KURT GRÖNFORS

Towards Sea Waybills and Electronic Documents

SJÖRÄTTSFÖRENINGEN I GÖTEBORG
SKRIFTER 70
GOTHENBURG MARITIME LAW ASSOCIATION

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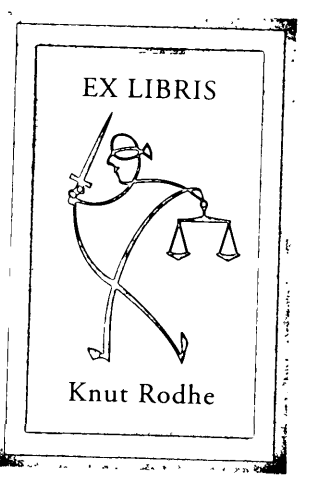

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Introduction

In legal textbooks, the contract of carriage traditionally is dealt with as separated from documentation. This latter subject is consequently also treated separately, often together with other kinds of documents, e g negotiable instruments and the use of such papers in commercial life.

This method of organizing legal materials involves certain risks. Some functions of traditional transport documents rest exclusively upon the contract of carriage, some upon general rules on contracts, etc. A dogmatic and systematic approach like this may draw lines of distinction that ignore important legal effects. Some functions – like the right of control to the goods *in transitu*, a main element that will be analyzed further – are not possible to observe in a static picture but quite easy to appreciate as soon as you take a dynamic approach. The interaction between the contract of carriage rules and the rules on documentation is especially important, as the various rules must function together as a whole in order to achieve the results wanted.

Furthermore, the functions of transport documents have grown out of a long historical process, created by practical needs and technical development. In order to understand the situation today you need an over-all knowledge about how the status of today was reached.

Bearing all this in mind, I have found it appropriate to apply *a method that combines a historic perspective with a functional approach.* Such a method allows us to follow, closely and in some detail, the rapid development that has taken place during the last thirty years of restructuring the documentation system, as a consequence of new cargo handling procedures and logistic thinking. It is the purpose of this book to explain what has happened and how changes developed from traditional systems.

This theme has an extra charm of novelty in these days as a result of the fact that the well-known private international organization of maritime

lawyers Comité Maritime International (CMI) at their Paris Conference in June 1990 adopted two sets of Rules, namely the CMI *Uniform Rules for Sea Waybills* and the CMI *Rules for Electronic Bills of Lading*. By reference to those Rules parties can agree to incorporate them in their contract and thus solve quite a few uncertainties considered to exist as to the legal effects when using the evergrowing practice of issuing sea waybills or shifting to electronic procedures. The philosophy behind the Rules is to build on existing and widely accepted commercial patterns of today concerning on the one hand land and air waybills and on the other hand ocean bills of lading in traditional paper-based systems. It is therefore hoped that this description of the mainlines of the historical development of documentation, using the functional approach, will shed light on the new Rules adopted. In depth knowledge of basic principles might prove more valuable for the easy access to the understanding of the Rules than detailed comments on the text of the Rules themselves.

The text is given in full in *Appendices A and B* below. See also *Comité Maritime International 1990 Paris II,* pp 190 *et seq.*

Ch 1

The Rise of the Bill of Lading

1. *The origin of transport documents*

In primitive societies carriage of goods was performed without any documentation at all. Merchants accompanied their cargo and sold it at the place of final destination. When Merchants began to stay ashore, this was one factor that called for some sort of documentation as parallell to the carriage of the cargo and as an instrument for creating "a grip on the cargo." The carrier became an intermediary between the sender and the receiver. These two persons wanted some proof concerning the consignment in the hands of the carrier and thus outside the immediate possession of both sender and receiver.

Documentation referring to carriage of goods has gradually grown out of such practical needs; it has been further developed by customs of the trade as well as by the law merchant *(lex mercatoria)*, and the rules have finally been codified at a comparatively late stage as well as elaborated in more details.

This historic growth out of basic practical needs must be kept in mind while discussing transport documents and their legal functions. Such particulars as the place of loading and the place of destination are easily understood why they are included, furthermore the description of the goods carried and so forth. With a higher degree of sophistication as to the administrative systems developed, other particulars have proved necessary to add.

