract with the carrier**" (Stress added).

¹⁴⁶ *Partenreederei Tilly Russ v Haven & Vorvoebedrijf* [1985] 1 QB 937 p. 946.

above, the one-sided character that contemporary contractual ordering frequently exhibits. Here obligation rests on agreement but the process through which the transaction's terms were established was largely non-reciprocal. Transactions that fall under the adhesion-contract paradigm present a difficulty for contract theory and practice. The difficulty is that in non reciprocal or one-sided ordering the assumptions with respect to human behaviour that inform classical contract theory are frequently no longer apt. The adhering party is not infrequently essentially passive. Thus, despite the dual perception expressed in the 1992 Act, the terms of the bill of lading will often constitute the contractual terms either because the shipper will be regarded as knowing the terms by virtue of a course of dealing or, in the absence of protest, an inference may be drawn that a shipper agrees to the goods being carried on the terms of the bill of lading whatever they are.¹⁴⁷ In practice, a shipper, even if he has not had previous dealings with the carrier, will contract on the terms which are common in the particular trade,¹⁴⁸ which are those of the carrier's bill of lading. Hence, it could be argued that the consistent course of dealing with bills of lading contracts and the commercial practice can establish bills of lading as contracts of carriage.¹⁴⁹

4.12 British Literature about the Contractual Role of Bills of Lading

On the one hand, many scholars, such as Gutteridge,¹⁵⁰ Crump,¹⁵¹ Reeday,¹⁵² refer

¹⁴⁷ M Furnston, P Shears "Commercial Law", 1995, Cavendish Publishing Limited p. 181

¹⁴⁸ P Todd "Modern Bills of Lading", 1990, BSP Blackwell Scientific Publications p. 91 "**An inference may also be drawn that a shipper intends to contract on any terms common in the particular trade, even if he has not had previous dealings with the particular carrier, unless that inference is expressly negated**" (Stress added). E Chance "Principles of Mercantile Law", 1980, Cassell Professional Handbooks Revised by L Curzon p. 228 "The person who wishes to send goods by sea makes an agreement with the shipowner to carry his goods. **such an agreement is effected by a bill of lading which is at one and the same time a receipt for the goods to which it relates, a contract for their carriage and delivery upon the terms and conditions therein stated, and a document of title to the goods consigned**" (Stress added).

¹⁴⁹ L Koffman, E Macdonald "The Law of Contract", 1995, Tolley pp. 18-20.

¹⁵⁰ H Gutteridge "The Law of Banker's Commercial Credits", 1976, Europa Publications Limited p. 90 "**The traditional bill of lading is ... represents the contract pursuant to which they are carried**". F Tillyard "Banking and Negotiable Instruments", 1906, London Adam and Charles Black p. 265 "**The contract contained in the bill of lading is not assignable at common law**". (Stress added).

to the bill of lading as being the contract of carriage not only between the shipper and the carrier but also between the carrier and the third party. On the other hand, there is a strong view, which has prevailed, that the bill of lading is merely evidence of the contract or excellent evidence of it.¹⁵³ If the terms of the bill of lading are merely evidence of the contractual terms, then there should be reference only to the real contractual terms and not to the terms of the bill of lading which can be modified at any stage of the transaction. There is a difference in the understanding of the contractual status of bills of lading between the former and the latter. The former accept, in accordance with statute law, that there is one contract of carriage, which is the bill of lading contract, under which the received cargo is transported and delivered to its destination. The latter accept that the bill of lading is not the contract of carriage. Their view is not compatible with the principal that the bill of lading as an original contract, rather than any other contract, is endorsed to the endorsee. The uncertainty regarding the contractual role of bills of lading

¹⁵¹ J Crump "General Average, Salvage and the Contract of Affreightment" 1985 *LMCLQ* 19 p. 19 "It was not until the 14th or 15th AD that merchants are found it necessary to invent contracts, like bills of lading and bills of exchange". (Stress Added). W Wills "*The Law of Negotiable Securities*", 1923, Sweet & Maxwell p. 51 "Moreover, until the 18 & 19 Vict c111, no one could sue upon the contract contained in the bill of lading unless he was originally a party to such contract" (Stress added).

¹⁵² T Reeday "*The Law Relating to Banking*", 1985, Butterworths p. 55 "Bills of lading (being both contracts of carriage and receipt for goods and also documents of title to those goods)". L Sealy, R Hooley "*Text and Material in Commercial Law*", 1994, Butterworths p. 14 "those standard form contracts ... bills of lading". L Gorton, R Ihre, A Sandervarn "*Shipbroking and chartering practice*", 1990, Lloyd's of London Press Ltd p. 50 "The bill of lading performs different important functions. It may constitute ... b) a contract for the carriage of the goods and the delivery thereof and thus contain the terms and conditions of carriage". M Wilford "*Time Charters*", 1982, Lloyd's of London Press p. 226 "A bill of lading ... including contract of carriage". A Kadar, K Hoyle, G Whitehead "*Business and Commercial Law*", 1993, Made Simple Books pp. 262-265, p. 262 "A contract of carriage of goods in a general ship, the contractual document being a bill of lading". (Stress Added)

¹⁵³ D Day "*The Law of International Trade*", 1981, Butterworths p. 12 "It represents or evidences the contract of carriage", J Beatson "Reforming the Law of Contracts for the Benefit of Third Parties" in 1992 Vol. 45 *Current Legal Problems* 1 Oxford University Press p. 6 "The bill of lading contains or evidences the main carriage contract between the shipper of goods and the carrier". C Schmitthoff, D Sarre "*Charlesworths Mercantile Law*", 1984, Stevens p. 575 "But the bill normally contains the terms of the contract of carriage. It is therefore evidence of those terms", R Grime "*Shipping Law*", 1991, Sweet & Maxwell p. 151 "The bill is also the vehicle for the contract of carriage". R Card, J James "*Law for Accountancy Students*", 1986, Butterworths p. 504 "It may be a contract between the shipper and the carrier ... for the carriage of goods in a general ship, the terms being evidenced by a bill of lading". C Schmitthoff "*Export Trade*", 1990, Stevens p. 542, 562 "a memorandum of the contract of carriage, repeating in detail the terms of the contract which was in fact concluded prior to the signing of the bill". R Bacon "*Payne's Carriage of Goods by Sea*", 1925, Butterworth p. 11 "it is very good evidence of the contract of affreightment, though not the contract itself". J Slater "*The Commercial Law of England*", 1929, Pitman & Sons p. 144 "A bill of lading ... which also contains the terms and conditions agreed upon as to their carriage. It is not necessarily the contract of carriage itself, though it

is expressed clearly in Guest's¹⁵⁴ work where the bill of lading is stated as being the contract of carriage and at the same time as merely evidence of it. Furthermore, when a ship is chartered and used as a general ship, the bill of lading is stated as being the contract of carriage between the charterer and the shipper or the consignee.¹⁵⁵

Watts¹⁵⁶ brings forward the opinion that:

“when the goods are put on board and the bill of lading signed, it is, in general, *the evidence of the contract, and cannot be varied by parol evidence*”. (Stress added).

Therefore, the term “evidence of the contract” is utilised in the sense that the bill of lading is the contract, which is compatible with the view expressed by Lord Esher in *Leduc v Ward* (Court of Appeal) and Mr Justice Clifford in *Delaware*¹⁵⁷ (Supreme Court of US). Hence, there is a divergence of opinion among scholars regarding the meaning which has been attributed to the terms “contained in” and “evidence of” the contract.

Salmond and Winfield¹⁵⁸ expressed the view that the bill of lading contract has to be in writing and in a bill of lading form in order to be negotiated.¹⁵⁹ Moreover, they have not rejected the view that we can have either a contract of carriage in the form of a bill of lading or an oral one.

is excellent evidence of it”.

¹⁵⁴ A Guest “*Principles of the English Law of Contracts*”, 1959, Clarendon Press Oxford p. 389 “**A bill of lading, then, is a contract assignable without notice**”.(Stress added).

¹⁵⁵ J Goodacre “*Marine Insurance Claims*”, 2nd ed, Witherby & Co Ltd p. 357 “**The bill of lading is regarded as the contract between the charterer and the shipper**”, p. 355 “This document becomes the contract of carriage”. R Temperley, J Rowlatt “*The Carriage of Goods by Sea Act, 1924*”, 1927, Stevens & Sons p. 9 “In the case of a contract the appropriate form of which is a bill of lading ... **a contract between a shipper of goods (who is not the charterer) and the ship owner**”. *Serraino & Sons v Cambell* [1891] 1 QB 283 p.292.

¹⁵⁶ J Watts “*A Compendium of Mercantile Law*”, 1924, Stevens & Son & Sweet & Maxwell p. 404

¹⁵⁷ 20 Led 779

¹⁵⁸ Sir J Salmond, P Winfield “*Principles of the Law of Contracts*”, 1927, Sweet & Maxwell pp. 123-24 “**a bill of lading is a contractual instrument** signed by or on behalf of a ship owner ... setting out the terms of the contract of carriage. There is no rule of law which requires that a contract for the carriage of goods by sea (a contract of affreightment as it is called) shall be embodied in such a bill of lading or that it shall in any other manner be made or proved in writing. **A contract of carriage made in the form of a bill of lading** possesses, however, certain characteristic qualities and incidents which do not exist in the case of a verbal contract for the same purpose”. (Stress added).

¹⁵⁹ The Carriage of Goods by Sea Act 1924

Does the endorsement of the bill of lading transfer contractual terms others than those of the bill of lading ? If it is suggested that the contract of carriage is other than the bill of lading, then this contract should be transferred to any third party instead of the bill of lading contract. Consequently, the transferee will become party to the real contract and not to a document which can hardly be seen as a mere evidence of some of the original contractual terms. According to Lord Chorley¹⁶⁰ the endorsee becomes a party of the contract of carriage evidenced in the bill of lading. The term “evidenced in” should be accepted only under the meaning that the bill of lading is the contract of carriage itself and, consequently, the contract can be conclusively evidenced in the bill. However, in American law the contract of carriage is evidenced thereby in the bill of lading, but the bill of lading is the contract of carriage.¹⁶¹

Express terms have contractual force if the parties are notified before or at the time of the conclusion of the contract.¹⁶² The publication of bills of lading, their procurement by the shipper and the common knowledge that goods are carried under the terms of bills of lading are more than a notification of the terms of the contract. Furthermore, shipper and carrier co-operate in the preparation of the bill. Thus, it could be said that in the case of bills of lading there is full notification of the terms of the contract prior to its conclusion. The master authorises the agreement as it is expressed in

¹⁶⁰ Lord Chorley “*Law of Banking*”, 1950, Pitman p. 242 In 1950, Lord Chorley wrote about the bill of lading contract that “Under the Bills of Lading Act 1855 the endorsee ... but becomes an assignee of the contract of carriage evidenced in the document”. *Scrutton on Charter Parties and Bills of Lading*, 1984, Sweet & Maxwell, p. 186 “transferred to him all the rights and duties of the original shipper under the contract evidenced in the bill of lading”, N Gaskell, C Debbatista, R Swatton “*Chorley & Giles Shipping Law*”, 1987, Pitman p. 254 “This Act established ... the consignee ... a party to the contract evidenced in the bill”. J Crossley Vaines “*Personal Property*”, 1954, Butterworth & Co Ltd p. 141 “By the Bills of Lading Act 1855, the benefit (But also the burden) of the original contract of carriage passes to the consignee or indorsee and he may sue there on ... Moreover **the indorsee is only bound by the contract in the bill**” (Stress Added). P Atiyah “*An Introduction to the Law of Contract*”, 1995, Clarendon Press p. 373 “The transfer ... is treated as **transferring the whole contract of carriage**” (Stress Added).

¹⁶¹ *The Themis* 275 F 254,262. *Aljassim v SS South Star* 323 Fsup 918,922 “The contract evidenced by the bill of lading ... is the contract of the ship”.

¹⁶² C Debbatista “The Bill of Lading as the Contract of Carriage: A Reassessment of *Leduc v Ward*” 1982 *MLR* 652. C Debbatista “*Sale of Goods Carried by Sea*”, 1990, Butterworths p. 138 “For surely, most shippers and carriers would expect the terms of their contract to be contained exclusively in the bill of lading”.

the bill of lading. Additionally, bilateral contracts are concluded on the exchange of mutual promises and contracts generally need no written record for their validity. In the case of contracts of adhesion mutuality of promises is differently perceived with regard to the creation of the contracts. The bilaterally exchanged promises can be agreed as contained in the well-known document used in the particular transaction. Consequently, the issue of the document at a later stage does not mean that it is evidence of a pre-existing contract.

In contrast, Reynolds¹⁶³ considered that the transferee took a different contract rather than the original contract, despite the fact that he recognises that the bill of lading is, in practice, the contract of carriage. In accordance with the doctrine of privity and the 1992 Act, the consignee has to become part of the original contract of carriage. This approach has been endorsed in order to by-pass the inconsistency which exists when it is suggested that a merely evidential document is endorsed as a contract.

Chorley and Giles¹⁶⁴ have argued that the contract is made (or more strictly evidenced) by a bill of lading. There is a big difference between saying that on the one hand the offer is the bill of lading and that on the other hand “strictly” the offer was not the bill of lading but a combination of oral terms and some of the terms of the bill of lading. If this dual phraseology is endorsed, then there is an uncertainty as to how to identify the offer for the conclusion of the contract and the contractual nature of the bill of lading.

¹⁶³ F Reynolds “The Carriage of Goods by Sea Act 1992” 1993 *LMCLQ* 436 p. 437 “The transferee of the bill of lading took, however, not the same contract as the consignor (of which contract the bill of lading was, **in theory at least**, merely evidence) but a new contract on the basis of what appears on the face and reverse of the bill of lading” (Stress added). *The Heidberg* [1994] 2 Lloyd’s Rep 287 p. 310 “The transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and the shipowner”.

¹⁶⁴ L Chorley, O Giles “*Shipping Law*”, 1951, Pitman & Sons pp. 92, 100 “The difficulties arise in the first place from the use of two entirely different forms of contract, the charter-party and the bill of lading ... The contract of affreightment is in this case made (or more strictly evidenced) by a bill of lading which is usually issued after the loading of the goods”. R Williams “Waybills and Short Form Documents: A Lawyer’s View” 1979 *LMCLQ* 297 p. 302 “It is generally accepted that a bill of lading is not the contract of carriage but merely evidence (albeit excellent evidence) of the terms of such contract”.

The contract is embodied in a bill of lading as in a charter-party.¹⁶⁵ Hence, the contractual nature of both documents should be considered as being identical. Moreover, the bill of lading is always the contract in hands of a third party holder. Even the contract of carriage under a charter-party can be concluded prior to the issue of the charter-party. Consequently, there can be support for the idea that the charter-party is merely evidence of the contract or that the contract is contained in or evidenced by the charter-party.

On the one hand, Goode¹⁶⁶ accepts that the contract must be found in many papers which have been issued during the loading process or in advertisements apart from the bill of lading . On the other hand, Henderson¹⁶⁷ says that the terms of the contract should be collected from prior arrangements and announcements only in the absence of a bill of lading. It sounds so unrealistic to look for the terms of the contract in so many unofficial papers which generally are not considered to contain the offer of the contract. Moreover, advertisements are not often considered to be offers but merely invitation to treat, since advertisements and announcements often lead to further negotiations before they are finalised.¹⁶⁸ It could be argued that the bill of lading introduces all the proposed

¹⁶⁵ F Hopkins, G Watkins “*Business and Law for the Shipmaster*”, 1977, Brown, Sons & Ferguson Ltd Glasgow p. 440 “A contract of affreightment can, and sometimes may, in the preliminary stages of negotiation, be made by word of mouth, but it is of course customary for the contract eventually to be embodied in some convenient form of document. The forms employed for this purpose may, according to circumstances be 1) charter parties, 2) bills of lading”. G Paton “*Bailment in the Common Law*”, 1952, Stevens & Sons p. 280 “... **goods were rarely shipped without a special contract embodied either in a charter party or a bill of lading**” (Stress added).

¹⁶⁶ R Goode “*Commercial Law*”, 1982, Penguin Books p. 607 “these must be ascertained after reference to all relevant facts and documents, including oral discussions between the parties or their respective agents, sailing advertisements, sailing cards, shipping notes, mates' receipts.”

¹⁶⁷ J Henderson “*Carver's Carriage of Goods by Sea*”, 1925, Stevens & Son pp. 70-71 “if no bill of lading ... is given upon the shipment, the contract of carriage must be collected from the announcements and arrangements that were made prior to the goods shipped ... Particular forms of bills of lading are used in certain trades and where that is the case a shipper will be presumed to agree to accept the usual form ... The bills of lading are usually procured by the shipper and filled up by him.” p. 73 “**The bill of lading purports to be a statement of the contract and it would be anomalous and inconvenient that a formal document, accepted by the parties, and apparently expressing the relation between them, should be only evidence, liable to be rebutted, of that relation**”. (Stress added). *Halsbury's Laws of England*, 1997, 4th ed Reissue, Butterworths Vol. 43(2) Par 1539 p. 1037.

¹⁶⁸ G Treitel “*The Law of Contracts*”, 1991, Sweet & Maxwell/ Stevens & sons, p. 13 “Advertisements of bilateral contracts are not often held to be offers since such advertisements do often lead to further bargaining”. *Partridge v Crittenden* [1968] 1 WLR 1204 p. 1209 “I think when one is dealing with advertisements and circulars ... there is business sense in their being construed as invitation to treat and not offers for sale”. R Upex “*Davies on Contract*”, 1991 Sweet & Maxwell p. 8 “The rule of law that calling for tenders is not making of an offer accords with common sense”.

terms and conditions as they have been finalised at the end of the negotiations. So, reference to the law of contract in order to establish the terms of the contract should be allowed when and if a bill of lading has not been issued. It is specified that:

“In itself it is not a contract in the sense of being a document signed and witnessed by or on behalf of both parties.”¹⁶⁹

As mentioned above, the existence of a contract does not depend on its signing by the parties, but simply by its acceptance by them. Therefore, it could be argued that the absence of the shipper's signature cannot be regarded as a parameter which nullifies the character of a bill of lading as a contract of carriage.

Todd¹⁷⁰ expresses the view that the bill of lading is a statement by the carrier of his view of the terms of the contract of carriage. The terms of the bill of lading have to be regarded as the contractual terms according to the view of both the shipper and the carrier, otherwise, there is no concluded contract between the parties under the general principles of the law of contract.

When a shipper contracts regularly with a liner, then he is bound by all the terms of the liner's bill of lading, due to the course of dealings. Does it make any difference when the shipper knows the published terms of the bill of lading from the time of his first shipment? A standard form contract is a printed document consisting of a uniform set of terms for use by an organisation as the basis upon which it trades. Does this description portray the bill of lading as it is engaged in maritime transport? Shippers are committed to contract on any terms common in the specific trade.¹⁷¹

¹⁶⁹ fn 165 Hopkins p. 489

¹⁷⁰ P Todd “*Modern Bills of Lading*”, 1990, BSP Blackwell Scientific Publications p. 90 “The bill of lading does not contain the carriage contract but is merely evidence of it ... Technically the bill of lading is a statement by the carrier of his view of the terms of the carriage contract”.

¹⁷¹ *ibid.* Todd p. 91 “**An inference may also be drawn that a shipper intends to contract on any terms common in the particular trade, even if he has not had previous dealings with the particular carrier, unless that inference is expressly negated**”(Stress added). p. 89 “When we are talking about the carriage contract, therefore, we mean not only the contract between the carrier and the original shipper of cargo, but also the contract that is usually transferred to subsequent holders of the bill of lading” G Thomson “*Bills of Lading*”, 1925, Stevens & Son p. 18 “The shipper commonly contracts with the shipowner with reference to the terms contained in the shipowner's printed bill of lading. The

The above analysis has brought out the divergence or convergence between the expressed views of the scholars. Their differentiation is based upon the endorsement or lack of endorsement of the following assumptions: first, the bill of lading should be classified as a special kind of contract which should be seen as a category *sui generis* within the category of contracts of adhesion; second, the endorsement or not of the principle that a later acceptance of a document, where the detailed terms of the contract are contained in and which has been historically employed as a contract, means alteration of any previously concluded contract; third, statutory rules, being more specific, are superseding general common rules .

The scholars, who have endorsed the view that the bill of lading is merely evidence, were unable to explain, through the principle of endorsement, the emergence of a receipt as a contract.¹⁷² In conclusion, all scholars have converged towards the view that the bill of lading is the contract of carriage on the hands of a third party.

4.13 Deductions

The Bills of Lading Act 1855, probably reflecting the prevailing view at the time, stated that the contract of carriage is contained in the bill of lading. Has English law achieved precision in the definition of the contractual nature of the bill of lading as Lord Bramwell asked when he challenged the language of the 1855 Act? Many scholars refer to bills of lading as standard form contracts. Judges and scholars referring to bills of lading as not being contracts, were unable to explain how a receipt or an evidential

contract is finally expressed in the signed bill of lading". N Curwen "The Problems of Transferring Carriage Rights: An Equitable Solution" 1992 *JBL* 245 p. 246 "In reality the carrier and buyer are playing out roles determined by the original carriage contract between carrier and shipper".

¹⁷² D Day "*The Law of International Trade*", 1981, Butterworths p. 13 "**The idea that a party can transfer contractual rights which he does not have is not a common one in English law**" (Stress added). R Bradgate, F White "The Carriage of Goods Act 1924" 1993 *MLR* 188 pp. 196-7 "The problem was resolved by judicial creativity, treating the Act as if it provided that a new contract with the consignee or transferee on the terms of the bill sprang up on consignment or indorsement. Curiously, the new Act raises the same problem".

document can be endorsed as a contract. English law evades this problem by stating that a contract springs up between the carrier and the consignee on the terms of the bill of lading. It has been established that the bill of lading is merely evidence of the contract. A dual perception (“contained in” or “evidenced by” the bill of lading) concerning the contractual role of bills of lading has been introduced lately. This has been endorsed by the Carriage of Goods by Sea Act 1992, which, as mentioned above, creates uncertainty about the contractual status of the bill of lading. The dual approach is not helpful because there is one contract of carriage expressed in a single way. According to the *Cho Yang Shipping v Coral* case, the dual perception means that the bill of lading is merely evidence in the hands of the shipper and regardless of the fact that in practice the bill of lading is referred to as bill of lading contract. The bill of lading is classified as a memorandum. The uncertain contractual nature of the bill of lading has not caused problems in practice because the bill of lading is used as the contract of carriage¹⁷³ regardless of the view expressed in *the Ardennes* case and rarely is there a conflict of interests between the shipper and the carrier. It could be argued that the adoption of the term “bill of lading contract” should mean that the bill of lading is the vehicle of the contract in the modern shipping practice. Otherwise, the bill of lading should not be referred to as a bill of lading contract in English law.

In the next chapter a comparative analysis of the contractual role of bills of lading as it stands in the three legal systems will take place.

¹⁷³ E Hardy Ivamy “*Dictionary of Shipping Law*”, 1984, Butterworths p. 9 “**In practice, the bill of lading is regarded as the contract**”. (Stress added). *Partenreederei Tilly Russ v Haven* [1985] 1 QB 931 p. 946 “**The United Kingdom admits that the question whether a bill of lading ought to be categorized as an oral agreement evidenced in writing rather than as an actual agreement in writing has not been resolved beyond dispute in the United Kingdom**”. (Stress added).

CHAPTER V

Comparative Analysis of the Contractual Role of Bills of Lading under Greek, United States and English Law

5.1 Introduction

The Greek legal system is a civil law system and, therefore, the codification of the different laws is its main characteristic. Thus, the evidential role of the issued documents in any transaction is stated within the articles of the codes. The evidential and contractual role of bills of lading is contained in the relevant article of the code, as mentioned in the particular chapter. The civil law systems of Europe, such as the Greek system, are based upon judges interpreting codes.¹

The US legal system has arisen from the common law tradition but it has developed its individuality. Since the Federal Bills of Lading Act 1916 (Pomerene Act) has been introduced to regulate the contractual role of bills of lading, the common law rules have not been applied any more to determine its contractual role. The reform of the law rests in the hands of the legislature rather than in the hands of the judge, whose duty now is to interpret and apply the principles of law as they have been expressed by statute law. In contrast, in the common law tradition, judges have a potential power to create law. Consequently, the introduction of the relevant Acts and the Uniform Commercial Code, regulating the role of bills of lading and in general the commercial documents, is the result of its development. The US judges have consistently followed the definition of the relevant article, regarding the contractual function of bills of lading, in a similar way

¹ A Chloros "Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Reasoning" in *Comparative Legal Cultures*, 1992, Dartmouth, pp. 87-91.

to the Greek judges. In other words a consistent and precise use of the legal terms has been endorsed by the US judges.

The English legal system is the representative of the common law tradition and it has its individuality. The whole of the common law is a product of judicial creativity. As a result, English judges still have a potential power to create law. As mentioned before, the key to English legal reasoning lies in its use of judicial precedent. The main reason for judicial reluctance to overrule old decisions would appear to be the fact that overruling operates retroactively and, therefore, judges do not want to overturn legal decisions which have been established by the judgements in the older cases. Judges do not approach a new case on the basis of broad principles and, therefore, judges do not decide *de novo*. On the one hand, it could be argued that judicial precedent provides certainty and consistency. Judicial precedent favours the *status quo*. On the other hand, judicial precedent slows down the pace of change within a legal system. In a commercial world, such as the maritime transport and commerce, where things are constantly changing, the advantages of judicial precedent can be a disadvantage. Under a strict compliance with the idea of judicial precedent, law would be certainly outdated. The legislature exists to change legal rules. Statute law has been introduced (the 1855 Act - the 1992 Act) regulating the contractual status of bills of lading, but English legal reasoning still remains firm in its use of judicial precedent. Accordingly, Lord Wright² said that “elasticity in the authorities” allows the law to advance. The differentiation in the approach of the judges created by the different opinions, regarding the contractual nature of bills of lading in the hands of the shipper, has been illustrated in our analysis of English law where many law Lords (Lord Esher, Lord Selborne, Lord Watson, Lord Fry) have stated that the bill of lading is the contract in the hands of the shipper. It could be

² Lord Wright “The Common Law in its Old Home” in Lord Wright *Legal Essays and Addresses*, 1939, Cambridge University Press pp. 341-42.

argued that those law Lords' approach was based on the idea that English legal reasoning should be focused on the interpretation of the relevant Act (the 1855 Act - the 1992 Act) rather than on judicial precedent. In US and Greek law judicial creativity cannot be used in order to cover a vacuum concerning the legal explanation of a matter, such as the transfer of a receipt into a contract, because of the legal characteristics of the two systems. A legal action according to these two systems has to be based upon a provision of a relevant Act. Thus, the civil law judges follow the principles which the legislature has created for them.

The words "the contract contained in the bill of lading" in the Bills of lading Act 1855 have been interpreted in English law in the sense that there is no contract contained in the bill of lading. This interpretation has prevailed! It could be argued that the definition of the 1855 Act, concerning the contractual role of the bill of lading in the hands of the shipper, has been replaced by the common law perception. Thus, the contractual role of the bill of lading is divided into two parts. One part, concerning the relation between the carrier and the shipper, is governed by common law rules and the other part, concerning the relation between the carrier and the endorsee, is governed by statute law. In contrast, in the US and the Greek legal regimes the contractual role is defined solely by the statute. The freedom of the judges has forced the legislature to introduce a dual terminology ("contained in" or "evidenced by" the bill of lading) in the 1992 Act, in order to accommodate both the interpretations which have been given to the previous Act.

Both the US and the Greek laws are more liberal in the introduction of rules regulating and categorising documents which have gained commercial utility through their mercantile usage. The US legal system, based on a common law tradition, has moved towards the civil law tradition by introducing, the codification of the rules, and also by the judge first interpreting the statute and then depending on judicial precedent.

English common law is not so progressive in introducing new rules and, therefore, the judges with their judgements not only create law but also, in the case of bills of lading, base their views, primarily on judicial precedent rather than upon the interpretation of the definition of statute law. Common law, because of the doctrine of judicial precedent, is inherently limited and can only develop new principles by varying and extending the application of existing principles. Legislation can embody wholly new principles of law formulated without reference to any existing principles. As mentioned above, even statutes do not enjoy the absolute authority accorded to them, because they conflict with the common law, which is still regarded as sovereign.

The bill of lading, by its usage in international trade, has developed from being a receipt, to being a receipt and a contract, while mercantile usage has transformed it into a document of title.³ The contractual role of bills of lading as it stands individually in the three systems has already been investigated. In this chapter, the whole focus will be on the synoptic comparison of the position between the three legal regimes without any detailed analysis of the cases or views which have already been conclusively examined in the previous chapters.

5.2 The Substance of the Term “Covered By”

The contract of carriage must be covered by a bill of lading according to English law (The Carriage of Goods by Sea Act 1924), United States law (The Carriage of Goods by Sea Act 1936) and Greek law (Nomos (Act) 2107/1992). This terminology has been transplanted to the three legal regimes from the Hague Rules. American Jurisprudence has interpreted the term “covered by” as meaning a complete incorporation of the

³ J Wilson “*Carriage of Goods by Sea*”, 1993, Pitman p. 123. W Tetley “*Maritime Liens and Claims*”, 1989, International Shipping Publications p. 332 “Way-bills, like bills of lading, are ... contracts of carriage...”. *The Law of June 18, 1966 of France* (Law No 66-420 JO 24 June 1966 p 5206). Articles 49 and 50 of the Degree of December 31, 1966, however, refer only to bills of lading because only **the case of bills of lading is the contract surrendered on delivery.**

contract of carriage into the bill of lading, in the sense that the bill of lading has become the contract which has superseded every prior agreement. In contrast it could be said that the terminology “covered by a bill of lading” has been interpreted by Greek legislature as meaning a demand for the conclusive evidence of the contract by the bill of lading.

The position under English law was not so clear. There was a discrepancy in the courts' decisions. In some cases the contract was regarded as being contained in the bill of lading under the meaning that the bill of lading was the contract of carriage, but in others the contract was merely evidenced by bills of lading. It will be recalled that the term “covered” as it has been perceived in the Hague Rules means that the Rules are implied to the bill of lading contract. Besides, the concept that the bill of lading contract is concluded by and with the issue of the bill of lading, despite there being case law and views expressed in favour and in accordance with statute law, has not prevailed in English law. As mentioned above, the term “bill of lading contract” is used to express a merely **evidential** role of the bill of lading. In English law, the decision in *the Ardennes* case is the judicial precedent which has overshadowed the definition of the statute law.

A harmonisation of the three legal systems could be achieved if they were to follow the perception that the term “covered” means that the bill of lading is the contract. If the bill of lading is not meant to be the contract of carriage, then why should the contract be covered by a bill of lading or any other document? Additionally, the contract should be covered by the bill of lading, if its terms have been incorporated within the content of the bill of lading. If it is suggested that some terms are not incorporated in it or that they can be modified by any means of evidence, then the contract is not fully covered by the bill of lading. On the one hand, if by “covered” is meant that the contract is merely concluded under the terms of the bill of lading or that the bill of lading is merely evidence of the contract, then the same perception has to apply to bills of lading under charter-parties and, therefore, there is no need to refer to the bill of lading at all. On the

other hand, it could be argued that when and if a bill of lading is issued, then the contract of carriage is reduced to writing in the form of a bill of lading contract. In international trade the bill of lading is circulated as the contract of carriage regardless of its holder and, therefore, it could be assumed that the term “covered by” is perceived in the sense that the bill of lading becomes the contract of carriage. Additionally, since the bill of lading is circulated as the contract, there is no disruption of maritime commerce in spite of the different approach in English law. In actual fact, the next case reported in England after *the Ardennes* case in 1950 was *Cho Yang Shipping v Coral* in 1997 and it is concerned with a bill of lading issued in Germany and not in England. Finally, it could be argued that maritime commerce would suffer disruption if a variable view was taken, because the international rules have to apply, as mandatory law, uniformly to the same contract of carriage which is covered by a bill of lading.

5.3 The Common Law Background

US law and English law stem from the common law tradition and, therefore, the understanding of the contractual nature of bills of lading should be the same. In contrast, Greek law is an example of a civil law system and, therefore, a comparison with regard to common law tradition cannot be presented. Under common law rules, as they are perceived in the US, the bill of lading is a contract made with the consignor.⁴ The bill of lading contract was not assignable under US and English common law.⁵ The preamble of

⁴ S Williston “*Williston on Sales*”, 1948, Revised Ed, Vol. 2 Baker Voorhis & Co. Inc. p. 530 Williston states that “Accordingly, a bill of lading, however made out, is, under the common law rule, a contract solely with the consignor”. *Brandt v Liverpool Steam Navigation Ltd* [1924] 1 KB 575 p. 594 Scrutton, L.J said that “Before the Bills of Lading Act 1855 ... the indorsement of the bill of lading...did not assign the contract contained therein, and therefore the person ... did not by the same indorsement acquire a right to sue the ship owner upon his contract, which was evidenced in the bill of lading”. *The Gudermes* [1993] 1 Lloyd’s Rep 311 p. 314 “But at common law that did not vest the endorsee any contractual rights against the shipowner under the bill of lading contract”.

⁵ *Cox v Vermont Cent Co.* 49 NE 97 In line Morton, J stated that the bill of lading is not negotiable and “An indorsement and delivery ... operates to transfer the title to the goods ... but not as an assignment of the contract, except by force of some statute, as is now the case in England and some of the states here” (Stress added).p. 100 “A bill of lading is not a negotiable instrument”. F Tillyard “*Banking and Negotiable Instruments*”, 1906, London Adam and Charles Black p. 265 “The contract

the 1855 Act recites the pre 1855 state of law under which property in goods covered by a bill of lading would pass to an endorsee upon endorsement of the bill of lading, but nevertheless all rights regarding the contract “contained in” the bill of lading continue with the original shipper. It is specifically mentioned that the 1855 Act was introduced in England, in order to govern the transfer of the contract of the original parties⁶ to a third party. In other words the statute was introduced to remedy the ineffectiveness of the common law in governing the transfer of the bill of lading contract to a third party. Thus, there was a common understanding among these common law systems.

As mentioned above, the bill of lading has been referred to as the contract of carriage with regard to the relation between the shipper and the carrier in some cases in English law also, (*Glynn v Margetson*, *Leduc v Ward*, *Frenkel v Macandrews & Co*, *Fraser v Telegraph Construction Co*, *Glynn v East and West India Dock*). Scholars, in both legal systems, have expressed the same view and they have based their opinion on statute law, as have the judges.⁷ The parole evidence rule was applicable to bills of lading contracts and, therefore, oral testimony could not change their content. The substance of the parole evidence rule is the same in both legal systems. The application or non-application of the rule is not based on the nature of the rule, but on the assumption of the nature of the document. The rule does not define the characteristic of the bill of lading, but the assumption of its character determines the application or non-application of the

contained in the bill of lading is not assignable at common law” (Stress added). *Corpus Juris Secundum*, 1975, Vol. 13 West Publishing Co. p. 253 **“As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law”** (Stress added).

⁶ R Kidner “Economic Loss : Anns, Junior Books and Bills of Lading” 48 *MLR* 352, p. 353 **“Accordingly the Act allowed the contract between consignor and ship owner also to be enforced between consignee and ship owner in certain circumstances”** (Stress added).

⁷ C Debattista “The Bill of Lading as the Contract of Carriage: A Reassessment of *Leduc v Ward*” 45 *MLR* 652 p. 659 “as far as Lord Esher MR was concerned, the terms of a contract of carriage covered by a bill of lading are generally to be found exclusively in the bill of lading, and **this is so whether or not the bill is in the hands of an endorsee or of the original shipper**” (Stress added). M Mark “*Sale of Goods*”, 1981, Butterworths p. 315 Mark said that “At common law... ***the contract created by the bill of lading*** could not, therefore the endorsee could not sue on the contract in his own name”. (Italics added). M Chalmers “*The Sale of Goods Act 1893*”, 1924, Butterworth p. 178 M Chalmers stated that “At common law the property in the goods could be transferred by the endorsement of the bill of lading, but ***the contract created by the bill of lading*** could not”. (stress added).

rule.

Bills of lading have become formal contracts in US law, but they have been treated as merely memoranda in English law. In fact, historically, the bill of lading, from being a receipt, develops into a receipt and contract, and, afterwards, through practical usage, becomes a negotiable document of title. Therefore, this function should be preserved. Additionally, since their introduction in international trade, bills of lading are used and issued in the same way in both systems. Hence, they should have the same contractual nature in both systems as well.

On the one hand, under the US law⁸ the issue of the bill of lading is regarded as superseding any previously concluded oral or written contract, by becoming the final contract of carriage. On the other hand, in English law the bill of lading is not the contract, in contrast with its historical introduction as the contract in international trade and statute law (the 1855 Act). There is a divergence of the two systems regarding the contractual role of bills of lading in the hands of the shipper.

The bill of lading is argued as being a contract which is passed as such to any third party.⁹ In fact the buyer and the carrier do not enter into a new contract with one other in order to facilitate delivery of the cargo.¹⁰ So, the carrier and the buyer are playing out roles determined by the original carriage contract between carrier and shipper. However, it is admitted in Halsbury's Laws of England¹¹ and by Hardy Ivamy, that, in

⁸ In *Southern Exp. Co. v J Dickson* 24 Led 285 p. 287 "We base our judgement upon the bill of lading and its legal results, adopting the fifth point of the plaintiff in error, that any antecedent agreement or understandings was merged therein and extinguished thereby" *Show v Indiana B & W Co* 9 NE 702, *The Lady Franklin* 19 Led 455. In *Transmarine Corporation v Charles H Levitt* 25 F2d 275 p. 277 "We agree that the bill of lading was the only contract between the parties, and that it took the place of the prior oral contract as the final memorial of the parties obligations"

⁹ A Bell "The Bills of Lading Act 1855 Today" 1985 *JBL* 124 p. 124 "The buyer of goods to sue their sea carrier on the terms of the bill of lading under which his overseas seller shipped them". G Treitel "Bills of Lading and Third Parties" 1986 *LMCLQ* 294 p. 296 "The bill of lading is already a contract between shipper and carrier to deliver the goods to the consignee or order"

¹⁰ N Curwen "The Problems of Transferring Carriage Rights: An Equitable Solution" 1992 *JBL* 245. E Pearson "*Law for European Business Studies*" 1994 Pitman p. 141 "In an overseas sale, buyers and sellers are usually distant from each other and the goods must be moved. Thus, an international carrier of goods is usually employed and either the seller or the buyer makes a contract with the carrier to transport the goods. **This is known as a bill of lading**" (Stress added).

¹¹ *Halsbury's Laws of England*, 1997, Vol. 43 (2) Butterworths p. 916 "In practice these contracts are

practice, the bill of lading is issued as the contract. In English law, there is very often a reference to the bill of lading contract¹² without a definition that in fact the bill of lading is not a contract, but a memorandum. Thus, so long as the bill of lading is regarded as being merely a memorandum in English law, judges should not refer to a bill of lading as a bill of lading contract. Besides, English scholars have mentioned the bill of lading as being a contract of adhesion and, therefore, their approach should be seen as a legal background upon which judges should base a reform of English law concerning the contractual status of bills of lading.

By making the distinction that the bill of lading is not issued as the contract between the shipper and the carrier, is English law more protective of the shipper's rights or more accurate regarding the terms of the contract of carriage than US law? The shipper is free to accept a bill of lading and, therefore, to be bound by its terms under which the goods are delivered to their destination. In English law, judicial creativity was necessary in order to explain the phenomenon that the bill of lading was regarded as merely a memorandum, under common law rules, and was transferred as a contract under statute law.¹³ In accordance with the language of the 1855 Act¹⁴ and the Pomerene Act¹⁵ the bill of lading is the contract which is transferred and the third party becomes part of it. Thus,

usually written and most often are expressed in one or other of two types of document called respectively a charter-party and a bill of lading". E Hardy Ivamy "*Dictionary of Shipping Law*", 1984, Butterworths p.9 "**In practice, the bill of lading is regarded as the contract**". (Stress added). J Cooke "*Voyage Charters*", 1993, Lloyd's of London Press Ltd p. 375 "It is rarely questioned in practice that the bill of lading accurately records the terms of the contract".

¹² *ibid.* p. 916 Par 1410 "In practice it is commonplace, if not wholly accurate, to refer to the bill of lading contract". Pearson "*Law for European Business Studies*", 1994, Pitman p. 209 "**Bills of lading ... which may be transferred by endorsement, are treated as negotiable instruments in the full sense of the word in most civil law countries**" (Stress added).

¹³ P Dobson "*Charlesworth's Business Law*", 1997, Sweet & Maxwell p. 659 "**The lawful holder until the COGSA 1992 the transferred contract is contained in the bill of lading**" (Stress added).

¹⁴ *The Bills of lading Act, 1855* stated that "Every consignee of goods named in a bill of lading ... to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods **as if the contract contained in the bill of lading had been made with himself**". (Stress added)

¹⁵ In accordance with section 111 of *the Pomerene Act* (49 USC 111) "A person to whom an order bill has been duly negotiated acquires thereby ... b) The direct obligation of the carrier to hold possession of the goods for him **according to the terms of the bill as fully as if the carrier had contracted directly with him**". (Stress added)

in accordance with statute law the bill of lading is the original contract of the shipper and the carrier which is transferred to the third party respectively in both legal regimes.