As has been pointed out in the Introduction, legal functions cannot be fully studied by scrutinizing one form with the boxes and clauses printed on it. Functions demand a functional approach in order to be correctly understood: you have to follow how a certain type of document in fact is used from the beginning to the end of the contract of carriage period. In other

words: you have to watch the machinery working for a period of time. Such a function like the right to control the consignment when *in transitu* is not printed on the document but is clearly understood when following the functional approach. The sender or the receiver, as the case may be, has to have "a grip on the cargo" when it is in the hands of the temporary intermediary, the carrier.

2. *The receipt function*

The English Bill of Lading (B/L) means receipt (Lat *recipisse* = I have received), referring to what has been loaded on board the ship. In French and German the term used is *connaissement* and *Konnossement* respectively (Lat *cognosco* = I acknowledge), also referring to the cargo received and loaded. In the Swedish Maritime Code 1667 Skips Lego Balken Ch 1 the German term is used ("Cognoscementer") and is characterized as a written proof of acknowledgement. The traditional phrases run, more or less, like this: "I, next to God Master of the Good Ship *The Hope*, have received one drum of tar, weighing 20 pounds, at port A and promise to deliver the same, provided we safely arrive, at port B to the holder of one copy of this document; so help me God. Dated and signed."

Obviously the receipt function was the first to attract attention. When lawyers in the olden days spoke about Bs/L or synonyms, they did not refer to such documents in the same sense as we do today. The B/L simply was the transport document used in ocean carriage of goods.

3. *The evidence of contract-function*

This important function of the B/L dates only from the 19th century in so far as more detailed contract clauses are concerned. Before this period the documents used contained a short sentence only summarizing the promise to carry, given by the Master or the Shipowner. Still in the standard form provided by the City of Stockholm, about 1800, this model is followed. (Flintberg, *Anmärkningar till Sveriges Rikes Sjö-Lag*, 1794, s 88.) The increased use of exemption clauses during the 19th century resulted in more and more printed clauses on the back of the document with the obvious ambition to include all conditions of carriage in the B/L as bearer of the whole contract. What was not fully included was at least referred to by incorporation clauses of various kinds (e g on general average, tariffs etc).

The *promise to carry* is still used with reference to this *core* of the contract of carriage. (I have studied this in detail in my book, in Swedish, Successiva transporter 1968, pp 17–91.)

The role of the B/L as *evidencing a contract to carry* likewise is a necessary

part of the most primitive transport documents. Originally such documents serve only as evidence of the fact that there exists a contractual relationship between the carrier and the other party. The contents of this contract is a consequence of the rules in national law, legislation and/or case law. Additional contract clauses printed on the paper document itself, often in small print on the back, or contained in the Carrier's Tariff, are comparatively late inventions, made in the second half of the 19th century. Nowadays this kind of contract clauses are included by way of a so-called *incorporation clause*, referring in short to the text of the contract clauses in full. An incorporation clause recommended and nowadays often discussed in international fora like ECE and UNCTAD runs like this:

"The terms of the transport operator's/carrier's standard conditions of carriage (including those relating to pre-carriage and on-carriage) and tariff applicable on the date of taking in charge of the goods for transportation, are incorporated herein as well as any international convention or national law which is compulsorily applicable to the contract evidenced in this document.

A copy of the transport operator's/carrier's standard conditions of carriage applicable hereto may be inspected or will be supplied on request at the office of the transport operator/carrier or their principal agents." (ECE Doc TRADE/WP. 4/GE. 2/R. 114, 7 February 1979, p 5.)

4. *The document of title-function*

It is this function that makes the bill of lading in the modern sense of the term a unique document as compared to other kinds of document used in commercial transactions. Often this function is described by using the expression that the B/L represents the goods. This *representative function* makes it possible to trade with the goods even when they are *in transitu.*

The background to this function and its role in international trade is especially the requirements of the commodity trade at the end of the 19th century. Transit times were long, while postal services had made good progress in cutting down their transit times. This opened up the possibility to mail transport documents representing the goods and trade with them while waiting for the cargo to arrive at the place of final destination.