The practical result of the convergence of the systems, at the time, was that the bill of lading contract was the contract which could not be transferred because of the doctrine of privity. In England the plain language of the 1855 Act has been challenged and it has been established that there is no contract contained in the bill of lading, despite the fact that case law and opinions comply with the wording of the Act. As mentioned above, in English law the contractual role of bills of lading in the hands of the shipper is governed by common law rules and its contractual role in the hands of the third party is regulated by statute law. So, two different sources of law, which are accommodated within the same legal system, are involved in the regulation of the contract of carriage in the form of a bill of lading. These two sources of law have brought forward a different perception for the contractual role of bills of lading in the hands of the shipper. The common law approach has overshadowed statute law in this respect.

In contrast in the US there is no doubt about the language of the Act, which governs not only the relation between the shipper and the carrier but also the carrier and the third party. Accordingly, Morton, J¹⁶ stated that:

“An indorsement and delivery ... operates to transfer the title to the goods ... but not as an assignment of the contract, except by force of some statute, as is now the case in England and some of the states here” (Stress Added).

There is a doctrine of privity which does not allow the acceptance of the bill of lading as the contract in the hands of a third party holder. So, the doctrine of privity was in force under the common law of the United States. Thus, under common law the endorsement of a bill of lading could not transfer even the contract of carriage, while the bill of lading

¹⁶ *Cox v Vermont Cent Co.* 49 NE 97 p. 100.

was regarded to be the contract of carriage itself.¹⁷ Moreover, Williston¹⁸ states that:

“Accordingly, a bill of lading, however made out, is, under the common law rule, a contract solely with the consignor”.

It has to be taken into consideration that the Pomerene Act has been introduced in US to overcome the ineffectiveness of the US common law rules for the transfer of the original contract of carriage to a third party as well. To that effect the courts and scholars have followed the view that the bill of lading is the contract of carriage. Under Greek law not only would the plain language of the 1855 Act never been questioned but the contractual role of the bill of lading, regardless of its holder, would be regulated by the statute. Additionally, there is no explanation why the 1992 Act has endorsed a dual perception (“contained in” or “evidenced by” a bill of lading) while the function and usage of the bill of lading is the same since the introduction of the 1855 Act. The dual perception, as mentioned above, is construed under the single meaning that the bill is not the contract.

In conclusion, the wording stating that the holder has contractual rights as if “he had been a party to that contract” is endorsed by all three legal systems thus identifying the bill of lading as the contract.¹⁹ The agreement in the legal language is reflected in the practical usage of the bill of lading as the contract of carriage in the hands of the third party.

5.4 The Contract of Carriage in Greek Law

The position of Greek law is unique regarding contracts of carriage of goods by sea. These are considered to be a kind of the broader category of contracts of affreightment (charter-parties). The issue of a bill of lading instead of a charter-party in

¹⁷ *The Delaware* 20 Led 779, *The Thames* 20 Led 804, *Corpus Juris Secundum*, 1975, Vol. 13, West Publishing Co. p. 253 “As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law” (Stress Added).

¹⁸ S Williston “*Williston on Sales*”, 1948, Revised ed., Vol. 2, Baker Voorhis & Co. Inc. p. 530

¹⁹ D Faber “Electronic Bills of Lading” 1996 *LMCLQ* 232 p. 243 “The Carriage of Goods by Sea Act 1992 expressly imposes on the holder all the liabilities under the bill of lading contract”.

the case of a charter-party contract is possible according to the wording of article 108 of the Maritime Code²⁰ and, vice versa, a charter-party can be issued in the case of a contract for the carriage of goods by sea. Besides, under English and United States law charter-parties are contracts of a different legal nature and they are governed by different rules. Since The Hague or The Hague-Visby Rules and The Hamburg Rules do not apply to charter-party contracts, then charter-parties have not been regulated under the International Conventions concerning the carriage of goods by sea.²¹ It has to be taken into account that the terminology, which is used to express the contractual role of documents which are circulated in maritime transport, should be uniformly applicable to all the documents which are utilised in this respect. Thus, the terminology, which is applied to express the contractual role of charter-parties in the three legal regimes, should be applicable to bills of lading as well.

Under the strict interpretation of the Greek Code of Private Maritime Law both charter-parties and bills of lading are evidence of the contract which means that the contract of carriage has been concluded prior to the issue of both the documents. It seems that the Greek legislature wanted the contract, which can be concluded prior to the issue of the bill of lading, to be merely incorporated in both the documents. Therefore, the contract of carriage is not concluded under the terms of both the documents. In fact, charter-parties are considered to be contracts of affreightment under Greek, English and United States law, which means that bills of lading have to be contracts of carriage as well. In other words, either the contract of carriage under a charter-party is concluded by

²⁰ T Karatzas, N Ready *"The Greek Code of Private Maritime Law"* 1982 p. 32, A Kiantou Pampouki *"Maritime Law"*, 1992, Sakkoulas p. 254-56. A Yiannopoulos *"Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems"*, 1995, Kluwer Law International. p. 200 A Kiantou-Pampouki **"According to Greek law ... From this viewpoint, the bill of lading is the carriage contract itself"**, p. 4 Yiannopoulos "The bill of lading is evidence of the contract of carriage between the parties", p. 229 R. Japikse "Section 412 provides that a bill of lading should.. state or indicate the terms of carriage", p.90 K Bernaw "A bill of lading on the contrary requires a written document, p. 91 "The courts hold by accepting the bill of lading, the shipper agrees with its stipulations". B Milhorn *"Vimar Seguros v M/V Skyrefer. Arbitration clauses in bills of lading under COGSA"* 1997 *Cornell International Law Journal* p.173 "The bill of lading is a contract of carriage".

²¹ Chapter I

the issue of the charter-party or the charter-party supersedes any prior oral contract of affreightment. Hence, it could be said that the term “evidence” can be used to indicate that bills of lading are the contracts of carriage too. To that extent, there are occasions in English law where the term “evidence” has expressed the function of the charter-party as the contract. For example, Schofield wrote that “most of the cases that have arisen on whether the contract of carriage is that evidenced by the bill of lading or by the charter”.²² Additionally, in United States jurisprudence it is stated that the contract is evidenced by a charter-party.²³

Furthermore, the Greek legislature has seen the bill of lading as the conclusive evidence of the contract of carriage.²⁴ The contract of carriage has to be conclusively contained in the bill of lading not only in order to be covered by a bill of lading but also to comply with the new requirement of Greek law after the recent introduction of the Hague-Visby Rules. No parol evidence is admissible to modify the written terms of the bill of lading.²⁵ Consequently, it seems that the bill of lading has become the final written expression of the contract. Hence, it could be argued that the principle of the bill of lading being the final writing of the contract, which has been established by *Leduc v Ward*²⁶ (English law) and *Delaware*²⁷ (US law), is ascertained in Greek law as well. Moreover, the exact wording of *Leduc v Ward* is found in the *John Vittuci Co v Canadian Pac Co*²⁸ case in United States jurisprudence. Therefore, it could be argued that the term

²² J Schofield “*Laytime and Demurrage*”, 1990, Lloyd's of London Press Ltd p. 341 p. 336 “The party with whom the ship owner concludes the contract of carriage evidenced by the bill of lading”.

²³ *Unterweser v Potash Importing Corporation of America* 36 F2d 869,870

²⁴ Court of Appeal of Athens 2147/78 7 EML 273, Chapter II, Article 108 “A contract of affreightment shall be evidenced by writing (charter-party). In the case of a contract for the carriage of goods, the bill of lading or ... may be substituted for the charter-party”

²⁵ Court of Appeal of Piraeus 1156/91 1991 EED 429

²⁶ [1888] 20 QBD 475 pp. 479-80 “It is the evidence in writing of what the contract of carriage between the parties is ... parol evidence to alter or qualify the effect of such writing is not admissible”

²⁷ 20 Led 779 p. 783 “in so far as it is evidence of a contract between the parties ... and cannot be contradicted or varied by parol evidence”. *Lewis Poultry Co v New York Co* 105 A 109 p. 112 “It is evidence of a contract of affreightment that must be construed according to its terms”.

²⁸ 238 F 1005 p. 1006 “A bill of lading is a contract for the carriage of goods reduced to writing and is the only evidence of the contract”.

“evidence” is perceived in the sense that no parol evidence is admissible to modify the bill of lading contract in any of the three legal systems. In other words, the bill of lading is the final expression of the contract and, therefore, it could be argued that the carrier’s bill of lading is the offer under which the contract of carriage is concluded. Moreover, as mentioned above, the bill of lading contract has to be in writing, as the charter-party contract, in order to be a contract in this form. The reduction of the contract into writing is necessary for the conclusion of the bill of lading contract. Thus, it could be argued that the bill of lading contract is concluded by and with the issue of the bill of lading.

It is worth mentioning that in common carriage in both US and Greek law the contract of carriage, in the hands of either the original parties or their transferees and endorsees, is expressed in the bill of lading. In contrast, in common carriage in English law, the bill of lading is seen as the contract of carriage except in relation to the original parties of the bill of lading. Since, the bill of lading is issued in the same way in the three legal systems, the novelty of English law is limited only in its approach regarding the relation of the original parties, and lacks a straight explanation for its divergence on this point. Taking into account the extent of international interest in regulating bills of lading, the need for the introduction of statutes in order to regulate the bill of lading contract was common in the three systems, which should be good grounds for accepting that the contractual role of the bill of lading should be defined solely by these statutes. It has not taken into consideration that the bill of lading cannot be explained in an ordinary way and that it cannot be compared with any other ordinary documents which are issued solely for internal usage. Its historical and business usage should play fundamental role in the decision for its contractual characteristic. For this reason, we have a divergence between the three systems based on the importance which has been attached to the bill of lading as a document with more than 600 years of historical usage as a contract in international

trade.²⁹ Besides, if a ship is chartered and a carriage is under a charter-party, then a charter-party expresses the contract of carriage in the three legal systems.

5.5 The Conclusion of the Contract and the Issue of the Bill of Lading

There is strong support for the view that the contract of carriage is concluded prior to the issue of the bill of lading in Greek law and that the bill of lading is merely conclusive evidence of it. The issue of the bill of lading is not regarded as a prerequisite for the conclusion of the contract.³⁰ This approach is the result of the prevailing theory that contracts can be formed by the meeting of the minds of the contracting parties. The contract of carriage is not regarded as being different from a traditional contract, which can be formed by any means, either oral or written. In English law, the contract of carriage is concluded prior to the issue of the bill of lading which is merely evidence of it. In comparison, it could be argued that the conclusion of a contract by the exchange of promises and the absence of a need for a written record are the main reasons for denying the view that bills of lading are contracts in English law. Thus, the contract can be concluded prior to the issue of the bill of lading under the terms of the bill of lading.

In practice many terms of the bill of lading are not negotiated which means that those terms come into existence by and with the issue of the bill of lading. The parties must know the actual terms contained in the individual bill of lading which they accept before the conclusion of the contract. Taking into account that the terms are contained

²⁹ W Tetley "*Marine Cargo Claims*", 3rd ed, BLAIS p. 225 "**The bill of lading is an extraordinary international contract.** It reflects 600 years of historical changes in contract law and has responded to the evolution of **both civil and common law.** Often the bill of lading contract issued in one jurisdiction and the contract completed in another while any resulting dispute is litigated in a third jurisdiction". (Stress added). Article 108 of The Greek Private Maritime Code "In the case of a contract for the carriage of goods, the bill of lading ... A contract of affreightment shall be evidenced by writing (charter-party)...". Polimeles Court of Piraeus 928/1994 1995 EML 296 p. 297 "The contract of carriage which is concluded between the carrier and the shipper is contained in and evidenced by the bill of lading...".

³⁰ A Antapasis "*Code of Private Maritime Law*", 1989, Sakkoulas Athens-Komotini p. 180, Court of Appeal of Thessaloniki 72/1991 1992 Hellenic Justice 1230

only in the bill of lading, then the parties get knowledge of the terms either before the issue if they fill in the missing terms of the bill of lading or when they accept the carrier's bill of lading. It could be argued that on both occasions the bill of lading emerges as the final writing of the contract. There are two facts which throw doubt on the last argument concerning the conclusion of the contract prior to the issue of the bill of lading. The first is the fact that the bill of lading is issued and accepted after the contract has been already concluded under the terms of the bill of lading, and the second is the fact that the bill of lading contract is the contract which is transferred to any third party. Consequently, the party who gets in his terms last (which in the case of bills of lading is the carrier), without the other party raising any objection, succeeds in contracting on his own standard terms.³¹ In Greek and US law even if the contract is concluded under the terms of the bill of lading prior to its issue, then the issued bill of lading, when it is accepted, becomes the contract of carriage. The bill of lading is ratified as such from the conclusion of the contract but it is still conditional upon the actual delivery of the goods.³²

In the three legal systems, there is a difference in the perception of the bill of lading as a legal document. It could be said that in Greek law the bill of lading is finally accepted as the expression of the contract despite the fact that there is a notion that it is only conclusive evidence of it. The bill of lading is issued as the contract which will be endorsed to a third party. Greek legislature has avoided specifying that the contract of carriage is a special contract which must have a definite form and in the case of common carriage that of a bill of lading.

In US and Greek law the bill of lading is the contract of carriage when the shipper accepts the bill of lading itself.³³ In contrast Mankabady³⁴ insists that the bill of

³¹ J Adams "Non-Contractual Business Dealings" 1983 *New Law Journal* 789. The rules of contract law are not always applicable, in strict sense, to commercial practice. The party who gets in his terms last, without the other party raising any objection, succeeds in contracting on his own standard terms.

³² *Gunard Co v Kelley* 115 F 678

³³ *Dietrich v United States Shipping Corporation* 9 F2d 733, 740

³⁴ S Mankabady "The Hamburg Rules on the Carriage of Goods by Sea", 1978, A Sijthoff Leyden p. 41

lading is not the contract despite the fact that the shipper has prepared the bill of lading and the carrier simply signs the presented bill of lading. We cannot reject the basic principle that the acceptance of a document in a transaction binds the person who has accepted it.

Furthermore, the grounds of the *Ardennes* case (English law) that the bill of lading is evidence of the contract which was not signed by the shipper have been rejected in *The Henry Hyde*³⁵ (US law). The practical consequences of the divergence of the legal systems regarding the contractual role of bills of lading between the original parties is better illustrated by the following examples. On the one hand, in *the Ardennes* an oral promise has superseded the written term of the bill of lading and the route of the ship has been defined according to the oral agreement of the parties. On the other hand, in *Jean Jadoi*³⁶ the court has not accepted any oral evidence to show that the parties orally agreed upon a different route from the one expressed in the bill of lading contract. Not only an oral agreement but also a written agreement, which is made before the issue of the bill of lading, is superseded by the bill of lading.³⁷ It is submitted that if *the Ardennes* case were to be tried in a US court then the bill of lading would be found to be the contract of carriage which has superseded any oral promises or agreements. Under the perception of US law the shipper in *the Ardennes* case should not have been awarded damages, moreover if the bill of lading was not the contract of carriage then the COGSA 1936 would not be regarded applicable as mandatory law. The absence of signature is not a

“The bill of lading is not the contract itself although it is usually based on information provided by the shipper and may even have been prepared by him ... It is indeed a strong evidence that a contract has been concluded and it is, therefore, rather difficult to successfully challenge the terms set out in it”. P. Atiyah “*The Sale of Goods*”, 1995, Pitman p. 376 “It should evidence a contract for the carriage of the goods”.

³⁵ 82 F 681

³⁶ 14 Fsup 161 p. 162 “A bill of lading, in addition to being a receipt, is a contract of carriage, and prior negotiations and oral agreements between the parties are conclusively assumed to be merged therein. Thus, it has been held that parol evidence cannot be received to contradict the terms of a bill of lading by showing that the parties orally agreed upon a different freight rate, a different route or destination, or a different valuation agreement from that expressed in the contract”.

³⁷ *West India Industries v Tradex* 664 F2d 946

reason for the rejection of the contractual nature of bills of lading.

Rogers,³⁸ Circuit Judge, states that evidence of assent of the other party to the bill of lading contract consists in his receiving and acting upon it. So, the acceptance without objection means that the bill of lading is the contract between ship and shipper. The judge bases his view on the judgements of *Glyn v East & West India Dock* (an English case) and *the Delaware* (an American case). Hence, a common understanding emerges about the contractual function of the bill of lading in both systems. It also emerges that an English case has been used as judicial precedent by a US court in order to establish the bill of lading as the contract in the hands of the shipper. The American judge has accepted the perception of the contractual nature of bills of lading as it has been expressed in this English case. The acceptance of the cargo means ratification of the bill of lading as a contract.³⁹ Thus, under the perception of US law the acceptance of the oranges by the carrier, as happened in *the Ardennes* case, would have meant ratification of the bill of lading as the contract despite the absence of any signature. Even the filing of a case under a bill of lading means its acceptance as the contract of carriage,⁴⁰ because the filing of a case under a bill of lading is regarded as equivalent to the acceptance of the bill of lading by the shipper. If *the Ardennes* were to be tried in a Greek court, then the bill of lading would have been the contract regardless of previous oral promises, because no oral evidence is allowed to change the bill of lading, which is regarded as the

³⁸ *Dietrich v United States Shipping* 9 F2d 733 p. 734 “Contract between ship and shipper is found in bill of lading, which is binding on shipper, although not signed by him, if accepted by him without objection”. *Carver on Carriage of Goods by Sea*, 6th ed, Par 50 “**Speaking of a bill of lading sets out the fact that the goods have been shipped and the terms upon which they are to be carried and delivered**”.

³⁹ *Dow Chemical v Rascator Maritime* 594 F Sup 1490 p. 1498 “Even if the master did not sign the bills of lading and even though four of the bills of lading for the manel’s cargo were issued prior to the vessel’s arrival in New Orleans because by accepting plaintiff’s cargo, the contract evidenced by the bills of lading was ratified”.

⁴⁰ *Kanematsu Corp v M/V Gretchen* (1995) 897 Fsup 1314 p. 1317 “When a party brings suit for damaged goods under the terms of a bill of lading that party consents to all of the conditions of the bill of lading”. *Mitsui & Co v Mira* (1997) 111 F3d 33 “Mitsui argues that **the bill of lading is a contract of adhesion** which it did not negotiate and which therefore should not bind it. By filing a lawsuit for damages under the bill of lading, Mitsui has accepted the terms of the bill of lading, including the unnegotiated forum selection clause. **Accordingly, Mitsui is bound by the bill of lading.**”

conclusive evidence of the contract of carriage.

The difference between the approach of the courts is based on their different assumptions: first that in Greek and US laws the bill of lading is a specific contract emerging by the issue of the document, and second that in English law the bill of lading is no different from an ordinary document that could have been issued after the conclusion of any ordinary contract as merely a memorandum of some of its terms. Moreover, the courts in US and in Greece only interpret the statute rather than using different sources of law in construing its contractual role between original parties and third parties. Can the memorandum approach be compatible with the introduction of the bill of lading and its usage as a negotiable instrument in US and Greek law and as a transferable document in English law? It is doubtful if the bill of lading could be regarded as the contract of carriage by an English court when, as happened in *the Henry Hyde* case, the shipment was made under a booking agreement and the bill of lading issued later.

The bill of lading is the contract of carriage for the shipper regardless of the fact that it is not been signed by him.⁴¹ So, the bill of lading becomes the contract by its issue regardless of whether or not it has been signed by the shipper. This is based on the characteristic of the bill of lading as a special contract, the acceptance of which is not necessary to be expressed through its signature by both the contracting parties. Moreover, it is stipulated that the bill of lading constitutes the contract of carriage for any shipper other than the charterer.⁴²

The American courts have declared that every prior agreement has been merged in

⁴¹ fn 32 pp. 681-82

⁴² J Goodacre "*Marine Insurance Claims*", 2nd ed, Whitherby Co Ltd p. 357. *Serranio & Sons v Cambell* [1891] 1 QB 283 p.292 Lopes LJ "As a general principle, it may be laid down that, when bills of lading are in the hands of strangers to the charter-party, **either as original shippers or as indorsees** to whom the property has passed, **they shew the contract** under which the goods are being carried", fn 76 Affley p. 163 "Where the shipper does not charter the vessel, the bill of lading evidences the contract of carriage made with the shipowner". (Stress Added)

the bill of lading which has become the contract of carriage. In accordance with Greek law any prior oral agreement cannot be evidenced by oral testimony. So, it could be said that, in a way, all prior agreements have been merged in the bill of lading under Greek law as well. Besides, in English law parol evidence has been accepted in order to modify the written terms of the bill of lading. Under Greek and US law the goods are transported according to the terms therein expressed, in contrast with the view in English law that the terms upon which the goods have been shipped may not be the same as those actually contained in the bill of lading.⁴³ In contrast, the goods are delivered to the holder of the bill of lading according to the terms of the bill of lading. Consequently, US and Greek law attribute a contractual function to bills of lading in contrast with English law which deprives the bill of lading of its contractual nature regarding the original parties. Furthermore, it seems that the subject has not arisen very often in English law either because, practically, the bill of lading is used as the contract for the shippers despite the controversy or because the judges do not refer to it, as long as the definition of the 1992 Act (“contained in” or “evidenced by” a bill of lading) is directly applicable. In the recent *Cho Yang Shipping v Coral*⁴⁴ case the dual perception has been interpreted in the sense that on both occasions the bill of lading is merely a memorandum of the contract. Besides, in US case law,⁴⁵ as mentioned above, the judges very often refer to the contractual status of bills of lading when they state their legal reasoning and, therefore, it is part of their *ratio decidendi*.

Finally, the bill of lading is regarded as the contractual document under United

⁴³ *Cho Yang Shipping v Coral* [1997] 2 Lloyd’s Rep 641

⁴⁴ [1997] 2 Lloyd’s Rep 641

⁴⁵ *Wemhoener Pressen v M/V Tadeusz* (1993) 5 F3d 734 Shipper sued carrier and terminal operator for damage to cargo caused when operator attempted to remove cargo from crate in which it had been shipped. p. 738, 734 “Bill of lading is contract between shipper and carrier and continues to govern rights and obligations of parties until delivery”. *Anyangue v Nedlloyd Lines* (1995) 909 Fsup 315 Shipper brought breach of contract action against shipping corporation and freight forwarding corporation which packaged and transported shipper’s cargo. p. 315 “Contract between carrier and shipper for carriage of shipper’s goods from Norfolk, Virginia to Duala, Cameroon, was the bill of lading carrier issued to shipper after receiving shipper’s cargo at Norfolk, stating terms of shipment”

States and Greek law. In English law the bill of lading is not a contractual document.⁴⁶ In contrast, Henderson⁴⁷, as presented below, states that it is anomalous for a formal document such as a bill of lading, accepted by the parties, to be treated as a memorandum. There is little doubt that the bill of lading is a statement of the contract and, therefore, like a statement that the contract has been reduced into writing in the form of a bill of lading. Has Henderson's view expressed the real use of the bill of lading in shipping? In fact, the bill of lading has been seen as the vehicle where the contract of carriage is expressed.⁴⁸ The contract of carriage gets a special form in order to express the specific functions of being able to be transferred to every transferee or to be negotiated while the goods are in transit.

There is a remarkable difference in the approach expressed in the Restatement of Contracts,⁴⁹ where the bill of lading is definitely stated as the contractual document, and the view expressed in Chitty on Contracts,⁵⁰ where the bill of lading is clearly stated as not being the contractual document.

In the US law, bills of lading are considered as being formal contracts.⁵¹ In formal contracts the writing constitutes the obligation itself. The formal contract is treated not

⁴⁶ A diametrically different view is expressed in: *Parker v The South Eastern RY* [1877] 2 CPD 416, *Watkins v Rymill* [1883] LR 10 QBD 178

⁴⁷ J Henderson "Carver's Carriage of Goods by Sea", 1925, Stevens & Son p. 73 "**The bill of lading purports to be a statement of the contract and it would be anomalous and inconvenient that a formal document, accepted by the parties, and apparently expressing the relation between them, should be only evidence, liable to be rebutted, of that relation**". N Palmer "Bailment", 1979, The Law Book Company Limited p. 609 "**This is in practice a standard form document which the shipper (traditionally) completes and hands to the ship owner's agent**" (Stress added).

⁴⁸ *The Roanoke* 59 F 161, *Southern Pacific Transportation v Commercial Metals Co* 72 Led 2d 114, *Glyn Mills Currie v The East and West India Dock* [1882] 7 AC 591 p. 596 Lord Selborne "The primary office of a bill of lading is to express the terms of the contract between the shipper and the shipowner". p. 616 Lord Fitzgerald "The bill of lading so far as it is a contract for carriage and delivery".

⁴⁹ *Restatement of the Law Contracts 2d*, 1981, Vol. 2 American Law Institute Publishers p. 121 sec 211

⁵⁰ *Chitty on Contracts*, 1989, Vol. 1, Sweet & Maxwell p. 541 Sec 857 and 27th ed, 1994 Vol. 1 p. 607 sec 12-092.

⁵¹ J Perillo "Corbin on Contracts", 1993, Vol. 1 West Publishing Co p. 13, Par 14 p. 16 "Among the contracts that are commonly classified as formal in character are ... documents of title". E Holmes "Corbin on Contracts", 1996, Vol. 3 West Publishing Co pp. 450, 451, 453 "Another feature of a formal contract is that it is treated not simply as evidence of a contract but as the obligation itself", p. 454 "Because the writing constitutes the obligation itself, another essential attribute characterising formal contracts is delivery".

simply as evidence of a contract but as the obligation itself.

Can a shipper transfer the bill of lading contract without the existence and delivery of the bill of lading? Because of the doctrine of privity, the 1855 Act and the 1992 Act in English law and the Pomerene Act in US law, have been introduced to transfer the shipper's original contract of carriage and, therefore, the existence of a valuable bill of lading is necessary. An issued bill of lading is valuable if the carrier has received the shipper's goods. In English law, the legal effect of the transfer of the bill of lading contract to a third party under the 1855 Act has been endorsed, but not the definition that the bill of lading is the original contract of the shipper which is transferred. Instead of limiting the non-application of the 1855 Act solely to the contractual role of the bill of lading in the hands of the shipper, the transfer of the contract should continue to be governed by common law rules as well. In US law the language of the statute has not been questioned, regardless of the fact that there was judicial precedent under US common law⁵² showing that the bill of lading was merely evidence of it, but, since its introduction, the statute defines the contractual role of the bill of lading in the hands of the shipper. An issued bill of lading is useless if the bill of lading does not represent the contract! However, it has become common knowledge, in practice, that the bill of lading is a contractual document, despite the fact that in English law this view has not been established by case law. Thus, it could be argued that the bill of lading is a formal contract and its delivery is necessary.

In 1859 Dowdeswell⁵³ wrote that the bill of lading is the document wherein general reference for the terms of the contract is made, which means that the bill is not a document which accidentally or occasionally might be issued by the parties as their memorandum of the contract. The question is, what has made US law, coming, as it does,

⁵² *Hellenic Lines v Embassy of Pakistan* 307 Fsup 947, *Ambler v Bloedel Mills* 68 F2d 268 p. 268 "Notation of rate on bills of lading is not conclusive, since bill of lading is not contract, but, at best, only evidence thereof, and any irreconcilable repugnance between prior written contract and bills of lading must be resolved in favour of former"

⁵³ G Dowdeswell "*A Compendium of Mercantile Law*", 1859, London p. 306 "but the instrument to which reference is generally had for the terms of such a contract is the bill of lading".

from a common law background, admit and treat bills of lading as contracts? and what has made the English law regard it as merely a memorandum, despite the fact that the bill of lading is referred to as the bill of lading contract? The basic feature is that the bill of lading is classified as a special contract which has to be in writing and that it supersedes any other agreements referring to the loaded cargo. In fact, English law has not taken steps to classify bills of lading as contracts which must necessarily be in writing, despite the fact that case law and views of scholars⁵⁴ are in favour of this approach. It is difficult to understand the difference in perception when we take into account the fact that, in both legal systems, the bill of lading is issued after loading. The difference in approach cannot be emphasised better than by quoting the language used by the judges in the case law. On the one hand, Morgan district judge said that “A bill of lading is a receipt given by a carrier for goods shipped, and a contract containing the terms of their carriage”.⁵⁵ On the other hand, Lord Saville held that “It is also common ground that the contract is contained in or evidenced by the bill of lading”.⁵⁶ Bills of lading are identified as documents which operate as receipts for the goods, and which contain or evidence the terms of the contract of carriage.⁵⁷ Besides, the goods are delivered to their destination under the terms of the bill of lading. Accordingly, Jacobs,⁵⁸ McLoughlin,⁵⁹ Cutteridge,⁶⁰ and Ready⁶¹ regarded the bill of lading as being the contract for their carriage and

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- ⁵⁴ P Richards “*Law of Contract*”, 1997, Pitman pp. 7-8 “**Contracts of adhesion ... initially they could be found in trade usages and eventually they were transformed into documents such as charter-parties ... bills of lading**” (Stress added).
- ⁵⁵ *AIG Europe v M/V Lauren* (1996) 940 Fsup 925 p. 929. *Cargill Ferrous International v M/V Anaddi* (1996) 935 Fsup 833 The shipper of cargo of steel coils found to be rusted at end of voyage sued vessel owners for the damage. *Craddock International Inc v W. Wilson* (1997) 116 F3d 1095.
- ⁵⁶ *The Nerano* [1996] 1 Lloyd’s Rep 1 p. 3
- ⁵⁷ *The Pioneer Container* [1994] 2 AC 324 p. 343, p. 327 “The carrier enters into the bill of lading contract not only on his own behalf but also as agent for the sub-contractors”. **In contrast in US, Spanish American Skin Company v The Ms Ferngulf** 143 Fsupp 345 p. 350 “A bill of lading may be a receipt for goods **plus a contract for the carriage of goods and also a negotiable document of title**”. (Stress added).
- ⁵⁸ B Jacobs “*The Law of Bills of Exchange, Cheques, Promissory Notes*”, 1943, Sweet & Maxwell p. 44 “**The bill is also a contract to carry the goods to the place and upon the conditions expressed and to give delivery to them to the consignee on the transfer of the bill**” (Stress added).
- ⁵⁹ J McLoughlin “*Introduction to negotiable instruments*”, 1975, Butterworths p. 9 fn 14 “A bill of lading is a document used when goods are despatched overseas. It details the goods and sets out the terms of the contract under which they are to be carried ... These copies together serve three purposes. **Basically they form the contract of carriage, they serve as evidence of receipt of the goods by the ship’s master, the copy sent to the buyer serves as a document of title, and on production at the port of discharge will entitle him to delivery of the goods**”. (Stress added)
- ⁶⁰ H Cutteridge “*The Law of Banker’s Commercial Credits*”, 1976, Europa Publications Limited p. 90 “**The traditional bill of lading is...represents the contract pursuant to which they are carried**”. (Stress added)
- ⁶¹ T Reeday “*The Law Relating to Banking*”, 1985, Butterworths p. 55 “**Bills of lading (being both contracts of carriage and receipt for goods and also documents of title to those goods**”. (Stress added). G Paton “*Bailment in the Common Law*” (1952) Stevens & Sons p. 280 “... **goods were rarely shipped without a special contract embodied either in a charter-party or a bill of lading**” (Stress added)

delivery in English law, because they based their views on statute law which was regarded as being superior to common law rules. In fact, Crump expressed the view that bills of lading are invented⁶² as similar documents to bills of exchange, concerning their contractual status, which means that both should be treated as formal contracts. In conclusion, Crutcher⁶³ stated that both in England and US the bill of lading was the contract of carriage in the hands of the shipper.

5.6 The Receipt of the Goods and the Bill of Lading Contract

The receipt of the goods which will be transported is a prerequisite for the conclusion of the contract of carriage⁶⁴ under English and United States law, which means that any suggestion that the contract has been concluded merely by the booking of space should be rejected. The receipt of the goods by the carrier could be seen as a necessary contractual term for the conclusion of the contract of carriage in the form of a bill of lading. In Greek law there is no mention of the necessity of the receipt of the loaded cargo in order to have a valid contract. However, the acceptance and the specifications of the cargo are elements which are characteristics necessary for the formation of the contract of carriage and which distinguish the contract of carriage from ordinary contracts. The contract of carriage is a contract for the transport and delivery of the loaded cargo to its destination. Consequently, it is not a contract merely for the transport of an unidentified quantity of goods. This kind of contract cannot be concluded

⁶² J Crump "General Average, Salvage and the Contract of Affreightment" 1985 LMCLQ 19 p. 19 "**It was not until the 14th or 15th AD that merchants are found it necessary to invent contracts, like bills of lading and bills of exchange**". (Stress Added)

⁶³ M Crutcher "The Ocean Bill of Lading - A Study in Fossilisation" 45 *Tulane LR* 697 p. 703 "***there are some generalisations about bills of lading established by reference to the circumstances existing both in England and American before 1800 which deserve attention; a. the bill of lading purports to be a contract of carriage of goods on a particular ship; b. it purports to be a contract for carriage only by water; c. it is in effect a contract with the master as well as the unidentified ship owner***". (Stress Added) C Maclaughlin JR "The Evolution of Bills of Lading" 35 *Yale LJ* 548 pp. 555-56 "A bill of lading has commonly been said to have three characteristics 1) ***a contract for the carriage of the goods*** ... When it became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract". B Abrahamsson "*International Ocean Shipping: Current Concepts and Principles*", 1980, West View Press/Boulder Colorado p. 83 "***The contract used in liner trade is the ocean bill of lading***". A Lowenfeld "*International Private Trade*", 1981, Matthew Bender Vol. 1 p. 31 "***A bill of lading ... to being a contract of carriage between the shipowner, the consignor or his endorsee***" (Stress Added)

⁶⁴ *Benjamin's Sales of Goods*, 1992, p. 928, *Pollard v Vinton* 26 Led 998 p. 999

merely by the meeting of the parties' minds; the acceptance of the loaded cargo is necessary in order to have a concluded contract. A contract of carriage can be concluded by the meeting of the minds of the contracting parties, but it is a different contract from the one for the transport and delivery of a loaded cargo. It appears that there exists a fundamental difference in the concept of the contract of carriage among the three legal systems. The bill of lading contract cannot be concluded prior to the passing of the cargo into the carrier's custody and it is different than a contract of carriage which can be concluded orally when the parties have agreed to all its terms. A contract of carriage, which is concluded prior to the issue of a bill of lading, is not a contract for the carriage and delivery of cargo which is identified in the provisions of the bill of lading. The knowledge of the specific characteristics of the loaded cargo, which has to be delivered to its destination and not of any other cargo with the same characteristics, should be regarded as an important term in order to be able to say that there is agreement between the contracting parties on all the terms of the contract in order to have a concluded contract. The bill of lading as a mere document is valueless⁶⁵ unless there is a valid contract for the carriage of the cargo which is mentioned in the bill of lading.

Can the booking of space be seen as a contract for the transport and delivery of a loaded cargo? The goods are delivered under the terms of the bill of lading contract and not under the terms which are merely evidenced in the bill of lading, in order to say that those terms can be modified by any means of evidence. Moreover, the cargo is transported and delivered under the same terms which means that the terms of delivery and transport are those contained in the bill of lading. The delivery terms, as contained in the bill of lading, come into existence because of the issue of the bill of lading. Any argument that the contract is concluded under different terms from those contained in the

⁶⁵ *National Bank of Bristol v Baltimore & Co* 59 A 134, 136. *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 p. 1044. *Benjamin's Sales of Goods*, 1992, Sweet & Maxwell p. 928.

bill of lading is invalid. Thus, a bill of lading under the above mentioned conception must be seen as being valueless if it is merely evidence of a contract.

Bills of lading which are issued prior to the receipt of the cargo become valid contracts after the delivery of the cargo in the custody of the carrier. The contract of carriage has to be the same for the original shipper and all transferees throughout the time the goods are in transit. The contract of carriage, as it is defined above, has to be in writing and in the form of a bill of lading in order to be passed, as the contract of the goods in transit, to any endorsee or assignee.

5.7 The Offer for the Conclusion of the Contract of Carriage

An offer is necessary for the conclusion of a contract. What is the offer for the conclusion of the contract of carriage of goods by sea? If it is suggested that the contract of carriage can be concluded merely by the meeting of the contracting parties minds, then all the terms of the contract will have been agreed at the time of the meeting of their minds. Many of the terms of a contract of carriage of goods by sea are not negotiated in every individual transaction. The contracting parties get knowledge of them either at the time they accept the bill of lading as their contract or at the time the shipper fills in and offers the bill of lading to the carrier. Therefore, even if it is submitted that the contract of carriage is not a contract for the transport and delivery of a loaded cargo, many terms of the contract of carriage of goods by sea, which are expressed in the bill of lading, have been established through practical usage and custom and they are merely accepted by all shippers. This characteristic distinguishes this contract from any ordinary contract and, consequently, the bill of lading seems to be the only offer for the conclusion of the contract. Thus, the terms of the bill of lading, which are never negotiated and are contained only in the bill of lading, cannot be regarded either as part of the contract or as

part of the offer for the conclusion of the contract, so long as they come into existence by and with the issue of the bill of lading. To that effect the bill of lading cannot be regarded as merely evidence of a contract concluded prior to its issue. The difficulty in understanding and explaining the conclusion of the bill of lading contract arises from the moment that the classical theory of contract is applied, instead of the principles of the conclusion of standard form contracts. Hence, the bill of lading must be established as being the offer for the conclusion of the contract of carriage.

5.8 The Bill of Lading in the Hands of Third Parties

The most important and practical convergence in legal terms and practical consequences is that among the three legal regimes the bill of lading is regarded as being the contract of carriage in the hands of third party holders. In England, as was said above, the doctrine of privity of contract has made necessary the introduction of an Act by which the transfer of the original contract is regulated. The third party becomes party to the bill of lading contract. If the bill of lading is not the original contract but merely evidence of it, then the consignee should become privy to the original contract rather than to the bill of lading contract. Do the shipper and the carrier choose to create the bill of lading as a new contract in order to be transferred to an endorsee? Do the shipper and the carrier conclude a contract of carriage before the issue of the bill of lading as the contract which will regulate only their contractual relations?

The Bills of Lading Act 1855, originally, and The Carriage of Goods by Sea Act 1924, now, have stated that the bill of lading is transferred as the original contract to any third party holder of the bill of lading in due course. If there is a contract contained in the bill of lading different from the original contract of carriage which has been concluded between the shipper and the carrier, then there are two contracts concluded

simultaneously for the same transaction? If the endorsee is regarded as being a party to the contract which is concluded between the shipper and the carrier, then which is this contract? Under a civil law perception or a sole interpretation of statute law, not the common law approach as it has been established in England, the dual perception of the contractual function of bills of lading, as it is stated in COGSA 1992, creates a problem not only in identifying the concluded contract between the original parties but also in the definition of the contract of carriage which is transferred to the consignee and which subsequently cannot establish the contract in which the consignee gets privity. Otherwise, if the matter is approached only under the strict line of common law, where the existence of judicial precedent (*The Ardennes* case) prohibits any other perception, then the bill of lading will be regarded as merely evidence of the contract indefinitely and regardless of its circulation in maritime transport as a standard form contract. It is doubtful if merchant usage can force the English courts to endorse a different perception in order to come into line with the practical usage of the bill of lading. Besides, as analysed in Chapter IV, the contract of carriage which is in the form of a bill of lading is transferred to the third party holder. Therefore, if this dual perception is literally interpreted, then it is difficult to establish the contract which is transferred to any third party by the COGSA 1992. Hence, the contractual role of the bill of lading should be regulated solely by statute law regardless of its holder. In both Acts the bill of lading is the original contract of carriage which is transferred to the third party. By contrast, there are views that even for the third party holder the bill of lading is evidence of the contract. These views, at least, at the moment, do not prevail in English law.⁶⁶

By contrast Greek and United States law recognise the existence of contracts for third party beneficiaries. Therefore, the bill of lading has to be the contract of carriage

⁶⁶ Lord Chorley "*Law of Banking*", 1950, Pitman p. 242. *In contrast* W Tetley "*Marine Cargo Claims*", 3rd ed, p. 220-21 "While the various bills of lading statutes give to the endorsee the rights of action that the shipper originally had under the bill of lading contract". (Stress Added).

which, according to the principle of endorsement or assignment, can be passed to any third party as the contract. Otherwise, it is invalid to apply the rules of endorsement or assignment to transform a document receipt to a contract or vice versa. An endorsement or assignment is merely an action to transfer the characteristics or rights and liabilities which already exist. It is not an agreement to transform the function of a document. In the end, in US and Greek law the definition of the statute law with regard to the contractual status of the bill of lading in the hands of the shipper has prevailed.

There is a view⁶⁷ that the consignee gets a different contract from the original one agreed between the shipper and the carrier. This kind of view has not been expressed in US and Greek law because the bill of lading is the contract which is the contract for every third party. It could be argued that the consignee gets the contract reduced into writing and contained in the bill of lading but he does not step into the original contract of the shipper and, therefore, he enters into a contract under the bill of lading terms with the carrier. So, according to the last suggestion, there are two contracts of carriage referring to the same cargo and their terms are modified according to who the contracting parties are. However, a single contract of carriage is concluded for the carriage of the loaded cargo which is transferred to any third party. The contract of carriage remains the same throughout the time the goods are in transit. Additionally, the consignee has to get privity to the original contract of carriage, which could mean that the original contract is reduced into writing in the form of a bill of lading, and not to a new contract different from the original one.

5.9 The Retroactive Force of the Bill of Lading Contract

The retroactive force of the bill of lading contract is recognised in both English

⁶⁷ F Reynolds "The Carriage of Goods by Sea Act 1924" 1993 *LMCLQ* 436 p. 437, *The Heidberg* [1994] 2 Lloyd's Rep 287.

and United States jurisprudence.⁶⁸ On the one hand, in US law the bill of lading contract is the retroactive contract and it is ratified as the contract. On the other hand, in English law the bill of lading is not regarded to be the contract despite the fact that the contract is concluded under the terms of the bill of lading. Thus, it seems that the issued bill of lading is just a piece of paper which might contain the terms of the contract even if it is considered to be a retroactive contract. There is an obvious difference in the positive way in which the US law treats the bill of lading and the uncertain and vague approach endorsed by the English law. The bill of lading, by being the retroactive contract, means that it has to be the only contract which has been concluded. Even if it is suggested that there is an oral contract concluded prior to the issue of the bill of lading, then this contract has to be the content of the bill of lading contract as it stands, prior to its reduction into writing and incorporation into the bill of lading. The bill of lading contract covers the whole transaction from its beginning. Consequently, it could be said that the shipment takes place under the bill of lading contract. The sailing of the ship with the cargo on board means the ratification of the bill of lading as the contract of carriage according to United States law⁶⁹, regardless of the issue of the bill of lading or its authorisation by the carrier. This approach has not been established in English law.

5.10 The Bill of Lading Contract as a Contract of Adhesion

Traditionally, contracts were thought of as resulting from a two-sided process of individualised bargaining; on this paradigm rests much of contemporary contract law's

⁶⁸ *Pyrene Co v Scindia Navigation Co* [1954] 2 QB 402, 419, *Caterpillar Overseas SA v Marine Transport Inc* 900 F2d 714, 719

⁶⁹ *Cavcar Company v M/V Suzdal* 723 F2d 1096 Vessel operator brought action against consignee to recover losses sustained due to liability to deliver cargo. p. 1101 "The departure of the ship with the cargo on board effected an implied ratification of the bill of lading, binding the ship to the obligations therein". *British West Indies Produce v S/S Atlantic Clipper* 353 Fsup 548 p. 554 "Once the S/S Atlantic Clipper sailed with the consignee's cargo aboard...it constituted ratification of the bills of lading". *Cactus Pipe & Supply v M/V Montmartre* 756 F2d 1103, *Tube Products of India v S.S Rio Grande* 334 Fsup 1039

theory and practice. The “contract of adhesion” paradigm emphasises, as mentioned above, the one-sided character that contemporary contractual ordering frequently exhibits. Here obligation rests on agreement but the process through which the transaction’s terms were established was largely non-reciprocal. Transactions that fall under the adhesion-contract paradigm present a difficulty for contract theory and practice, namely that in non reciprocal or one-sided ordering the assumptions with respect to human behaviour that inform classical contract theory are frequently no longer apt. The adhering party is not infrequently essentially passive. Bills of lading have been accepted as belonging to this category of contracts in the US and the Greek legal systems which means that the bill of lading has been the standard form contract under which the contract of carriage has been concluded. Therefore, there is no difference between the contract of carriage and the bill of lading. Any minor prior agreements must be included in the content of the bill of lading in order to be regarded as part of the contract of carriage and parol evidence is not admissible to alter the written terms of the bill of lading.⁷⁰ Besides, in English law the bill of lading has not yet been established as belonging to this kind of contract, even though scholars and case law have referred to it as such. It could be argued that the bill of lading, by being a contract of adhesion, means that is the contract of carriage itself in accordance with English terminology,⁷¹ as mentioned below.

5.11 The Meaning of the Terms “Contained in” and “Evidence by”

The use of the sentence “the contract of carriage is contained in or evidenced by a bill of lading” in English law is unique.⁷² The reason for the dual perception of the

⁷⁰ *La Salle Machine Tool, Inc. v Maher Terminals, Inc* 452 Fsup 217 p. 221 “Bills of lading issued under COGSA have been held to be contracts of adhesion”, *A Schroder Music Publishing Co Ltd v Macaulay* [1974] 3 ALLER 616, Court of Appeal of Athens 4466/1978 1979 EED 408

⁷¹ H Tiberg “*The Law of Demurrage*”, 1971, Stevens p. 569 (fn 7) “**The bill of lading is evidence of the agreement in the same way as any written contract, in English terminology the bill of lading would then be the contract**”, p. 569(fn 7) “**a bill of lading inconsistent with a prior informal contract of carriage must prima facie be taken to change the contract**”.

⁷² fn 64 Benjamin's p. 954, *The Coral* [1992] 2 Lloyd's Rep 158, 159. J Beatson “*Anson's Law of*

contractual role of bills of lading has not been explained. According to this phraseology the bill of lading has two contractual characteristics. If the bill of lading is evidence of the contract for the shipper who has concluded the contract with the carrier, on behalf of the consignee or any future transferee, in the hands of whom the bill of lading will be probably found after a possible transfer, then why should the bill of lading not be evidence of the contract for the consignee or endorsee as well? Reynolds,⁷³ as presented below, brought out the unhelpfulness of this dual perception, because it is obvious that the third party becomes party to a contract which must be stated in a single way in order to be identified. Hence, it could be argued that this dual perception of the contractual role of bills of lading might indicate an uncertainty or a deliberate decision of the legislature to leave open a dual contractual function to be settled by legal theory and the courts, instead of imposing, a single contractual role as mandatory law.

This dual terminology has not been followed by Greek and United States law, where the bill of lading has been attributed with the single contractual concept of being the contract of carriage. Any dual contractual perception of the bill of lading is unjustified because the bill of lading has one contractual function and not two. If it is made clear that a contract of carriage for the transport and delivery of a loaded cargo is different from a contract solely for the transport of an unidentified (aorist) quantity of goods, then the dual contractual function of the bill of lading cannot be supported. The offer under which the contract of carriage is concluded must be identified. This identification is impossible under a dual contractual perception of bills of lading. It will be recalled that the final offer for the conclusion of the bill of lading contract is the carrier's bill of lading which is

Contract", 1998, Oxford University Press p. 468 "It is a document **which contains or evidences the terms of the contract** for the carriage of goods agreed upon **between the shipper of the goods and the shipowners** whose ship is to carry them" (Stress Added)

⁷³ F Reynolds "The Carriage of Goods by Sea Act 1992" 1993 *LMCLQ* 436 p. 441 "**The lawful holder can sue as the contract "contained in or evidenced by" the bill of lading, is not helpful in this respect**". (Stress added). A Brance "*Export Practice and Management*", 1994, Chapman & Hall p. 265 "The bill of lading starts its life as ... containing or evidencing the contract of carriage between the carrier and the shipper".

filled in by the shipper himself.⁷⁴

The use of the term “evidence of the contract” is distinctive among the three legal regimes. The term “evidence of the contract” in the case of bills of lading means, in accordance with United States law, that the bill of lading is the contract of carriage itself and that is why the bill of lading is evidence of it. However, there are some cases in which the bill of lading is stated as being evidence of the contract of carriage, but the grounds of those judgements are based clearly on English literature.⁷⁵ On the one hand, according to the judgement in *Crook v Allan*, the bill of lading is merely evidence of the contract and the acceptance of the bill of lading by the shipper does not make any difference regarding its role as merely evidence of the contract. On the other hand, the judgement of the *Crook v Allan* case has been rejected in United States jurisprudence. Hence, in American jurisprudence there is a firm opinion that the bill of lading is issued as the covering contract. According to English jurisprudence, in the case of bills of lading, the term “evidence” mainly means that the bill of lading is merely evidence of it and parol evidence is admissible to alter the written terms of the bill.⁷⁶ There are some occasions on which “by evidence of contract” means that the bill of lading is the contract for the shipper as much as with the consignee and the main example is the *Leduc v Ward* case. In fact, in Greek law the term “evidence” has been used in the sense that the bill of lading is conclusive evidence which could not be modified by oral testimony. It seems that the Greek approach is closer to the American perception because it could be said that the bill is the final expression of the contract. For example in the 10/1991 decision of the Polimeles court of Piraeus⁷⁷ it is stated that under United States law the bill of lading is not considered to be either a demonstrative or constructive document for the creation, or

⁷⁴ Chapter IV pp. 120, 143-146

⁷⁵ *Ambler v Bloedel Donovan Lumber Mills* 68 F2d 268, 270. *Toyon Kisen v Wr Grace Co* 53 F2d 740

⁷⁶ *The Ardennes* [1951] 1 KB 55. G Affley “*Business Law*”, 1982, Macdonald & Evans p. 164 “A bill of lading is not the contract of carriage but is merely evidence of a pre-existing agreement”. B Edwards “*Getting Paid for Exports*”, 1990, Gower p. 58 “A bill of lading...evidence of carriage”.

⁷⁷ 1991 Armenopoulos 1002, Polimeles court of Piraeus 11/1991 1991 EML 209, 210.

evidence of the contract of carriage. The court based its view on the variety of ways under which a contract can be formed and on the wording of COGSA. It was shown in a previous chapter that the bill of lading is always the contract of carriage and even the loading of the goods on board means ratification of the carrier's bill of lading as the contract of carriage. There is a difference in the interpretation of COGSA by the Greek court. Thus, in a civil law system, the accuracy of terminology is fundamental matter which is in accordance with the views of Lord Bramwell and Lord Loughborough about precision of terminology. There is a fundamental difference in the understanding of the term "evidence". The suitable interpretation of this term in the case of bills of lading should be that the bill of lading is the contract itself.

5.12 The Importance of the Bill of Lading as a Contract

Does it really matter if the bill of lading is evidence of the contract or the contract itself? First of all, the parol evidence rule is applicable when the bill of lading is the contract and not if it is not. In accordance with the doctrine of privity, the bill of lading has to be the contract in which the third party becomes part. Taking into account that the bill of lading is established as always being the contract for the third party, in accordance with the language of the 1855 Act, then the view that any other contract of carriage than the bill of lading is transferred as the original contract cannot be endorsed. The delivery of the goods has to be made under the terms contained in the bill of lading which means that the terms of the bill cannot be merely evidence of the terms of delivery. In US and Greek law this question has not arisen because there is a strict compliance with the wording of the Acts where the bill of lading is identified as the contract. Additionally, the Acts are applicable because the bill of lading is the contract of carriage. Furthermore, the international rules are applied to the bill of lading contract as well and not to a

memorandum of a contract. The bill of lading has been transformed internationally into a formal contract and a contract of adhesion.

As mentioned above, in England two perceptions of the contractual nature of bills of lading have been developed: First, the minority view that the bill of lading is the contract, which is based upon the statute law and supported by case law and the views of scholars; Second, the prevailing view that the bill of lading is a receipt and not a contract which is based upon common law rules. It is hard to explain the diametrically different approach, taking into account that both sides know that the bill of lading is issued after the loading of the cargo.

On the one hand, the *Vimar Seguros* case⁷⁸ in the supreme court of the US colourfully illustrates the position where the bill of lading was stated as being the contract of carriage. It is worth mentioning two points: first, that the clause in the bill of lading was referring to the contract contained in or evidenced by the bill of lading which was translated by the court as the bill of lading being the contract of carriage and second, that the bill was a contract of adhesion. On the other hand, as mentioned above, in *Cho Yang Shipping v Coral* it was held that by “contained in or evidenced by” was meant that the bill of lading was merely evidence of the contract. It could be argued that the perception of the Supreme Court of US is preferable to the interpretation of the English court, because by introducing a single contractual role for the bill of lading regardless of its holder, a uniformity in maritime transport and commerce among the three legal systems is brought out. Additionally, since bills of lading have been attributed with the function of expressing the contract in order to replace oral contracts with written ones, which create certainty with regards to the terms of the contract of carriage, it is in the best interests of the shipper, for the bill of lading to be attributed with the single status of

⁷⁸ 132 Led2d 462 p. 483 “A bill of lading, besides being a contract of carriage, is a negotiable instrument”. p. 470 “The contract evidenced by or contained in this bill of lading shall be governed by the Japanese law”.

being the contract of carriage and, thus, avoid any uncertainty about the terms of the contract. The carrier, therefore, can not impose upon the shipper contractual terms which were not incorporated in the bill of lading.

The question of the contract being concluded before the issue of the bill of lading and, therefore, of the bill of lading being merely evidence of it, has been answered in US and Greek law by stating that the bill of lading supersedes all the prior agreements. Tiberg⁷⁹ wrote that if a bill of lading is inconsistent with a previous oral contract, it supersedes *prima facie* the oral contract. Furthermore, in 1998, Mr Justice Rix⁸⁰ stated that the bill of lading supersedes any pre-existing contract of carriage (other than in a charter-party) and, therefore, the bill of lading becomes the contract itself. Mr Justice Rix refers to the dictum of Mr Justice Channell⁸¹ that a bill of lading signed by the master of a vessel is usually a contract with the shipowner. Thus, it could be argued that the dictum of Rix J is another persuasive precedent which indicates that even today there is some dissent from the prevailing view in English law that the bill of lading is not the contract. *Obiter* statements are opinions on the law. However, *obiter* statements are worthy of consideration first because they have been made by judges within the same system.

The bill of lading, as mentioned above, is not an ordinary document but a document, the characteristics and the terms of which, have been created through its usage in trade initially in order to cover the absence of any written terms of the contract of carriage. This contractual function cannot be abolished and we cannot rely upon the ordinary law of contract to establish the conclusion of a contract, and the terms of the contract. Which would be costly and a time consuming business taking into consideration

⁷⁹ H Tiberg “*The Law of Demurrage*”, 1971, Stevens p. 569 (fn 7) “... **a bill of lading inconsistent with a prior informal contract of carriage must prima facie be taken to ‘change’ the contract**”.

⁸⁰ *The “Hector”* [1998] 2 Lloyd’s Rep 287 p. 299 “**Moreover, until the bill of lading is issued and supersedes any pre-existing contract of carriage (other than in a charter-party)**, the contract of carriage is best evidenced by the mate’s receipt”. p. 293 “It is further complicated, it seems to me, where the question is concerned **with a negotiable document like a bill of lading.**” (Stress Added).

⁸¹ *Wehner v Dene Steamship Co* [1905] 2 KB 92 p. 98.

the complexity of the contract of carriage. For instance, if a shipper, holder of a bill of lading issued in England, tries the case in an American court, regardless of the conflict of laws issue, then the bill of lading will be the contract of carriage upon which the shipper will base his actions and rights and for that reason the COGSA 1936 will be applicable. By contrast, if a shipper holder of a bill of lading, issued in the USA as the contract of carriage between the shipper and the carrier, files a suit under English law, then the bill of lading will not be seen as the contract but merely as a memorandum and, therefore, the shipper or the carrier will have to establish which are the actual terms of their contract of carriage. The diametrically different approaches will not result merely in a differentiation in the wording of the judges, but different terms of the contract of carriage will be applicable to the cases and even the mandatory application of an Act will be refused.

5.13 The Contractual Role of Bills of Lading as Viewed by the Scholars

The scholars in the three legal systems have expressed the following views in relation to the contractual status of bills of lading: First, the American scholars have a clear opinion that the bill of lading is the contract of carriage. The issue of the bill of lading means that any prior agreement has to be merged in the bill of lading in order to be regarded as part of the final contract which the bill of lading expresses. Second, the Greek scholars have stated that, in practice, the bill of lading is the contract, but they have been influenced by the wording of the Maritime Code and, therefore, the bill of lading is the conclusive evidence of the contract. It could be argued that any agreement concluded prior to the issue of the bill of lading is not superseded by the bill of lading as it has been understood in American jurisprudence. The oath and the admission can be used as the last means of evidence in order to show that the bill of lading is not the contract of carriage. To that extent, the characteristic of the bill of lading as the

conclusive evidence of the contract should be a barrier to the use of these means of evidence, because in fact the bill of lading is not conclusive evidence, if it can be amended by any means of evidence. Potamianos, as mentioned above, has stated that the contract of carriage is concluded by, and with the issue of, the bill of lading, which is submitted to be the correct approach, because it creates certainty about the contractual terms with regard not only to the shipper-carrier but also to the carrier-consignee. Third, as mentioned above, a variety of views concerning the contractual role of bills of lading has been expressed by the English scholars. The majority of the scholars have stated that the bill of lading is merely evidence of the contract and they have based their views on the judgement in *the Ardennes* case (a single judicial precedent) and have disregarded statute law (the 1855 Act). In fact, there is a number of scholars who have stated that the bill of lading not only is the contract of carriage but also that the contract is created by the bill of lading.

In conclusion, it could be argued that in USA, in Greece and partly in England scholars have agreed to the idea that the accepted bill of lading becomes the contract of carriage. Maritime commerce would suffer severe disruption if shippers were not bound by the terms of the accepted bill of lading.

5.14 The Establishment of the Bill of Lading as the Contract of Carriage

The prevailing view of an individual system, with regard to the contractual status of bills of lading in the hands of the shipper, should not influence the acceptability of the arguments, so long as they are based upon the law of one of the three systems. The prevailing views have been already presented in the previous chapters. Even if an argument is not applicable now to one of the legal systems, it does not mean that it is legally inaccurate. Thus, any argument should not be dogmatically rejected because it

does not comply now with the prevailing view of a legal system. Commercial law is formed and reformed first by practical usage and afterwards the legislature writes down the legal principles which have already been established by that same practical usage.

The bill of lading, in the light of the views which have been expressed in the three legal systems, could be argued as being the contract of carriage for the following reasons: First, it is a contract for the performance of a specific obligation which is the transport and delivery of the loaded cargo. The goods are always delivered under the terms of the bill of lading contract. Hence, these terms should be regarded as the contractual terms under which the cargo is transported. The captain of the ship signs the bill of lading as the contract of carriage which binds the carrier. Minor agreements preceding the loading belong to the loading process. The booking of shipping space has nothing to do directly with the transport of the cargo. It is an agreement useful for a better and quicker way of processing the loading of the goods. A failure by the carrier to comply with the terms of a booking of space does not imply the consequences of failing to comply with the duties of a bill of lading contract. For example, the carrier has not the right and duty to deliver the loaded cargo to its destination on the production of the bill of lading. Additionally, there is no valid contract before the loading of the cargo.

Even if a bill of lading has not been actually issued but if it has been agreed that a bill of lading will be issued in due course, then the bill of lading is the retroactive contract covering the transaction from its commencement. This exemption applies only if the goods have been loaded or have been transferred into the custody of the carrier.

Second, mercantile custom and usage have established the bill of lading as the contract of carriage rather than as a memorandum. Since its introduction in international trade, the bill of lading is utilised as the contract of carriage. If the bill of lading is accepted as mere evidence of the contract of carriage, then there is a risk that its terms be modified by any means of evidence, at any time either, by the shipper or the carrier, thus

creating uncertainty. The contracting freedom of the parties is limited by the different national laws and International Conventions (The Hague Rules, The Hague-Visby Rules, The Hamburg Rules). Many contractual terms are implied in the bill of lading contract, firstly, by the application of these International Conventions and secondly, by the national Acts which have implemented those Rules. Thus, the contracting parties cannot disregard these Rules. The bill of lading, which is in a printed form, contains terms and conditions, which have not been agreed by the contracting parties, in order to be able to say that the bill of lading is evidence of the prior concluded contract. This could have happened if the bill of lading had contained only the terms of a prior oral agreement and nothing else. Consequently, it cannot be suggested that the bill of lading is evidence of a prior concluded contract, when some of its terms have never been negotiated prior to the acceptance of the bill of lading as the contract. It is common knowledge in international shipping that the bill of lading is the contractual document. Hence, any customer knows that the contract of carriage is concluded under the carrier's bill of lading. Many of the terms and conditions of carriage have been fixed through mercantile practice and shippers have little say in this matter. Furthermore, the bill of lading has been established as a contract of adhesion and, thus, every shipper must either simply accept the bill of lading as the contract of carriage or refuse to contract. Therefore, the principles under which the conclusion of a standard form contract takes place must apply instead of those of an ordinary contract. Besides, the adhering party is not infrequently essentially passive and, therefore, the shipper can demand the incorporation of additional terms in the bill of lading which terms become part of the finally accepted bill of lading contract. Parol evidence is inadmissible to alter terms of a written contract such as a bill of lading contract.

Third, the bill of lading, which is usually filled in by the shipper, is the offer for contracting. The carrier accepts the offer by receiving the goods for loading and by

signing the bill of lading. The shipper gets knowledge of the acceptance when he receives the signed bill of lading. If the carrier inserts new conditions then there is a counter offer and, therefore, in order to have the conclusion of the contract, the shipper must assent to those new terms by receiving the bill of lading without objection. The rules of contract law are not always applicable to commercial practice in the strict sense. The party who gets in his terms last, without the other party raising any objection, succeeds in contracting on his own standard terms. The acceptance of the carrier's bill of lading means the emergence of the bill of lading as the contract. Kelly, Jr, circuit judge,⁸² stated that by filing a suit on the bill of lading means that the bill of lading has been accepted as the contract. The acceptance of the goods by the carrier means ratification of the carrier's bill of lading as the contract, regardless of the issue or the signature of the bill of lading.⁸³ Besides, the actual issue and the signing of the bill of lading are necessary in order the bill of lading to function not only as a contract but also as a document of title.

Fourth, the bill of lading contract has retroactive force and covers the whole transaction from its beginning. The final contract in the form of the bill of lading contract emerges when the bill of lading is signed by the carrier. All actions prior to the issue of the bill of lading have been contracted under the idea that they are covered by the bill of lading. So, all actions have taken place under the terms of the bill of lading contract. The contracting parties have contracted with the idea that the issued bill of lading will be their final contract which will cover, retroactively, the whole transaction. Thus, it is submitted that the bill of lading is the contract of carriage which is a standard form contract⁸⁴

⁸² *All Pacific Trading Inc v Vessel M/V Hanjin Yosu* 7 F3d 1427 p. 1432 "Plaintiffs' initiation of this suit constituted acceptance of the terms of the Hanjin bills of lading".

⁸³ *Insurance Company of North America v S/S American Argosy* 732 F2d 299 p. 303 "A ship, by setting sail with the goods on board, may be deemed to have ratified a bill of lading that was neither issued nor authorised by its master". *D Osguthorpe v Anschutz Land and Livestock Company* 456 F2d 996 p. 1000 "Since delivery is not necessary in the absence of an express intention. The important factor is whether the parties arrived at a meeting of the minds". *Armour and Company v P Celic* 294 F2d 432 p. 435 "enforceable agreement results regardless of whether copies are delivered to each of the parties".

⁸⁴ H Collins "*The Law of Contract*", 1993, Butterworths p. 126 "Here the owner of the goods arranges with a carrier for transport and delivery through *a contract known as a bill of lading*". J Smith "*The Law of Contract*", 1993, Sweet & Maxwell p. 156, pp. 155-56 "Mellish LJ, in his classic judgement,

imposed upon the international carriage of goods by sea in order to achieve uniformity, harmonisation and efficiency in international trade. Therefore, the principle that the contract is concluded by the meeting of the minds of the contracting parties is applicable in the sense that the parties know first that the carrier's bill of lading will be issued in due course as the contract and second, that it is subject to the delivery of the goods to the carrier's custody.

5.15 The Definition and the Utility of the Bill of Lading Contract

The variety of views which has been expressed about the contractual function of bills of lading among the three legal regimes is indicative, that the contractual role of bills of lading is unsettled. There is no uniform perception of what is meant by a bill of lading contract. The absence of an international standardisation of its definition has allowed a different definition of the bill of lading contract among the three legal systems. There is no clear definition of the term "contract of carriage" or of its form among the three legal regimes either. American law indicates that its COGSA applies as a mandatory rule to contracts of carriage in the form of a bill of lading. So, the contract of carriage is a special form contract and not an ordinary contract. GOGSA applies to ordinary contract if and when the parties incorporate a clause to that extent and only as a mere contractual term of it. Thus, COGSA 1936 is inapplicable if the contract is not in the form of a bill of lading and, therefore, the aim of the legislature was to regulate the bill of lading contract. In English law, COGSA 1971 applies to bills of lading which are regarded, either as containing the contract or being evidence of it, despite the fact that the contract of carriage is covered by a bill of lading. In accordance with the prevailing view

distinguished between two types of paper... (ii) the type which all reasonably well informed persons would expect to contain such terms... His example of the second type was a bill of lading which invariably contains the terms of the contract of carriage (Stress added). Anonymous "The ocean bill of lading" (1993) 32 *Traffic Management* 82A-83A "The bill of lading is probably the most important piece of paper issued for ocean shipments. This vital document is a contract between carrier and shipper that spells out legal responsibilities and liabilities for both parties".

in English law, the bill of lading is merely evidence of the contract in spite of the fact that statute law (the 1855 Act) stated that the contract was contained in the bill of lading. Consequently, the language of GOGSA 1971 under US and Greek law interpretation reveals an inability to establish which is the contract of carriage when a bill of lading is issued. Greek law considers that the contract of carriage is nothing more than an ordinary contract. However, the provisions of the Private Maritime Code of Greece do not apply as mandatory rules to the contract of carriage when and if it is issued in a special form. The recent introduction of the Hague-Visby Rules should bring Greek law in to uniformity with American law, because as mandatory law the rules are applicable to any contract in the form of a bill of lading. A document which is merely evidence of a contract can only be transferred as such. The bill of lading could be seen as a “chameleon contract” if it is not established with a single contractual characteristic. Mrs Justice Reed⁸⁵ found the distinction of the bill of lading being some times the contract and at other times merely evidence of it as “metaphysical”. The establishment of a standard contractual nature for the bill of lading in legal theory is needed, despite the fact that in practice there is a silent acceptance of the bill of lading as the contract of carriage.

Hence, the bill of lading is a written contract of carriage for the transport and delivery of a loaded cargo to its destination. It can be concluded by the transfer of the goods into the custody of the carrier. It is validated as a contract simultaneously with the receipt of the cargo by the carrier and as a bill of lading when it is signed by the carrier. The signing of the bill of lading has retroactive force by its emergence as a contract. So, a bill of lading comes into force as a valuable bill of lading by the acceptance of the cargo by the carrier which at the same time triggers the conclusion of the bill of lading contract. It could be suggested that the bill of lading is validated as a bill of lading at the time of

⁸⁵ *The Roseline* [1987] 1 Lloyd's Rep 18 p. 20 “I have come to the conclusion that this distinction seems somewhat metaphysical”.

the oral agreement of the parties, but always on the hypothesis that the specified goods will be received in due course. Since the goods are transferred into the carrier's custody, the bill of lading is valuable and legally enforceable. Hence, it could be argued that the contract in the form of a bill of lading arises by and with the issue of the bill of lading. While the conclusion of a contract of carriage, either oral or written, other than a bill of lading contract cannot be ruled out, this oral or written contract should be transferred to a third party as the original contract rather than the bill of lading. The doctrine of privity of contracts states that a person may not enforce a contractual promise, even when the promise was expressly made in his favour, if he is not a party to the contract.⁸⁶ Greek and United States law provide for the enforceability of stipulations to the benefit of non-parties.⁸⁷ In fact, as mentioned above, in the case of a contract in the form of a bill of lading, the holder of the bill becomes a party to the bill of lading contract and any oral promises not contained in the content of the bill are not regarded as part of the contract. It could be argued that the bill of lading is regarded as the contract for the consignee regardless of the fact that the consignee might have knowledge of terms agreed between the shipper and the carrier even if they are not contained in it. If it is suggested that an oral contract of carriage is concluded prior to the issue of the bill of lading, then this oral contract, rather than the bill of lading contract, should be transferred to a third party. Furthermore, a bill of lading can be regarded as being evidence of the contract when there is definite agreement of the parties mentioned within the content of the bill. This bill of lading cannot be transferred as the original contract to a third party.

According to the views mentioned above, the bill of lading has been the vehicle which transfers the contract. The bill of lading gained its characteristic of being a document of title after it was accepted as the contract through practical usage. If the bill

⁸⁶ T Downes "A Text Book on Contract", 1991, Blackstone Press Limited pp. 318-367.

⁸⁷ Restatement of the Law, *Contract 2d*, Vol. 2 1981 American Law Institute Publishers Chapter 14 pp. 438-477. K Kerameus, P Kozyris "Introduction to Greek Law", 1988, Klumer Law and Taxation Publishers, Sakkoulas p. 81.

of lading is not the contract then why is the original contract not assigned to the third party instead of the bill of lading contract? English law has concealed the inconsistency of transferring a receipt as a contract by judicial inventory. To that extent the 1855 Act stipulated that the contract “contained in” the bill of lading, and “contained in or evidenced by” according to COGSA 1992, can be transferred as the original contract of the shipper to the third party. Besides, in US and Greek jurisdictions the relevant Acts have been utilised properly, in accordance with their language, for the transfer of the bill of lading contract to the third party. The judicial inventories, as applied in English law, have not been affirmed in US and Greek law because of the principles of endorsement and assignment of a contract to a third party beneficiary. The principle can be applied to assign a contract and not a receipt as a contract. Moreover, the advantages of statute law in reforming the law were preferred to a sole reliance upon judicial precedent and the limited force of common law tradition.

Since the view of the bill of lading being a contract does not express its practical usage, why do judges refer to the bill of lading contract? In English law, there are not many cases where the shipper has challenged the bill of lading as his contract. In particular, while the bill of lading has been linked with the insurance of the cargo or the production of a letter of credit, there did not appear to have been reported any cases of conflict between the shipper and the carrier regarding the contractual status of their bill of lading upon, which the insurance of the cargo and the letter of credit have been issued. Hence, these facts should be enough ground for us to understand that the bill of lading has been circulated as a contractual document rather than a memorandum. Moreover, scholars regard the bill of lading as being a contract of adhesion. The endorsement of the view that the bill of lading is not a contract but merely a memorandum will result in the need to employ the national laws of contract in order to establish the contract of carriage regardless of the existence of the bill of lading. For example, if the bill of lading is

merely a memorandum or merely a receipt then the same shipper loading his cargo to the three countries has to investigate which is the contract of carriage and he must even question if and when the contract of carriage has been concluded under the three different national rules of the law of contract and take into account the plethora of exceptions for the conclusion of a contract. Consequently, the same shipper transporting the same cargo under the three legal systems might come across the phenomenon that his contract be either the bill of lading or a combination of oral and written terms but not the bill of lading. In such a case, the bill of lading which the shipper accepts is of no use, since any conversations taking place prior to the issue of the bill of lading might be used in different ways under the three legal systems in order to modify or not to modify the terms of the contract of carriage.

In contrast, the supreme court⁸⁸ in USA accurately held that there is no need for the bill of lading to be merely evidence and, therefore, it must be either the contract or be without any force or effect as evidence of it due to the fact that there is already a concluded contract which could be evidenced by the principles of the national law of contract of the three legal regimes.

On the one hand, the whole effort of the International Conventions was to regulate the carrier's liability. The standardisation of the contents of the bill of lading contract, which aimed to avoid the incorporation of countless exemption clauses, was part of this effort as well. If the bill of lading is merely evidence of the contract, then what is the use of having printed bills of lading where the detailed terms of carriage are contained?⁸⁹ On

⁸⁸ In 1889, the supreme court of Indiana in the *Louisville E & St LR v Wilson* 21 NE 341 p. 343 Mitchell J stipulated his opinion about the contractual role of bills of lading. He said that "The bills of lading must be regarded either as complete contracts, into which all the oral negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported...".

⁸⁹ R Bradgate, F White, S Fennell "*Commercial Law*", 1995, Blackstone Press Limited p. 186 "**On the back of modern standard form bills are detailed the terms and conditions of carriage**". A Watson "*Finance of International Trade*", 1990, The Chartered Institute of Bankers p. 80 "**The full contract details appear on the back of the bill of lading**". (Stress Added)

the other hand, if the bill of lading is merely evidence, then only the agreed terms must be incorporated therein after the conclusion of the contract. Consequently, the shipper and the carrier in co-operation have to produce their personal bill of lading which will contain only the agreed terms in every particular shipment. Hence, a bill of lading standard form of contract is part of the broader objective of enhancing the negotiability and commercial utility of the bill of lading. A bill of lading is a common mercantile document, which has been used for hundreds of years. It has been established that any insurance policy is issued on the basis of the terms of the bill of lading rather than upon any oral contract which has been concluded before the issue of the bill of lading. In cases such as *the Ardennes* if the shipper wants to insure the goods, then the premium will be decided according to the contractual terms of the bill of lading and not according to any oral agreement. The letter of credit in consequence will be issued upon the terms of the bill of lading contract in combination with the existence of an insurance. Thus, letters of credit and insurance premiums have been based upon the standard terms of the bill of lading contract and not upon terms not contained in the bill of lading. Can the view that the bill of lading is a receipt and not a contractual document, enhance the commercial utility of the bill of lading when, at the same time, the bill of lading has to be a negotiable instrument, that is to say a formal contract? The view of the bill of lading being a memorandum and merely a receipt hampers the circulation and the negotiability of the bill of lading rather than meeting the demands for a universally harmonised contractual role.

CHAPTER VI

The Negotiability of Bills of Lading and their Contractual Role under Greek, United States and English Law

6.1 Introduction

As early as 1818 in Marseilles, merchants were asking the courts to recognise the legal character of the maritime sale of goods, which was a sale of a bill of lading representing goods at sea in a ship.¹ The courts of Marseilles found it suitable to hear and decide cases in accordance with the law merchant despite the lack of authority in the French Commercial Codes. Merchants everywhere began to deal with documents representing goods, without waiting to check the goods, as was the practice under the Napoleonic Code. Thus, the transition of the bill of lading from a mere receipt to a negotiable instrument developed by the practice of merchants arranging the sale of goods in transit. The success of the use of bills of lading in international trade is attributable to its negotiable character and its feature as a document of title.²

Distinctive features of negotiability³ are mainly the following: First, the paper must be freely assignable. For an instrument to be negotiable, it must contain words such as “to order” or “to bearer”, which indicate their negotiability. Second, a transferee, who takes one of these documents in good faith and for value, acquires a good title, even though his transferor has a defective title. Third, any claim is merged in the paper.

¹ A Knauth “*The American Law of Ocean Bills of Lading*”, 1953, American Maritime Cases Inc. pp. 374 - 377

² C O'Hare “Shipping Documentation for the Carriage of Goods and the Hamburg Rules” (1978) 52 *Aust L J* 415 p. 419

³ W Holdsworth “The Origins and Early History of Negotiable Instruments” 1915 *LQR* 12, 173, 376 and 1916 *LQR* 20, G Gilmore “The Commercial Doctrine of Good Faith Purchases” 63 *Yale L J* 1057, N Deloukas “*Commercial Papers*”, 1980, Sakkoulas pp. 25-30

E Hoppu states that:

“The primary object of the Hague Rules was ... to strengthen the value and significance of the bill of lading as a negotiable instrument”.⁴

The establishment of the negotiable character of bills of lading is ascertained straight from the first International Convention. The Economic and Social Commission for Asia and Pacific⁵ states that the bill of lading is a negotiable instrument. Under the Hamburg Rules⁶ bills of lading are treated as fully negotiable. Moreover, in a recent report of the Secretary - General of United Nations,⁷ bills of lading are stated as being negotiable instruments. However, there is no mention of or comparison with the negotiability of bills of exchange. It seems that under the International Conventions, bills of lading are regarded as being negotiable instruments.⁸ In which of its functions their negotiability is centralised will be examined.

The negotiability of bills of lading in relation to their contractual role will be examined in this chapter, in order to show their interrelation and influence on each other. The chapter will not deal with property rights represented and transferred by the

⁴ E Hoppu “The Carrier's Liability Under the Scandinavian Bills of Lading Acts in Case of Concurrent Causes” (1971) 15 *Scandinavian Studies in Law* 109 p. 123.

⁵ United Nations “*Use of Maritime Transport: A Guide for Shippers, Freight Forwarders and Ship Operators*” (ST/ESCAP/ 516) p. 100

⁶ Sweeny “*Review of the Hamburg Conference*” p. 19 in The Speakers' Papers for the Bill of Lading Conventions Conference, 1978, New York, Lloyd's of London Press. Bills of Lading. *Report by the Secretariat of UNCTAD*, 1971, New York (TD/B/C4/15L/6/Rev. 1) p. 45 “The negotiable character of the bill of lading as a document of title in so far it has been recognised in shipping practice finds due recognition under the Hamburg Rules”. p. 24 “For practical purposes, order bills of lading are usually treated as fully ‘negotiable’”.

⁷ Legal Issues of Electronic Data Interchange. Electronic Data Interchange: Report of the Secretary-General (A/CN 9/350) in United Nations Commission on International Trade Law Yearbook Vol. XXII (1991) United Nations p. 386

⁸ U Drobnig “*Security Over Corporeal Movables in Germany*” in J Sauveplanne “*Security Over Corporeal Movables*”, 1974, A Sijthoff - Leiden p. 185. F P de Rooy “*Documentary Credits*”, 1984, Kluwer Law and Taxation Publishers p. 136 “A bill of lading ... a negotiable instrument”. M Amos, F Walton “*Introduction to French Law*”, 1935, Clarendon Press p. 357 “Bills of lading ... are *titres negociables*”. F Lawson, A Anton, L Brown “*Amos and Walton's Introduction to French Law*”, 1967, Clarendon Press p. 365 “**The character of negotiability ... is conferred upon ... bills of lading, bills of exchange**” (Stress added). R Huebner “*A History of Germanic Private Law*”, 1968, Rothman Reprints Inc p. 567 “Commercial papers ... bills of lading ... embodying contract claims ... whose possession determines the right to enforce the obligation that is therein embodied”.

endorsement of bills of lading as documents of title.

6.2 Greek Law

Bills of lading may be issued either to order or simply consigned to a named person.⁹ The issue of bills of lading “to bearer” is not allowed under the Greek law. Is the bill of lading a negotiable instrument or not? Bills of lading are considered to be negotiable instruments.¹⁰ Straight bills of lading (non-negotiable bills of lading) are considered as assignable commercial papers.¹¹ In the case of commercial papers, there is only the relation between the issuer of the document and the holder of it. The way of legalisation of every holder depends on the form in which the document has been issued. Concerning the characteristics of the bill of lading as a commercial paper, there are scholars who purport that bills of lading are causal and demonstrative commercial papers.¹² For instance, Loukopoulos¹³ says that the bill of lading is a constructive commercial paper and not simply a causal negotiable instrument. Every third party holder of the bill of lading is entitled to receive the goods under the terms of the bill, regardless of other existing agreements which are not incorporated therein.¹⁴ Thus, bills of lading as commercial papers (negotiable documents of title) are constructive instruments.¹⁵ According to article 170 (c) of the Greek Maritime Code¹⁶:

⁹ T Karatzas “*The Greek Code of Private Maritime Law*”, 1982, M Nijhoff Publishers Art 169 p. 46, E Skalidis “*Commercial Code*”, 1985, Sakkoulas Art 169 p. 506.

¹⁰ Polimeles court of Piraeus 396/1979 1979 EED 410 p. 411, *ibid.* Karatzas p. 47 Art 172 “As regards the acquisition of rights in the cargo, delivery of a bill of lading to a holder who is lawfully entitled under the provisions of the preceding article shall have the same consequences as delivery of the cargo itself”, *ibid.* Skalidis pp. 284-85. Articles 76(e) and 80(2) of 17.7/ 13-8/1923 Legal Decree on Limited Companies, Article 978 of Greek Civil Code, Court of appeal of Athens 4466/78 1979 EED 408.

¹¹ K Karavas “Contribution in the Meaning of Commercial Papers” (1957) 24 *Newspaper of Greek Jurists* 201 p. 223. K Spiliopoulos “The Assignment of Straight Bills of Lading” 1953 *Themis* 97.

¹² *ibid.* pp. 211-12, N Rokas “*Commercial Papers*”, 1992, p. 26, A Kiantou - Pampouki “*Maritime Law*”, 1992, Sakkoulas p. 317, N Deloukas “*Commercial Papers*”, 1980, Sakkoulas p. 37.

¹³ A Loukopoulos “*The Casual or Abstract Character of Bills of Lading*” in Aferoma to A Tsirintanis Association of Greek Commercial Lawyers Sakkoulas (1980) p. 73. A Loukopoulos “Assignment of the Demand for Compensation for Loss or Damage of the Goods upon the Endorsement of the Bill of Lading” 1984 *EED* 1.

¹⁴ Perdicas “*Commercial Law*”, 1960, Vol. 1, p. 548.

¹⁵ *fn* 12 Deloukas p. 37

¹⁶ *fn* 9 Karatzas p. 46. Court of Appeal of Thessaloniki 473/1979 1980 Armenopoulos 413. Court of

“In the case of an order bill of lading, the provisions of the law in force on bills of exchange shall apply by analogy in respect of defences which may be raised against the holder”.

The law that is applicable to Bills of Exchange, in regards to defences which may be raised against the holder, is applicable to bills of lading which indicates that bills of lading should be considered as constructive documents either.¹⁷ The doctrine of literalita, therefore, applies to the bill of lading as well. The rights of every holder of the bill of lading are incorporated in the document and any references to terms outside the content of it are inadmissible.¹⁸ The bill of lading is not negotiable by its genesis but it has to be declared as such by incorporating the term “to the order” on the surface of the document. As a result, it is regarded as technically endorsed which means that all defences raised against the holder of a bill of exchange can be raised against the holder of the bill of lading as well. The order bill of lading is transferred with the endorsement free of every burden, and every holder in due course receives the document free of defectives.¹⁹ Moreover, the endorsement of the bill of lading results in the emergence of a guarantor's liability for every endorsee of the bill of lading.²⁰ Articles 1, 10 and 46 of 5325/32 Act on Bills of Exchange and Promissory Notes, concerning obligation under clauses contained in the document itself, do not apply to bills of lading.²¹ Thus, if a clause is incorporated in the bill of lading and refers to the content of another document such as a charter-party, then the content of that document is regarded as part of the

Appeal of Thessaloniki 474/1979 1980 EED 95. Court of Appeal of Piraeus 638/79 1980 EML 11. Polimeles Court of Piraeus 904/85 1985 EML 425 p. 428.