Furthermore, it became possible to mail more than one original copy of a B/L to agents in various harbours, thus trying to sell the goods before their arrival for the best price in the region covered.

The birth of the fullfledged B/L can be traced back only about two hundred years. Still the term B/L was used by maritime lawyers with reference to paper documents equipped with the two first functions only, meaning nothing more than a transport document used for ocean transportation.

In search of a glorious history, legal scholars have reverted to the Medieval Ages and drawn attention to the so-called Bs/L used in Marseilles in the 13th century. In such documents, the master issuing the paper declared that he had taken on board the goods as specified and promised to hand them over to the other party or his people after the completion of the voyage. (See e g Pappenheim, *Handbuch des Seerechts, Schuldverhältnisse des Seerechts 2,* 1918, pp 212 *et seq.*)

The receipt of the goods and the promise to deliver them at the place of final destination were included. But the general procedure still was the rather primitive one that the merchant himself accompanied his cargo or at least was represented by a supercargo during the voyage or by some agent at the port of destination.

Other scholars, desiring to expand the history back to Ancient Rome, have declared a paper with the following text as one of the earliest known examples of a B/L:

"From Arctus Bibulus, pilot of a public vessel of 2000 artabas burden, whose figure head is an ibis, acting through Sextus Atinius of the 22nd legion, second maniple, to Acusilaus, public collector of corn for the two villages of Lysimachus, deputy of Lucius Marius, freedman of Augustus, greeting:

I acknowledge that you have embarked into my vessel at the harbour of Ptolemais in the Arsinoite name at Erboreis to the address of Dionysus and Philologus, ... first Syrian wheat, pure, genuine, unadulterated and winnewed, measured in a public brazen measure of Alexandria, of first Syrian corn on thousand seven hundred and eighteen and a half artabas ... which I will convey to Alexandria and deliver to Dionysus and Phililogus or to whomsoever they shall order it to be given, and I have no claim against you (signed) J.H. ... in the 2nd year of Tiberius Ceasar Augustus", which by the way means AD 15.

We here have named the carrier, the agent, the port of loading and the port of discharge, the commodity and its weight ("artabas") and the shipper. (The internationally wellknown merchant banker *Bernhard Wheble* has in 1982 drawn my attention to this document and some comments on it made by Mr *Brian Parkinson* in a mimeographed paper with the title "Maritime Documentation – the future", presented at an international meeting.)

I am quite convinced that a creative historian with imagination could discover even older documents of the same kind from some thousand years before Christ, either in Ancient Egypt or in the trade on the Yangzi River in China. But I doubt that such findings would be of any real interest today. When the term B/L is used with respect to such documents, it generally means a document referring to the carriage of some goods by sea. The complete functions of a B/L in the modern sense of the word were not included.

But there is clearly the beginning of a promise to carry. The *receipt function* is already there. A general reference to *an unspecified duty to deliver* the goods to someone at the place of *destination* is included. Consequently, *a promise to carry* the goods between the two points is implied. Obviously the document *evidences a primitive contract to carry*. Finally, there is a general *description of the goods* in very broad terms; the details were worked out later on up to our times, when this part of a transport document became elaborately specified and further regulated as to its legal effects.

In spite of all this, the *basic character of a B/L* in the modern sense of the term was still lacking, viz *the unique mechanism for releasing the goods*. The carrier has to deliver the cargo only to *the holder of one original of the B/L*. This rule finally makes the B/L a true *document of title: delivery only against surrender of the document*. An English decision by the House of Lords in 1793, *Lickbarrow* v *Mason* (1794) 5 T R 685, can be looked upon as the finalization of a fullfledged B/L in the modern sense. Thus, the birth of the B/L can be very accurately fixed in time. (This development is covered in an excellent way by *Bennet* in his regrettably not very wellknown study *The History and Present Position of the Bill of Lading as a Document of Title to Goods*, Cambridge 1914.)