¹⁷ N Kousoulis “*Matters of Electronic Bills of Lading*”, 1992, Sakkoulas Athens - Komotini p. 29, fn 13 Loukopoulos p. 74. Scorza, an Italian scholar, says that the relation between bills of lading and the content of carriage is the same such as between bills of exchange and the relation which was the cause of the issue of the bill of exchange. Scorza “*La Polizza Di Carico*” I 215, A Loukopoulos “*Ocean Bills of Lading*” Afieroma to K Roka Association of Greek commercial lawyers, 1985, Sakkoulas p. 28. O Farmakidis “*The Law of the Greek External Trade*”, 1993, Sakkoulas p. 238

¹⁸ fn 11 Karavas p. 219, fn 12 Deloukas p. 28, Rokas p. 14

¹⁹ N Deloukas “*Maritime Law*”, 1979, Sakkoulas p. 435 sec 254

²⁰ *ibid.* p. 436

²¹ D Kambisis “*Private Maritime Law*”, 1982, Sakkoulas p. 474, fn 9 Skalidis pp. 289-321

content of the bill of lading itself. It will be recalled that the bill of lading is considered to be a contract on behalf of a third party.²² The contract of carriage of goods is a contract on behalf of a third party as well.²³ Therefore, it seems that the bill of lading is the contract of carriage on behalf of a third party.

Has the characteristic of bills of lading as negotiable instruments (commercial papers) any influence on their role as contracts of carriage? In accordance with the view of Professor Kotsiris,²⁴ the issue of a commercial paper has not aimed to create a new claim but only the creation of a better way of securing the satisfaction of the rights of the holder of the paper. However, the new form of expression of the rights of the parties is a newly formed agreement based totally on the content of the new document. The promise for transport and delivery of the goods at the agreed destination is incorporated in the bill of lading. The incorporation of the promise for transport in a constructive commercial paper, such as the bill of lading, could be said to create a new contract of carriage which did not exist before. Thus, if it is suggested that the contract of carriage has been concluded prior to the issue of the bill of lading, then the issue of the bill of lading is the new form of the contract of carriage. Hence, it could be said that the bill of lading supersedes any prior agreement. In accordance with Loukopoulos, the prevailing view in Italy and Germany, regarding demonstrative commercial papers, is that the relation contained in the bill of lading is new. It is distinguished from the relation which was the reason for the issue of the document.²⁵ Moreover, Loukopoulos states that new relations are raised by and with the issue of the bill of lading which are transferred according to the rules applying to commercial papers.²⁶ In common carriage, therefore, where there is no other document issued prior to the bill of lading, the contract of carriage should be

²² fn 19 Deloukas p. 427. Court of Appeal of Piraeus 1046/81 1982 EED 416 p. 417.

²³ Stathopoulos and Georgiadis "*The Law of Obligations*", 1979, Vol. II p. 432, Court of Appeal of Athens 4558/1973 28 *Armenopoulos* 112.

²⁴ L Kotsiris "The Aksiografiki Idea of Incorporation" (1978) *Armenopoulos* 885 p. 890.

²⁵ fn 13 Loukopoulos p. 67

²⁶ fn 17 Loukopoulos p. 32

regarded as being created by and with the bill of lading. The existence of any prior oral agreements, which under the Greek law may be considered to be the contract of carriage, should not be regarded as having any contractual application in relation to the principle of the creation of the commercial papers as contracts. Accordingly, Potamianos²⁷ states that the contract of carriage is created by and with the issue of the bill of lading. The claim and right incorporated in the bill of lading does not exist before the issue of the bill of lading²⁸, but it is created by and with the issue of the bill of lading. This view comes in support of the statement that the contract created by and with the issue of the bill of lading is a new contract for every holder of the bill of lading. The Polimeles court of Piraeus in 2073/78 case held that new contractual rights are created with the issue of the bill of lading. Even if there were other contractual rights, the new bill of lading contract has merged the old ones. Their content is conclusively contained and derived from the bill of lading.²⁹ Furthermore, Sotiropoulos³⁰ says that the contractual function of the bill of lading consists in the incorporation of the contract and the rights of the receiver for the delivery of the cargo. Besides, taking into account that the bill of lading is the only contract for every holder of the bill of lading, it is not specified whether the rights pre-exist and are simply incorporated in the bill of lading or whether they are created by the bill of lading.

Does the endorsement of the bill of lading transfer the contract of carriage?

Professor Tsirintanis³¹ stated that:

“The transferable power of the bill of lading is extended to the rights related to the concession and the contract of carriage. There is no need for the incorporation of any clause referring to the rights

²⁷ F Potamianos “*The Contract of Carriage by Sea*”, 1962, Vol. 1 Athens p. 40

²⁸ fn 17 Loukopoulos p. 21

²⁹ 7 EML 398 p. 401

³⁰ P Sotiropoulos “*Energetic Legalisation to Sue for Damages of Loss of the Cargo*”, 1988, In Hellenic Association of Maritime Law Memory D Markianos Athens p. 101

³¹ A Tsirintanis “*Studies of Commercial Law- Maritime Law*”, 1949, Sakkoulas p. 348

which will be transferred”.

Therefore, the contract of carriage is transferred with the endorsement to the consignee. In the 371/1958³² decision, the court of first instance of Piraeus held that the contract of carriage, which is contained in the bill of lading, is transferred to the endorsee by the endorsement of the bill. Loukopoulos³³ regards the decision as inaccurate and the contract of carriage not transferred. Besides, according to the 384/1971 decision of the Supreme Court (Arios Pagos),³⁴ the holder of the bill of lading is legalised by the endorsement of the bill of lading to sue the carrier for damages caused by any inadequate execution of the contract of carriage into which they have entered. The only contract into which the holder of the bill of lading and the carrier have been entered is the bill of lading contract. Hence, the contract of carriage for every endorsee or consignee of the bill of lading is concluded by and with the bill of lading contract. Even for the original shipper consignee of a constructive commercial paper, such as the bill of lading, the contract of carriage has to be the bill of lading, regardless of any underlying agreement. The holder of a bill of lading has an autonomous right to sue the carrier under the bill of lading contract, which has been transferred to him by the endorsement of the bill of lading.³⁵ Thus, the bill of lading is the contract of carriage for all holders of the bill of lading in due course.

6.3 United States Law

A bill of lading is not a negotiable instrument such as a bill of exchange under common law in the United States, but it is simply a quasi-negotiable instrument.³⁶ In

³² 1958 EED 415

³³ fn 17 Loukopoulos p. 17

³⁴ 1971 Newspaper of Greek Jurists 543

³⁵ Supreme Court 1720/84 13 EML 15, Polimeles Court of Piraeus 712/90 18 EML 460 p. 461, Monomeles Court of Piraeus 2791/81 1982 EML 288 p. 289, Court of Appeal of Thessaloniki 913/90 1990 EML 449 p. 450, Court of Appeal of Athens 1326/70 1971 EED 87 p. 89. Supreme Court 1137/84 1985 EED 650.

³⁶ *American Jurisprudence 2d*, Vol. 13 pp. 799-800 and Vol. 70 p. 929 “Apart from statute, a bill of lading

*Pollard v Vinton*³⁷ in the Supreme court, Mr Justice Miller, held that the bill of lading is not a negotiable instrument. Accordingly, Morton, J stated that the bill of lading is not negotiable and

“an endorsement and delivery ... operates to transfer the title to the goods ... but not as an assignment of the contract, except by force of some statute, as is now the case in England and some of the states here”.³⁸

There is a doctrine of privity which does not allow the acceptance of the bill of lading as the contract in the hands of a third party holder. Consequently, the doctrine of privity was in force under the common law of the United States. Thus, under common law the endorsement of a bill of lading could not transfer even the contract of carriage, while the bill of lading was regarded to be the contract of carriage itself.³⁹ Furthermore, the bill of lading is not negotiable⁴⁰ but it is merely a contract by a carrier to deliver the goods described at their destination. Correspondingly, Williston⁴¹ states that:

“Accordingly, a bill of lading, however made out, is, under the common law rule, a contract solely with the consignor”.

Hence, the bill of lading is the contract which is concluded by the consignor and the carrier. Is there any other kind of contract between the consignor and the carrier? It seems illogical to have any contract of carriage concluded by the shipper and the carrier other

is not a negotiable instrument in the sense that a bill of exchange or promissory note is”, *The St Johns NF* 272 F 673 p. 674 “A bill of lading is not a negotiable instrument, or a piece of commercial paper, and the doctrines favouring an innocent holder for value do not wholly apply”. *Frontier Nat Bank of East Port v Salinger* 126 NE 40 p. 41 “It is well settled that a bill of lading is a monument of title quasi-negotiable”, *Polard v Reardon* 65 F 848, *National Bank of Bristol v Baltimore Co* 59 A 134. *The Carlos F Roses* 44 Led 929 p. 933 “Bills of lading ... while quasi-negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes”.

³⁷ 26 Led 998

³⁸ *Cox v Vermont Cent Co.* 49 NE 97 p. 100 “A bill of lading is not a negotiable instrument”

³⁹ fn 37 p. 999 “It is at once a receipt and a contract”, *The Delaware* 20 Led 779, *The Thames* 20 Led 804, *Corpus Juris Secundum*, 1975, Vol. 13, West Publishing Co. p. 253 “As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law”.

⁴⁰ *Fourth Nat Bank v Nashville Co.* 161 SW 1144, 1146.

⁴¹ S Williston “*Williston on Sales*”, 1948, Revised ed, Vol. 2, Baker Voorhis & Co. Inc. p. 530

than the bill of lading contract. Even if it is considered that the contract of carriage is different from the bill of lading contract, then the bill of lading contract has superseded the previous contract. Otherwise, there will be two contracts for the same transaction and the bill of lading contract, as a later one, referring to the same cargo, will prevail. Therefore, the characteristic of bills of lading as the contract of carriage is ascertained, while it has been denied its fully negotiable character.

First the Uniform Bills of Lading Act 1909, which was withdrawn in 1951, gave full negotiability to bills of lading issued in intra-state transactions. The Federal Bills of Lading Act 1916 (Pomerene Act)⁴² did the same for bills of lading issued in the United States in foreign and inter-state trade. The intention of Congress⁴³ was to attribute full negotiability to bills of lading. Additionally, the character of bills of lading as contracts is stated.⁴⁴

In accordance with section 111⁴⁵ of the Pomerene Act:

“A person to whom an order bill has been duly negotiated acquires thereby a) ... b) The direct obligation of the carrier to hold possession of the goods for him **according to the terms of the bill** as fully as if the carrier had contracted directly with him”. (Stress added).

Thus, the bill of lading is becoming the controlling contract of carriage. The endorsee or

⁴² 49 USC 81-124. *Corpus Juris Secundum*, 1990, Vol. 13, West Publishing Co. pp. 344-349.

⁴³ *Chicago & N W R Y Co. v Bewsher* 6 F2d 947 p. 953 Kenyon circuit judges and Scott district judge state that “it was the clear intention of Congress to so legislate that ordinary bills of lading may be fully negotiable”, *The Ferncliff* 22 Fsup 728 p. 729 “At common law a bill of lading was regarded as quasi negotiable only and congress enacted Federal Bills of Lading Act to remove that limitation on full negotiability”.

⁴⁴ *ibid.* *Chicago* case p. 952 “It has been **almost universally** held that a bill of lading is not only a receipt but **a contract**”. (Stress added). *Spanish American Skin Company v The Ms Ferngulf* 143 Fsup 345 p.350 “A bill of lading may be a receipt for goods **plus a contract for the carriage of goods and also a negotiable document of title**”.(Stress added). *Amoco Overseas Company v ST Avenger* 387 Fsup 589 p. 594. *Z K Marine Inc. v M/V Arghigetis* 776 Fsup 1549, *West India Industries Inc. v Tradex Petroleum Services* 664 F2d 946, *Internation In v M/V Folawiyo* 480 Fsup 1245, *Berisford Metals Corporation v S/S Salvador* 779 F2d 841 p. 845, *Babbit v Grand Trunk Western Co.* 120 NE 803, *M M Landy Inc. v J Nicholas* 221 F2d 923 p. 929 “The idea of negotiability has now been extended to documents of title such as ... order bills of lading”.

⁴⁵ 49 USC 111

transferee of a bill of lading, therefore, can maintain an action on the bill in its own name.⁴⁶ Hence, the bill of lading is the contract of carriage for every endorsee.⁴⁷ The bill of lading has to be declared negotiable by its issue to the order, otherwise it is not a negotiable instrument.⁴⁸ The straight bill of lading, in which it is stated that the goods are consigned to a named person, is an assignable document of title under United States law.⁴⁹ As it is specified in section 115 of the Pomerene Act:⁵⁰

“The endorsement of a bill shall not make the endorser liable for any failure on the part of the carrier or previous endorsers of the bill to fulfil their respective obligations”.

COGSA⁵¹ enhances the negotiability of bills of lading as well. The Uniform Commercial Code (UCC)⁵² introduced the due negotiation of bills of lading. The concept of due negotiation of bills of lading is identical to the concept of the negotiation of a negotiable instrument to a holder in due course.⁵³ The holder in due course takes the instrument for value in good faith and without any notice of a defence.⁵⁴ In due negotiation there arises⁵⁵ the “direct obligation of the issuer to hold or deliver the goods **according to the terms of the document** free of any defence or claim by him except those arising under the terms of the document or under this article”. (Stress added)

The bill of lading is authorised as the document which represents the contract of carriage. It has been issued as such in order to be passed to some transferee. The doctrine

⁴⁶ *East Tex Motor Freight Lines v W H Hutchinson & Son* 241 SW2d 759

⁴⁷ *Stiles v Ocean S S Co.* 34 F2d 627 p. 628 “By the endorsement ... libelants became vested with title to the goods and a party to the contract of carriage”.

⁴⁸ 49 USC 83 “A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill”.

⁴⁹ *Transcon Lines v Lipo Chemical Inc.* 474 A2d 1108

⁵⁰ 49 USC 115

⁵¹ *Union Insurance Society of Canton v S S Elikon* 642 F2d 721 p. 723

⁵² R. Anderson “*Uniform Commercial Code*”, 1985, Vol. 7, The Lawyers co-operative Publishing Co. p. 584 Article 7-501. *Iowa Packers Inc. v Chicago Railway Co.* 402 F2d 930 p. 934 “The liability of the carrier to any holder of an order bill of lading elevates an order bill of lading to the status of a negotiable document”.

⁵³ *ibid.* UCC section 7-501:7 p. 589

⁵⁴ *ibid.* section 3-302

⁵⁵ *ibid.* section 7-502

of privity which prohibited the transfer of the bill of lading contract to a transferee has been by-passed.

Knauth,⁵⁶ Kendall,⁵⁷ Abrahamsson,⁵⁸ Gilmore and Black⁵⁹ regard the bill of lading as fully negotiable instrument. T Schoenbaum⁶⁰ defines that a negotiable bill of lading means that it functions as a document of title.

Bills of lading are classified as formal contracts like bills of exchange.⁶¹ In the first edition of the Restatement of the Law of Contracts⁶² bills of lading are considered as negotiable instruments. In the second edition of the same work bills of lading are regarded as negotiable documents belonging always in the same category, with the negotiable instruments (bills of exchange, promissory notes etc.) of formal contracts. The legal operation of a formal contract, like bills of lading, is dependent upon the form in which it is issued, the mode of expression, and not upon any other factor as the sufficiency of the consideration that is given in relation for it.⁶³ Every formal contract,

⁵⁶ fn 1 p. 386 "The course of business and legal events have steadily conferred on the order bill of lading an increasing characteristic of negotiability".

⁵⁷ L Kendall "*The Business of Shipping*", 1983, Cornell Maritime Press p. 248 "The bill of lading thus becomes in practice a negotiable instrument ... In the eyes of the United States courts, the bill has been fully negotiable since 1916 when the Federal Bills of Lading Act was passed". M Crutcher "The ocean bill of lading - A study in fossilisation" 45 *Tulane L R* 697 p. 702 "The bill of lading is negotiable by the custom of merchants".

⁵⁸ B Abrahamsson "*International Ocean Shipping: Current Concepts and Principles*", 1980, West View Press p. 84 "If it is directed to the order of someone we have the to order bill of lading, which is negotiable".

⁵⁹ G Gilmore and C Black "*The Law of Admiralty*", 1975, The Foundation Press Inc. pp. 94-100. G Gilmore "The Commercial Doctrine of Good Faith Purchases" 63 *Yale L J* 1057 p. 1080 "Bills of lading are throughout the country fully negotiable".

⁶⁰ T Schoenbaum "*Admiralty and Maritime Law*", 1987, West Publishing Co. p. 299 "The negotiability feature of the order bill of lading means that it functions as a document of title".

⁶¹ *Restatement of the Law of Contracts*, Second Edition, 1981, American Law Institute Publishers, Vol. 1 section 6 pp. 18-20 "Formal Contracts: The following types of contracts are subject in some respects to special rules that depend on their formal characteristics and differ from those governing contracts in general ... negotiable instruments and documents ...". "Negotiable documents are such ... bills of lading ... run to bearer or to the order of a named person, or, where recognised in overseas trade, to a named person or assigns".

⁶² *Restatement of the Law of Contracts*, 1932, American Law Institute Publishers Vol. 1 section 10 p. 9 "Negotiable Instruments: Negotiable instruments are such bills of exchange ... By statutes, in many states, bills of lading ... if running to bearer or to the order of a specified person, are negotiable". p. 8 section 7 "Formal contracts are ... negotiable instruments".

⁶³ A Corbin "*Corbin on Contracts*", 1963, West Publishing Co. Vol. 1, Section 5 p. 10 "A formal contract is one, the legal operation of which is dependent upon the form in which it is made, the mode of expression, and not upon the sufficiency of the consideration that is given in relation for it, or upon any change of position by the promisee in reliance upon it ... Among the contracts that are commonly classified as formal are ... negotiable instruments". M Baum, H Peritt "*Electronic Contracting*,

therefore, may be enforced according to its terms independent of any underlying contract.⁶⁴ Thus, the bill of lading should be regarded as the contract of carriage, which is created by and with the issue of the bill of lading, for every consignee or transferee or endorsee. Therefore, the bill of lading is not transferred as merely evidence of the contract because by its nature it is a contract. The bill of lading contract, being the basis for the documentary function of the bill, continues to govern the relationship between shipper or third party holder of the bill of lading and carrier until the delivery of the goods under its terms.⁶⁵

6.4 English Law

The origin of bills of exchange is found in the contract of *cambium*,⁶⁶ which was a contract to transport money and it was contained in an instrument *ex causa cambii*. The bill of exchange emerged as an independent contract possessing some exceptional features of its own.⁶⁷ All negotiable instruments are contracts in writing and the law referring to written contracts applies to them.⁶⁸ The rights under this contract are simply enforceable by whoever has lawful possession of the document which represents it. Transferability in a document is that quality that enables the owner to pass on his rights to a third party. Negotiability is that quality that enables the transferee to get a better title than the transferor. Verbal contracts may be transferable but only written are negotiable.

Publishing, and EDI Law", 1991, J Wiley & Sons Inc. p. 691 "Documents of title provide evidence of contract of carriage".

⁶⁴ UCC 3-104:16 "Conflict with underlying contract: The fact that there is a conflict between the terms of the negotiable instrument and the separate underlying contract does not affect the negotiability of the commercial paper, and in hands of a holder in due course, it may be enforced according to its terms". UCC 3-305:5 "commercial paper is distinct from and independent of the underlying contract".

⁶⁵ *Leather's Best Inc. v SS Mormaclyx* 451 F2d 800 p. 807, *Interocean Steamship Corporation v Mellon International Bank* 865 F2d 699 p. 700. fn 36 *National Bank of Bristol* case p. 136 McSherry, C.J. says "A bill of lading, as a mere document, is valueless".

⁶⁶ fn 3 W Holdsworth (1915)p. 24

⁶⁷ W Holdsworth "A History of English Law", 1925, Methven & Co. Ltd Vol.VIII p. 137, 131.

⁶⁸ *Saunderson and Others v Piper and Others* [1839] 132 ER 1163,1165, J Salmond and J Williams "Principles of the Law of Contracts", 1945, Sweet & Maxwell p. 164, J Salmond and P Winfield "The Law of Contracts", 1927, Sweet & Maxwell p. 123.

At the beginning the bill of exchange acquired only the feature of transferability.⁶⁹ Originally, negotiable meant transferable, but afterwards the term was used to indicate the effects of transfer, namely, that the transferee first took freely from equities and second, that he could sue in his own name. According to the primary meaning every negotiable instrument was only transferable.

The transition of the bill of lading from a mere receipt into a negotiable instrument and a document of title emerged from the mercantile practice of arranging the sale of goods while they were in transit.⁷⁰ It has to be borne in our mind that the three party relationship (shipper-carrier-receiver) in the contract of carriage is different from the relationship between the issuer, the transferor and the transferee of a negotiable instrument. Bills of lading making goods deliverable to order are, by mercantile custom, negotiable instruments.⁷¹ The use of bearer bills of lading, which is one that does not name the person to whom the goods are to be delivered, is allowed under English common law. The Carriage of Goods by Sea Act 1924 does not regulate straight bill of lading which is making the goods deliverable to a named consignee at all, regardless whether the straight bills of lading can be governed by the provisions referred to sea way-bills or not.

Are bills of lading negotiable instruments or not? Ashhurst, J⁷² held that:

“The assignee of a bill of lading trusts to the endorsement; the instrument is in its nature transferable, and in this respect, therefore, this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined

⁶⁹ J Ewart “Negotiability and Estoppel” 1900 *LQR* 135 p. 140. fn 67 Holdsworth p. 158 “Of the three main features of negotiability the bill of exchange was only just beginning to acquire on - the feature of ready transferability”. R Asariotis “Contracts for the Carriage of Goods by Sea and Conflict of Laws Regarding the contracts (Applicable Law) Act 1990” 1995 *JMLC* 293 p. 297 “In Germany where ... a bill of lading is that of a negotiable instrument”.

⁷⁰ F Sanborn “*Origins of Early English Maritime and Commercial Law*”, 1930, pp. 214-15.

⁷¹ *Scrutton on Charter-parties and Bills of Lading*, 1984, Sweet & Maxwell p. 184

⁷² *Lickbarrow v Mason* [1775-1 2] All ER 1 p. 3

the delivery of the goods to the purchaser only, but he has made it an endorseable instrument”.

The bill of lading, therefore, has emerged as a transferable document as a bill of exchange. At that time “transferable” was synonymous with “negotiable”, although Lord Loughborough,⁷³ CJ. considered that the bill of lading was not negotiable as the bill of exchange. Moreover, C Blackburn⁷⁴ stated cases and views, expressed at that time or previously, where the bill of lading was considered as a fully negotiable instrument. The judgement in *Lickbarrow v Mason*⁷⁵ describes bills of lading “as negotiable and transferable by endorsement and delivery”. It has been criticised and suggested, therefore, that the bill of lading was not described in the case as negotiable. The view has prevailed that bills of lading are not negotiable instruments, despite the fact that even bills of exchange, at that time, were regarded as being transferable documents, because “transferable” was synonymous with “negotiable”. Moreover, Woldsworth⁷⁶ states that as early as in the sixteenth century the court of admiralty was prepared to hold that bills of lading were not only assignable but negotiable.

Under English common law the bill of lading does not aspire to the concept of negotiability whereby the transferor can acquire a better title than that of his predecessor. It will be recalled that the bill of lading was not a negotiable instrument according to common law in the United States as well. Additionally, the bill of lading is negotiable if it is made negotiable, while a bill of exchange is negotiable unless its negotiability is specifically excluded.⁷⁷ When the word “negotiable” is used in relation to bills of lading, it merely means “transferable”,⁷⁸ despite the fact that the mechanism of negotiability-

⁷³ *ibid.* p. 8

⁷⁴ C Blackburn “*A Treatise on the Effect of the Contract of Sale*”, 1845, W Benning & Co. pp. 279, 287, 295.

⁷⁵ [1794] 5 Term Rep 683

⁷⁶ *fn* 67 p. 257

⁷⁷ C Schmitthoff “*Export Trade*”, 1990, Stevens pp. 572-73

⁷⁸ Treitel in “*Benjamin's Sales of Goods*”, 1992, Sweet & Maxwell pp. 938-39 sec 18-021. *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 p. 446 “It is well settled that “negotiable”, when used in relation to

endorsement and delivery is used in the same way as in other negotiable instruments. The original transferability of bills of lading was limited in such a degree that the enactment of Bills of Lading Act 1855 was necessary, in order to regulate and allow the transfer of the bill of lading contract. M Chalmers⁷⁹ stated that:

“At common law the property in the goods could be transferred by the endorsement of the bill of lading, but the contract created by the bill of lading could not”. (Stress added).

In accordance with this view, it could be said that the bill of lading is the contract with the shipper which could not be transferred because of the doctrine of privity. The contract is created by the bill of lading which means that the writing is necessary for its existence. Therefore, the bill of lading has been enveloped with the characteristic of the contract of carriage by its issue. Hence, it should not be regarded as being merely evidence of a previous concluded contract. Even if it is suggested that there was an oral agreement prior to the issue of the bill of lading, then it has been superseded by the bill of lading contract which is the final expression of the contract in writing. It is recognised as being the creation of the contract by and with the issue of the transferable bill of lading. In fact bills of lading are regarded as quasi-negotiable.⁸⁰

The Bills of Lading Act 1855 gave a right of action on the bill of lading contract

a bill of lading means simply transferable”. *Curney v Behrend* [1854] 3 E & B 622 p. 633 “A bill of lading is not, like a bill of exchange ... a negotiable instrument”. *Nippon Yusen Kaisha v Ramjiban* [1938] AC 429 p. 449 “It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is”. T Howard “The Carriage of Goods By Sea Act 1924” 1993 *JMLC* 181 p. 183 Howard says “A bill of lading was not, however, accepted as being a negotiable instrument”. P Dobson, C Schmitthoff “*Charlesworth's Business Law*”, 1991, Sweet & Maxwell p. 10

⁷⁹ M Chalmers “*The Sale of Goods Act 1893*”, 1924, Butterworth p. 178

⁸⁰ R Grime “*Shipping Law*”, 1991, Sweet & Maxwell p. 124. J Crossley Vaines “*Personal Property*”, 1954, Butterworth p. 140. R Pennigton and A Hudson “*Commercial Banking Law*”, 1978, McDonald and Evans p. 77, F Tillyard “*Banking and Negotiable Instruments*”, 1906, p. 263 “A bill of lading is not negotiable in the sense that ... can pass to such transferee a better title”. D Walker “*Principles of Scottish Private Law*”, 1975, Clarendon Press Vol. 1 p. 833 “But a bill of lading is not a negotiable instrument *stricto sensu*”. A Gibb, N Walker “*Introduction to the Law of Scotland*”, 1956, W Green & Son Ltd p.472 “The bill of lading is not strictly a negotiable Instrument”. *Halsbury's Laws of England* (4th ed) vol. 43 sec 491, R Negus “The Negotiability of Bills of Lading” 1921 *LQR* 442. F Tudsbury “Symbolical Deliveries by Documents” 1915 *LQR* 84, R Chorley “The Conflict of Law and Commerce” 1932 *LQR* 51. C Schmitthoff and D Sarre “*Charlesworth's Mercantile Law*”, 1984, Stevens & Sons p.573

to the endorsee or consignee or transferee, but it is generally submitted that it did not provide the instrument with any additional degree of negotiability.⁸¹ Scrutton, L.⁸² said that:

“Before the Bills of Lading Act 1855 ... the endorsement of the bill of lading ... did not assign the contract contained therein, and therefore the person ... did not by the same endorsement acquire a right to sue the shipowner upon his contract, which was evidenced in the bill of lading”.

Parke B⁸³ stressed that a contract of carriage was not transferable. Thus, Parke's judgement, in combination with Scrutton's judgement, ascertains that the contract of carriage is the bill of lading which is transferred to the holder of the bill of lading, certainly under the previous fulfilment of the conditions as they are stated in section 1 of the Bills of lading Act 1855. Additionally, it emerges that it has been established that the bill of lading was the contract that could not be transferred. Hence, under the 1855 Act, even as a quasi-negotiable document, the bill of lading was the contract of carriage for every endorsee.⁸⁴ In the case of section 1 of Bills of Lading Act 1855 not applying, the bill of lading was still the contract of carriage under which every holder of the bill of lading could take delivery. Bingham L J⁸⁵ pointed out that:

“if the judges' approach is correct, there was in truth no need for the 1855 Act because it is almost impossible to “imagine” circumstances in which a bill of lading holder could obtain goods

⁸¹ M Megrah and F Ryder “*Paget's Law of Banking*”, 1972, Butterworths p. 579.

⁸² *Brandt v Liverpool Steam Navigation Ltd* [1924] 1 KB 575 p. 594

⁸³ *Thompson v Dominy* [1845] 14 M & W 403

⁸⁴ *Glyn Mills Currie Co v The East and West India Dock* [1882] 7 AC 591 p. 596 Lord Selborne states that “Everyone claiming as assignee under a bill of lading must be bound by its terms and by the contract between the shipper of the goods and the ship owner therein expressed”. fn 77 Schmitthoff p. 574 “This implies that the bill itself shall contain all essential terms of contract of carriage and a third party, such as an endorsee or other holder of the bill of lading, shall be able to gather them from the document itself”.

⁸⁵ *The Aramis* [1989] 1 Lloyd's Rep 213 A case brought by the holders of the bill of lading as endorsees for damages of goods upon delivery. p. 225

without becoming party to the bill of lading contract". (Stress added).

Therefore, the holder firstly becomes party to the contract of carriage by the presentation of the bill of lading and then he gets delivery, not he gets delivery first, and after that he becomes party to the contract. There is a great support for the view that a new contract on the same terms as the bill of lading has arisen by the presentation of the bill of lading in order to get delivery.⁸⁶ But the bill of lading is already the contract of carriage under which every holder of the bill who fulfils the conditions of the 1855 Act gets delivery of the cargo. Consequently, it is assumed that the holder of the bill enters into the bill of lading contract with the presentation of the bill of lading, which was the valid contract under which the holder's of the bill of lading were entitled to a valid document of title as well.

Debattista⁸⁷ accepts that bills of lading are negotiable instruments by stating that:

"this is simply to say that the two documents [bills of lading and bills of exchange] are negotiable in different, if sometimes overlapping, circumstances: not that one is negotiable while the other is not".

He points out that it is not necessary for the bill of lading to be regarded as a negotiable document in an identical way as the bill of exchange. There are cases⁸⁸ where the bill of

⁸⁶ *The Kapetan Markos* NL[1986] 1 Lloyd's Rep 211, *Cremer v General Carriers SA* [1974] 1 WLR 341 p.349 "The Court of Appeal affirmed that a contract incorporating the terms of the bill of lading was to be implied".

⁸⁷ C Debattista "*Sale of Goods Carried by Sea*", 1990, Butterworth p. 23, A Tettenborn "Transferable and negotiable documents of title: A redefinition?" 1991 *LMCLQ* 538.

⁸⁸ *The Federal Bulker* [1989] 1 Lloyd's Rep 103 Incorporation of an arbitration clause in the bill of lading p.105 "The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charter-party". *The Merak* [1964] 2 Lloyd's Rep 527 p. 531 "The bill of lading is a commercial document to be used by commercial people. It is a negotiable instrument which may be acquired by a party who has no knowledge of the charter-party to which it refers" p. 534 Lord Justice Davies "*As a general rule a bill of lading being a negotiable instrument, must be construed according to its terms without reference to any extrinsic facts or documents*". (Stress added). *T Thomas & CO Limited v Portsea Steamship Limited* [1912] AC 1 The appellants were the consignees of the cargo and the holders of the bill of lading relating thereto. By the bill of lading the goods were to be delivered to the shipper or his agents. The question raised by the appeal was whether the arbitration

lading is ascertained as a negotiable instrument without any comparison with bills of exchange, and probably under the meaning that the contractual rights have conclusively merged in the bill of lading. Various views about the negotiable character of bills of lading have been expressed by scholars.⁸⁹

Moreover, there is a view that the bill of lading is a negotiable instrument which is unimpeachable in the hands of the holder in due course but its negotiability is only extended to the transfer of the right to demand the goods under the bill of lading contract.⁹⁰ Besides, there is support for the view that bills of lading are not negotiable in the sense that bills of exchange are.⁹¹

In contrast, in statutory exceptions the bill of lading is regarded as a fully negotiable instrument. Especially, under s 2(1), 8, 9 of Factors Act 1889 and s 24, 25 of Sale of Goods Act 1979 the endorsee of a bill of lading acquires a better title than his predecessor possessed.⁹² Additionally, every endorsee gets more than the endorser had in all cases where a previous vendor's right of stoppage in transitu is not valid against the

clause in the charter-party was incorporated by reference in the bill of lading. p. 6 "When it is sought to introduce into a document like a bill of lading (a negotiable instrument) a clause such as this arbitration ... should be done by distinct and specific words" p. 9 "bills of lading being negotiable instruments" p.11 Lord Robson says "It is to be remembered that a bill of lading, is a negotiable instrument, and if the obligations of those *who are parties to such a contract*" (Stress added). *The Mobil Courage* [1987] 2 Lloyd's Rep 655 p. 658 "There are to be three signed negotiable bills of lading". *Huge Mack & Co. Ltd v Burns Lines Ltd* 77 Ll L.R 377 p. 386 "The shipper is entitled to receive his bill of lading - a negotiable instrument of which he may make immediate use". *Cowdenbeath Coal Company Ltd v Clydesdale Ltd* 22 Ses Cas 682 p. 693 "as negotiable instrument".

⁸⁹ D Greig "*Sale of Goods*", 1974, Butterworths p. 88 "**Almost universally a negotiable instrument**", "The bill of lading is for most purposes a negotiable instrument which is unimpeachable in the hands of the holder in due course". G Fridman "*Sale of Goods*", 1966, Sweet & Maxwell p. 91 "The reason for this lies in the negotiability of bills of lading as a consequence of which the seller may find that he has lost his rights ... as against the goods themselves ... by virtue of dealing with bills of lading by the buyer". *The Marlborough Hill* [1921] 1 AC 444 p. 452 "If this document is a bill of lading, it is a negotiable instrument. Money can be advanced upon it".

⁹⁰ R Colinvaux "*Carver's Carriage by Sea*", 1982, Steven & Sons Vol. 2 p. 1114 sec 1597, T Williams "*Principles Of the Law of Personal Property*", 1926, Sweet & Maxwell p. 142 "by the custom of merchants, the bill of lading, when endorsed by the consignee with his name, becomes a negotiable instrument the delivery of which passes the property in the goods".

⁹¹ G Borrie "*Stevens Elements of Mercantile Law*", 1965, Butterworths p. 268. J Charlsworth "*Principles of Mercantile Law*", 1942, Stevens & Son, Sweet & Maxwell p. 211. Lord Chorley and Q Giles "*Shipping Law*", 1947, Pitman p. 155. T Ottaway "*Principles of Mercantile Law*", 1929, Vol. 2 The Donnington Press p. 64. R Holland "*Mercantile Law*" (6th ed) Pitman 255. K Wedderburn "*Sutton and Shannon on Contracts*", 1956, Butterworth p. 450. A Diamond "*Sutton and Shannon on Contracts*", 1970, Butterworth p. 515. J Jacobs "*The law of bills of exchange, cheques, promissory notes*", 1924, Sweet & Maxwell p. 45

⁹² fn 77 p. 573

endorsee.⁹³ The exception is now contained in section 10 of the Factors Act 1889 and in section 47(2) of the Sale of Goods Act 1979. In those cases a fully negotiable bill of lading means that, according to the principle of negotiable instruments, the contract of carriage is created by and with the issue of the document and it is merged in the document. However, in the United States, the understanding of the common law that the bill of lading is not a negotiable instrument has changed and the bill of lading is regarded as a negotiable instrument if it has been issued as such.

The function of the bill of lading as a document of title is distinct from its role as a negotiable instrument.⁹⁴ Schmitthoff⁹⁵ states that:

“Even a bill of lading which is not made negotiable, operates as a document of title because the consignee named therein can only claim delivery of the goods from the ship owner if able to produce the bill of lading”.

Thus, the bill of lading remains a document of title and a negotiable instrument so long as the contract is not discharged.⁹⁶ However, the bill of lading stands as a valid document of title so long as it is based on a valid contract of carriage.⁹⁷ Is the bill of lading the contract under which the bill of lading is discharged as a document of title? The bill of lading continues in force from the landing of the cargo,⁹⁸ until there has been an actual delivery

⁹³ *Fuentes v Montis* [1868] LR 3 CP 268 p. 276 “including bills of lading, as against stoppage in transitu only”.

⁹⁴ fn 77 p. 593, Leng Lim Hock “*Legal Aspects of Sea and Air Cargo Transport Documents with Especial Reference to International Carriage*” Unpublished PHD Thesis, 1990, University of Kent p. 26

⁹⁵ *ibid.* p. 593

⁹⁶ *Barclays Bank Ltd v Comminsoners of Customs and Excise* [1963] 1 Lloyd's Rep 81, J Wilson “*Carriage of Goods by Sea*”, 1993, Pitman p. 147 “It must be remembered that the prime function of a bill of lading as a document of title is in relation to the contract of carriage”, A Hudson “The exhaustion of bills of lading” 26 *MLR* 442, C Grunfeld “Issue of bill of lading: Causation” 13 *MLR* 516. *The “Future Express”* [1992] 2 Lloyd's Rep 79 A consignee in a bill of lading is entitled to enforce the rights of suit under the contract of carriage contained in or evidenced by that bill. p. 96. fn 90 Colinvaux p. 1138 “The bill of lading ... until ... delivery of them under the bill of lading”. *The Future Express* [1993] 2 Lloyd's Rep 542. *The Antwerpen* [1994] 1 Lloyd's Rep 213.

⁹⁷ *Heskell v Continental Express* [1950] 1 All ER 1033 p. 1044 “The whole truth of this matter is that, in the absence of a contract of carriage, the bill of lading is a nullity”.

⁹⁸ fn 90 Colinvaux p. 1138, G Borrie “*Stevens and Borrie's Elements of Mercantile Law*”, 1973, Butterworths p. 355 “It is the symbol of goods at sea, and remains so until the goods have come to the hands of a person entitled under the bill of lading to the possession of them”. J Macleod and A Hudson

of it under the bill of lading.

It seems that the contract under which the goods are delivered is the bill of lading. Furthermore, the bill of lading⁹⁹ carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the ship owner. The bill of lading, therefore, remains, being a negotiable document of title and contract of carriage until delivery takes place to the right person under the bill of lading contract. As a result, there is no other contract of carriage than the bill of lading. The bill of lading is established as the contract for the transport and delivery of the cargo between the shipper and the carrier. Thus, the bill of lading has been the contract since its issue and it is not transformed into a contract by its transfer. The wording and the approach of the judge in the case do not make clear that the contract of carriage is something different from the bill of lading contract as long as the bill of lading carries the contractual rights. In a Scottish case it is forcefully stressed by Lord President¹⁰⁰ that when there is a wrongful delivery to a person without presentation of the bill, the lawful holder of the bill has the right to sue the carrier under the bill of lading contract.

Consequently, the right person to get delivery is the holder of the bill of lading and the contract under which the delivery takes place is the bill of lading contract.

Under the newly introduced Carriage of Goods by Sea Act 1992, every holder of a bill of lading has been vested with all rights under the contract of carriage. The negotiability of bills of lading has not been changed by the introduction of this Act. Therefore, every endorsee gets delivery of the goods under the terms of the bill of lading

“*Stevens and Borrie's Elements of Mercantile Law*”, 1978, Butterworths p. 511

⁹⁹ *Sanders Brothers v Maclean* [1883] 11 QBD 327 A case of refusal to accept the cargo because two copies of the bill of lading were offered instead of three. The bill of lading has been indorsed to the plaintiffs. p.341

¹⁰⁰ *Pirie v Warden* Third Series [1870-71] Sc R R 610 p. 615. R Coode “*Commercial Law*”, 1982, Penguin Books p. 621 “As holder of the bill of lading, the consignee or endorsee is entitled to delivery of the goods from the carrier at the port of destination on presentation of and ***upon the terms contained in the bill of lading***” (stress added)

contract. A claimant,¹⁰¹ not being the lawful holder of the bill of lading, will only be able to establish a contractual title to sue the ship owner by virtue of *Brandt v Liverpool*. Finally, it is submitted that the bill of lading is a negotiable instrument concerning its contractual function and it is the contract of carriage for every holder in due course.

6.5 Deductions

Among all the three legal systems the negotiable bill of lading is regarded as being the contract of carriage for every consignee or endorsee. In common carriage, unlike bills of lading under charter-parties, there is no distinction between the original shipper and third party holder of the bill of lading, concerning the contractual role of bills of lading. Moreover, among the three legal systems the bill of lading has to be issued in a negotiable form in contrast with the bills of exchange which are negotiable unless their negotiability is excluded.

Greece and United States have introduced statutes, where the negotiable characteristics of bills of lading are stated. English common law, like the common law in the United States, regards negotiable bills of lading as being simply transferable instruments. Besides, as it is stated above, the bill of lading has been developed internationally into a fully negotiable instrument. The bill of lading contract was not even transferable under English and United States common law. Under certain statutes (Factors Act 1889 and Sale of Goods Act 1979) in English law, bills of lading are regarded as being fully negotiable instruments. It will be recalled that many scholars in England have pointed out a fully negotiable bill of lading without any comparison with the negotiable character of bills of exchange. The Bills of lading Act 1855 and the newly introduced The Carriage of Goods by Sea Act 1924, which has repealed the former, have introduced the transfer of the bill of lading contract to every endorsee or consignee, but

¹⁰¹ S Baughen "The Gudermes. What Future for *Brandt v Liverpool*?" 1994 *JBL* 62

said nothing more about the negotiable character of bills of lading.