5. *The idea of using a unique piece of paper as a key to the goods*

The B/L pattern for releasing the goods builds on a very simple idea. One unique piece of paper has to be produced by the consignee and thus functions as *the key that alone can give access to the hiding-place where the goods are stored*, as it has been stated, rather poetically, in the Swedish *travaux préparatoires* for the implementation of the Hague Rules into Swedish national law. (*Nytt juridiskt arkiv II*, 1936, p 533.)

Against surrender of the document means *the simultaneous change of the B/L against the goods*, described and referred to in the B/L, at the place of final destination.

As simple as this idea may seem, it works very efficiently as long as it is closely followed in accordance with the intention behind. The B/L is sent by mail to the consignee, who has to produce this very piece of paper to the carrier and at the same time takes care of the goods in his possession. This procedural requirement – the surrender of the goods against the simultaneous delivery of the document – makes it meaningful to refer to the document as serving as a *symbol* for the goods themselves.

From this arrangement two important consequences follow, building on the symbolic function of the document. It opens up the possibility to trade with the goods also when in transit by using the document as a substitute for the cargo, as the buyer of the bill of lading knows that he finally can change

it against the cargo in its physical shape. In principle, this fact also makes it possible for the carrier to know who holds the right to the goods and thus controls the goods. The custom of issuing more than one original, however, demands some modification of this principle (as will be seen from what is said *infra* 1.6).

6. *The number of originals issued*

Already the Swedish Maritime Code 1667 mentions the issuance of three Bs/L. The traditional intention behind the issue of these copies is that one is for the consignor, one is for the carrier "following the goods" and one is for the consignee. All three are considered as being originals – something that from a merely semantic point of view might be a little confusing, the very meaning of the term original being something that is unique (see further *infra* 2.3).

The wish of Merchants to have Bs/L for the same consignment at the same time in more than one port, in order to get the best price, leads to an increase of the number of originals issued to six, seven or sometimes even more. This meant that keys "to the hiding place of the goods" were available at many places at the same time. When the cargo arrived at the place where the goods finally were to be sold, there was one key only where the goods were available, "the others to be void." But if the person having the right of control wanted to unload the goods in some intermediary harbour, the possession of one original during the voyage would not then prevent the unhappy situation that there still might be someone in good faith at the place of final destination producing one original and demanding the delivery of the goods against surrender of the document. In order to prevent such a conflict, it is an old international trade custom to require the possession of all originals (full set) from the person who demands the right of control to the goods in transit. This is also the rule contained in the ICC (International Chamber of Commerce) rules on documentary credits as well as in many national maritime Codes (like the Swedish one). Such a rule is necessary for the system to make it work.

As a matter of course, the issuance of many originals creates a risk of disturbing the function of the B/L as a document of title. Still three originals are usually issued. This will be further elaborated on *infra* Ch 2.

7. *The right of control and the number of bills of lading*

A necessary condition for the effective operation of this system is, of course, that the holder of the original document, who has the right to demand delivery of the goods at the place of their final destination, will not have to face the risk of someone else having the right of intervening in the regular

performance of the transport, e g by being permitted to give instructions to the carrier to unload and re-route the goods with the result that these will never arrive to their named destination. He who, by holding the original B/L, has the right to claim the delivery of the goods must consequently have the right to control the goods when *in transitu. The right to claim delivery and the right of control are thus necessarily linked to each other for functional reasons.* (Cf Richter in *Seetransport*, Rostock 1985, Beiträge zum nationaler und internationaler Seerecht, Heft 9, p 42.)

The term right of control (or right of disposal) is used as a label indicating the right to give all sorts of new instructions to the carrier as to the fulfilment of the contract of carriage. The *contents of the right of control* covers such instructions as to stop the goods in transit, including their withdrawal already at the terminal of departure, to unload, to warehouse or to re-route the goods, and to deliver the goods to some other person than the first consignee indicated in the B/L at any stage of the transit as well as to change the place of delivery of the goods.

The consignor has the exclusive right of control from the moment the carrier takes the goods in his charge and *the consignor has got all originals in his possession.* As long as he keeps these originals, he still holds the right of control. *As soon as he himself has given away at least one original, he loses his right of control.* A person who buys one original has the right to demand delivery of the goods, as soon as they have arrived at the place of final destination. The right to intervene before that time with new instructions belongs only to the person who has got all the originals. By these arrangements it is possible for the parties in a sales contract to vary the point of time when the goods leaves the seller's sphere of influence and enters into the sphere of influence of the purchaser and thus to adapt the individual financing arrangements accordingly.

The details about the contents of the right of control now given are designed in order to make the trading with cargo in transit as easy as possible. The possible interventions of this kind can be labelled *the positive functions* of the right to control, and they are all reflecting an activity from the side of the purchaser. They are supplemented by *the negative function* (Germ *Sperrfunktion*), meaning that the person having the right to control knows that no outsider can interfere with the regular fulfilment of the carriage. This function is especially important for banks and other institutions financing the underlying sales contract. If the bank has the right of control, it has security in the goods carried in a way that is similar to the possession of the goods themselves.

But the right of control has its limitations. *The carrier has the right not to comply with the instructions* as to the goods, if these instructions interfere

with the carrier's normal or intended operations, or if they are not practically possible to carry out at the time when the instructions reach the carrier, or if damage or substantial inconvenience otherwise would be caused to him or to consignees of other consignments. One example offers the situation when the unloading of all cargo in the hold is required, because the consignment in question is stowed on the very bottom of the ship's holds. On the other hand, the carrier *can* follow the instructions given by someone *not* being the holder of the necessary document, but in such a case the carrier is responsible to the holder for all damage caused thereby. Furthermore, a seller can use his right of stoppage *in transitu* to the goods, *based on the sales contract*, even if the necessary document is already held by the buyer. Thus, being the bearer of the necessary document or documents does not give exactly the same effective protection as being in the possession of the goods themselves.

Bearing in mind these facts, one might raise the question, if the right of control really can be said to constitute a legal right. The answer seems to be Yes, in the same way as many other rights, called rights, often are substantially limited in a similar manner. The terminology seems to be appropriate, as long as these limitations are kept in mind.

Persons using their right of control are liable to the carrier. This side of the right has to be stressed as well. The liability includes a reasonable remuneration and the duty to indemnify the carrier against all expenses, loss and damage involved in carrying out the instructions given to him by the person having the right of control.

8. *Possession, ownership and the English Bills of Lading Act 1855*

English rules and traditions concerning privity of contract have caused some additional functions appendixed to Bs/L. These functions have not been included in the general rules on negotiable documents or even in a Maritime Code, but in a separate Act, viz the Bs/L Act 1855. Under this Act the right of suit is conferred on every consignee or endorsee to whom the property in the goods has passed under or by reason of the consignment or endorsement. In this way he naturally becomes a party to the contract between the consignor and the carrier. The possession of the goods passes from the sphere of the consignor to that of the consignee by use of the document only. Therefore, the B/L does resemble a *negotiable document.* As the Act covers only the right for a new holder to claim the goods from the carrier, but not other aspects of negotiability, a B/L is often characterized as a *quasi-negotiable* document, or better a *transferable* document.

The transferability function is thus arrived at under common law. For civil lawyers, recognizing contractual effects in relation to third parties within a wide range, a similar arrangement is not called for.

Even British lawyers begin to challenge the principle of privity of contract in its strict form. A recent case, *The Aliakmon*, 1986 1 A C 785, focused on the unwanted difficulties that can arise. The buyer's bank had refused to back their bill of exchange in payment of the price of the goods. An exchange of letters thus occurred, the effect of which was to vary the contract so that the sellers retained the right of control, and thus the property of the goods. The result was that a buyer to whom the risk of the goods has passed on loading is unable to sue the carrier whose fault caused the loss. This situation is a little odd, resting on the doctrine of the bailment on terms, not on the function of the B/L as such. After a broad analysis, two English lawyers have come to the conclusion that a proper solution of all these legal problems should start with the abandonment of the privity of contract rule, by permitting third party beneficiaries to sue. (Adam and Brownsward in the *Journal of Business law* 1990, pp 23–35. The present status of English law, including *The Aliakmon,* is described by Debattista, *Sale of Goods Carried by Sea*, Lond etc 1990, pp 43–69.)