Under Greek and United States legal systems, the contract of carriage is conclusively contained in such a constructive commercial paper as the negotiable bill of lading and, therefore, the contract is created by and with the issue of the bill of lading for every holder of the bill of lading in due course. This principle applies in cases where the bill of lading is regarded as a fully negotiable instrument under English law as well. There is no particular reason, therefore, for the bill of lading not to be regarded as the concluded contract by and with the issue of the bill in all the other cases, where the full negotiability of bills of lading does not apply as well. Hence, a compliance with the principle, that in all situations of common carriage the bill of lading is the contract of carriage, will for the first time achieve a uniform approach on the matter within the English law.

In United States and Greek law the relation between the function of the bill of lading as the contract of carriage and as negotiable instrument and document of title is clearly affirmed without any contradiction or inconsistency. The function of bills of lading as negotiable documents of title is based on the existence of a valid contract of carriage under which the whole process of transport and delivery of the goods takes part. The bill of lading itself is raised as the contract of carriage for every holder in due course and, consequently, as a negotiable document of title and this interrelation stands for the whole legal life of the bill of lading as a negotiable document of title and a negotiable instrument. In contrast, in English law the position is not clear, because there is a strong support for the view that the bill of lading is merely evidence of the contract. Thus, the bill of lading is not the contract of carriage. At the same time, the bill of lading as a quasi-negotiable instrument of title bases its function as such on a valid contract of carriage. The goods are delivered to every endorsee or consignee under the bill of lading contract. The bill of lading stands as the document of title so long as the goods are

delivered to the consignee or endorsee under the bill of lading contract, which is consequently the valid contract of carriage. As a result, there is an inconsistency, because a mere evidence of probably part of the contract comes to be considered as the whole contract of carriage which is the basis for the valid existence of the bill of lading as document of title. English courts should consider a uniform approach regarding the bill of lading as the valid contract of carriage under which the transport and delivery of the goods occurs in all the cases. This uniform conception of bills of lading as the valid contract of carriage would bring English law into line with the United States and Greek legal systems concerning this specific matter.

CHAPTER VII

Bills of Lading under Charter-Parties and their Contractual Role under Greek, United States and English Law

7.1 Introduction

In carriage of goods by sea, the contract of carriage is embodied either in charter-parties or in bills of lading. A charter-party is a contract between the charterer and the ship owner.¹ The co-existence of two (charter-party and bill of lading) contractual documents has given rise to many problems concerning matters such as who is the carrier, the shipper or which is the contract of carriage itself?

The contractual function of bills of lading under charter-parties will be investigated in this chapter. The central purpose of the analysis of the legal operation of bills of lading, which are issued in relation to a chartered ship, will be the discovery of any differences or similarities about their contractual role in comparison with their contractual role in common carriage. Reference to the functions of bills of lading as documents of title and as receipts will be made only in order to establish the characteristics of the bills of lading under charter-parties that will help to identify whether these bills of lading are real bills of lading. No further analysis of their role as receipts and documents of title will be undertaken.

7.2 Greek Law

Under Greek law, a contract of affreightment must be evidenced by writing in a

¹ N Gaskell, C Debattista and R Swatton "*Chorley & Giles Shipping Law*", 1987, Pitman p. 174, *Yeramex International v SS Tendo* 595 F2d 943. *Trade Arbed Inc v S/S Ellispontos* 482 Fsup 991 p. 995 "The charter-party is a separate contract which terms define the rights and liabilities of only the charterer and the owner".

charter-party.² The inaccuracy of the use of the term “evidenced by” in the case of charter-parties has been investigated in chapter II. In fact, the charter-party is the contract of carriage and not evidence of it. Besides, in the same transaction a bill of lading might be issued concurrently with a charter-party. Are the bills of lading under the charter-party the contract of carriage, evidence of it or merely a receipt? In paragraph 2, article 170 of the Greek Private Maritime Code³ stated that:

“As regards the relationship between the carrier and the freighter, the terms contained in the contract of affreightment, as evidenced by the charter-party, shall prevail”.

According to the language of the article, the bill of lading under charter-party is not even evidence of the contract of carriage. In contrast, the bill of lading is issued as the conclusive evidence of the contract as the charter-party. The legislator decided to attribute a higher contractual role to the charter-party than to the bill of lading when and if both documents are issued in the same transaction. Potamianos says that:

“The bill of lading is not the contract because the contract has already been formed by the charter-party, but it is simply evidence of the loading”.⁴

Potamianos regards the bill of lading as being merely a receipt. It will be recalled that Potamianos considers that the contract of carriage is created by and with the issue of the bill of lading.⁵ According to Potamianos, we cannot have a contract of carriage without an issued bill of lading, but we can have a contract of affreightment (Charter-party contract). It will be recalled as well that under Greek law, the contract of carriage of

² T Karatzas and N Ready “*The Greek Code of Private Maritime Law*”, 1982, M Nijhoff Article 108 p.32
“A contract of affreightment shall be evidenced by writing (charter-party)”.

³ *ibid.* Article 170 (2) p. 46

⁴ F Potamianos “*The Contract of Carriage by Sea*”, 1962, Vol. 1 Athens p. 15. B Kiantos “*Private Maritime Law*”, 1974, Vol. 2, Sakkoulas p. 53

⁵ Chapter II pp. 28, 39, 40

goods is a species of the contract of affreightment.⁶ Principally, in order for the bill of lading to be a bill of lading it has to be at least conclusive evidence of the contract, if the wording of the Code is followed. According to Potamianos' view, which must be steadily followed regardless of whether or not the contract is a contract under charter-party or in common carriage, the bill of lading is the contract.

In 2493/1975 case the court of first instance of Piraeus⁷ stated that if the holder of the bill of lading is the charterer, then the terms of the charter-party prevail over the terms of the issued bill of lading. In accordance with article 170 of the Greek Maritime Code and with court decisions and the views of scholars, the bill of lading under charter-parties is merely a receipt regarding the relation between the charterer and the shipowner.

In contrast, the court of first instance of Piraeus in 3242/1963 case⁸ stated that:

“If the charterer and the receiver is the same person, then clauses incorporated in the bill of lading prevail as subsequent one, regardless of the principle about charter-party clauses introduced by paragraph 2 of article 170”.

It is submitted that the issue of the bill of lading in the name of the charterer shows a clear intention of the parties to put their agreement in a new form. The judgement is in compliance with the principal that the bill of lading has the contractual characteristic of being the contract by its legal nature as such. Prior to the introduction of the current Maritime Code, other scholars also supported the prevailing of the bill of lading contract over the charter-party, when the shipper and the receiver are the same person.⁹ If in the case of a contract of carriage of goods by sea, a charter-party has been issued instead of a bill of lading, then the terms of the bill of lading as subsequent one supersede the charter-

⁶ Chapter II pp. 27-28

⁷ 1981 Legislation of courts of Piraeus p. 194, Court of Appeal of Athens 4466/1978 1979 EED 408

⁸ 1964 EED 226, The same view had been expressed in 2302/54 decision of the Court of First Instance of Piraeus 1954 EED 265. Dr D Kribas 1954 The newspaper of Greek Jurists 1140 p. 1145, Tsagaris 1954 EED 270

⁹ Sotiropoulos 1964 EED 228

party.¹⁰ Moreover, if a bill of lading has been issued instead of a charter-party in the case of a contract of affreightment, then the bill of lading is the contract of carriage.¹¹

The use of the bill of lading as the contract of carriage has not been ruled out regarding the relation between the charterer and the shipowner, but the intention for such a use must be specifically illustrated.¹² As an example a hand written clause should be inserted either in the bill of lading or in the charter-party. This means that this bill of lading as a legal document is not a contract.

In the case of the clause “all terms and conditions as per charter-party” being incorporated in the bill of lading, then the bill of lading should be considered as being the contract of carriage in the relation between the charterer and the shipowner. The terms of the charter-party have become part of the bill of lading contract. Thus, in the event of conflict between the incorporated terms of the charter-party and the bill of lading arising, the charter-party terms, relating to the function of the bill of lading, should prevail over the terms of the bill of lading because this is the will of the contracting parties. The whole matter of the conflict of the terms should be regarded only as an interpretation of the conflicted terms of the bill of lading contract.

The bill of lading under the charter-party is considered to be the contract of carriage for the third party holder.¹³ Hence, the bill of lading is issued as a contract for the third party. But as a third party contract the bill of lading has to be a contract for the parties which have issued it as well. The incorporation of the terms of the charter-party in the content of the bill of lading has not been ruled out, but the incorporation has to be specific and precise in order to apply to the relations between the carrier and third parties.¹⁴ In 167/1983 case, the court of first instance of Piraeus¹⁵ stated that:

¹⁰ *ibid.* p. 232

¹¹ Stauroopoulos “*Interpretation of the Commercial and Maritime Code*”, 1978, Sakkoulas p. 429, D Kambisis “*Private Maritime Law*”, 1982, Sakkoulas p. 471.

¹² *fn* 4 Potamianos p. 49

¹³ Kambisis p. 473, Stauroopoulos pp. 432-33

¹⁴ Court of Appeal of Piraeus 638/79 8 EML 11, Court of Appeal of Athens 4410/78 7 EML 15.

“in the relation between carrier and third party holder of the bill of lading the terms of the charter-party are not taken into account, but only the terms of the bill of lading”

In fact, the bill of lading is not generally regarded as being the contract of carriage in the hands of the charterer as consignee or endorsee of the bill of lading¹⁶ as well.

There is no specific provision in the Private Maritime Code of Greece in which the transformation of the bill of lading from a receipt to a contract of carriage has been stated. According to article 170 of the Private Maritime Code, the contractual characteristic of the bill of lading depends on its holder, but this transformation has not been explained through the use of the general principals of law. The conclusion of the bill of lading as the contract of carriage should depends more on the principles of the law of contracts than on who its holder is. Moreover, the bill of lading has been principally identified as the conclusive evidence in the writing of the contract of carriage regardless of its holder. Furthermore, the bill of lading as a negotiable instrument has to be a contract as well and its contractual terms must be found conclusively in its content. The bill of lading is issued as a negotiable instrument if it is in a negotiable form and, so, its terms are the terms of the contract of the transaction, despite the existence of any underlying contract. The legislator, by indicating that the terms of the charter-party prevail over the terms of the bill of lading, does not regard the bill of lading as a negotiable instrument. Besides, as mentioned in the previous chapter, the bill of lading is a commercial paper when it is issued in a negotiable form. Therefore, there is some doubt that the named bill of lading document is a bill of lading in principal.

¹⁵ 1984 EED 113 p. 114, Court of Appeal of Thessaloniki 913/90 1990 EML 449

¹⁶ N. Deloukas “*Maritime Law*”, 1979, Sakkoulas p. 263, Sioufas 1970 EED 150.

7.3 *United States Law*

In private carriage a charter-party has always been issued as the contract of carriage between the charterer and the ship owner.¹⁷ But bills of lading very often happen to be issued in the same transaction with charter-parties. There is no rigid distinction in practice between operations governed by charter-parties and those in which a bill of lading emerges. The question which arises in those cases is whether the issued bill of lading serves as the contract of carriage in the relation between the charterer and the carrier?

A charter-party is not subject to the Carriage of Goods by Sea Act 1936 (COGSA) regardless of whether it is being the contract of carriage or whether a bill of lading has been issued under the charter-party.¹⁸ Bills of lading issued in the case of a ship under charter-party have to comply with the Act. The question is why those bills of lading have to comply with COGSA, when the Act does not apply as a mandatory status? Perhaps they comply because those bills of lading are potential contracts which COGSA has to apply on a later stage, when the bills of lading will serve as contracts for the goods.¹⁹ Charter-parties do not by their own force incorporate the Carriage of Goods by Sea Act 1936.²⁰ Parties can incorporate some or all the provisions of COGSA in a contract of private carriage such as a charter-party.²¹ COGSA governs such cases as a matter of contract, not as mandatory rules, and the Act applies to the extent that the contracting parties intended to do so.²²

¹⁷ *Vanol USA Inc. v M/T Coronado* 663 Fsup 79 p. 81 “The cargo was shipped pursuant to the terms and conditions of the voyage charter-party between Vanol and Shell making it the governing contract of carriage”. *Yeramex International v SS Tendo* 595 F2d 943 p. 946

¹⁸ 46 USC 1305 “The provisions of this chapter shall not be applicable to charter-parties; but if bills of lading are issued in the case of a ship under a charter-party, they shall comply with the terms of this chapter”, *Matsushita Elect Corporation v SS Aegis Spirit* 414 Fsup 894 p. 901

¹⁹ 46 USC 1301 (b) “The term ‘contract of carriage’ applies only to contracts of carriage covered by a bill of lading ... , insofar as such document relates to the carriage of goods by sea, including any bill of lading ... as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading ... regulates the relations between a carrier and a holder of the same”.

²⁰ *G B Michael v SS Thanasis* 311 Fsup 170

²¹ *Colgate Palmolive Co v SS Dart Canda* 724 F2d 313, *Trade Arbed Inc v S/S Ellispontos* 482 Fsup 991.

²² *Marine Sulphur Queen* 460 F2d 89 p. 103 “A bill of lading may serve three functions: as a receipt, as a

COGSA does not apply so long as the bill of lading operates as mere receipt for the goods, because it applies only to the bill of lading contract. As early as 1889 Brown, J.²³ stated that:

“The bills of lading are not, as the libelants contend, the only contracts between the parties. Even if they had been regularly issued, they would only have been in execution of the previous contracts of affreightment ... it has been long settled, not only that the bills of lading do not supersede the provisions of the charter-party in so far as they differ from it, but that they are controlled by the charter-party, in the absence of any proof of authority and intention to make a new contract”.

The co-existence of two contractual documents in the same transaction is ascertained. Nevertheless, the charter-party prevails over the bill of lading contract. Bills of lading merely operate as receipts and documents of title when the charterer himself ships the goods.²⁴ It emerges that the arise of any contractual characteristic of bills of lading depends on the person who ships the cargo and its contractual status is conditional. Consequently, bills of lading in such cases do not operate as new contracts regarding the relation between charterer and the carrier. Then, it becomes clear that the bill of lading

document of title and as a contract for the carriage of goods, however, it does not perform the third function for the shipper and carrier when there is a charter-party containing the terms of the carriage contract”. *Shell Oil Co v M/T Gilda* 790 F2d 1209, 1212, *PPG Industries Inc. v Ashland company* 527 F2d 502 p. 507 “COGSA can apply to this case only as a matter of contract and only to the extent that the parties have manifested an intent that it should apply”.

²³ *Crenshawe v Pearce* 37 F 432 p. 434

²⁴ *The Fri* 154 F 333 pp. 336-37, *The G R Crowe* 294 F 506, *The Sonia II* 151 F2d 727 p. 730 “In the first place, where a bill of lading is issued by the master to a charterer who has contracted for the full capacity of the ship, the bill of lading is merely a receipt and not a contract”. *The Andros Mentor* [1970] 1 Lloyd's Rep 145 p. 151 “Since the bill of lading were in the possession of he charterer, they were merely receipts, and the rights and liabilities of he parties were governed by the terms of the charter-party”. *Larsen v AC Carpenter Inc.* 620 Fsup 1084 p. 1108 “A bill of lading is deemed merely a receipt when it is issued to the charterer ... The relations between the parties are governed by the voyage charter-party ... This agreement constitutes a private contract of carriage, to which the provisions of COGSA are not applicable”. *Unterweser v Potash Importing Corporation of America* 36 F2d 869 p. 870 “The bill of lading, which operated as a receipt for the goods and as a document of title, did not have the effect of varying the contract between the shipper and the ship owner, evidenced by the charter-party”.

has only two functions instead of three. However, the bill of lading as a legal document is a contract. Can this document named as a bill of lading be regarded as a real bill of lading when it lacks the function of being a contract?

If the bill of lading is intended to serve as the contract of carriage, then COGSA applies and the bill of lading will supersede any inconsistent provisions of the charter-party. The parties can express their intention to modify the charter-party contract into the issued bill of lading. There is no specific identification of what constitutes an intention for modification.²⁵ Thus, the parties can show their intention in many ways, but their arrangement can be expressed within the content of the bill of lading. The flexibility of the rule states that the charter-party prevails over the terms of the bill of lading concerning the relation between the charterer and the carrier. This is stressed by Friendly, Chief judge.²⁶ The intention of the parties to accept the bill of lading as their contract must be found either in the charter-party or in the bill of lading. The mere issuing of the bill of lading, for the carriage of the same goods for which a general contract as the charter-party has been already issued, is not regarded as an intention of the parties to put their agreement into a new form.²⁷ Besides, in order for a document to be a bill of lading, it has to be a contract. So far it is ascertained that the bill of lading under charter-party, in general, is merely a receipt and a document of title²⁸ in the hands of the charterer.

Is the bill of lading under charter-party a receipt, or evidence of the contract or is

²⁵ *Ministry of Commerce v Marine Tankers Corp.* 194 Fsup 161 p. 163 Palmieri, district judge, stated that “The parties to a charter, intending to modify the terms originally agreed upon, may express such modifications in the bill of lading given to the charterer. If the court finds such an intention, it will give effect to the variations embodied in the bill of lading”.

²⁶ *Nichimen Company v MV Farland* 462 F2d 319 p. 328.

²⁷ *Shell Oil Company v M/T Gilda* 790 F2d 1209 p. 1212 “**COGSA applies by its own terms only if the bill of lading is the contract of carriage.** If the shipper charters the entire vessel, the charter-party rather than the bill of lading is the contract of carriage unless the parties express an intent to the contrary”. (Emphasis added). *Trade Arbed Inc v S/S Ellispontos* 482 Fsup 991 p. 995 “The parties to a charter-party could agree that bills of lading would govern relations between the charterer owner as well as the charterer shipper”.

²⁸ *Sucrest Corporation v M/V Jennifer* 455 Fsup 371 p. 380 “COGSA, of course, would apply if the bill of lading served as the contract for the carriage of the sugar ... Where ... the charterer holds the bill of lading, it is equally well settled that the bill of lading serves merely as a receipt for the cargo and does not function as the contract for the carriage of the goods”.

the contract itself in the hands of a third party consignee or holder in due course ? A bill of lading which has been transferred for value to a third party which is not a party to a charter-party, constitutes an undertaking independent of the charter-party,²⁹ even though the provisions of the charter-party expressly incorporated into the bill of lading are part of the contract. As a result, it is recognised that the bill of lading is the contract of carriage in the hands of every third party consignee or holder in due course. Hence, a transfer of the bill of lading receipt for the goods has transformed the bill into a contract. According to Dawson, the bill of lading becomes the contract for the following reasons: First, the third party is a stranger to the charter-party contract. Second, the bill of lading has been established in international trade as the document on which every holder of the document should rely with regard to the terms of the contract of carriage. It is suggested that the bill of lading is the contract of carriage, but in case of bills of lading under charter-parties, the contractual element does not arise until the bill of lading is transferred.³⁰ The acceptance of bills of lading as being or not being contracts of carriage is like a chameleon changing its colour according to the environment. Even a chameleon has as a permanent characteristic the ability to change colours and the ability does not suddenly emerge from nowhere. Thus, the characteristic of being the contract of carriage has to be created by the issue of the bill of lading, in order to be able to arise at any moment.

However, even against a consignee, the charter-party may be incorporated into the bill of lading and as part of the contract of carriage it will govern the relationship of the parties.³¹ The incorporated terms are regarded as being part of the contract which, in such

²⁹ *Chilean Nitrate Sales Corp v The Nortuna* 128 Fsup 938 p. 940 Dawson, district judge, stated that "It is true that where a bill of lading has been transferred for value to a third party not a party to a charter-party, it constitutes an undertaking independent of the charter-party, except as to provisions of the charter-party expressly incorporated into it".

³⁰ *United States v Wessel, Duval & CO Inc.* 115 Fsup 678 p. 682, *Sarantex Shipping Company v Wilbur-Ellis Company* 391 Fsup 884 p. 887 "A bill of lading is a document generally used as both a receipt and a contract, but where the shipper is also the charterer, the contractual element does not arise until the document is transferred".

³¹ *Siderius Inc v Newser Navigation* 613 Fsup 916 p. 919 "A charter-party is deemed incorporated into a bill of lading and binding as against an assignee, even though the assignee is a stranger to the charter-party, if the bill of lading states that it is governed by the charter-party and identifies it with sufficient

cases, is the bill of lading.³² In *Production Steel Company of Illinois v SS Francois Ld* ³³ the court held that the bill of lading and not the charter-party was the contract of carriage despite the fact that a reference to the charter-party was incorporated in the bill of lading. Thus, we have two contracts but there is an integration of the charter-party contract into the bill of lading contract. The mere incorporation of a general clause “subject to all terms” or “conditions” cannot alter all the terms of the bill of lading.³⁴

In *Midland Tar Distillers Inc v M/T Lotos*³⁵ the court held that a mere incorporation in the bill of lading of a provision that referred only to the appointment of arbitrators by parties to the charter-party, was enough to be regarded as an incorporation of the charter-party into the bill of lading. Hence, the court read the charter-party and the bill of lading together in order to form the contract of carriage. The factor which influenced the court to take a different decision in the last two cases was the language used in the bill of lading. In the former case the bill of lading was very detailed and was found to embody fully the obligations of the parties. This contrasted with the bill of lading in the latter one, which was completely devoid of any detail. It could be said that even in cases where the reference to the charter-party is well incorporated in the bill of lading, the contract of carriage is the bill of lading regardless of whether provisions of the charter-party are incorporated in the bill of lading. Those incorporated provisions apply as part of the bill of lading and only as such.

specificity”, *State Trading Corp of India v Grunstand Shipping Corp* 582 Fsup 1523, 1524, *Lowry & Co v SS Le Moyne D'Iberville* 253 Fsup 396, 397-98. Compare with *United States Barite Co v M V Haris* 534 Fsup 328, 329, 330, *Platamon De Navegacio SA v Empresa Colombiana De Petroleos* 478 Fsup 66, 68.

³² *Son Shipping Co v De Fosse & Tanghe* 199 F2d 687 p. 688 “Where terms of the charter-party are, as here, expressly incorporated into the bill of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the charterer and the ship owner.”. *United States v Sugarland Industries* 231 F 239 p. 241.

³³ 294 Fsup 200

³⁴ *ibid.* p. 201 “The fatal difficulty with Federal's contention ... is its failure to recognise that the charter-party contract and the bill of lading are two separate and distinct integrated contracts, and that the mere statement in the bill of lading that it was” Subject to all terms, conditions of “the charter-party contract even if it be treated as an incorporation by reference (which is doubtful), could not have the effect of obligating plaintiff to perform the obligations of the parties to the charter-party”.

³⁵ 362 Fsup 1311

There is another situation where the charterer of a vessel uses the vessel as a general ship and issues bills of lading on its behalf. The definition of the term “carrier” includes the meaning of “the owner or the charterer who enters into a contract of carriage with a shipper”.³⁶ Is the charter-party employed as the contract of carriage between shipper and carrier? The answer is that the provisions of the charter-party are not binding on the cargo owner. The bill of lading is the contract of carriage.³⁷ Any prior oral agreement between charterer and the shipper does not bind the ship; the only contract is the bill of lading.³⁸ The ship, by sailing with the goods on board, is regarded to have ratified the bill, even though it was neither issued nor authorised by its captain.³⁹

In accordance with the prevailing view, in cases where the consignee or holder of the bill of lading in due course is the charterer, then the charter-party is once again the contract of carriage. Courts have looked into the identity of the parties in order to identify the controlling document, in case there was a conflict between charter-party and bill of lading.⁴⁰ Since the transferee or consignee of the bill of lading is not party to the charter-party, then the bill of lading is the contract of carriage. In contrast, if the consignee or transferee is the charterer then the charter-party is the contract of carriage and it is not superseded by the bill of lading. Accordingly, Carswell⁴¹, Chief judge, considered that the charter-party and not the bill of lading controlled the consignee's claims against the carrier. The consignee was the charterer of the vessel and holder of the bill of lading issued under the charter-party. However, the goods which were carried by the chartered vessel had been shipped by a third party shipper who had no idea of and no relation with the charter-party. It has not taken into account that the goods have been shipped under the

³⁶ 46 USC 1301 (a)

³⁷ *The Capitaine Faure* 10 F2d 950, *The Fort Morgan* 270 US 253

³⁸ *The Blandon* 287 F 722, *The Ersom* 272 F 266, *The owego* 270 F 967.

³⁹ *Demsey v Seastar* 461 F2d 1009, *Dow Chemical Pacific Ltd v Rascator Maritime SA* 594 Fsup 1490, *Insurance Company of North America v S/S American Argosy* 732 F2d 299.

⁴⁰ *Ministry of Commerce, State Purchases Directorate of Athens, Greece v Marine Tankers Corporation* 194 Fsup 161 pp. 162-3

⁴¹ *Albert Reed & Co v M/S Thackeray* 232 Fsup 748

bill of lading contract and the endorsement of the bill of lading has transferred this bill of lading contract to the endorsee. The existence of another contract between the consignee and the carrier was not enough to change the identity of the contract under which the specific goods have been loaded and transported.

So far the bill of lading is merely a receipt and a document of title as long as it stays on the hands of the charterer. A transfer of the bill of lading surprisingly turns the bill into a contract of carriage. First of all, the bill of lading has been identified as a receipt, a contract of carriage and a negotiable instrument.⁴² Second, the bill of lading as a negotiable document of title serves as contract complying with the rules of the negotiable instruments which require the content of the contract to be conclusively contained in the document itself. The bill of lading is a negotiable instrument if it has been issued in a negotiable form, which means that the terms of the transaction are found within the bill of lading. Any underlying contract is superseded and, therefore, even if the charter-party was the contract of the transaction, it has been repealed by the bill of lading. According to the prevailing view, the bill of lading cannot supersede the charter-party, which means that the bill of lading is not a negotiable instrument on this occasion and so it cannot be a bill of lading. Sweet⁴³, district judge, stated that:

“One of the consequences of the charter-party being the contract of carriage is that the bill of lading issued for the Maya Crude Oil was not issued as a document of title evidencing a contract of carriage, but rather as a receipt evidencing only that Maya Crude Oil was loaded aboard the Ruth M”.

Therefore, there is some doubt about the function of this bill of lading as a negotiable

⁴² *The Delaware* 20 Led 779 p. 782 “It is a written acknowledgement, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated”.

⁴³ *Marathon International Petroleum Supply Co v ITI Shipping SA* 766 Fsup 130 p. 134

document of title. The term “evidence of contract” is understood to have the meaning that the bill of lading is the contract.⁴⁴ The bill of lading has to be a contract in order to be a bill of lading and, consequently, a document of title. Third, the transfer of a receipt cannot transform it into a contract of carriage. In order for a document to be a contract, it has to be accepted by the parties as such, complying with the principles of the law of contracts. Fourth, the bill of lading, being a document of title, has to contain the contract under which the delivery of the goods, to every consignee or other person therein designated, will take place.⁴⁵ Therefore, a bill of lading under charter-party has to be, first of all, a contract in order to be a bill of lading, otherwise the term “bill of lading” is used to identify a mere receipt. A document arises as a contract either under the principles of the law of contract when it has been issued as such or when it is transferred by endorsement to the endorsee as such. External factors, such as those referred by Dawson, cannot by-pass their inconsistency and their incompatibility with the general principles of the law of contract. Hence, there is some doubt as to whether the bill of lading under charter-party is a real bill of lading.

7.4 English Law

There are cases in English law where a charter-party, which is a contract of carriage between the charterer and the shipowner,⁴⁶ has been issued together with a bill of lading. Thus, the parties need to know when the bill of lading rather than the charter-party

⁴⁴ *Vanol USA Inc v M/T Coronado* 663 Fsup 79

⁴⁵ *Interocean Steamship Corporation v Mellon Bank International* 865 F2d 699 p. 703 “A party's obligation to prevent misdelivery of shipped goods derives, in part, from the terms of the bill of lading. The contract of carriage between a shipper and carrier enunciates the responsibility of the carrier to deliver enumerated goods to a specified location”.

⁴⁶ P Todd “*Modern Bills of Lading*”, 1990, Chapter 7 p. 90, C O'Hare “Shipping Documentation for the Carriage of Goods and the Hamburg Rules” 1978 *Aust LJ* 415 p.416 “It is identified as a standard type of commercial contract”. *President of India v Metcalfe Shipping Co, Ltd* [1969] 3 All ER 1549 p. 1552 “The charter-party is not merely a contract for the hire of the use of a ship. It is a contract by which the ship owners agree to carry goods and to deliver them. If the ship owners fail to carry the goods safely, that is a breach of the contract contained in the charter-party”. (Stress added).

regulates their relations.

Lord Esher MR⁴⁷ considered that a bill of lading under charter-party is merely a receipt between the shipowner and the charterer. His Lordship stressed that the contract of carriage in such cases is contained in the charter-party. Thus, the term “contained in” is used once again to identify the characteristic of the charter-party as the contract of carriage.⁴⁸ It will be recalled that the same term has been used in an identical way in order to declare the contractual characteristic of bills of lading. That is to say that both documents (charter-party and bill of lading) are contracts of a similar kind and that is why the same term has been used to identify their contractual characteristic. Moreover, the bill of lading has been given in order to be passed as the contract of carriage. The charterer deals with the goods in transit through the bill of lading contract and document of title. His Lordship has not explained how a receipt can be transformed into a contract by endorsement. The contract must be contained in the bill of lading in order to be able to be transferred. Furthermore, it has been recognised that the bill of lading has been issued as a contract for the goods in transit. Hence, there is an obvious inconsistency. According to Lopes LJ⁴⁹ the mere issue of the bill of lading does not operate as a new contract and cannot alter the contract contained in the charter-party.

The bill of lading should be considered to contain the contract, because the

⁴⁷ *Rodocanachi & Co v Milburn Brothers* [1887] 18 QBD 67 p. 75, *Leduc v Ward* [1888] 20 QBD 475 p.479, *Kruger & CO Limited v Moel Tryvan Ship Company Limited* [1907] AC 272 p. 280 “It is clear that as between the charterers and ship owners the terms of their contract must be found in the charter-party”. *The Njegos* [1936] All ER 863.

⁴⁸ *Halsbury's Laws of England*, 4th ed, Vol. 43 p. 354 sec 527 “As, however, the parties may vary their contract by agreement, the bill of lading will prevail over the charter-party, even as between the ship owner and the charterer, where they have expressly agreed to vary the contract as contained in the charter-party, ... and have inserted in the bill of lading a statement to that effect, or where it is otherwise clear from the circumstances that the contract is intended to be varied”. *Benjamin's Sales of Goods*, 1992, Sweet & Maxwell p. 931 sec 18-016 “But it is not evidence of the terms of a contract of carriage, for the contract will be contained in the charter-party”. N Gaskell, C Debattista and R Swatton “*Chorley & Giles Shipping law*”, 1987, Pitman pp. 262-63 “Their contract is contained in the charter-party and that the bill of lading is a between themselves, only a receipt and a document of title”. *Halsbury's Laws Of England*, 1993, (4th ed) Reissue, Butterworths Vol. 5(1) p. 322 sec 414 “An agreement for the carriage by sea of a cargo or for the use of a ship ... is normally contained in a charter-party”, *The “Roseline”*[1987] 1 Lloyd's Rep 18.

⁴⁹ fn 47 *Rodocanachi* case p. 79

shipowner has supplied it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods. Thus, the bill of lading should be the contract of carriage of the goods in transit.⁵⁰ The bill of lading is issued as the contract for every third party endorsee. Hence, the bill of lading is issued as a contract in order to be passed as such by the charterer. The main principle, that the bill of lading is endorsed as a contract, is not eliminated by the fact that in this case it is not applied. Consequently, it should be the contract for the original contracting parties. It is submitted that at the moment that the parties decide to put their agreement for the transport of the loaded cargo into a new form, in order to be able to be transferred as such, the bill of lading should be considered as the contract of the cargo for the shipper-charterer as well. The cargo will be delivered according to the contractual terms of the bill of lading, no matter if the endorsee is the charterer or a third party.

If a bill of lading was made out to the charterers, then as between the charterers and the owners it operated not as a contract but as a receipt for the goods.⁵¹ Hence, there was no bill of lading contract made on shipment. The only contractual document was the charter-party. It could be said that the bill of lading contract is created on shipment and by the shipment. Thus, it is a specific kind of contract in writing, expressed in the form of a bill of lading. To that extent, it is questionable if the issued document is a real bill of

⁵⁰ *The Al Battani* [1993] 2 Lloyd's Rep 219 In the absence of an endorsement the plaintiffs contract of carriage is contained in the agreement of March 12, on its face, was made on behalf of the receivers of the cargo. The defendants relied on the fact that the plaintiffs requested an extension of time, which would have been necessary only if the contract was contained in the bill of lading p. 222 In line with Sheen J says that "The bill of lading must be considered to contain the contract, because the ship owner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods". Fn 1 Gaskell p. 180 "the bill of lading will accordingly be issued on the latter's behalf and will constitute the contract of carriage"

⁵¹ *Molthes Reders Aktieselskabet v Ellerman's Wilson Line* [1927] 1 KB 710. A case regarding the collect of freight where the bill of lading issued to the shippers. The bill of lading was the contract between the shipowners and the shippers. It is stated as a principal that when a ship is chartered by a charter-party not amounting to a demise, and subsequently the ship is subchartered for a single voyage and bills of lading are signed by the master in respect of cargo carried on the voyage, the contract contained in the bill of lading is a contract with the shipowner. The legal right of freight was with the owner. p. 716 Greer J considered that "The bill of lading was made out to the charterers, and as between the charterers and the owners it operated not as a contract but as a receipt for the goods. ***There was therefore no bill of lading contract made on shipment.*** The only contractual document was the charter-party". (Stress added)

lading, despite the fact that it has been named as such. The bill of lading is not created as a contract which means that it cannot be categorised as a bill of lading, which is characterised by its three functions. Besides, it could be argued that the bill of lading is the contract between the shipper and the shipowner.⁵²

The bill of lading could be the contract of carriage between charterer and shipowner if a positive intention is expressed. The simple fact of the issue of a bill of lading cannot alter the charter-party.⁵³ In *Davidson v Bisset & Son*⁵⁴ oral evidence was admitted to show an intention to vary the charter-party by a bill of lading.

Therefore, is the bill of lading the contract of carriage or is it merely a receipt for the consignee? Bowen, LJ,⁵⁵ concerning bills of lading under charter-parties, states that:

“The bill of lading is a document regulating the rights and liabilities of the consignees”.

When a bill of lading is in the hands of third parties, unrelated to the charter-party, either as original shippers or as transferees or endorsees, the bill of lading is the contract of carriage⁵⁶ and not evidence of it. However, there is no reasonable explanation to the effect that a receipt has been transformed into a contract. According to the Bills of Lading Act 1855 and the Carriage of Goods By Sea Act 1924 a contract “contained in” the bill of lading is transferred to any consignee without any distinction being made whether the charterer is the consignee himself or not. Therefore, the bill of lading should be the contract for the charterer as a consignee as well. Besides, the charter-party, taking

⁵² *ibid.* p. 715 “The bill of lading contract is a contract between the shipowner and the shipper”, p. 718 “here there was a bill of lading contract”.

⁵³ *fn 48 Benjamin's Sales of Goods* p. 931

⁵⁴ [1878] 5 R (Ct of Sess) 706

⁵⁵ *Gullischen v Stewart Brothers* [1884] 13 QBD 317 p. 319. W Park “Incorporation of charter-party terms into bills of lading contracts: A case rationalisation” 1986 *VUWLR* 177 p. 178 “In establishing the contractual relationship between the ship owner and consignee, the Court's concern is to interpret the bill of lading contract”.

⁵⁶ *Serraino & Sons v Cambell* [1891] 1 QB 283 p. 293. *Temperley Steam Shipping Company v Smyth & CO* [1905] 2 KB 791 p. 802. R Bartle “*Introduction to Shipping Law*”, 1963, Sweet & Maxwell p. 5 “**When, however, shipper and charterer are different persons the rights of the former and any indorsee are governed by the bill of lading alone**”. (Stress added)

into account that the bill of lading is merely a receipt, should be the only contract which can be assigned to a third party according to the rules of assignment. Additionally, in the case that the parties have already entered into a contract, there is no need for the issue of another document which by its nature is a contract.

A bill of lading must be issued as the contract of carriage in order to be transferred as such. Accordingly, Debattista⁵⁷ states that section 1 of the Bills of Lading Act 1855 merely transfers contracts “but it does not create them: if the bill of lading performs no contractual function on its issue, then its transfer can pass no contract where none exists”. It is suggested that a new contract on the terms of the bill of lading emerges between the carrier and the consignee.⁵⁸ As the charterer has no contractual rights under the bill of lading, there are no rights to transfer. Following the repeal of the 1855 Act, a similar problem arises in relation to 2(1) of the COGSA 1992. This section vests in a lawful holder of a bill of lading, by virtue of becoming holder, all rights of suit under the contract of carriage, as if he had been a party to that contract. Prior to the endorsement of the bill, the terms of the contract of carriage are to be found in the charter-party, while the bill of lading constitutes a mere receipt in the hands of the charterer. A document emerges as a contract either if it is issued as such complying with the general principles of the law of contract or when it has been issued as such and, in accordance with the provisions of the Carriage of Goods by Sea Act 1992, it is merely transferred to any lawful holder of the bill of lading. Clauses 2(1) and 5 (1) of the Act⁵⁹ give the holder rights under the original contract of carriage as expressed in the bill of lading and not under any charter-party. Consequently, the bill of lading has to be the contract which is transferred as such.

What contractual rights can be transferred when the bill of lading is merely a

⁵⁷ C Debattista “*Sale of Goods Carried by Sea*”, 1990, Butterworths p. 169

⁵⁸ *Hain Steamship Company, Limited v Tate & Lyle Limited* 41 Com. Cas 350 p. 357

⁵⁹ *Halsbury's Statutes*, 4th ed, Current Statutes Services 39 Shipping pp. 133, 137.

receipt? Lord Wright MR⁶⁰ regards that every holder of the bill of lading as endorsee, except when the charterer is an endorsee, is bound by liabilities under the contract contained in the bill of lading rather than the charter-party. His Lordship has not taken into account that according to the prevailing view, there is no contract contained in the bill of lading under charter-party. Additionally, there is no indication that he regards the bill of lading as the contract of carriage between the charterer and the carrier. If the bill of lading is merely a receipt then it cannot be endorsed, because there is doubt as to whether a document as such should be considered as a bill of lading. Hence, the receipt can be assigned to any third party as such. A receipt cannot be regarded as a retroactive contract of carriage. The acceptance of and consent to the employment of a document as the contract, by any third party, cannot be suggested before an indication to that extent has been shown by the third party itself. But the bill of lading must be considered as the contract of carriage for the loaded cargo regardless of the shipper or the consignee. Otherwise, the same document (the bill of lading) will have a dual conception with different characteristics, firstly, it will be a receipt and a document of title and secondly, it will be a receipt, and a document of title and a contract of carriage as well. However, every document which belongs to a category has to envelop, always, and during its legal life, the same characteristics, in order to be classified as such. The charterer and the shipowner can incorporate, in the bill of lading, a clause which will refer to the employment of the charter-party as their contract, but only as part of the bill of lading contract which is the contract of carriage of the specifically named cargo carried under the bill of lading contract.

The terms of the contract under which the goods in transit are delivered to every consignee of the bill of lading as document of title, regardless of whether the charterer is

⁶⁰ fn 58 p. 364

the consignee, should be found in the bill of lading contract.⁶¹ Accordingly, Lord Justice Davies⁶² considers the bill of lading as a contract. Hence, it is questionable, once again, if a receipt as the bill of lading under charter-party should be classified as such, despite it being named as such. Although the consignee's contract is the bill of lading which he holds, there are occasions where the terms of the charter-party are contained in the bill of lading as well. Terms of a charter-party incorporated in a bill of lading are considered to be written terms of the bill of lading contract.⁶³ The incorporated clause must specifically refer to the terms which will be incorporated and must be relevant to the content and context of the functioning bills of lading. The bill of lading contract governs the carriage of the goods and no longer the charter-party.

Is the bill of lading the contract of carriage for the charterer as a consignee? In *Steamship Calcutta Company v Andrew Weir & Co*,⁶⁴ the ship is put up as a general ship, taking into account that the bill of lading has firstly been issued to a third party which has been transferred by endorsement to the charterers, the charterers as consignees of the bill of lading demand delivery of the goods under the bill of lading contract. As a result, in the present case there never was any shipment of the goods by the charterers under the charter-party, neither did they acquire them under the charter-party. According to the judge, in a case when no part of the shipment or actual carriage is under the charter-party, it does not appear that the terms of the charter-party apply to the transaction at all.

⁶¹ *T Thomas & Co Limited v Portsea Steamship Company* [1912] AC 1 p. 5 "It acknowledges the shipment of the goods in the usual way and the terms upon which the goods are to be delivered".

⁶² *The Dunelmia* [1969] 2 Lloyd's Rep 476 Even though the charterers were not the shippers and took as indorsees of a bill of lading, nevertheless relations between parties were governed by the charter-party. The master was only authorised to sign bills of lading without prejudice to the charter-party. On the other hand, a bill of lading can be issued not against the terms of the charter-party. p. 483 "**The bill of lading also is in general, a contract (this time between the shipper and owner)**". (Stress added).