Will it be within reach for acting lawyers today to experience common law to come closer to civil law on this point? That would surely simplify matters considerably. It has been reported that a change of the 1855 Act intending to cover also waybills is in preparation.

9. *The bill of lading as a tool for "getting the grip on the cargo"*

The bill of lading mechanism for releasing the goods – the delivery of the goods against the simultaneous surrender of the document – makes it possible for persons without possession of the goods to "get the grip on the cargo", although it is in the possession of the carrier. For the document as a physical object, a tangible thing, can be delivered to someone else just in the same way as the goods carried. A voluntary transfer of possession from one person to another (under a contract of sale from seller to buyer) is deemed to be made under most legal systems, when the buyer or his agent acquires custody of the goods or is enabled to exercise effective control over them. Where no B/L is issued, delivery to the carrier for the purpose of transferring the goods to the buyer is usually considered to constitute delivery of the goods. According to a fairly recent English decision (*Kum* v *Wah Tat Bank Ltd*, 1971 1 Lloyd's Rep 439), this applies also where the goods are shipped not to the buyer but to a bank to which they are pledged by way of security.

The basic idea of drawing a line of distinction at the point of time when the goods leave the seller's sphere of influence and enter into the buyer's sphere of influence – the passing of risk and the passing of property – can be adhered to, when dealing with a unique paper as a physical object in the same

way as when dealing with the goods themselves. "The grip on the cargo" is thus well established.

The rule requiring the production of full set of the originals in order to be entitled to interfere with the performance of the carriage by demanding their unloading etc, means that, when the seller has delivered one single original to another person, he has lost his grip on the cargo. On the other hand, a bank having all originals delivered as security for a letter of credit can be sure that no one can interfere with the contractual performance of the carriage, and the bank thus has the necessary effective control.

It may be pointed out that a seller on the level of the sales contract always has a right of *stoppage in transitu*. This right always wins in comparison to the interest of protecting the buyer in possession of the document (or documents). This has nothing to do with the right of control; as has already (*supra* 1.7) been pointed out, the right of stoppage, *based on the sales contract*, does not require the production of any transport document (albeit such a production might offer a practical way of proving the buyer's situation).

At the same time it is only fair to state that the possession of the original document does not equal the possession of the goods themselves in all cases. The holder demanding unloading or similar measures relating to the goods carried can be denied his demand. The carrier has the right to ignore the instructions, if damage or substantial inconvenience would be caused to other customers. On the other hand, the carrier can follow the instructions given by someone *not* being the holder of the necessary document or documents. But in such a case he is responsible to the holder of the documents for all damage caused thereby. Thus, the possession of the necessary documents does not give exactly the same effective protection as the possession of the goods themselves.

10. *The issuance of ancillary copies*

In addition to the originals it is universally accepted to issue some extra copies for special purposes. Some particulars contained in the originals are required for the carriers in order to enable them to write out the ship's manifest, which constitutes so to say a condensed index to a complete collection of documents issued for one and the same voyage. One or even more copies are needed to achieve the release of the goods from Customs authorities. The same is true as to port authorities, terminal operators, cargo insurers and many other actors on the maritime transport market.

The number of copies have thus increased rapidly. A total of sixty copies is not unusual, some twenty or thirty copies are quite normal. There can be cases where over one hundred copies have been issued. The administrative costs are considerable.

11. *The concept of carrier and the role of the shipowner*

Traditionally the shipowner is the central and dominating actor on the shipping scene. Often he was at the same time the Master of the ship, thus concentrating all functions to his own person. If he uses other enterprises for performing some of his functions, e g stevedores for loading and unloading the vessel, he is usually liable, as long as loss or damage is caused while these other persons performed their work "in the service of the vessel by order of the owner and the Master" (quotation from the Scandinavian Maritime Codes art 233).

The shipowner traditionally also has been the carrier, which is the concept we have used hitherto in this chapter. But the carrier does not have to be the shipowner at the same time. On the contrary, it is abundantly clear that this term refers to the person who concludes a contract of carriage with the customer. It can also indicate the performing carrier, meaning he who takes care of the goods for transport, even if he has not concluded the contract with the customer. In order to be carrier such a person does not have to own the ship in question but can equally well be the charterer of the ship. The functions can thus become split.

In recent years this tendency to split the functions has been growing rapidly. The container revolution and the need for further financial resources for investment in enormously expensive ships has led to sale and lease back of ships in relation to financial companies and to the creation of managing companies of various kinds. The shipowner perhaps keeps only one of his functions, viz that of being the legal owner of the ship in the meaning of holder of the title to the ship as real property. Navigational and commercial operations might be split between quite a few legal entities of various kinds.

For those dealing with the contract of carriage and its documentation, the concept of carrier is the key concept.

Ch 2

The Bill of Lading Crisis

1. *Change of infrastructure*

The efficient function of the B/L pattern as now described presupposes the existence of the unchanged infrastructure upon which it builds. The physical carriage of goods must be comparatively slow but the mail service for distributing unique paper-based Bs/L rapid and efficient. In this way the necessary documentation will arrive in time before the goods. Thus they can be taken care of appropriately when they arrive. This was the situation at the end of last century and during the first half of this century – the "golden age" of paper-based Bs/L.

But in the early 60's a dramatic change occurred, giving rise to what has been called the B/L Crisis. Thanks to containerization and to the shortening of stop-over periods and cargo-handling procedures in terminals transit times were substantially cut down. At the same time postal services deteriorated all over the world by operating much less efficiently than before. Far too often the goods arrived before the B/L had arrived and could be produced by the holder in order to get delivery of the goods. Goods piled up in harbours waiting for delivery, because consignees still waited for their original Bs/L. In modern trade such unnecessary delays are unacceptable.

2. *Possible remedies*

In principle, there are two methods for coping with this new situation. One is to speed up the forwarding of transport documents. The other is to change the mechanism for releasing the goods and make it completely independent of the production of a unique piece of paper that has to be mailed to the place of final destination.

In order to outweigh the deficiencies of mail services in our times, many solutions have been launched. The Master carries one original in "the ship's

bag" (which means the safe of the Master on board the ship) and delivers it to the receiver, who immediately produces the same original to the Master and demands delivery of the goods carried. Such a farce obviously cannot be accepted as a serious routine for delivery "against surrender of the document." The lack of one original in the hands of the receiver is sometimes substituted by his presentation of a bank guarantee for any harm possibly occurring to the rightful holder of the B/L by the carrier's delivery of the cargo without the production of any B/L at all. Such a routine can be criticized because a person buying a B/L buys the right to some cargo, not a right of compensation. Today it seems unacceptable to argue (like in the old decision 1938 ND 31, Oslo Byrett) that a seller, knowing that the cargo must arrive before the mail service possibly can deliver the B/L, thereby accepts delivery of the cargo without production of the B/L and, consequently, the risk of default of payment caused thereby. Many Bs/L are carried to consignees in briefcases by couriers using air carriage and thus are transformed to a kind of appendix to passenger contracts. This arrangement might be advantageous to airlines and courier services but seems rather primitive compared to the standard of telecommunications available today. With the help of teleprinters, electronic mail and the like Bs/L can be issued at the port of destination – there exist no legal obstacles to such routines. Electronic methods for distributing transport data and thus speeding up procedures will be further studied in Chs 6 and 7.

The other way out of the B/L crisis, as has already been pointed out, obviously is to change the mechanism of releasing the goods into a procedure that is completely independent of some unique piece of paper that has to be produced at the place of final destination – as we found out in Ch 1, the modern B/L pattern is only two hundred years old. Luckily enough the first used routines, some thousand years old, comply with this description, namely what here will be referred to as the waybill pattern. This will be further dealt with later on in Ch 3.

3. *The number of originals*

The speeding up of the physical carriage of the goods and the slowing down of mail services have not alone created difficulties for the traditional B/L pattern. One additional cause is the custom to issue more than one original.