⁶³ fn 55 *Gullischen* case p. 318. T Thommen "*Bills of Lading in International Law and Practice*", 1985, Eastern Books Company pp. 38-39 "When they are expressly incorporated, they become terms of the contract contained in the bill of lading".

⁶⁴ *Steamship Calcutta Company v Andrew Weir & Co* [1910] 1 KB 759 An action by the charterer's as holders of the bill of lading. Plaintiffs the shipowners and defendants the charterers. Judgement for the plaintiffs. Charterers liable to pay the freight. p. 764 "The cargo being in truth the cargo of the shipper, the bill of lading constitutes a contract of carriage between the shipper and the charterers ...", fn 55 *Gullischen* case pp. 318-19

According to Scrutton LJ,⁶⁵ the endorsement of the bill to the charterer, when the charterer claims on the bill of lading, does not alter or affect his rights, which are expressed and limited by the bill of lading. Hence, the bill of lading was regarded as the contract of carriage between the charterer as an endorsee and the carrier, regardless of the existence of any charter-party between them. The third party is an independent contractor and merely an agent of the charterer. It is the right view because the bill of lading is the only contract which has been issued for the cargo which is mentioned therein, regardless of whether or not the charterer can transport cargo under the charter-party.

In contrast, according to Lord Denning MR,⁶⁶ when the charterer is not the shipper and takes as endorsee of a bill of lading, then the charter-party is still the contract which governs the relations between the parties in the transaction. His view has been founded on the decision in *Love and Stewart Ltd v Rowfor Steamship Company Ltd* ⁶⁷, where Lord Sumner considered that the only contract between charterer and ship owner is the charter-party. A new bargain had not been made between them. The charterer simply presented the bill of lading in order to get delivery of the goods. The fact that the cargo had been shipped under the bill of lading contract and the charterer had become part to the bill of lading contract has been underestimated. The shipped goods have been transported under the bill of lading contract. The charterer has never shipped goods under the charter-party. The charter-party was a contract for the carriage of goods, but it was not the contract of carriage of the actually shipped cargo. The existence of two different contracts between the charterer and the ship owner is not a reason for solving any dispute between them under the terms of the wrong contract. Lord Denning implied the terms of

⁶⁵ *Hogarth Shipping Company v Blyth, Greene & Co Limited* [1917] 2 KB 534 Charterers as receivers and endorsees under the bill of lading. Dispute about the incorporation of a clause to the bill of lading. p.551 Scrutton LJ said that “the indorsement of the bill to the charterer, when the latter claims on the bill of lading, does not alter or affect his rights, which are founded on and limited by the bill of lading”.

⁶⁶ fn 46 *President of India* case p. 1555 Lord Denning MR stated that “Even though the charterer is not the shipper and takes as indorsee of a bill of lading, nevertheless their relations are governed by the charter”.

⁶⁷ [1916] 2 AC 527

the wrong contract concerning a dispute between the parties for the delivery of goods transported under the bill of lading contract. The parties have never been involved in the transaction of any goods referred to their charter-party, but the charterer simply happened to be the receiver of a cargo shipped under an independent contract of carriage. Therefore, the endorsement of the bill of lading to a third party, which in this case happened to be the charterer of the vessel, does not transfer the bill of lading to the endorsee, but it brings about the substitution of the bill of lading contract by the charter-party contract which emerges as the contract of carriage. Under this principle endorsed by this decision, every endorsement of the bill of lading to a third party should cause the alteration of the contract of carriage from the bill of lading contract to the charter-party contract.

The Law Commission⁶⁸ suggests that the charterer cannot have the rights under the bill of lading contract transferred to him, because he has rights under the charter-party contract. In contrast, the bill of lading contract is the contract which has been transferred to him and which has nothing to do with the charter-party contract. The endorsement or assignment of a bill of lading transfers the bill of lading contract rather than the charter-party, which cannot be ignored. Otherwise, it has to be accepted that the endorsement of the bill of lading transfers the charter-party contract rather than the bill of lading contract. The terms of the charter-party which is incorporated in the bill of lading can prevail over its terms, but only as the terms of the bill of lading contract which is transferred to the charterer-consignee. Consequently, courts must construe the contract under which the specific load has been shipped. There is a contradiction in the report where it is stated that the holder of the bill of lading becomes party to the contract of carriage which is contained in or evidenced by the bill of lading. It is well established that the holder becomes party to the bill of lading contract. In fact, it is stated that the bill of lading only

⁶⁸ Law Commission Report No 196 (1991) HC 250 p. 21

contains the contract of carriage.

The charter-party is deemed, according to the prevailing view, to be the contract of carriage between the charterer and the shipper regardless of the fact that the charterer is an endorsee.

In the case of a ship being sub-chartered, then the contract between the sub-charterer and the shipowner is the bill of lading under which the goods have been shipped.⁶⁹ It could be argued that the bill of lading will constitute the contract of carriage for any shipper other than the charterer.

Finally, bills of lading under charter-parties should be regarded as contracts of carriage for the specific load, regardless of who the shipper, the endorsee or the consignee may be, in order to achieve a uniform conception of the bills of lading and to avoid the inconsistency described above.

7.5 *Deductions*

Among the three legal systems, bills of lading under charter-parties are regarded as being merely receipts and documents of title between the charterer and the shipowner. Besides, those bills of lading are considered to be the contracts of carriage in the hands of third parties. The transformation of a receipt into a contract of carriage by an endorsement has not been principally explained under the three systems which are investigated. It is questionable if those bills of lading belong to the same category as bills of lading in common carriage. O'Hare⁷⁰ questions the treatment of bills of lading under charter-parties as bills of lading as well. The fundamental element, which is the basis for the doubt which has arisen, regarding the characteristics of the documents which are

⁶⁹ *Turner v Haji Goolam Mahomed Azam* [1904] AC 826 p. 835 "Under these circumstances the ship owners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading." p. 826 "Held, that bills of lading ... but contracts which bound the shipowners". *Gardner & Sons v Trenchman* [1884] 15 QBD 154

⁷⁰ fn 46 O'Hare p. 420

named as bills of lading and issued under charter-parties, is the absence of the contractual function. This is the primary element of the bill of lading in common carriage. Bills of lading and charter-parties are contractual documents. Consequently, a document as a bill of lading or a charter-party, in order to belong to this category of legal documents, must be a contract. The charter-party is a general contract which refers to many things, one of which might be the transport of cargo. Besides, the bill of lading contract refers to the transport of a loaded cargo and delivery of it, to its destination, always under the terms therein contained. The bill of lading is not the contract for a cargo which is specified as an unidentified quantity, but it is the contract for the transport and delivery of the loaded cargo which can be identified only when it has been passed into the carrier's custody. Neither document because of the legal nature of its function can be attributed with a variable contractual status. The shipper-charterer, by demanding a bill of lading which will be the contract for the goods in transit, signals his intention to put the contract for the loaded cargo into a new form. If the charterer wants merely a receipt, it is not necessary to ask for a bill of lading, which by its nature, in order to be a bill of lading, has to be a contract. It will be very easy to assign the charter-party contract according to the law of the three legal systems. There is no need to have a new form of contract, which will be passed by endorsement or assignment, according to the negotiable or non-negotiable form in which the bill of lading has been issued. A negotiable bill of lading has three characteristics, namely, receipt, contract and document of title. If and when one of these characteristics is not applicable, then it is not a real bill of lading. Therefore, when the bill of lading is regarded as merely receipt in the hands of the charterer, this document is not a bill of lading as it has been perceived in common carriage. If we want to call a document a bill of lading when it has only two characteristics, namely, receipt and document of title, then we use the same name for two different kind of documents. A bill of lading, in order to be a valid document of title, has to be based on a valid contract. The

holder of the bill of lading gets delivery according to the terms of the bill of lading contract. Therefore, the valid contract, under which the bill of lading is a valid document of title, is the bill of lading contract itself. Additionally, a bill of lading, issued to a third party shipper, constitutes the contract of carriage.

Furthermore, bills of lading are negotiable instruments, at least under the Greek and United States law. In contrast, there is doubt about the negotiable characteristic of bills of lading under English law. The full negotiable status of bills of lading, as is mentioned above, has been declared by the International Conventions. Hence, the bill of lading as a negotiable instrument is always a contract, regardless of any underlying contract. Therefore, the charter-party is the underlying contract, which is superseded by the bill of lading contract, and the bill of lading is the contract for its issuer and its holder. Moreover, it has been accepted that bills of lading under charter-parties have been issued in order to be passed as contracts and documents of title for the goods in transit. They should be issued as contracts in order to be passed as such to any endorsee. If the bill of lading is not transferred, then it should remain as such in the hands of the charterer. The bill of lading, by being merely receipt, means that it has not been issued as a contract which can be transferred. Consequently, it can be assigned as a receipt to a third party. The acceptance of bills of lading under charter-parties as contracts of carriage for the specific load, regardless of who the shipper or the endorsee is, will eliminate the inconsistency which has been mentioned and will bring uniformity to the conception of bills of lading under charter-parties and in common carriage. Otherwise, bills of lading under charter-party cannot be put in the same category as bills of lading in common carriage. Moreover, the traditional bill of lading has been attributed with three functions. Finally, any document, in order to be a true bill of lading, has to accommodate the three functions.

CHAPTER VIII

The Contractual Role of Bills of Lading on Matters of Conflict of Laws

8.1 Introduction

Parties entering into a transaction which may involve more than one country have to select the law under which any disputes, arising out of their contract, should be settled. Probably the most eminent device for pre-selecting a specific national law to govern an international contract and that which is used most world-wide is the so-called governing law clause.¹ In such a clause the parties expressly stipulate their intention that the law of a particular country will apply to their contract. The choice is express when the contract incorporates a clause which specifies the law by which it will be governed. Neither of the Hague and Hague-Visby Rules deals with matters of choice of law, arbitration or jurisdiction.² According to Mann's view³, article X of the Hague Rules or the Hague-Visby Rules do not constitute a rule relating to matters of conflict of laws.

The EEC (Rome) Convention on the Law Applicable to Contractual Obligations of 1980 regulates contractual matters of conflict of laws. The Convention applies

¹ F Mann "The Proper Law of the Contract" 1950 *ILQ* 60, UNTCAD, *Report on Bills of Lading*, 1971 p. 50 "Carriers usually attempt to avoid confrontation with courts and jurisprudence that may operate against their interests by inserting 'jurisdiction' clauses in their bills of lading specifying that a particular court, law or the law of a particular country should exclusively determine any disputes that may arise from the bill of lading", Admiralty and Maritime Law 1972-73 *Harvard L R* 52

² D Jackson "The Hague-Visby Rules and Forum, Arbitration and Choice of Law Clauses" 1980 *LMCLQ* 159 p. 159 "Neither the Hague nor the Hague-Visby Rules contain any provisions relating to arbitration, jurisdiction or choice of law". A Diamond "The Hague-Visby Rules" 1978 *LMCLQ* 225, F Mann "Uniform Statutes in English law" 1983 *LQR* 376 p. 401 "Neither of them [Hague and Hague-Visby Rules] deals with jurisdiction", *ibid.* UNTCAD p. 50 "The 1924 Convention does not refer to jurisdiction".

³ *ibid.* Mann p. 395 "Article X of the Hague Rules or... the Hague-Visby Rules ... leaves no doubt but that it does not constitute a conflict rule, as in fact academic writers have frequently pointed out". F Mann "Statutes and the conflict of laws" 1972-73 *BYIL* 117 p. 126 "Article X is a self-limiting internal provision. It does not express a choice of law".

generally to any disputes arising out of contracts in relation to a choice between the laws of different countries.⁴ The contracting parties have the freedom to express their choice of law in their contract.⁵ Therefore, the parties' express selection, regarding the applicable law of the contract, is stated in the contract itself. Thus, the document in which the contractual choice of the parties is incorporated should be regarded as the contract itself, rather than evidence of it. It is noteworthy to mention that the provisions of the Convention shall not apply to "obligations arising under bills of exchange ... and other negotiable instruments, to the extent that the obligations under such other negotiable instruments arise out of their negotiable character".⁶ The Convention does not determine whether an instrument is negotiable. Subsequently, bills of lading are excluded unless they are not regarded as being negotiable instruments. The exclusion applies only to obligations arising out of their negotiable character. Moreover, the Convention cannot prejudice the application of other Conventions which have already been applied to contractual disputes.⁷

A detailed examination of the principles of conflict of laws is out of the scope of the following analysis, but through the investigation of cases of conflict of laws we will examine the contractual role of bills of lading. On the one hand, if the bill of lading is the contract of carriage and there is an express contractual choice of law, then the contractual choice of law clause will be incorporated therein. On the other hand, is the bill of lading the contract of carriage, when the contractual choice of law clause is expressed therein? Reference to cases, where the expressed clause of forum in the bill of lading contract was

⁴ I Fletcher "*Conflict of laws and European Community Law*", 1982, North-Holland Publishing Company. OJ 1980 L 266/1 Article 1(1) "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries"

⁵ Article 3 "The choice must be express or demonstrated with reasonable certainty by the terms of the contract". O Chukwumerije "Applicable Substantive Law in International Commercial Arbitration" 1994 *Anglo-American Law Review* 265 p. 265 "This principle (party autonomy) enables the parties to a contract to determine the law to govern their contract".

⁶ Article 1(2)c

⁷ Article 21 "This convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party".

regarded as a choice of law of the contract, will be made in order to show that, even on these occasions, the clause was contained in the contract itself. Greek, English and United States law will be examined separately and, in the end, we will compare the contractual role of bills of lading on matters of conflict of laws.

8.2 Greek Law

Greece has implemented the Hague and the Hague-Visby Rules, but not the Hamburg Rules. A major part of the Hague Rules had been transplanted into the Greek Private Maritime Code. There is no specific provision in the Code which regulates matters of conflict of laws concerning the contract of carriage of goods by sea. The Convention of Rome 1980, relating to the law applicable to contractual obligations, come into force on April 1991.⁸ Therefore, matters of conflict of laws on contracts are governed by this Convention now. Prior to the implementation of the Rome Convention, different issues relating to conflict of laws on contracts of carriage of goods by sea were governed by article 25 of the Greek Civil Code.⁹ According to article 25, contractual obligations are governed by the law which the parties have chosen. In the absence of the choice of law, the law with the closest connection with the contract is applicable. In our analysis, we will not examine further all the occasions where there is no expressed choice. A freedom of choice of the applicable law has been introduced by article 25.

The chosen applicable law governs any claim arising out of the contract of the parties. Therefore, in the case of carriage of goods by sea, the contract of carriage must be identified, because the choice of law has to be demonstrated therein. Meanwhile, it could be said that the choice of law may be contained in a document which is merely evidence

⁸ Z Papazoi-Pasia "*Private International Law*", 1991, Thessaloniki p. 1

⁹ K Kerameus, P Kozyris "*Introduction to Greek Law*", 1987, Klumer Law and Taxation Publishers, Sakkoulas Chap 16 p. 271, A Georgiadis, M Stathopoulos "*General Principles*", 1978, Vol. I, Sakkoulas p. 42.

of the contract rather than being the contract. Any suggestion of this kind could not be accepted because, first of all, the choice of law has to be the original contractual choice and second, it has to be definite and unmodified by any means of evidence. In accordance with article 25, only the choice of the parties expressed in their contract is taken into account. Evrigenis¹⁰ states that the contractual obligations are governed by the law chosen by the parties and the choice is expressed in their contract.

Is the bill of lading the contract of carriage in which the choice of law is expressed? In 2073/78¹¹ decision, the Polimeles court of Piraeus stated that the contractual rights are created and contained in the bill of lading. Article 25 of the Civil Code is applicable to the contractual rights arising from the bill of lading contract. It seems that the bill of lading is the contract where the choice of law is contained. The same court in the 375/1991 decision held that a clause of choice of law contained in the bill of lading was valid against the shipper and every consignee or endorsee in due course.¹² Once again, the document, which contained the clause of the choice of the applicable law, was the bill of lading, which means that the bill of lading has to be accepted as the contract of carriage itself. It could be said that the bill of lading, which contains the choice, is merely evidence of the contract. In the end, the court accepted the clause as the contractual choice of the parties and not as evidence of it, which could be modified by any means of evidence.

In a case where there is no clause referring to the application of a specific law, then we have to look for other indications contained in the contract in order to identify

¹⁰ D Evrigenis "Problems of the Applicable Law in Contracts" 1970 *Armenopoulos* 1057 pp. 1059-1061.

¹¹ 7 EML 398 p. 401, Polimeles Court of Piraeus 2408/78 1979 EML 23, Polimeles Court of Piraeus 2406/78 1979 EML 27. Court of Appeal of Piraeus 189/91 1991 Piraiki Nomologia 345.

¹² 20 EML 485, Polimeles Court of Piraeus 816/75 3 EML 394, Polimeles Court of Piraeus 524/85 1989 Nomiko Vima 1340-41 "According to the clause contained in the bill of lading the Hague Rules as they have been implemented in Egypt are the applicable law of the contract", Polimeles court of Piraeus 1440/85 1989 Nomiko Vima 1340 The clause of the bill of lading concerning the application of the Carriage of Goods by Sea Act 1936 of the United States in disputes arising out of the contract was valid.

the applicable law. The fundamental factor in determining the applicable law, is sometimes a clause of jurisdiction incorporated in the contract, which indicates that the parties intend that any dispute should be decided according to the law of the forum.¹³ In 1505/87¹⁴ decision, the court of appeal of Thessaloniki held that a clause of jurisdiction of the foreign courts was valid against the consignee or any endorsee.

According to a clause of a bill of lading, any difference which arises from the bill of lading will be brought in the country where the carrier has its professional head quarters. The Supreme Court (Arios Pagos)¹⁵ held that the court of the place of the carrier's company has jurisdiction if it is the head-quarters of the carrier. It is submitted that the law of the forum was the applicable law. An arbitration¹⁶ clause contained in the bill of lading was valid against the shipper and the consignee. It is submitted that the applicable law is often the law of the state where the arbitration takes place.¹⁷ Additionally, in a case in which a clause of arbitration, contained in a charter-party which has been incorporated in the bill of lading under charter-party, is an indication regarding the applicable law of the contract.¹⁸ In all cases the contractual choice of law or clause of jurisdiction or clause of arbitration was expressed in the bill of lading.

Kozyris¹⁹ stated that the EEC Convention on the Law Applicable to Contractual Obligations of 1980 supersedes article 25 of the Civil Code. In fact, the freedom of choice of law expressed in their contract is the principle of the Convention as well. Therefore, the choice of law of the parties will continue to be expressed in their contract and in the case of carriage of goods by sea, the bill of lading will continue to express the

¹³ fn 10 Evrigenis p. 1063

¹⁴ 1989 Nomiko Vima 1342, Polimeles Court of Piraeus 1230/80 1981 EML 110.

¹⁵ Arios Pagos 2164/86 1989 Nomiko Vima 1342.

¹⁶ Court of Appeal of Piraeus 189/1991 20 EML 356 p. 357, Court of Appeal of Athens 4466/1978 27 Nomiko Vima 227, Court of Appeal of Piraeus 1143/1984 16 Diki 611.

¹⁷ fn 10 Evrigenis p. 1063. Monomeles Court of Piraeus 864/79 9 EML 7 A clause of arbitration contained in the bill of lading is a powerful indication that the intention of the parties was that any dispute will be governed by the law of the place of arbitration.

¹⁸ Court of Appeal of Athens 7015/1977, Polimeles Court of Piraeus 2493/1975 1981 Piraiki Nomologia 194.

¹⁹ fn 9 Kerameus p. 273

choice of law of the contracting parties. Additionally, it is questionable whether the contractual function of the bill of lading is governed by the Convention, taking into account the fact that the bill of lading is regarded as a negotiable instrument.

8.3 United States Law

Any dispute about issues of contract is determined by the law which is chosen by the contracting parties. This principle is stated in section 186 of the Restatement on Conflict of Laws²⁰ and it is applicable to all contracts and all issues arising out of them. According to section 187 of the Restatement on Conflict of Laws, “the law of the state chosen by the parties to govern their contractual rights and duties will be applied”.²¹

The parties' choice of law is expressed in their contract itself and not in any document which is merely evidence of it.²² Any reference to a document in which a choice of law clause was expressed, in order to determine the applicable law of the contract, should be regarded as if the document was the contract itself. Otherwise, the choice of law clause, taken into account, will be merely evidence of the parties selection and not the original selection, as section 187 requires. When the contracting parties have made such a choice, they will generally refer specifically to the state of the chosen law in their contract. In some cases a choice of forum expressed in the contract becomes in effect a choice of law. Maicer and McCoy²³ stated that:

“The selection of forum selects an entire legal regime to govern all

²⁰ Restatement of the Law, *Conflict of Laws 2d*, 1971, Vol. 1, p. 558. R Anderson “*Uniform Commercial Code*”, 1981, Vol. 1, The Lawyers Co operative Publishing Co UCC 1-105 p.109

²¹ *ibid.* Section 187 p. 561

²² W Reese “General Course of Private International Law”, 1976, *Recueil Des Cours*, Vol. II, A Sijthoff p.128 “Almost invariably, this agreement will take the form of a choice of law provision in the contract”. further A Knauth “Renvoi and Other Conflict Problems in Transportation Law” 1949 *Col LR* 1, A Nussbaum “Conflict Theories of Contracts” 51 *Yale LJ* 893.

²³ H Maicer and T McCoy “A Unifying Theory for Judicial Jurisdiction and Choice of Law” 1991 *AJCL* 249 p. 254. P Hay “The Interrelation of Jurisdiction and Choice of Law In United States Conflicts Law” 1979 *ICLQ* 161 p. 161 “Frequent statements in the case law and in literature tend to equate choice of law and jurisdiction” *Shaffer v Heithier* 433 US 186 p. 225, 53 *Led 2d* 685 p. 711 “practical considerations argue in favor of seeing to bridge the distance between the choice of law and jurisdictional inquiries”

aspects, including choice of law aspects, of the case at bar ... *It is the choice of the forum that is the choice of applicable law*".

(Stress added).

Moreover, in the Restatement on Conflict of Laws, it is stated that:

"It should be reiterated that in the contracts area the forum, in the absence of a contrary indication of intention, will not apply the choice of law rules of another state".²⁴

Accordingly, Chief Justice Burger²⁵ decided that a clause, requiring that disputes must be decided before the London Court of Justice contained in a towage contract, was valid. The court looked at the clause of forum which was expressed in the contract itself and not at any document in which the contract, and consequently the choice of law clause, might be evidenced. The supreme court decided that forum selection clauses are generally enforceable. Is the bill of lading the contract where the intention of the parties, regarding the applicable law of the contract, is expressed? The Carriage of Goods by Sea Act 1936 (COGSA) governs all issues of the contract of carriage and the relation between the parties where a bill of lading is issued as the contract of carriage.²⁶ COGSA is applicable to contracts for the carriage of goods by sea, to and from ports of the United States.²⁷ Contracts of carriage are those covered by a bill of lading as the contract of carriage.²⁸ Moreover, in section 1300 is stated that:

"Every bill of lading ... which is evidence of a contract of carriage

²⁴ fn 20 *Restatement of the Law* pp. 559-560. W Reese "Conflict of Laws and the Restatement Second" 1963 *Law and Contemporary Problems* 679. A Ehrenzweig "Contracts in the conflict of laws" 1959 *Col LR* 973.

²⁵ *The Bremen v Zapata Off-Shore Co.* 407 US 1, 32 Led 2d 513

²⁶ Notes "Ocean Bills of Lading and Some Problems of Conflict of Laws" 1958 *Columbia L R* 212 p. 213, T Schoenbaum "*Admiralty and Maritime Law*", 1987, West Publishing Co. p.315 "Thus COGSA governs the relationship between the parties where a bill of lading is issued as the contract of carriage".

²⁷ 46 USC 1312, Gilmore & Black "*The Law of Admiralty*", 1975, pp. 130-39, D McCune "Delivery of Cargo Carried Under Straight Bills of Lading: The Ocean Carrier's Rights and Obligations" 1985 *Uniform Commercial Code Law Journal* 344 p. 351 "Since the Pomerene Act is the controlling federal statute, it must be applied in a suit against the ocean carrier in a US court involving an outbound bill of lading".

²⁸ 46 USC 1301 (b)

by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter”.²⁹

Therefore, COGSA applies as a mandatory rule to all those bills of lading. It is worth mentioning that section 1300 refers to bills of lading as evidence of the contract, but, as it will be recalled, court decisions and authors regard bills of lading as being contracts of carriage under United States law.³⁰ As it happens, Sprouse, senior circuit judge, Russel, circuit judge, and Britt, district judge³¹ in the court of appeal stated that:

“The bill of lading is a contract between the shipper and the carrier and continues to govern the rights and obligations of the parties until delivery”.(Stress added).

The nature of the bill of lading as the contract is confirmed. The bill of lading is not only referred to as being the contract of carriage but it is treated as such. Additionally, section 1303(8) prohibits bill of lading clauses which relieve the carrier from liability.³² Therefore, any term in a bill of lading contract, compulsorily subject to COGSA, that is contrary to any provision of COGSA should be regarded as null and void.

The validity of foreign law clauses in bills of lading subject to COGSA as a matter of law has been addressed in numerous cases. Hincks³³, circuit judge, stated that forum selection clauses of bills of lading are not *per se* invalid and in each case the enforceability of such agreement depends upon its reasonableness. It is stressed that if congress had intended to invalidate forum selection clauses, it would have done so. Clark, chief judge, and Medina and Waterman, circuit judges,³⁴ stressed the enforceability of a forum selection clause expressed in the bill of lading as well.

²⁹ 46 USC 1300

³⁰ Chapter III. *Beverdict on Admiralty*, 1989, Vol. 2A, Matthew Bender, Chap V

³¹ *Wemhoener Pressen v Ceres Marine Terminals* (1993) 5 F3d 734 p. 738

³² 46 USC 1303(8)

³³ *W Muller & Co. v Swedish American Ltd* 224 F2d 806, *Paterson, Zochonis Ltd v Compania United Arrows* 493 Fsup 626 p. 629 “We therefore address the forum selection clause contained in the Mitsui bills of lading and conclude that it is enforceable”.

³⁴ *Murillo Ltd v The Bio Bio* 227 F2d 519

Furthermore, Waters³⁵ stated that the contracting parties usually stipulate an exclusive forum for the settlement of disputes. It is obvious that the contracting parties express their selection of the applicable forum in the content of the contract of carriage itself. Accordingly, Reese³⁶ said that:

“Almost invariably, this agreement will take the form of a choice of law provision in the contract”.

Consequently, the choice of law will be expressed in the contract and not in any document which is merely evidence of it. In both cases the contractual forum selection of the parties was expressed in the bill of lading which means that the bill of lading has been seen as the contract of carriage where the selection of the parties was expressed.

Besides, Friendly³⁷, circuit judge, stated that:

“Carriage of Goods by Sea Act invalidates any contractual provision in bill of lading for shipment to or from United States that would prevent cargo able to obtain jurisdiction over carrier in American court from having that court entertain suit and apply substantive rules prescribed by Congress”.

The court in *the Indussa* case invalidated the clause contained in the bill of lading and applied COGSA as the applicable law, but the bill of lading has been issued as the contract of carriage and that is why the Act has been implied. Davis,³⁸ circuit judge, considered that a forum selection clause contained in the bill of lading, which required the parties to litigate their disputes in the People's Republic of China, was invalid.

³⁵ C Waters “The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update” 1990 *Tulane Maritime Law Journal* 29 p. 29 “Parties contracting for the transport of goods frequently stipulate an exclusive forum for settling disputes that arise from the performance of the contract”. M Sturley “Bill of Lading Choice of Forum Clauses: Comparisons between United States and English law” 1992 *LMCLQ* 248, S Denning “Choice of Forum Clauses in Bills of Lading” 1970 *JMLC* 17. P Borchers “Choice of Law in the American Courts in 1992: Observations and Reflections” 1994 *AJCL* 125.

³⁶ W Reese “Choice of Law in Torts and Contracts and Directions for the Future” 1977 *Columbia JTL* 1 p. 21, Fn 27 McCune p. 351 “Absent an effective choice of law in the bill of lading itself”.

³⁷ *Indussa Corporation v SS Ranborg* 377 F2d 200 p. 200

³⁸ *Hughes Drilling Fluids v M/V Luo Fu Shan* 852 F2d 840

COGSA was the applicable law of the bill of lading contract. Moreover, Nakazawa and Moghaddam³⁹ concluded that foreign choice of law clauses contained in bills of lading are *per se* invalid, when COGSA applies to the bill of lading contract as a matter of law. In all those cases, COGSA is the applicable law of the bill of lading contract.

Ferguson,⁴⁰ circuit judge, stated that:

“We reject the view that COGSA pre-empts all contract terms when its sole force is by incorporation into a contract for foreign transportation”.

Therefore, when COGSA is applicable only because it has been incorporated by reference in the bill of lading, then a forum selection clause contained in the bill of lading is enforceable and the Bremen test is applicable. Nadelmann⁴¹ considered that the ruling in the *Zapata* case governs the field of admiralty as long as there is no federal legislation to the contrary. Beeks⁴², senior district judge, stated that the forum clause contained in the bill of lading, regardless that COGSA was contractually incorporated in the bill of lading, must be given effect. In both cases the bill of lading was the contract where the selection of the forum was expressed. Accordingly, Kozyris⁴³ considered that:

“The choice made in the contract is given effect”.

Hence, it is confirmed that the choice of law is made in the contract itself.

The conception of the term “contained in” is expressed by the view of Keeton⁴⁴,

³⁹ A Nakazawa, B Moghaddam “COGSA and Choice of Foreign Law Clauses in Bills of Lading” 1992 *Tulane Maritime Law Journal* 1 p. 2.

⁴⁰ *North River Insurance Co. v Fed Sea / Fed Pac Line* 647 F2d 985 p. 989, *Underwriters of Lloyd's of London v The M/V Steir* 773 Fsup 523, *State Establishment for Agricultural Product Trading v M/V Weser Munde* 838 F2d 1576

⁴¹ K Nadelmann “Choice of Court Clauses in the United States: The Road to Zapata” 1973 *AJCL* 124 p. 134, K Nadelmann “Choice of Law Resolved by Rules or Presumptions with an Escape Clause” 1985 *AJCL* 297.

⁴² *Ampac Trading Company v M/V Ming Summer* 566 Fsup 104

⁴³ P Kozyris “Choice of Law in the American Courts in 1987: An Overview” 1988 *AJCL* 547 p. 561. Further S Symeonides “Symposium on Choice of Law and Admiralty: Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology” 1982 *Tulane Maritime Law Journal* 223. S Symeonidis “Choice of Law in the American Courts in 1988” 1989 *AJCL* 457, M Solimine “Choice of Law in American Courts in 1991” 1992 *AJCL* 951.

⁴⁴ *Citrus Marketing Board of Israel v M/V Ecuadorian Reefer* 754 Fsup 229 pp. 231-232

district judge, when he stated:

“the bill of lading is the only contract for carriage of the cargo ...
COGSA regulates the terms of contracts for carriage of goods at sea
that are contained in bills of lading”.

Consequently, the bill of lading is the contract of carriage itself and according to Meskill,⁴⁵ circuit judge, the ocean bill of lading is a contract of adhesion as well. Orlando and Giacco⁴⁶ stated that forum selection clauses, used in adhesion contracts were recently held valid as long as they are not unfair. It will be recalled that bills of lading are regarded as adhesion contracts as well. Besides, Tetley⁴⁷ said that:

“The consignee's rights will not necessarily be governed by the
proper law of **the bill of lading contract**”. (Stress added).

Therefore, the bill of lading is the contract and the express choice of law is incorporated therein.

In general, choice of law problems, that tend to plague contracts, are present in the case of the bill of lading as a contract of carriage as well. COGSA has eliminated many choice of law problems in connection with the bill of lading contract, when it applies as mandatory applicable law of the bill of lading. As a result, Kozyris and Symeonides⁴⁸ stated that choice of law and choice of forum clauses are often upheld.

The US supreme court recently held the enforceability of foreign

⁴⁵ *Allied Chemical International Corp v Companhia De Navegacao* 775 F2d 476, Fn 41 Nadelmann p. 134 “The fact remains that the contract of ocean carriage is a contract of adhesion normally prepared by carriers”.

⁴⁶ M Orlando and K Giacco “Admiralty and Maritime Law: The Pitch, Roll and Yaw of the US Supreme Court “Winter 1993 *Tort & Insurance Law Journal* 137 p. 143, *Carnival Cruise Lines Inc. v Sbiute* 1991 AMC 1697, *Goldberg v Gunard Line Ltd* 1992 AMC 1461

⁴⁷ W Tetley “Who may claim or sue for cargo loss or damage” 1986 *JMLC* 153 p. 164

⁴⁸ P Kozyris, S Symeonides “Choice of Law in the American Courts in 1989: An Overview” 1990 *AJCL* 601 p. 619. A Knauth “*Ocean Bills of Lading under American Law*”, 1953, p. 154 “Consequently the question whether the law of the place where the bill of lading contract is made should be given effect is seldom of practical interest in American law suits”. *Cerro De Pasco Copper Corp v Knut Knutsen* 94 Fsup 60 p. 61 “The parties stipulated in the bills of lading that all controversies arising under this bill of lading are to be governed by the law of Norway and to be decided in Oslo. I see no reason why this provision ... should be ignored”.

arbitration clause in maritime bills of lading.⁴⁹ This holding should be read narrowly and not as being applicable to cases of choice of law in bills of lading where COGSA is applicable as mandatory law. Otherwise, the COGSA's goal of preventing parties from limiting their liability will be undermined. In conclusion, it is ascertained that the bill of lading is the contract of carriage where the choice of law or the choice of forum has always been expressed on matters of conflict of laws under US law.

8.4 English Law

All contracts have a proper law,⁵⁰ which is the source of their legal force, but it is not easy to ascertain which system of law is to prevail as the proper law. The parties to any kind of contract have a great liberty to choose the law by which their contract is to be governed and their intention may be expressed in the terms of their contract. According to Thomson's view,⁵¹ when the contract contains a selection of law, then this law is the dominant one, on the hypothesis that the contract which incorporates the selection is valid. It is ascertained that the express selection of the parties is incorporated in the contract itself. Hence, the document which contains the express choice should be regarded as the contract as well. Willes, J.⁵² stated that the language of the contract itself determines the intention of the parties. We should look at the contract in order to find the express choice of the parties, if there is one. Accordingly, Lord Atkin,⁵³ regarding the

⁴⁹ *Vimar Seguros v M/V Reefer* 132 Led 2d 462. E Clark "Foreign Arbitration Clause and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA" 1996 *Brigham Young University Law Review* 483. *Mitsui & Co v MIRA* (1997) 111 F3d 33 "The Supreme court has consistently held forum selection and choice of law clauses presumptively valid".

⁵⁰ *Compagnie D' Armement Maritime* [1971] AC 572 p. 587 Lord Morris "The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined". C McLachlan "Splitting the Proper Law in Private International Law" 1990 *BYIL* 311 p. 312 "In one sense, the notion of the proper law does little more than state the issue. It does not in itself determine which law is the proper law to govern a particular situation".

⁵¹ A Thomson "A Different Approach to Choice of Law in Contract" 1980 *MLR* 650 p. 653 "Where the contract does contain a selection the proper law is putative in the sense of being the governing law on the hypothesis that the contract is valid".

⁵² *Lloyd v Guibert* [1865] LR 1 QB 115 p. 120. *Egon v Libera* [1995] 2 Lloyd's Rep 64,69 p. 65 "The arbitration clause ... as validly incorporated in any contract which was validly made".

⁵³ *The King v International Trustee for the Protection of Bondholders* [1937] AC 500 p. 529, Giuliano and

proper law of contract, said that:

“Their intention will be ascertained by **the intention expressed in the contract**”. (Stress added).

In the absence of a specific choice, their intention will arise by necessary inference from the language of the contract and the relevant surrounding circumstances at the time of its making. However, it is submitted that the parties' intention and selection of choice of law is expressed in the contract itself. There is no indication, from the wording of the above mentioned cases, that the express choice of law should be seen as merely evidence of the contractual choice of law. Any reference therefore to the content of a document means that this document is the expression of the contract and not a mere evidence of it.

Is the bill of lading the contract in which the choice of law or choice of forum is expressed? Lord Atkin,⁵⁴ in a case where the bill of lading contained a clause to the effect that any claim should be brought before the courts of Marseilles, stated that:

“... the clause in the contract should not be given effect to”.

It emerged that the clause was contained in the contract, which happened to be a bill of lading. Correspondingly, Lord Scrutton⁵⁵ said that the contracting parties to a bill of lading have agreed therein, that any dispute should be resolved where the goods and the witnesses are. Once again, the contractual choice of law has been expressed in the bill of lading. Roche J⁵⁶, in a case where a clause in a bill of lading referred to English law,

Lagarde Report 1980 C 282/4 p. 16 “Choice of law to be applied can be inferred from the terms of the contract”. p. 17 “The parties' choice must be express or be demonstrated with reasonable certainty by the terms of the contract”. Report by Professor A Tizzano on the Protocols on the interpretation by the court of justice of the Rome Convention of June 1980 OJ 1990 No C 219/1. D Pierce “Post Formation Choice of Law in Contract” 1987 *MLR* 176 p. 177 “Even in the absence of an express choice of law in the contract itself”. E Scoles, P Hay “*Conflict of Laws*”, 1982, West Publishing Co p. 633 “They will usually do so by means of an express choice of law clause in their written contract”

⁵⁴ *Owners of Cargo Ex “Athenee” v Athenee* [1922] 11 Ll L R 6 p. 7. T Sing “Conflict of Laws Implications of the Carriage of Goods by Sea Act 1924” 1994 *LMCLQ* 280 p. 283 “Where there is an express choice of foreign proper law in the bill of lading”.

⁵⁵ *Maharani Wollen Mills Co. v Ancor Line* [1927] 29 Ll L R 169 p. 169

⁵⁶ *Anselme Dewavrin v Wilsons & North -Eastern Railway Shipping Company Ltd* [1931] 39 Ll L R 289

decided that the proper law was English law, which means that the bill of lading was the contract where the selection of the parties was expressed. Additional ground for the acceptance of this view is provided by Roche who said that:

“... The contract of carriage between the parties which was a bill of lading for the carriage from Dunkirk to Hull...”⁵⁷

The bill of lading is treated as the contract of carriage and not only mentioned as such.

Lord Wright,⁵⁸ in a case where a bill of lading stipulated that the proper law of the contract was English, delivering the decision of the court of appeal stated that:

“There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading”.

The parties' express statement of their intention to select the law of the contract, expressed in their contract, was decisive. It is submitted that bills of lading were the contracts whose the proper law was ascertained by the decision. It has to be taken into account that in this case, additionally, the bill of lading was regarded as the expression of the contract. It could be said that the content of the bill of lading is the content of the contract, but the bill of lading is still evidence of it. By accepting this view, every choice of law expressed in the bill of lading is merely evidence of it and not the contractual choice of law of the parties. Hence, when there is an express choice, the courts should take into account the choice of law of the parties expressed in their contract of carriage, instead of taking into account the evidence of it which could be modified by any means of evidence. Accordingly, Trappe⁵⁹ said that the best way of ascertaining the application of the selected forum is to insert the arbitration clause into the bill of lading contract. The

⁵⁷ *ibid.* p. 290.

⁵⁸ *Vita Food Products v Unus Shipping Company Limited* [1939] AC 277 p. 292, Notes H Gutteridge 1939 LQR 323

⁵⁹ J Trappe “Legal Issues in Maritime Arbitration” 1983 *Arbitration* 202 p. 207 “Insert into the bill of lading contract the arbitration agreement”.

consistency of the courts to rely only on clauses expressed in bills of lading seems to be a firm indication that bills of lading should be regarded as the contract on matters of conflict of laws.

Parcels were shipped on the steamship Nestor under a bill of lading where two different clauses were contained in the bill of lading. Clause number 1 stated that the contract which was contained in the bill of lading is to be governed by the Australian Sea Carriage of Goods Act 1924. Clause number 16 stated that the contract which was evidenced by the bill of lading is to be governed by English law. According to the wording of the clause, there is a contract of carriage and the bill of lading is merely evidence of it. In fact, MacKinnon LJ⁶⁰ said that the contract is governed by English law according to the choice of law expressed by the parties in their contract. On the one hand, Luxmoure LJ and Du Parcq LJ⁶¹ stated that the contract of carriage was contained in the bill of lading. Meanwhile, the contractual choice of law, and not evidence of the choice, was contained in the contract. On the other hand, MacKinnon LJ⁶² held that:

“the contract between the plaintiffs and the defendants is the bill of lading”.

Therefore, it emerges that the term “contained in” means that the bill of lading is the contract of carriage. The bill of lading is treated as such. Morris⁶³ has criticised the weight which is attributed to the expressed intention of the parties. In contrast, Lord Denning⁶⁴ refused to accept the choice of law in the contract, as a decisive factor determining the proper law of the contract. In fact, the choice of law was contained in a

⁶⁰ *Ocean Steamship Company v Queensland State Wheat Board* [1941] 1 KB 402 p.410.

⁶¹ *ibid.* pp. 414-15 and at 416 respectively

⁶² *ibid.* p. 410

⁶³ JHCM “Service out of the Jurisdiction and the Proper law of the Contract” 1945 *LQR* 21 p. 23, J Morris and G Cheshire “The Proper Law of the Contract in the Conflict of Laws” 1940 *LQR* 320. Further see L Collins “Forum Selection and an Anglo-American Conflict the Sad Case of the Chaparral” 1971 *ICLQ* 550, F Mann “The Proper Law in the Conflicts of Law” 1987 *ICLQ* 437, F Mann “The Proper Law of the Contract: An Obituary” 1991 *LQR* 353, J Morris “The Scope of the Carriage of Goods by Sea Act 1971” 95 *LQR* 59.

⁶⁴ *The Fehmarn* [1958] 1 WLR 159 p. 162 “I do not regard the choice of law in the contract as decisive”

bill of lading and, therefore, the choice was contained in the contract regardless of the right or wrong of the argument.

In *Kadel Chajkin v Mitchell Cotts & Co (The Stensby)*, Sellers J,⁶⁵ in a case where there was a bill of lading contained, first, a clause stated that the English language of the bill of lading is not conclusive evidence that the contract should be governed by English law, and second, a paramount clause stated that the proper law of the contract was not the English law, held that the bill of lading is a technical contract, which indicates that it should be regarded as the contract where the choice of law was expressed. Meanwhile, Brandon J,⁶⁶ in a dispute which arose under a bill of lading, stated that the court should give effect to the agreement of the parties as it was expressed in the bill of lading.

Lord Reid, Lord Wilberforce and Lord Diplock⁶⁷ held that an arbitration clause contained in a bill of lading is a decisive factor, indicating a choice of the proper law of the contract, which will be the law of the place where arbitration will take place. Accordingly, Briggs⁶⁸ considered that a choice of arbitration forum contained in the contract is a powerful indicator of the proper law of the contract. Besides, Webster J⁶⁹ said that the bill of lading, in which an arbitration clause was incorporated, was governed by English law, which was the law of the place of the arbitration. Moreover, Ackner J⁷⁰ considered that an arbitration clause contained in a charter-party, which was incorporated in the bill of lading under charter-party, was enough to decide that the proper law of the bill of lading was the law of the arbitration clause. Additionally, in the same case, Ackner

⁶⁵ *Kadel Chajkin v Mitchell Cotts & Co (The Stensby)* [1947] 2 All ER 786 p. 788

⁶⁶ *The Eleftheria* [1970] P 94 p. 99

⁶⁷ *Compagnie Tunisienne De Navigation SA v Compagnie D'armement Maritime* [1970] 2 Lloyd's Rep 99, 103,111,117.

⁶⁸ A Briggs "The Validity of Floating Choice of Law and Jurisdiction Clauses" 1986 *LMCLQ* 508, 513, *Halsbury's Laws of England*, Vol. 8, Conflict of Laws, 1974, Butterworths p. 409 "If the parties agree that arbitration shall take place in a particular country, an English court will usually, although not always, conclude that the parties have impliedly chosen the law of the country of arbitration as the proper law".

⁶⁹ *The Oinoussin Pride* [1991] 1 Lloyd's Rep 126,131

⁷⁰ *The Freights Queen* [1977] 2 Lloyd's Rep 140, *The Mariannina* [1983] 1 Lloyd's Rep 12, D Thomas "Arbitration Agreements as a Signpost of the Proper Law" 1984 *LMCLQ* 141.

J⁷¹ held that:

“They thus had two relevant contracts a bill of lading and a charter party”.

Furthermore, Megaw LJ⁷² in the Court of Appeal clearly stated that:

“A question was raised ... as to the proper law of the bill of lading contract”.

It has become quite clear that the bill of lading is the contract of carriage and that its proper law selected by the parties' choice of law is incorporated therein. The bill of lading is not only mentioned as the contract but it is accepted as such.

Choice of jurisdiction and choice of law are usually selected in tandem and they are contained in bills of lading.⁷³ Lord Denning MR and Lord Diplock⁷⁴ relied on an exclusive jurisdiction clause, contained in the bill of lading and stated that the proper law of the contract was French. In contrast, Brandon J⁷⁵ refused to enforce a foreign jurisdiction clause contained in a contract for the carriage of goods by sea. The clause in the case was contained in a bill of lading which means that contract of carriage and bill of lading were identical things.

⁷¹ *ibid.* *The Freights Queen* p. 141

⁷² *Armar Shipping Co. Ltd v Caisse Algerienne* [1981] 1 WLR 207 p. 210

⁷³ fn 2 Jackson p. 165, Fn 52 *Giuliano and Lagarde Report* p. 16 “The most common case in which the court may infer a choice of the proper law is where the contract contains an arbitration or choice of jurisdiction clause naming a particular country as the seat of arbitration or litigation. Such a clause gives rise to an argument that the law of the country chosen should be applied as the proper law of the contract”. J Fawcett “The interrelationship of jurisdiction and choice of law in private international law” 1991 *Current Legal Problems* 39.

⁷⁴ *The Sindh* [1975] 1 Lloyd's Rep 372, *The Amazona* [1989] 2 Lloyd's Rep 130 p. 135 “In the present case the contract expressly provided for the jurisdiction of the courts here”. The clause was incorporated in the bill of lading. *DSV Silo v Owners of the Seinal* [1985] 1 WLR 490 p. 498 Lord Brandon of Oakbrook said that “As regular holder of bill of lading no 7 GFG were parties to the contract of carriage contained in it ... Since that contract had in it clause 27 the exclusive Sudanese jurisdiction clause”. The clause was contained in the bill of lading and the contract was contained in the bill of lading which means that contract and bill of lading are identical terms. A Redfern, M Hunter “*Law and Practice of International Commercial Arbitration*”, 1986, Sweet & Maxwell p. 93 “This concept is expressed in ... a choice of forum is a choice of law”.

⁷⁵ *The Makejell* [1975] 1 Lloyd's Rep 528 p. 535 “A foreign jurisdiction clause contained in a contract for the carriage of goods by sea should not be enforced”. *MV Kwik Hoo Tong Hondel v James Finlay and Company* [1927] AC 604 pp. 609-10 “The result is that the forum provided for the settlement of disputes in English, and that therefore the contract is intended to be governed by English law”.

Lord Diplock⁷⁶ invalidated a choice of forum contained in a bill of lading and the Carriage of Goods by Sea Act 1971 (COGSA) was regarded as the proper law of the contract, despite the fact that the bill of lading in the case was referred to as an adhesion contract. Mann⁷⁷ said that the statutory character of COGSA 1971 displaced the proper law of the contract. He argues that COGSA 1971 should apply when the bill of lading is regulated by English law. Besides, Lord Bingham⁷⁸ said that:

“I would ... infer that the parties intended their contracts to be governed by the law of the forum where disputes were to be tried”.

A clause of forum was incorporated in the bill of lading and was accepted as the expression of a choice of law of the contract. Lord Nourse⁷⁹ in the same case stated that:

“I agree that the proper law of *the contracts created by the bills of lading* was English law”. (Stress added).

First of all, it could be argued that according to this statement, there is only one contract of carriage, which is concluded by and with the issue of the bill of lading. It is submitted that the choice of law was expressed in the bill of lading contract and not in the bill of lading evidence of the contract. Moreover, accordingly, Hobhouse J⁸⁰ stated that both contracts (Bill of lading and Charter-party) were governed by the same proper law. It seems that, under common law, the bill of lading was always the document in which the selection of the choice of law of the contract was expressed. The selection of the parties, which has been taken into account, was always the original contractual choice and not evidence of it.

⁷⁶ *The Hollandia* [1983] AC 565 p. 577, E Burgin, E Fletcher “*The Student's Conflict of Laws*”, 1928, Stevens & Son & Sweet & Maxwell p. 154 “Harter Act 1893, The Carriage of Goods by Sea Act 1924 of the United Kingdom ... do not necessarily determine the proper law of any particular contract but they contain terms and provisions which are of paramount effect on the contracts to which they apply”. Further see A Jaffey “Statutes and choice of law” 1984 *LQR* 198, F Mann “The Hague-Visby Rules and the Force of Law” 1987 *LQR* 523.

⁷⁷ fn 2 Mann p. 395 and Fn 3 Mann p. 125

⁷⁸ *The Komninos S* [1991] 1 Lloyd's Rep 370 p. 376, R Asariotis “Implications of a British Jurisdiction Clause” 1992 *JBL* 321.

⁷⁹ *ibid.* pp. 377-78

⁸⁰ *The Paros* [1987] 2 Lloyd's Rep 269 p. 272

Choice of law in contract is now put on a statutory basis. The Contracts (Applicable Law) Act 1990 has replaced the common law rules and the doctrine of the proper law of contract. The Act implements the EEC Convention on the Law Applicable to Contractual Obligations of 1980.⁸¹ The Convention applies to contracts having no connection with a European Union contracting state and to contracts with such a connection.⁸² The Convention does not prejudice the application of other International Conventions to which a contracting state is a party or will become a party.⁸³ Thus, carriage of goods by sea will be dealt with by the Carriage of Goods by Sea Act 1971 which has implemented the Hague-Visby Rules in England. Obligations arising out of the negotiable character of negotiable instruments are excluded from the provisions of the Contracts Applicable Law Act 1990.⁸⁴ According to the views of North and Fawcett,⁸⁵ a bill of lading which is transferred in England is not negotiable and it is within the scope of the Convention. Accordingly, in Benjamin's Sales of Goods,⁸⁶ it is said that:

“Thus, a bill of lading transferred in England can never be a negotiable instrument and thus will always fall within the convention”.

In contrast, Merkin⁸⁷ stated that:

“Thus, in a dispute in the English courts concerning a bill of lading, the Convention would not be applicable”.

⁸¹P North & J Fawcett “*Private International Law*”, 1992, Butterworths Chap 18 pp. 457-521, A Jaffey “The English Proper Law Doctrine and the EEC Convention” 1984 *ICLQ* 531, A Jaffey “*Introduction to the Conflict of Laws*”, 1988, Butterworths, Chap 9 pp. 133-171, p. 133 “The choice is express when the contract contains a provision which specifies the law by which it is to be governed”, “The EEC Convention on the Law Applicable to Contractual Obligations” P North 1980 *JBL* 382, P Williams 1986 *ICLQ* 1, O Lando 1987 *CMLR* 159, C Morse 1982 *Yearbook of European Law* 107. R Weintraub “Functional Developments in Choice of Law for Contracts” 1984 *Recueil des Cours* 243 pp. 278-90 about the EEC Convention.

⁸² R Merkin “Contracts (Applicable Law) Act 1990” 1991 *JBL* 205 p. 205

⁸³ fn 81 North p. 521 Article 21

⁸⁴ fn 82 Merkin p. 208

⁸⁵ fn 81 North p. 471

⁸⁶ (1992) (4th ed) Sweet & Maxwell p. 1675

⁸⁷ fn 82 Merkin p. 208

Furthermore, Anton⁸⁸ and Morse⁸⁹ considered that bills of lading might have been included in the category of negotiable instruments.

Does the Contracts Applicable Law Act 1990 introduce something new about the bill of lading as the contract, where the choice of the applicable law is expressed? The freedom of the parties in common law to adopt any system as the law applicable to their contract, which was subject only to the exemption that the choice had to be bona fide, has been introduced by article 3 (1) of the Act as well.⁹⁰ It seems that the principle established by the *Vita Food* case is still valid. Smith⁹¹, Merkin⁹² and Anton⁹³ stated that the principle of the freedom of the parties to select their applicable law, established by *Vita Food* case, is confirmed by the 1990 Act.

In a recent case Saville J⁹⁴ stated that a choice of forum and choice of law clause contained in the bill of lading was the choice of the parties regarding the applicable law. Thus, the contractual agreement of the parties was expressed in the bill of lading, which means that the bill of lading has to be seen as the contract itself and not as evidence of it.

⁸⁸ A Anton "*Private International Law*", 1990, W Green p. 321, R Plender "*The European Contracts Convention*", 1991, Sweet & Maxwell p. 65 "Thus, in the case of a bill of lading received on board and to order, **it is by mercantile custom negotiable** because it may affect property in the goods shipped". (Stress added).

⁸⁹ C Morse "*Contracts (Applicable Law) Act 1990*" in Current Law Statutes Annotated, 1990, Vol. 3 Sweet & Maxwell p. 36-14 "Thus obligations arising under bills of lading and similar documents may fall outside the scope of the Convention, but only if the relevant obligations arise out of the negotiable character of these documents".

⁹⁰ fn 89 Morse p. 36-17 "Art 3 deals with the power of the parties to the contract to choose the law to govern it ... **The distinction between the case where the parties have made a choice of law in the contract**". (Stress added).

⁹¹ R Smith "*Conflict of Laws*", 1993, Cavendish Publishers Limited p. 105 "Article 3 of the Convention confirms the position which had been reached by English common law - that the parties should be free to select the law to govern their contract. The leading pre-Convention authority for English law, the decision of the privy council in *Vita Food* ... established that the parties were free to select any governing law they wished". fn 88 Morse p. 36-19 "The law chosen need not in principle have any geographical or physical connection with the contract. This approach is in accord with the views expressed by ... and reflects the practice of the common law: *Vita Food* ...".

⁹² fn 82 Merkin p. 212 "The common law ... conferred upon the parties almost absolute freedom to adopt any system of law as the law applicable to their contract ... This was subject only to the exceptions that the choice had to be bona fide ...". There is a clear reference to the *Vita Food* case.

⁹³ fn 88 Anton p. 326 "It is significant that the text does not require that there should necessarily be a connection between the situation which the contract regulates and the chosen law ... The view was taken that the common law could still be summed up in the words of Lord Wright in the *Vita Food Products* case".

⁹⁴ *The Havhelt* [1993] 1 Lloyd's Rep 523 p. 525

Moreover, Saville⁹⁵ held that:

“Those bills of lading contained or evidenced a contract for the shipment of the goods”.

First of all, the statement has not identified where the contract of carriage has been expressed and, consequently, where the choice of the parties has been contained. If the contract is evidenced by the bill of lading then the choice of law expressed therein is merely evidence of the parties' selection of the applicable law. Therefore, the choice of law is not the contractual choice of law and it cannot be taken into account, because it can be modified by any means of evidence. Second, Saville recognised that the contractual intention of the parties, regarding the applicable law, has been expressed in their contract which has been taken into account. At the same time, the choice of law was expressed in the bill of lading which means that the bill of lading was regarded as the expression of the contract. In another case Saville J⁹⁶ stated that the bill of lading is the contract where the choice of law is contained. Besides, Lord Goff of Chieveley⁹⁷ considered that the choice of law has been incorporated in the bill of lading contract. Additionally, Langton J,⁹⁸ in a case concerning matters of choice of law, stated that:

“I have found them the original contracts were made in Palestine in the form of bills of lading”.

The formation of the contract of carriage in the form of a bill of lading is recognised. Hence, the conclusion of the contract of carriage in the bill of lading form is a common practice. Furthermore, Langton⁹⁹ in the same case said that:

⁹⁵ *ibid.* p. 524, *The Adolf Warski* [1976] 1 Lloyd's Rep 107 p. 109 “The proper law of the contracts of carriage contained in or evidenced by the bills of lading was Polish law”. *fn 77 Komninos case p. 372* “Under contracts of carriage contained in or evidenced by two bills of lading”.

⁹⁶ *The Ines* [1993] 2 Lloyd's Rep 492 p. 495 “As I have indicated, it is common ground that there is a bill of lading contract which contains an English law and jurisdiction clause”.

⁹⁷ *Republic of India v India Steamship Co. Ltd* [1993] AC 410 p. 419 “That must have incorporated the old Hague Rules into the bill of lading contract”. *Spiliandia Maritime Corporation v Cansulex Ltd* [1987] AC 460 p. 486 Lord Goff of Chieveley said that “Since there was not only a dispute as to the effect of the bill of lading contract”.

⁹⁸ *The Torni* [1932] P 27 p. 43

⁹⁹ *ibid.* p. 39

“... The original contract was contained in the bills of lading ...”.

Thus, the sense in which the term “contained in the bill of lading” has been used was that the bill of lading was the contract itself. Greer LJ¹⁰⁰ in the court of appeal, concerning the choice of law, held that:

“Those who are making contracts for the shipment of goods from Palestine to this country to insert in a contract made by bill of lading”.

Therefore, the choice of the applicable law is inserted into the bill of lading contract and not evidence of it. Accordingly, Megaw LJ¹⁰¹ stated that the bill of lading was a contract. Moreover, in *Partenreederei MS Tilly Russ v Haven & Vervoedrijf Nova NV* before the European Court of Justice it is stated that:

“According to the United Kingdom, a bill of lading, not only constitutes a receipt for the goods received by the carrier, **but also the contract** subject to whose terms the goods are carried and a document of title of the goods”.¹⁰² (Stress added).

Finally, in carriage of goods by sea, the bill of lading was always the document where the contractual choice of the applicable law was expressed. The bill of lading has to be regarded as the contract of carriage where the contractual choice of law is stated, because the express choice of law is stated in the contract itself. In contrast, there are views considering that the bill of lading either contains or evidences the contract of carriage, despite the fact that it is always regarded that the choice of law, expressed in the bill of lading, is the contractual choice of law and not merely evidence of it, which approves the view that the contract is contained in the bill of lading under the sense that the bill of lading is the contract itself.

¹⁰⁰ *The Torni* [1932] P 78 p. 87

¹⁰¹ *Coast Lines Ltd v Hodic & Veder Chartering NV* [1972] 2 QB 34 p.47 “But different considerations apply to the two types of contract- charter party and bills of lading contracts”.

¹⁰² [1985] 1 QB 931 p. 945

8.5 Deductions

Among the three legal systems, the choice of the applicable law, which is expressed in the contract itself, is contained in the bill of lading. The choice of law expressed in the bill of lading has been regarded as the contractual choice of law and not evidence of it. Under United States law the bill of lading is regarded as the contract of carriage for purposes of conflict of laws. The same view is followed under Greek law but the only difference in the approach is based on the language of article 108 of the Greek Private Maritime Code which regards the bill of lading as conclusive evidence of the contract. Besides, the choice of law is contractual and not merely conclusive evidence of an orally agreed choice of law. Consequently, there is not any contractual choice of law agreed prior to its incorporation in the bill of lading. There is no need to refer to the choice of law contained in the bill of lading if it is not the contractual one.

In fact, The Rome Convention 1980, which is applicable both in England and in Greece, states that the express choice of law is contained in the contract itself as well and, consequently, the express choice of the applicable law incorporated in bills of lading is also the contractual choice. Hence, if it is suggested that the bill of lading is evidence of the contract, then the choice expressed therein should be only evidence of it. Therefore, the courts have to take into account only the original contractual choice of law and not the evidence of it as it has been expressed in any bill of lading. In contrast, it is established in our analysis that courts have taken into account only choice of law clauses contained in bills of lading and such clauses have been regarded as the contractual choice of law and not evidence of it. Additionally, article 2 of the Convention is of universal application under the meaning that the choice of law may result in the law of a state not party to the Convention, which is in consistence with the Hague Convention on Private

International Law.

There is some uncertainty about the contractual role of bills of lading under English law on matters of conflict of laws. In some cases, it is stated that the bill of lading either contains the contract or evidences it. But the choice of law expressed in the bill of lading has been seen as the contractual choice of law and not as merely evidence of it. Besides, the bill of lading is the contract in which the express choice of law is incorporated. Consequently, the suggestion that the bill of lading on matters of conflicts of law is evidence should be eliminated.

Furthermore, among the three systems, a common approach regarding the incorporation of the express choice of law in the content of the contract itself is observed. Choice of arbitration, in the absence of an express choice of law, incorporated in the contract has been seen as an indication of the parties' choice of law as well.

Uniformity and harmonisation on matters of conflict of laws on contracts needs a uniform approach concerning the contractual role of bills of lading in cases of carriage of goods by sea. Therefore, the bill of lading has to be seen as the contract of carriage in which the choice of law has been expressed. Greek and English laws should avoid any contradiction in their approach to the contractual status of bills of lading and they should follow the example of United States law by clearly specifying that the bill of lading is the contract of carriage in which the choice of law is expressed. The bill of lading is the contract where the choice of law is incorporated regardless of who its holder is. This approach should be followed on any occasion where a question of the contractual status of bills of lading has arisen. A clear specification by the scholars, and the court decisions that the bill of lading is the contract of carriage in which the choice of law is expressed will greatly help to achieve a uniform approach among the three legal systems.

CHAPTER IX

The Contractual Role of Computerised (Electronic) Bills of Lading

The paper based documentation for sea carriage has been criticised in recent years. The criticism is founded on three points: First, it is time-consuming to send documents from the place of shipment to the destination. During the containerised shipping revolution, it was discovered that congestion at destination terminals was caused by the late arrival of the bills of lading. When bills of lading arrive late, release of goods is usually delayed, demurrage costs and port congestion are increased. Second, it is open to fraud. However, data stored on magnetic media, can be easily altered without leaving any physical evidence in the medium, which means that fraud can be achieved through EDI as well. Therefore, this disadvantage exists in the case of electronic bills of lading as well. Thus, it could be said that this criticism applies to electronic bills of lading which strengthens the continued use of paper bills of lading when they are sent quickly to their destination. It would be more difficult to commit fraud with electronic means when strict measures to safeguard the passwords have been taken. The possibility of achieving fraud by using electronic bills of lading is always an open option. EDI (Electronic Data Interchange) is “the standardised method of electronically transmitting and processing data”.¹ Characteristic of EDI is the standardised format used in transmitting data. Consequently, the content of the bill of lading should be standardised in order to be

¹ Electronic Data Interchange: A Quiet Revolution 3 *Price Waterhouse Review* (1988 Reprint p. 3). E Ali “EDI and EFT: The Height of Efficiency” 1992 *Canadian Banker* 44 “Electronic data interchange (EDI) is computer to computer communications of standardised electronic message formats, called transaction sets. Transaction sets specify formats for common business documents such as purchase orders, bills of lading” (ABI Information CD Room Abstract).

suitable for electronic transfer. Third, it is costly because of the use of labour in order to cope with the paper work.

The paper bill of lading can be replaced by recording the relevant information by other means, such as computers, which can be transmitted between the places of shipment and destination by telex or via satellite so that the bill of lading is printed out in the necessary places. Electronic data processing and electronic data transmission can be used. The former method combines the old way of filing in documents with modern telecommunication. This could be seen as the first step towards a quicker way of sending documents to a destination, than directly introducing a completely new electronic bill of lading and it would eliminate any need for a print out of the bill of lading. Both methods create problems regarding the authenticity of the bill of lading. The authenticity of the bill is related to the requirements that firstly, the bill of lading be in writing; secondly, the signature be authentic; and thirdly, the interrelation of its characteristic as a negotiable document of title and the need for a paper document be looked into. The three legal systems need some time to adapt their legal understanding and their practical usage of purely electronic data and electronic bills of lading. For example, the rules of evidence are different in the three jurisdictions. The traditional definition of “document”, “writing” and “signature” is different from the electronic ones. Thus, there is a departure from established notions of what constitutes a writing and what constitutes a signature and, therefore, raises the significant question of enforceability under the three legal regimes.² The bill of lading as EDI creates problems which are related to the use of means of evidence which is unrelated to traditional documents because they are synonymous with writing and signature requirements.³ There is a need to update the definitions of writing

² J Ritter, J Gliniecki “Symposium: Electronic Communications and Legal Change: International Electronic Commerce and Administrative Law: The Need for Harmonised National Reforms” 1993 *Harvard Journal of Law & Technology* 263. D Morrisson “The Statute of Frauds Online: Can a Computer Sign a Contract for the Sale of Goods?” 1992 *Geo Mason UL Review* 637 p. 658 “In theory it seems clear that EDI is a writing to the same extent that a telegraphic transmission is a writing”.

³ G Chandler III “The Electronic Transmission of Bills of Lading” 1989 *JMLC* 571 p. 575

and signature. We are not involved in an investigation of those matters, but we only look at the possible contractual status of bills of lading in the electronic era.

Some pieces of international legislation have sought to update to the traditional definitions of document, writing and signature. The United Nations Commission on International Trade Law has undertaken the formulation of legal rules aimed at the removal of many obstacles which exist for the implementation of electronic trade.⁴ The SIA (Standard Interchange Agreement) relates to the interchange of data and not to the commercial contractual obligations between parties.⁵ Thus, the contractual role of the transferred data is not regulated. It is not a substitute for individual contracts. Issues such as the formation of the underlying contract, its terms and conditions, have not been addressed by the Interchange Agreements. They have not been regarded as communication issues but merely part of the trading relationship between the parties. Therefore, agreements governing the transfer of data have to be accompanied by agreements regarding the contractual status of the transferred data.

The current legal regime surrounding bills of lading and their transfer does not seem, on the face of it, to preclude a computerised system. In the Hamburg Rules it is only stated that the signature on the bill of lading may be in handwriting or made by any other electronic means.⁶ The primary advantage of electronic documents lies, in the ease and speed with which they can be exchanged. The speed in the exchange of the electronic documents has made the standardisation of content and format necessary. The relation between the electronic bill of lading and the contract of carriage has to be defined. Does

⁴ United Nations Convention on Contracts for the International Sale of Goods, 19 *ILM* 671 Article 13, UNIDROIT Convention on International Factoring, 27 *ILM* 943,944 Article 1(4), United Nations Conference on Trade and Development, Convention on International Multimodal Transport of Goods 19 *ILM* 938 Article 5, 1(10), Inter-American Convention on Contracts for the International Carriage of Goods By Road, 29 *ILM* 83 Articles 3, 4, 5(1).

⁵ *EDI Association Standard Electronic Interchange Agreement*, 2nd ed, 1990

⁶ J Gliniecki, C Ogada "Symposium: Current Issues in Electronic Documents, Writings, Signatures and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce" 1992 *Journal of International Law and Business* 117

the transferred data represent the contract of carriage? Kindred⁷ stated that there is no practical way to transmit all the terms of the contract, even if it were desired. In contrast, the electronic bill of lading, by being the contract of carriage, will always be transferred as such.

Electronic bills of lading do not appear to be in common usage in International Trade. In the United States the electronic bills of lading have been used on a restricted basis of accommodating billing purposes.⁸ Does the electronic transfer of the bill of lading mean that the function of the bill of lading as the contract is not needed any more? S Williams⁹ considered that if EDI can be implemented to serve the functions of the bill of lading, then its effects will be unparalleled. Accordingly, Kozolchyk¹⁰ said that computer technology has attempted to serve the three functions of the bill of lading by telecommunication messages. Thus, there is an attempt to transplant and implement the functions of bills of lading through electronic means of telecommunication. Is the electronic bill of lading the contract of carriage or evidence of it? The formation of the contract through the electronic exchange of messages is a matter which has to be defined¹¹ by the legal systems of Greece, England and the United States.

American scholars, who have written about electronic bills of lading, considered that the paper bill of lading is the contract of carriage, which means that the electronic bill of lading has to implement this function as well.¹² There is still some confusion about

⁷ H Kindred "Trading Internationally by Electronic Bills of Lading" (1992) 7 *Banking & Finance Law Review* 265

⁸ R Whitaker "Electronic Documentary Credits" 1991 *The Business Lawyer* 1781. T Smith "Unwilling Partners Handicap EDI Users" 1990 *Network World* 23

⁹ S Williams "Something Old, Something New: The Bill of Lading in the Days of EDI" 1991 *Transnational Law & Contemporary Problems* 555 p. 567

¹⁰ B Kozolchyk "The Paperless Letter of Credit and Related Documents of Title" 1992 *Law and Contemporary Problems* 39 p. 84.

¹¹ Report: The Commercial Use of Electronic Data Interchange 1990 *The Business Lawyer* 1645, A Boss "Symposium: Current Issues In Electronic Data Interchange: Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment" 1992 *Journal of International Law & Business* 31 p.62

¹² fn 10 p. 84 "the three main functions of the ocean bill of lading (receipt of the goods, contract of freight, and document of title)". R Merges, G Reynolds "Toward a Computerised System for Negotiating Ocean Bills of Lading" 1986 *JMLC* 23 p. 26 "The bill of lading is a receipt for the goods and a contract of carriage". R Kelly "Comment: The CMI Charts a Course on the Sea of Electronic Data

the contractual status of the traditional paper bill of lading which can be transferred to the electronic bills of lading as well. It is worth mentioning that Stasia Williams, in an article about electronic bills of lading, considered that the paper bill of lading has served as the contract of carriage. But she contradicts herself by saying that:

“The bill of lading also serves as a contract of carriage between the shipper and carrier ... The bill of lading evidences a contract into which parties have already entered”.¹³

The contradiction can be avoided only if it is considered that, the term “evidence” means that the issued bill of lading has become the contract of carriage. A shifting in her understanding of the contractual role of bills of lading is observed. If the bill of lading serves as the contract, this means it cannot be merely evidence of it. The content of the contract of carriage must be that of the bill of lading. Otherwise, the bill of lading cannot serve as such. In contrast, Duhe¹⁴, circuit judge, in the court of appeal said that the paper bill of lading is the contract of carriage. Thus, the contractual role of the electronic bill of lading should be that of the paper bill of lading, which is also the contract of carriage. Furthermore, the electronic bill of lading should be considered as having superseded any prior oral agreement and become the final contract. It should also be regarded as a standard form contract. Therefore, the electronic bill of lading will be enveloped with all

Interchange: Rules for Electronic Bills of Lading” 1992 *Tulane Maritime Law Journal* 349 p. 351 “it may represent the contract of carriage between the shipper and the carrier”. M Glisson, W Cooper “The Ins and Outs of Shipping Documents” 1991 *CPA Journal* 66 “The bill of lading is a widely used shipping document ... identifying contracting parties and stating terms and conditions of agreement”. J Steinfeld, Jr “When Is a Third Party Liable?” 1991 *Distribution (DWW)* 90 “The beginning point must be the bill of lading contract”. R Price, J Whelan “Gulf States: Carrier Responsibility for Carriage Stowage” 1989 *Middle East Executive Reports* 16 “depending on the terms of the bill of lading contract”. W Farrall, A Parker “Piecing Together the Liability Puzzle” 1988 *Transportation & Distribution* 46 “The key contract between shipper and carrier is the bill of lading” (ABI Information CD Room Abstracts).

¹³ fn 9 p. 561, fn 6 p. 137 “The bill of lading functions both as evidence of the contract for carriage of goods and as a receipt for the goods”.

¹⁴ *Metropolitan Wholesale Supply Inc v M/V Royal Rainbow* (1994) 12 F3d 58 p. 61 “A bill of lading, the contract of carriage between the shipper and the carrier, continues to govern the rights and obligations of the parties until the delivery of the cargo”.

the contractual characteristics of the paper bill of lading, as it is established in the United States system.

It is worth mentioning that some scholars, writing about electronic bills of lading and following the English Literature, still state that the bill of lading is merely evidence of the contract.¹⁵ So, these scholars do not envelop the electronic bill of lading with the characteristic of being the contract of carriage. It seems that the bill of lading is unrelated to the contract of carriage. There is a distinction between the contract of carriage and the bill of lading. The contract of carriage is not issued in the form of a bill of lading. For instance, Webster, J¹⁶ in the court of first instance, said that the contract was contained in or evidenced by the bill of lading without any further specification of which the contract of carriage is. This dual reference does not verify the contract of carriage and, consequently, the contractual nature of bills of lading. Lord Leggatt¹⁷, concerning the same case in the Court of Appeal, referred to the bill of lading contract. The same approach has been endorsed by Lord Goff of Chieveley¹⁸ in the House of Lords concerning the same case and the contractual role of bills of lading. Thus, it is obvious that there is an uncertainty regarding the contractual role of the paper bills of lading in English law and this uncertainty may affect electronic bills of lading as well.

On the one hand, in Greek law, Kousoulis¹⁹ stated that the original purpose of the paper bill of lading was to evidence the contract of carriage, which consequently would

¹⁵ Hannesson *op cit* p. 169 "Receipt of the goods and evidence of the contract", K Burden "EDI and Bills of Lading" 1992 *The Computer Law and Security Report* 269 p. 269 "A bill of lading ... evidence of the terms of the contract of carriage".

¹⁶ *The Texaco Melbourne* [1992] 1 Lloyd's Rep 303 p. 305 "The fuel oil was shipped pursuant to a contract of carriage under which the defendants for reward undertook to carry the cargo in the vessel from Tema to Takoradi, both in Ghana ... They placed themselves in breach of their duties to the department under the contract contained in or evidenced by the bill of lading to which they were party".

¹⁷ *The Texaco Melbourne* [1993] 1 Lloyd's Rep 471 p. 473 "Under a bill of lading contract the despondent owners of the Texaco Melbourne ... failed to deliver to Takoradi a cargo of inland fuel oil", p. 475 "Thus the measure of damages of a cargo ... under a bill of lading contract".

¹⁸ *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473 p. 476 "Under the bill of lading contract dated Nov 16, 1982, the ship owners acknowledged the shipment on board the vessel at Tema in Ghana of a cargo ... for carriage from Tema to Takoradi, also in Ghana".

¹⁹ S Kousoulis "Matters of Electronic Bill of Lading", 1992, Sakkoulas p. 47, 53.

be the purpose of the electronic bill of lading. It appears that the contract of carriage and the bill of lading are two different conceptions. The contract of carriage is not issued in the form of the electronic bill of lading, despite the fact that the bill of lading is attributed with the characteristic of being the conclusive evidence of the contract. The contract of carriage is considered as an ordinary contract and is not established as a special form of contract which has to be in the form of an electronic bill of lading. It would be more suitable to have the electronic bill of lading as the final contract which can be transferred as such to every transferee. The bill of lading is the conclusive evidence of the contract of carriage according to the Greek law as it is stated above in chapter II. On the other hand, the bill of lading, originally an entry to the book of loading, has served as the contract of carriage rather than merely evidence of it.²⁰

The electronic bill of lading has to accommodate the function of being a negotiable document of title²¹ and as such it must be based on the existence of a valid contract of carriage, under the terms of which the goods are delivered to the receiver in due course. In the case of bills of lading, the terms under which the goods are delivered are those contained in the bill of lading itself, which indicates that the bill of lading is the contract of carriage under which the bill of lading is validated as a document of title. Therefore, the electronic bills of lading have to be the valid contracts as well. Additionally, the paper bill of lading, and the electronic bill of lading by being negotiable instruments, are contracts as well.

The CMI²² Rules for Electronic Bills of Lading are a recent attempt to regulate the issue and negotiation of bills of lading through the use of computers. The CMI Rules

²⁰ A Knauth "*The American Law of Ocean Bills of Lading*", 1953, p. 134, Maclaughlin JR "The Evolution of Bills of Lading" 35 *Yale LJ* 548 p. 555

²¹ fn 8 Whitaker p. 1782 "It has been argued that, by definition an electronic record cannot be negotiable ... no electronic document can be negotiated". E Hemley "Negotiable Electronic Bills of Lading" 1991 *Global Trade* 36

²² CMI Rules 1991 *JMLC* 620 p. 623 Section 8 "The Private Key is unique to each successive Holder", Section 7(b) "The proposed new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer".

should accommodate the implementation of the three functions of the paper bill of lading, namely being a receipt, a contract and a document of title. Consequently, the electronic message under the CMI rules must have the same contractual status as the paper bill of lading.²³ Thus, the electronic bill of lading should replicate the function of the paper bill of lading as the contract of carriage.²⁴ However, the CMI rules are not comprehensive in their handling of bills of lading.²⁵ They govern only matters of electronic transfer of bills of lading. It is doubtful whether the private key procedure can function as a negotiable bill of lading. The transferee's rights depend upon both the issuance of a private key and the acceptance of the right to control. The CMI Rules are implied as part of the contract. In the case that they conflict with the carrier's standard terms and conditions then the CMI Rules prevail. On the one hand, the carrier may issue a private key to the transferee in the belief that he has accepted the receipt message and the carrier would not be expected to be bound by terms other than those of the receipt message that sent. The rights depend not only on the lawful acquisition of the private key, but also on the text of the carrier's valid receipt message. However, the transferee would not want to pay for an electronic bill of lading whose terms and conditions are other than those he has received. There is no definition of the electronic bill of lading and its contractual role, nor any specific reference to a document in which the contractual terms are stated. There is only a general definition that "contract of carriage" means any agreement to carry goods by sea. The Hague Rules refer to a contract of carriage covered by a bill of lading, under the meaning that the bill of lading is the regulated contract in which the provisions of the Rules are implied. Hence, a contract in the form of a bill of lading should be within the definition of the CMI Rules as well. On the other hand, as it has been shown in chapter V, there is

²³ fn 11 Boss p. 59 "Electronic message shall have same force and effect as paper bill of lading for both evidentiary and contractual purposes".

²⁴ S Maduegbura "The Effects of Electronic Banking Techniques on the Use of Paper-based Payment Mechanisms in International Trade" 1994 *JBL* 338 p. 349 "The CMI Rules attempt to replicate the three main functions of the bill of lading, namely, receipt, contract and negotiation".

²⁵ fn 12 Kelly p. 360

an open option to have a paper bill of lading²⁶ which is a contract of carriage, rather than evidence of it. It is, therefore, submitted that the paper bill of lading, which is a substitute for the electronic bill of lading, has to function as the electronic bill of lading has already functioned. Thus, it could be said that the electronic bill of lading had functioned as the contract of carriage as well. Kindred²⁷ considered that electrodocs do not express the terms of the contract of carriage, but they can establish an agreement by reference to the carrier's conditions of carriage. Despite the fact that in practice the bill of lading has been seen as the only expression of the contract, the bill of lading is not conclusive evidence of the contract according to his view²⁸ and this ambiguity cannot be by-passed by the use of EDI. Besides, the bill of lading according to the American perception is the contract of carriage and, therefore, there is no ambiguity in order to be by-passed by the use of EDI.

In conclusion, the establishment of a common perception of the contractual role of bills of lading is needed. From the above analysis, it becomes clear that there is still a great difference in the understanding of the contractual nature of electronic bills of lading. There is no a definite understanding about the interrelation between the contract of carriage and the electronic bill of lading. In the electronic era, there should be a uniform perception of the contractual feature of electronic bills of lading. The electronic bill of lading will be transferred, as the contract of carriage, to every transferee. Hence, it should be the contract of carriage for the parties who have issued the electronic bill of lading as such. The exchange of electronic messages makes it very difficult to establish the time of the conclusion of the contract. It is even more difficult to find out when the last shot for the conclusion of the contract has gone off and who fired it. The whole process is slowed down if the contracting parties do not know the final expression of their contract. The electronic bill of lading is the offer under which the contract of

²⁶ fn 22 Section 10(a) "The Holder has the option at any time prior to delivery of the goods to demand from the carrier a paper bill of lading".

²⁷ H Kindred "Modern Methods of Processing Overseas Trade" 22 *JWT* 5 p. 9.

²⁸ fn 7 p. 275

carriage is concluded. An electronic bill of lading issued in the United States is transferred electronically, first, to England and afterwards to Greece. For the American lawyer, the electronic bill of lading is the contract of carriage between the shipper and the carrier and, therefore, contract of carriage and bill of lading are synonymous terms. Parole evidence is not admissible to modify the bill of lading contract. For the English lawyer, according to recently established terminology, the electronic bill of lading contains or evidences the contract of carriage. So, on first sight, the lawyer will be unable to define a single contractual status for the electronic bill of lading. If the lawyer follows the view that the electronic bill of lading is merely evidence of it, then parole evidence will be admissible to modify the terms of the bill. So, the conception of the contract of carriage is different from the bill of lading. Furthermore, there is no reason for the electronic bill of lading not to be seen as the contract, since it has not established any principle, in accordance with the law of contract, under which the bill of lading is rather evidence of the contract than the actual contract itself. The Greek lawyer will see the electronic bill of lading as the conclusive evidence of the contract. Parol evidence is not admissible to vary the terms of the bill, but the contract of carriage is not synonymous with the bill of lading contract. Hence, the same document, used for so long in the international trade, will be attributed with different contractual roles in the three legal systems. Carriers will continue to contract and transport cargoes under their standard contractual terms just as they are expressed by their bill of lading. Thus, the electronic bill of lading must be the contract of carriage which complies with the practical usage of bills of lading as standard form contracts as well. The electronic bill of lading as the substitution of the paper bill of lading has to accommodate its contractual function. The introduction of electronic bills of lading is not intended to lead to an abolishment of their contractual function but simply to achieve a quicker transfer of the bill of lading contract to its destination. Furthermore, the electronic bill of lading as a negotiable instrument,

has to be a contract by itself, which means that it will be the contract of carriage. The electronic bill of lading by being a negotiable instrument is by nature a formal contract and as such supersedes any prior agreements or any underlying contract.

CHAPTER X

The Contractual Role of Straight (Non-Negotiable) Bills of Lading

The carriage of goods by sea has been undertaken under order bills of lading for many years. The characteristic of order bills of lading as a document of title requires the surrender of the document against delivery.¹ A late arrival of the bill of lading causes problems because a ship cannot deliver its cargo without the production of the order bill of lading. Besides, cargo, which was carried under straight bills of lading, consigned to a named person, can be delivered without the presentation of the document itself.

A straight bill of lading is defined as “a bill in which it is stated that the goods are consigned or destined to a specified person”.² Straight bills of lading are governed by the Federal Bills of Lading Act 1916 and the Greek Private Maritime Code, in the United States and Greece respectively. In contrast, it is significant that the newly introduced Carriage of Goods by Sea Act (COGSA) 1924 in English law does not apply to straight bills of lading. A straight bill of lading is a sea way-bill for the purposes of the Act. Despite the existence and use of straight bills of lading consigned to a named person for some years, a new non-negotiable document, “the sea way-bill”, emerged in International trade. It seems that the first sea way-bills were issued in 1970 by the Atlantic Container Line.³

Is a straight bill of lading the contract of carriage or evidence of it? Straight bills

¹ 49 USC 89(c), J Wilson “*Carriage of Goods by Sea*”, 1993, Pitman p. 158, E Skalidis “*Commercial Code*”, 1985, Sakkoulas Thessaloniki, Article 173 p. 507.

² 49 USC 82, UCC 7-104, *Benjamin's Sale of Goods*, 1992, p. 925, Skalidis op. cit Article 171 p. 506.

³ R Vocos “The Sea way-bill: A New Innovation in the Carriage of Goods by Sea” 1988 *Cargo Claims Analysis* 132 p. 133.

of lading have the same contractual characteristic as order bills of lading under Greek law. There is no provision in the Greek Private Maritime Code which distinguishes the contractual status of straight bills of lading from that of order bills of lading. Hence, a straight bill of lading is conclusive evidence of the contract of carriage and parole evidence is not accepted to modify its content. Straight bills of lading are widely in use and in circulation in United States commerce⁴ as well. In United States law, it is pointed out that there is no difference between order and straight bills of lading concerning their role as contracts of carriage. Alvin Rubin, circuit judge, stated that:

“a bill of lading serves the function of being a contract of carriage whether negotiable or not”.⁵

In English law there is no court decision referring directly to the contractual characteristic of straight bills of lading. There are some cases which refer only to the transferable characteristic of straight bills of lading.⁶ Grime⁷ suggested that straight bills of lading were governed by the Bills of Lading Act 1855. It is assumed therefore that the straight bill of lading shares the contractual status of order bills of lading, taking into account that a straight bill of lading is a kind of bill of lading. It has to be stressed that the function of straight bills of lading has not received any detailed examination. There appears to be the impression that this kind of bill of lading is either obsolete or has been ousted from the legal system of England. According to the wording of the newly introduced COGSA 1992, straight bills of lading are not regarded as being a species of bills of lading. It seems that the same contractual status, which has been attributed to

⁴ *Data Point Corporation v Lee Way Motor Freight Inc.* 572 F2d 1128 p. 1130 “The interpretation of this widely used bill of lading, which was promulgated by the Interstate Commerce Commission for interstate shipments, has been held to be a matter of Federal law”.

⁵ *West India Industries Inc. v Tradex Petroleum Services* 664 F2d 946 pp. 946, 949, *Hogan Transfer and Storage Corp v Waymire* 399 NE2d 779, *Maggard Truck Line Inc v Dreaton Inc* 573 Fsupp 1388. *Transport Clearing Northwest v Bardahl MFG Co* 589 P2d 1242.

⁶ *Henderson v Comptoir D'Escompte de Paris* [1873] LR 5 PC 253, 259. *Soproma v Marine & Animal by Products Corporation* [1966] 1 Lloyd's Rep 367.

⁷ R Grime “*Shipping Law*”, 1991, Sweet & Maxwell p. 153 “That of itself is not an objection under the 1855 Act, which clearly encompasses “straight (non-negotiable) bills of lading”.

order bills of lading by the three legal regimes, is applicable to straight bills of lading as well.

It is worth mentioning that COGSA 1992 regulates sea way-bills. Are sea way-bills something different than straight bills of lading? A straight bill of lading is non negotiable and indistinguishable from sea way-bill⁸. Accordingly, Todd⁹ states that:

“The liner way-bill (called a straight bill of lading in the United States) is such a document ... It is not, unlike the traditional bill of lading, a negotiable document, and delivery is made not against presentation of the document, but to a named consignee”.

Hence, it seems that sea way-bill is another name for straight (non-negotiable) bill of lading. The sea way-bill is a contract of carriage.¹⁰ Additionally, sea way-bills are straight bills of lading and, therefore, they are contracts of carriage under United States law¹¹ as well. It should be stressed that different names are used for sea way-bills such as way-bills or liner way-bills.¹² There is no specific regulation about sea way-bills in Greek law. Sea way-bills can be regulated under the provisions of straight bills of lading if they are regarded as straight bills of lading. Therefore, they are conclusive evidence of the contract as well.

Lloyd¹³ said that the bill of lading will be replaced by the sea way-bill as the

⁸ A Lloyd “The Bill of Lading: Do We Really Need it?” 1989 *LMCLQ* 47 p. 50. J Cooper “*Current Law Statutes Annotated*” [1992] 3 Chapters 37-52 pp. 50-2 “Sea way-bills are essentially non transferable bills of lading”.

⁹ P Todd “*Modern Bills of Lading*”, 1990, Blackwell Scientific Publications p. 251

¹⁰ W Tetley “*Marine Cargo Claims*”, 3rd ed, International Shipping Publications p. 942 “the ocean way-bill is a non negotiable contract of carriage of goods by sea, dependent on the terms and conditions found in the way-bill”.

¹¹ E Hemley “Negotiable Electronic Bills of Lading” (May 1991) *Global Trade* 36 p. 38 “sea way-bills (another term for the non negotiable bill of lading)”. W Tetley “*Marine Cargo Claims*”, 3rd ed, International Shipping Publications p. 941 “At times the contract is a non negotiable receipt, often called a way-bill or straight bill in the United States”. T Schoenbaum “*Admiralty and Maritime Law*”, 1987, West Publishing Co p. 301 “As a non negotiable bill of lading, the liner way-bill is subject to the Pomerene Act under American law”.

¹² C Debattista “Sea way-bills and the Carriage of Goods by Sea Act 1971” 1989 *LMCLQ* 403

¹³ fn 8 Lloyd p. 56, p. 49 “The contract of carriage had been contained in a sea way-bill instead of a bill of lading”.

contract of carriage. Correspondingly, the Law Commission¹⁴ in its report stated that:

“the sea way-bill contract remains a contract personal to the shipper and the carrier”.

Thus, it could be argued that the sea way-bill is the contract of carriage. There are scholars supporting the view that sea way-bills are evidence of the contract.¹⁵ Williams¹⁶ considered that:

“the bill of lading (and hence, the way-bill) are generally considered to be excellent evidence of the contract of carriage”.

Hence, there is no original argumentation about the contractual status of sea way-bills, simply a reference to the contractual status of order bills of lading. Thus, sea way-bills must be regarded as a kind of bill of lading as well.

The Law Commission in England declared that sea way-bills are broadly similar to straight bills of lading found in the US Federal Bills of Lading Act 1916.¹⁷ The Commission does not state whether the similarity extends only to the name or to the legal functioning as well. It is submitted that by referring to the Federal Bills of Lading Act 1916, it is meant that sea way-bills have the same functions as straight bills of lading under United States law. In support of this view Tetley¹⁸ says that the “transfer of a straight bill of lading in the United States is generally analogous to the transfer of a way-bill under the common law”. Consequently, sea way-bills, as straight bills of lading, are contracts of carriage. It is mentioned above that a straight bill of lading is treated as a sea way-bill for purpose of the COGSA 1992. Otherwise, the straight bill of lading with its own characteristics is not governed by the Act. Hence, instead of a sea way-bill being a

¹⁴ Law Commission Report No 196 (1991) HC 250 p.33

¹⁵ fn 9 Todd p.252, J Wilson “Legal Problems at Common Law Associated with the Use of the Sea Way-bill” 1989 *Il Diritto Marittimo* 115 p.115, Fn 7 Grime p. 125 “it may evidence the terms of the contract of carriage”.

¹⁶ R Williams “Way-bills and Short Form Documents: A Lawyer's View” 1979 LMCLQ 297 p. 302

¹⁷ fn 14 p. 32. C Debattista “Sales of Goods Carried by Sea” 1990 Butterworths p. 199.

¹⁸ W Tetley “Way-bills: The Modern Contract of Carriage of Goods by Sea” 1984 JMLC 41 p. 61.

straight bill of lading the opposite is legislated for, despite the fact that straight bills of lading have been in use for many years in international trade. Sea way-bills and straight bills of lading have the same contractual status. It emerges that among the three legal regimes, there is no original argumentation regarding the contractual status of sea way-bills rather than a copy of the contractual status of straight bills of lading. Hence, the contractual status of sea way-bills is subsequently that of order bills of lading as it stands in the three legal systems.

The introduction of a new name on the face of a document does not necessarily create a new document. Straight bills of lading continue to accommodate the legal functions which sea way-bills were introduced to accommodate. Therefore, there is a complete overlapping and two documents accommodate the same legal function. The establishment of new rules in order to regulate documents, which serve the same legal functioning as pre-existing documents, causes an overproduction of rules. There is no need for further legislation regulating sea way-bills. There is a need in English law either to regulate straight bills of lading separately or to make clear that sea way-bills, which are governed by the Carriage of Goods by Sea Act 1992, are straight bills of lading and then change the term "sea way-bills" to "straight bills of lading" in order to have a uniform terminology used among the three legal regimes. It could be argued that straight bills of lading are contracts of carriage because their only difference with order bills of lading is based on their non-negotiable characteristic and not on their functions as contracts and receipts. Straight bills of lading should be the only documents which are issued in the event of the issue of a non-negotiable bills of lading being demanded.

CONCLUSIONS

It is a matter of priority and essential to the functioning of the economy that the bill of lading should be regarded as a contractual document. As a matter of legal accuracy, any term should be used with its literal meaning rather than have its literal meaning interpreted in a particular way that it is suitable for the occasion on which is used. Thus, the bill of lading contract has to mean the contract rather than the receipt or memorandum. The standardisation of forms of contracts is a rational and economically efficient response to the rapidity of market transactions and the high cost of negotiations.

The Hague Rules and the Hague-Visby Rules state that the contract of carriage is covered by a bill of lading. There is no explanation in the Rules either of the contractual role of bills of lading or of the concept of the term "covered". The Rules apply to bills of lading under charter-parties when and if the bill of lading is the contract of carriage. It could be argued that The Hague Rules are applied in the bill of lading contract in common carriage of goods either. It emerges, therefore, that by "covered" is meant that the bill of lading is the contract itself rather than merely a memorandum. Nevertheless, the bill of lading, as a free contract has been circumscribed by the legislation. The bill of lading is the contract, governed by the mandatory regime of the Rules, rather than any other kind of oral or written contract.

The bill of lading is defined as evidence of the contract in the Hamburg Rules. The wording of both the Hague and the Hague Visby Rules stating that the contract of carriage is covered by a bill of lading, is omitted. Besides, the bill of lading continues to accommodate the same functions as it has accommodated from its introduction in the

international trade.¹ Consequently, it continues to cover the contract of carriage and, therefore, the bill of lading should still be the contract of carriage instead of being merely evidence of it. Additionally, the Rules are applicable to bills of lading under charter-parties when the bills of lading are contracts of carriage and not merely evidence of them. Uniformity will be achieved if the bill of lading is regarded as the contract in which the Hamburg Rules are applied. Common carriage should be connected with the issue of the bill of lading as the contract.

The bill of lading, concerning the relation between the original parties, is the contract of carriage in the US law; it is conclusive evidence of the contract in Greek law and it is merely evidence of the contract in English law.

This differentiation has created a problem regarding the terms of carriage and delivery of the goods and a problem for the common perception of bills of lading as negotiable instruments. Among other things, the purpose of the international rules is the reassurance of the negotiable character of bills of lading, which is related to their existence as contracts. Bills of lading cannot be valuable negotiable instruments without being valuable contracts of carriage. English law regards them as merely evidence in combination with the view that they are merely transferable documents.

A commercial instrument, such as the bill of lading, which is used in an extent scale in international trade, cannot be compared with any ordinary document circulated in a national system and attributed with characteristics which are suitable for a national legal system but which lack any concept of international uniformity. Hence, the functions of the bill of lading have to be uniform. Taking into account the international effort to harmonise the use of bills of lading, the shipper, the carrier and the third party holder of

¹ A Mitchehill "*Bills of Lading and Practice*", 1990, Chapman and Hall p. 1 "If this single document became lost, as the shippers were in all respects at the mercy of the master, who possessed the sole proof of the contract". M Crutcher "The Ocean Bill of Lading - A Study in Fossilization" 1971 *Tulane L R* 697 p. 702 "The master is an active party in making the contract of affreightment", p. 715 "The master is again a party to the contract".

the bill of lading must have uniform duties and obligations under the same contract of carriage, namely the bill of lading contract which at the same time has to be a receipt and a negotiable instrument.

Therefore, in the light of the views prevailing in the US and the Greek law, in combination with the case law and the view's of scholars who have adopted the bill of lading as a contractual document in English law, the bill of lading should be the contract of carriage for the following reasons: First, carriers transport all cargo according to their terms, which have been standardised.² The carrier's terms are contained in their bill of lading which has been printed and published in advance. Hence, carriers have taken responsibility by themselves to standardise and offer their terms, which are always in compliance with the provisions of the Conventions, as the only offer for the conclusion of the contract. International Conventions have failed to produce an overall standard contract of carriage which has to be expressed in a specific contractual document.

Second, carriers accept and keep the loaded cargo under the terms of their bills of lading until the issue of the bill of lading.³ Hence, the contract, which retroactively will be applicable to the carriage, is finalised as expressed in their bill of lading. The carrier always has the last shot for the conclusion of the contract of carriage.

Third, the bill of lading, which is filled in by the shipper, seems to be merely an offer.⁴ The contract is concluded when the carrier accepts the cargo. The acceptance of the cargo by the carrier means ratification of the bill of lading as the contract.⁵ The bill of lading should be regarded as being in legal existence between the shipper and the carrier, despite the absence of the carrier's signature. The signature should be regarded as a

² Chapter IV pp. 131-34, Chapter III pp. 73-75, Chapter II pp. 48-51

³ Chapter IV pp. 142-46, Chapter III pp. 64, 71-72. E Chance "*Principles of Mercantile Law*", 1980, Cassell-London p. 228 "A bill of lading is at once and at the same time ... a contract for their carriage and delivery upon the terms and conditions therein stated".

⁴ Chapter IV pp. 142-44. D Taylor, E Rutland "*Exporting*", 1976, Teach Yourself Books p. 38 "**The offer of a contract is made by the shipper tendering his cargo. The acceptance is made by the shipowner**". p. 39 "**It embodies the terms of the contract of carriage**". (Stress added)

⁵ Chapter III pp. 63-64

necessity in order the bill of lading to be transferred by endorsement to any third party and to be circulated as a document of title. Consequently, the bill of lading should be simultaneously considered as an existing document, from the moment the carrier has accepted the goods, on the hypothesis that the bill of lading will be signed in due course. Therefore, the bill of lading should be regarded as a bill of lading from the moment the goods have passed into the carrier's custody. If the bill of lading is signed before the delivery of the goods to the carrier, then it becomes a valid bill of lading from the moment the cargo passes into the custody of the carrier.⁶ It will be recalled that the necessity for the carrier's signature in the bill of lading is established, which is inserted after the receipt of the goods by the carrier, if the bill of lading is to be regarded as a bill of lading. This is to avoid the issue of bills of lading without the existence of the analogous cargo.⁷ Therefore, we have fulfilled the two aims which are, firstly, to have a loaded cargo, and therefore a valid contract, which is transported under the bill of lading, and secondly, the legal existence of the bill of lading contract contemporaneously with the delivery of the cargo in the carrier's custody. The difference between the time of the receipt of the goods, which means conclusion of the contract, and at the time of the receipt of the contractual document, which results from administrative inadequacies in the handling of the documentation by the shipping companies, will be irrelevant. Consequently, there will be no defect between the emergence of the bill of lading contract and its legal binding.

Fourth, any preliminary negotiations and agreements are superseded by the bill of lading contract.⁸ It has become common knowledge that the bill of lading is the final contract which covers all actions that have taken place from the embarkment of the

⁶ Chapter III pp. 67-68. H Tiberg "*The Law of Demurrage*", 1960, Almqvist & Wiksell p. 33 "the bill of lading contract is not made until the goods have been brought on board the ship", p. 3 "**a freight contract called a bill of lading**". (Stress added)

⁷ C OHare "Shipping Documentation for The Carriage of Goods and The Hamburg Rules" 52 *Aust LJ* 415 pp. 418-19, Chapter III p. 67

⁸ Chapter III pp. 67-68

bargain.⁹ It could be said that all actions have taken place in the knowledge that the bill of lading would be the final contract. In all events, the acceptance of the bill of lading by the shipper bounds him.¹⁰ Hence, a bill of lading, to have binding force, must be delivered to and accepted by a shipper, because until a shipper assents to a bill of lading there is no meeting of minds which is necessary for a binding contract.

Fifth, shippers ship the goods in order for them to be delivered to the consignee under the terms of the bill of lading contract.¹¹ The contract of carriage in the form of a bill of lading is necessary in order to transfer it to any consignee or endorsee, in accordance with the national laws of the three legal systems. An oral bill of lading contract has not been established despite the fact that we can have an oral contract of carriage. The kind of promise made in a bill of lading can be made without it being in writing; in such a case the promise might be enforceable as a simple contract, but would not benefit from the quality of negotiability, which is a feature of a bill of lading.¹² Hence, it could be said that the contract of carriage in the form of a bill of lading comes into existence by and with the issue of the bill of lading. When is the bill of lading regarded as being in existence? The transfer by endorsement of a bill of lading to a consignee named therein is not necessary, because the bill of lading is already the contract between the shipper and the carrier, to deliver the goods to the consignee or to order under its terms.

Sixth, the terms of the International Conventions, namely The Hague Rules and The Hague Visby Rules, are implied to the contract of carriage when the contract is in the form of a bill of lading. The Hamburg Rules, apart from being applicable to any kind of

⁹ Chapter IV pp. 129-31

¹⁰ Chapter IV pp. 109-110, Chapter III pp. 62-65

¹¹ Chapter IV pp. 123-129

¹² J Ridley *"The Law of The Carriage of Goods by Land, Sea & Air"*, 1978, Shaw & Sons p. 108 "... is considered to be a negotiable instrument for the purpose of the Carriage of Goods by Sea Act 1971 and other Statutes". P Atiyah *"An Introduction to the Law of Contract"*, 1995, Clarendon Press p. 373 "Only those documents recognised by law or the custom of trade to be transferable by delivery (or endorsement) are negotiable".

contract of carriage, are applicable to the bill of lading contract as well.¹³

Seventh, the bill of lading as a negotiable instrument, when it has been issued as such, contains the contract itself. The bill of lading, by being a negotiable instrument, is a formal contract, which means it has to be a written contract and, as such, supersedes any underlying contract. Otherwise, the bill of lading will not be a negotiable instrument. Hence, parol evidence is inadmissible in order to modify the bill of lading contract.¹⁴ Additionally, as a transferable document of title under English law the bill of lading has to be issued as the contract for all its holders. All the principles of the law of contracts are applicable to the bill of lading contract as well. Moreover, the bill of lading has to be the contract of carriage in order to fulfil its function as the document the assignment of which transfers the rights and obligations under the contract of carriage and also the title to the goods which are subject to the terms therein contained. The bill of lading has to be the contract which validates the bill of lading as a document of title and a negotiable instrument.¹⁵ Otherwise, the bill of lading is null and void.

Eighth, the bill of lading is the contract in which the express choice of law of the contracting parties is contained.¹⁶ There emerges an understanding which is in accordance with the *ratio decidendi* of the judges that the bill of lading is rather a contractual document than a memorandum, in contrast to what is stated on other occasions in English law.

Ninth, the bill of lading has been established as a contract of adhesion which means that it is not a free negotiable contract any more.¹⁷ In the case of contracts of

¹³ Chapter I pp. 23-25

¹⁴ J Parris "*Making Commercial Contracts*", 1988, BSP Professional Books p. 34. M Whincup "*Contract Law and Practice*", 1992, Kluwer Law and Taxation Publishers pp. 77-78.

¹⁵ M Wright MBE "*Build Up your Exports*", 1992, Tate Publishing- Milton Keynes p. 72 "**A bill of lading is a fully negotiable title document**"(Stress added). p 71 "each reflecting a contract of freightment with the carrier". A Mason "*Export: A Manual of Instruction*", 1973, Business Books Limited p. 59 "Bills of lading are negotiable documents" p. 59 "**The bill of lading usually gives effect to the terms of the contract of carriage**"(Stress Added). Fn 1 Crutcher p. 702 "The bill of lading is negotiable by the custom of merchants".

¹⁶ Chapter VIII

¹⁷ Chapter IV pp. 131-33, Chapter III pp. 73-75, Chapter II pp. 48-51

adhesion the only offer for contracting is under the terms of the contract of adhesion.¹⁸ Moreover, the offer for acceptance is the carrier's bill of lading. Once the content of the contract has been formulated, it is used in every transaction. The individuality of the contracting party is irrelevant and, therefore, any negotiation of its terms is out of question. Consequently, the bill of lading, by being a standard form of contract, cannot be merely a document in which the terms of a previous concluded contract have been printed on its reverse side.¹⁹ A bill of lading contract of adhesion can be concluded by and with its issue and acceptance by the shipper. A contract of carriage in the form of a bill of lading cannot pre-exist the issue of the bill of lading itself and all its terms must be contained in the document. It is a fiction to regard the detailed terms of the bill of lading contract as based on agreement in every individual transaction.

Tenth, the bill of lading under common carriage is the contract for every third party.²⁰ The bill of lading under a charter-party is the contract of carriage in the hands of every holder except the charterer.²¹ As it is stated in chapter VII the bill of lading should be the contract of carriage for every holder regardless of whether he is the charterer or not. The bill of lading, even under a charter-party, is issued as the contract of carriage for the goods in transit. The goods are carried and delivered to any consignee under the terms of the bill of lading contract. The bill of lading is the issued contract for the loaded cargo as long as it is in transit. Therefore, it should be regarded as such for the shipper-charterer versus the carrier as well.

¹⁸ D Yates "Exclusion Clauses in Contracts", 1978, Sweet & Maxwell. pp. 1-4, E Jacobs "Effective Exclusion Clauses", 1990, Fourmat Publishing p. 32 "Expressly agreed term does not have precedence over a standard term is where the parol evidence rule applies", N Wilson "Freedom of Contracts and Adhesion Contracts" 1965 *ICLQ* 172.

¹⁹ Fn 12 Atiyah p. 17 "Contracts for carriage of goods by sea would usually be recorded in a printed bill of lading". R Bradgate, F White, S Fennell "Commercial Law", 1995, Blackstone Press Limited p. 186 "**On the back of modern standard form bills are detailed the terms and conditions of carriage**, so when the bill is issued and signed by the master it merely evidences a contract that was previously concluded". A Watson "Finance of International Trade", 1990, The Chartered Institute of Bankers p. 80 "**The full contract details appear on the back of the bill of lading**".

²⁰ Chapter IV p. 123-24, Chapter III p. 87, Chapter II p. 50

²¹ Chapter VII pp. 227, 235, 239-244.

Additionally, uniformity will be achieved by establishing a standard contractual function for the bill of lading regardless firstly of whether it is issued in common carriage or under a charter-party and secondly, of who its holder is. Otherwise, the bill of lading under a charter-party should be regarded as a different kind of bill of lading with different characteristics. Delivery of the goods must take place under the terms of the bill of lading itself in order the bill of lading to be a negotiable document of title or a document of title, which is transferable by assignment.²² If the holder possesses the cargo under terms which are not contained in the bill of lading, then there is doubt whether this bill of lading could be defined as a negotiable document of title.

The above conclusions are accurate, taking into account the assumptions under which they have been made. Acceptance of these conclusions will put the three legal systems in line. The term "bill of lading contract" will have legal substance and will not be used inaccurately in order to come into terms with the real shipping practice. There is a need for judicial inventories in order to cover the inconsistency about the transformation of a bill of lading from merely a receipt to a contract and then back to a receipt again, these judicial inventories have been exposed by many scholars in English literature. On the contrary, these judicial inventories have been rejected by the USA and the Greek legal systems. The established view in English law that the bill of lading is merely a memorandum has not caused many problems in the use of the bill of lading in England because, first of all, in practice the bill of lading is worked and used as the contract between all the parties and second, there were no many cases in English law where the contractual nature of the bill of lading has been questioned in order to motivate an upset in its smooth circulation or to enforce any serious concern in practical terms, regardless of its legal inconsistency as has been explained above. Additionally, in the

²² G Zekos, J Carby-Hall "Sea Way-bills: A New Marketable Name for Straight Bills of Lading" 1994 *II Diritto Marittimo* 714

relation between the consignee and the carrier, where the real conflict of interests arises most of the time, the bill of lading emerges as the contract in English law. There is a metamorphosis of a receipt to a contract, in another words, the bill of lading turns out to be a chameleon contract. Besides, in US and Greek law, a bill of lading contract is transferred as such to any third party, in accordance with the principle of endorsement or assignment. Thus, regardless of whether or not the same principle of law has been used or even if an accurate principle of law has been applied, a convergence has been established among the three legal systems concerning the contractual aspect of the bill of lading which has caused the most problems in the practical usage of the bill of lading.

The importance of having a uniform contractual role for the bills of lading is seen in the following example. If a shipment has taken place in Germany (*Cho Yang Shipping v Coral*)²³ where the bill of lading has been issued and been accepted, then the bill of lading will be the contract under German law. Thus, the goods are actually shipped and carried under the bill of lading contract. Besides, if the same case is tried simultaneously in Greece, USA and England, then the following phenomenon will arise. First, the goods will be shipped and carried under the bill of lading contract under the Greek and the USA law and second, in English law the same goods will be shipped and carried under the terms which are merely evidenced by the bill of lading concerning only the original parties. In contrast, the goods are carried under the terms of the bill of lading for any third party, in accordance with the three legal systems. Consequently, the same facts are interpreted in totally different way and, therefore, the commercial utility of the document is hampered, not to mention the difference in the approach regarding the negotiable character of the document. Additionally, the bill of lading has to be the contract in order for the national Acts to be applied, as mandatory law, in US and Greek law. The disadvantage and the practical problem caused in the carriage of goods by sea from the

²³ [1997] 2 Lloyd's Rep 641

fact that the bill of lading is a contract in one system and evidence of it in another, comes out plainly. The insurance premium for both parties is based on the standard terms in the bill of lading. Otherwise, the insurance company cannot insure the cargo against loss at sea, because individual terms might cause uncertainty about participant's rights and obligations. Therefore, general commercial interests seems to make it necessary for all parties to rely on the bill of lading as the only expression of the terms of the contract of carriage.

Moreover, the advantages of a uniform approach are reflected primarily in the right legal application, first of all, of the principle of endorsement or assignment. Second, conformity with the characteristic of the bill of lading as a standard form of contract will be achieved. Third, the principle that the acceptance of a document, where the detailed terms of the contract are contained, means that there will be alteration of any other previously concluded contract will be adhered to. Fourth, the principle that a negotiable instrument is a formal contract will be adhered to as well. This principle is not applicable in English law since the bill of lading is merely a transferable document, except on the occasions where the bill of lading is regarded as being a negotiable instrument. Fifth, any legal document has the same characteristics throughout any transaction, regardless of who its holder is. Sixth, the parol evidence rule is only applicable to contracts such as a bill of lading contract. Those principles of law must strictly be applied and not be bypassed occasionally in order to get practical results instead of solving the problem through the use of the principles of law.

There was some judicial creativity²⁴ when, considering the 1855 Act (English Law) it stated that a new contract with the consignee or transferee, on the terms of the bill, emerged on consignment or endorsement. The 1992 Act (English Law), in which a

²⁴ J Ramberg "Charter-parties: Freedom of Contract or Mandatory Legislation?" 1992 *Il Diritto Marittimo* 1069 p. 1071 "One may well ask from a theoretical point how it is that the bill of lading as a mere receipt all of a sudden can be converted into a contract of carriage upon the endorsement and transfer to the consignee"(Stress Added).

single contractual status of the bill of lading is not defined, raises the same problem.²⁵ For instance, a bill of lading evidence of a contract cannot be endorsed as a contract and a bill of lading, being merely a receipt, cannot be endorsed as a contract either.²⁶

The argument for a uniform approach is strengthened further, we take into consideration the efforts to create an electronic bill of lading which have made clear the need for a common contractual understanding of the document. Electronic collection and circulation of the bill of lading will make the establishment of the terms of the contract very difficult, since the bill of lading will be merely a receipt and not the contract, not to mention the legal problems and costs which will arise because of the differences in the national legal systems regarding the law of contract. Besides, the bill of lading, as the final writing of the contract, produces a common format of the contract of carriage; it creates security, improves the negotiability of the document and finally, advances the commercial utility of the document, in compliance with the efforts of the International Conventions.

In practice, the bill of lading has been established as a standard form contract of carriage. Hence, it should be the contract of carriage for every holder namely the shipper, the shipper-charterer, and any third party holder. A contract of carriage other than a bill of lading contract can be concluded before and without the issue of a bill of lading. As a result, this contract, instead of the bill of lading contract, should be seen as the original contract of carriage which is assigned to every third party. A bill of lading can be used merely as evidence of the contract if there is a term within its content. Hence, this bill of

²⁵ Fn 12 Atiyah p. 373 “**The consignor usually makes a contract with the carrier which is evidenced in a bill of lading.** The transfer of the bill of lading to the consignee is treated as **transferring the whole contract of carriage**”. (Stress Added)

²⁶ D Day “*The Law of International Trade*”, 1981, Butterworths p. 13 “**The idea that a party can transfer contractual rights which he does not have is not a common one in English law**”(Stress added). R Bradgate, F White “The Carriage of Goods Act 1924”1993 *MLR* 188 pp. 196-7 “The problem was resolved by judicial creativity, treating the Act as if it provided that a new contract with the consignee or transferee on the terms of the bill sprang up on consignment or indorsement. Curiously, the new Act raises the same problem”.

lading cannot be seen as a negotiable instrument and nor as being a formal contract. Bills of lading issued in a non-negotiable form are contracts as well, because there is no difference in their contractual role from that of the order bills of lading.²⁷

Electronic bills of lading should accommodate the same functions as the paper bills of lading, because the aim of the electronic bills of lading is merely a fast and easy electronic transfer of them.²⁸ It is impractical to suggest that the electronic bill of lading is merely evidence of the contract and, so, we transfer the evidence of the contract instead of the contract itself. Therefore, electronic bills of lading should be regarded as contracts as well. The issue of the bill of lading marks the formation of the contract of carriage in such a form which is able to transfer the contractual rights to any consignee or endorsee and also which allows it to function as the title for the goods in transit. In addition, the acceptance that the bill of lading emerges as a bill of lading at the moment the goods are delivered in the carrier's custody, means that the issue of the bill has marked the conclusion of the contract. The bill of lading is retroactively enforceable from the moment the goods are taken into the carrier's custody. Parties can agree differently but this does not diminish the characteristic of the bill of lading as being a contract in general by its legal nature.

The initial purpose of the International Conventions was to regulate the bill of lading contract, because the carriers incorporated many exception clauses in the bills of lading contracts and excluded their liability, although the International Rules failed to give a standard definition of the bill of lading and its characteristics. This absence of any definition has resulted into inconsistency about its contractual role, which has been analysed above. There is a need for a definite illustration of the functions of the bill of lading, and a document, in order to be regarded as a bill of lading, has to accommodate

²⁷ Chapter X pp. 284-288

²⁸ Chapter IX pp. 273-283

these functions, namely, receipt, contract and document of title. Additionally, the aim of the International Conventions, as mentioned above, is to increase the negotiability of bills of lading, which means that they should be formal contracts as well. Hence, bills of lading have to be clearly defined as being negotiable instruments which are related directly to their function as contracts.

Moreover, it must be specified that bills of lading, under charter-parties, are either different kinds of bills of lading with their own characteristics or they arise as contracts of carriage for every different shipper and they supersede the charter-parties as the subsequent contracts of the loaded goods. Furthermore, the harmonious transfer of the characteristics of the paper bills of lading, in common carriage and under charter-party, into the electronic bills of lading has to be defined as well.

There is a need for a protocol of amendment of the Hamburg Rules in which the conception of the standard contractual role of paper bills of lading and their functions will be stated. The regulation of electronic bills of lading and the transfer of the characteristics and functions of paper bills of lading into the electronic ones should be stated as well. The definition and establishment of the characteristics of both the paper and the electronic bills of lading as being receipts, contracts of carriage and negotiable instruments will resolve the problems which the authorities are facing in their effort to introduce electronic bills of lading as negotiable documents of title.

An effort to achieve a uniform understanding on functioning of bills of lading is expressed by the “Bolero Project” in the European Union²⁹ where the problem of bills of lading as negotiable instruments is spelt out; therefore, the paper on which they are printed does not just carry information but it also carries value. It is, therefore, legally difficult to replicate such a physical token with an electronic message. Additionally, as a negotiable instrument it has to be a formal contract as well.

²⁹ T Sharona “Bolero Trade Steps” 1995 *Banker* Vol. 145. pp. 72-75.

At the moment, only the Hamburg Rules state the signature by electronic means.³⁰ The relevant article of the Hamburg Rules is insufficient to permit the rules to apply to electronic bills of lading, since other parts of the Rules require a document and it relates only to the method of signature. Thus, the Rules require amendment in order to define and cover the electronic bills of lading in all contracting states and this would have to be done by an International Convention.

The recent UNCITRAL³¹ model law on electronic commerce, together with the CMI Rules,³² could be used as a guide in order to define when electronic messages satisfy the requirements of writing, signature, originality, safeguard of transfer and storage of messages. The above mentioned definition of the bill of lading contract and its conclusion should be adopted, in order to express paper and electronic bills of lading contracts. It is obvious that the term “writing” will have the relevant meaning with regard to paper or electronic writing, as will have been defined within the protocol. Both electronic and paper bills of lading should be stated as being fully negotiable instruments under the meaning which has been presented above. Hence, upon receiving goods, the carrier sends the electronic bill of lading to the shipper describing the goods, the contract terms and a password that will be used to transfer the bill of lading contract to a third party, taking into account that it is a negotiable instrument if it has been issued in the relevant to order or to bearer form. The password will be nullified automatically once has been used, in order to avoid any kind of fraud and to prevent anybody having access to the bill of lading except the last holder. A new password will be inserted in order for the bill of lading to be endorsed once more, if the last holder wishes to endorse it or merely

³⁰ The Hamburg Rules, Article 14.3 “The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, or in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued”.

³¹ United Nations: UNCITRAL Model Law on Electronic Commerce 1996 (1997) ILM Vol. XXXVI Number I. G. Zekos “The use of Electronic Technology in Maritime Transport: The Economic Necessity and the Legal Framework in European Union Law”, 1998 *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/1998/issue3/zekos3.html>.

³² 1991 *JMLC* 620

to transfer without endorsement, if the bill of lading is issued to bearer. Thus, the traditional, negotiable bill of lading and the electronic bill of lading should have the three characteristics of being: a contract with the carrier, a receipt for the goods and a negotiable document of title.

This protocol will bring a harmonious and standard definition and understanding among the national systems of what is meant by bill of lading and the characteristics which a document must have in order to be considered as a bill of lading. The contract of carriage is a contract for the transport and delivery of the loaded cargo to its destination. The delivery of the cargo in the custody of the carrier is a prerequisite for the conclusion of this contract. The bill of lading, which defines the enumerated goods and the terms under which the goods will be transported and delivered to its destination, is the offer for the conclusion of the contract. Thus, the bill of lading should be a written contract of carriage for the transport and delivery of a loaded cargo to its destination. It should be ratified as a contract simultaneously with the receipt of the cargo by the carrier and as a bill of lading when it is signed by the carrier, but the bill of lading has retroactive force by its ratification and covers the whole transaction from its commencement. The introduction of the writing as a prerequisite for the conclusion of the bill of lading, as in the case of the charter-party contract, will bring uniformity and certainty regarding the contractual role of bills of lading in the carriage of the goods by sea.

The suggestions which are mentioned above, (about bills of lading under charter-parties), have to be introduced into the relevant Acts of the three legal regimes in order to achieve a harmonious understanding of what a bill of lading is. Additionally, the functions of the paper bill of lading have to be attributed to the electronic bill of lading which have to be regulated within the same rules which apply to the paper ones. Consequently, the amendment of the Acts of the three legal regimes in order to accommodate the proposed changes is necessary.

Moreover, according to the findings of our analysis, the following changes should be introduced, in order to achieve a uniformity and a convergence of the systems not only in legal terms but also in real substance: First, there is a need for the amendment of the Greek law to state that negotiable and non-negotiable bills of lading and charter-parties are contracts of carriage, rather than merely conclusive evidence of them. Under the Greek law, both contracts of carriage under bills of lading and contracts under charter-parties are regulated under the same provision of the Private Maritime Code. The bill of lading should be regarded as a bill of lading by the time the carrier has received the cargo into his custody. The signature, which according to Greek law is necessary in order to regard the document as a bill of lading, should have retroactive force by the time of the receipt of the goods. Consequently, Greek courts should interpret the demand for conclusive evidence as the need for the final expression of the contract in the form of a bill of lading which has retroactive force from the commencement of the whole bargain and, therefore, the contract is covered by a bill of lading.

Second, in the United States law, it should be mentioned that the negotiable bill of lading and the non-negotiable bill of lading are the contracts of carriage. It must be stated that the term “evidence”, which is stated in COGSA 1936, means that the bill of lading is the contract itself. These definitions will be of a great help since, for instance, Greek courts have interpreted the term “evidence” of the COGSA 1936 as an indication that the bill of lading is merely evidence of the contract, regardless of the fact that American courts have clearly accepted bills of lading as contracts.

Third, in English law the dual perception is not helpful in expressing the contractual nature of the bill of lading, taking into consideration its future application to an electronic bill of lading contract as well. It could be said that the dual contractual perception of bills of lading, as it is stated in English law, means that in English law there is an inability to define a standard contractual characteristic of bills of lading and,

consequently, there is an absence, in accordance with the principles of the law of contract, of a legal definition of their legal characteristics. Any document, including the bill of lading, should have only one characteristic per function and this characteristic must be applicable as a mandatory rule similarly regardless of who its holder is. The bill of lading as a legal document is invented as being a contract³³ with the special characteristic of being at the same time, both a receipt and a document of title, and the bill of lading can be transferred to any third party. Moreover, the bill of lading has constantly functioned as a contract of carriage since its introduction in international trade, regardless of the views expressed against it. Furthermore, there is a growing support of the view that it has become a standard form contract rather than merely evidence of a percentage of the contract.³⁴ Hence, the bill of lading should be defined as the contract of carriage and the term “evidence” should be deleted. Additionally, there is a need for the introduction of the non-negotiable bill of lading as the alternative for the negotiable bill of lading, instead of treating a non-negotiable bill of lading as a sea way-bill.

Full negotiability must be attributed to the bill of lading as in most civil law legal systems in Europe and specifically in the Greek law and in the US law as well, which, as mentioned above, complies with the aim of the International Conventions.

In practical terms, the acceptance of the bill of lading as the contract for all the parties taking part in the carriage of goods by sea does not cause any problem or any further upset in any of the systems. Besides, taking into account that the principles of endorsement and assignment have the same substance among the three jurisdictions, the

³³ J Crump “General Average, Salvage and the Contract of Affreightment” 1985 *LMCLQ* 19 p. 19 **“It was not until the 14th or 15th AD that merchants are found it necessary to invent contracts, like bills of lading and bills of exchange”**.(Stress Added). TES “Notes” 1887 *LQR* 471 p. 472 **“bills of lading whose true explanation is usually to be found no in the ordinary way, but by consideration of history and business usage”**(Stress added).

³⁴ E Hardy Ivamy “*Mozley & Whiteley's Law Dictionary*”, 1993, Butterworths p. 30 “Bill of lading. A Mode of authenticating the transfer of property in goods sent by ship. **It is thus used both as a contract for carriage and as a document of title**”(Stress Added). J Saunders “*Mozley & Whiteley's Law Dictionary*”, 1977, Butterworths p. 41 “It is thus used both as a contract for carriage ...”. *Black's Law Dictionary*, (6th ed),1990, West Publishing Co., 8th Reprint 1994, p. 168 “It is receipt for goods, **contract for their carriage**”. (Stress Added).

application of the same principles of law, in order to transfer the same document in the three legal systems, is vital for international shipping. As mentioned above, the endorsement of the view that the bill of lading is issued as a contract, cultivates the ground for the establishment of the bill of lading as a negotiable instrument and a formal contract, which is the view that it has prevailed in many civil law countries, including Greece, in the European Union and the USA. This does not cause any significant problems, taking into account that in practice the bill of lading is used as a contract. Verbal contracts can be transferable, but only written contracts can be negotiable. Furthermore, the introduction of harmonious rules for electronic bills of lading is more urgent problem now than ever before, and this has to be addressed and solved and therefore a uniform approach to the functions of the bill of lading, in whatever form it may be issued, is vital for the unhampered carriage of goods by sea. The absence of any precedent in doubt of its contractual character in Greek and US law, and the scarcity of authorities in English law, concerning the relation of the original parties, is, in fact, a strong confirmation of the view that the bill of lading should be the contract within the three systems. Unless, in international trade, a bill of lading is regarded as expressing all the terms of the contract, and full effect is given to them, it cannot fulfil its dual function “as a document whose assignment transfers both the rights and obligations under the contract of carriage and also the title to the goods which are subject to those terms”.³⁵

A computerised system for the negotiation of bills of lading, which demands a uniform legal functioning among the original parties and their transferees, would lead to the reduction in costs and the improvement of information flow in the shipping world. Consequently, the lower cost of shipping and the higher efficiency of carriage of goods by sea will increase the efficiency of the entire world market, which is very desirable. The biggest obstacle is the hypnotising effect of the *status quo* that has been established, not

³⁵ *Partenreederei Russ v Haven* [1985] 1 QB 931

only through its historical usage in a paper form, but also through the different approaches, regarding its functioning, namely the contractual role and the negotiable nature, which have been endorsed by the three legal systems. Introducing EDI to bills of lading would eliminate the tendency of shipping documents to turn up after the goods in question have actually arrived. Until the law can catch up with the pace of progress, it is unlikely that banks and/ or the customs authorities would accept an electronic bill of lading.