As has been said the term original refers to something that is unique and thus cannot exist in two or more numbers. But as far as Bs/L are concerned, they are usually issued in three originals; *one* for the consignor, *one* for the consignee and *one* designated to be kept by the carrier and often said to "follow the goods" (cf *supra* 1.6). Even more originals are issued, e g five or seven originals. This usage made it possible to mail one original each to the

seller's agents in Rotterdam, Antwerp and Hamburg and wait until the very last moment to sell the commodity carried, e g grain, to a merchant at the place where the best price happened to be offered. The carrier's agent at this place then hands over his original to the buyer who thus can produce this original and have the goods delivered to him, the other originals to be void.

This use of the term original comes close to the use of the same term referring to sculptures, often produced in e g six originals, numbered from 1/6 to 6/6, other possible copies being copies only and as such not having the same value. The idea of numbering the originals of Bs/L (e g first original, duplicate and triplicate) was followed in the old version of the Scandinavian Maritime Codes but was later abandoned, in spite of the fact that this numbering was one of the few Scandinavian original contributions to the international law of Bs/L. (Cf *Fortsatta förhandlingar om befraktningavtalet i Helsingfors den 4–5 juli 1922*, Helsingfors 1923, p 235.)

In printed forms the most common number of originals stated on the face of the B/L is usually three, e g: "In witness whereof three (3) original Bs/L have been signed, if not otherwise stated above, one of which being accomplished the others to be void." The reason for the three originals, as just explained, was soon forgotten in practice. The original "following the goods" was entrusted to surface mail and the third original meant for the receiver at the place of final destination was sent by air mail, this in the hope (obviously not very flattering for our postal services) that at least one original would eventually arrive in time and safely. In order to save work and costs, often both these originals were put in the same envelop and mailed. Now and than the seller even got all three originals and consolidated them in one envelop – because mail rates had increased too much! – addressed to the buyer at the place of final destination. Office routines thus became completely cut off from the legal functions intended for the documents and as a result these were used in a completely non-sensical way.

Still merchants kept the number of three instead of shifting over to issue one original only.

In the printed BIMCO forms COMBICONBILL and COMBIDOC, the number of originals is recommended to be restricted to two (2) originals. I do not know how far such a recommendation has been followed as to Bs/L modelled on these forms. CMI even went further and in the Venice Seminar 1983 *recommended the issuance of one original only*, and this expressly in order to prevent difficulties caused by the use of many originals. (*CMIColloquium*, Venice 1983, p 83.) Statements to the same effect have been made in legal litterature. (Stenseth & Stenvik, *Oljeterminhandel*, 1989, Marius No 169, p 125.)

For, needless to say, the floating around on the market of more than one original creates uncertainty, because at the place of final destination each

separate original is enough to demand the goods released to the holder. This opens up one way of maritime fraud, as long as the carrier does not know the actual position of all existing originals. You sure have to pay a comparatively high price for the commercial advantage of using many originals.

4. *The increase of ancillary copies*

In addition to the number of originals, an impressive and ever-increasing number of copies are issued for special purposes, like for Customs purposes, for intermediary carriers and forwarders, for harbour authorities and terminal organisations, banks, underwriters etc. Under the widely accepted standard *ECE Key Layout* each particular has its exclusive place on the face of the transport document. As all pieces of information are not necessarily included in all copies but in the relevant pieces only, modern copiators permit a selection of necessary items from "the information package" designed especially for insurers, forwarders, terminals, Customs authorities etc. National requirements vary and merchants thus have to adapt themselves to the routines in the country in question.

International trade has a tendency to create more and more papers, although serious work is done from time to time in order to cut down paper work and facilitate the administrative burden of the transport industry as well as of exporting and importing merchants.

These varying requirements of a great many copies accompanying the issuance of a B/L have been tied expressly to this type of transport document. It is easier to reduce the number of ancillary copies and find procedures if you do not insist on traditional Bs/L. This is true especially as to national administrative requirements for declaring this and that when the goods are transgressing national border lines. Bs/L thus cause remote complications outside their own scope.

5. *The bill of lading in sales transactions*

One main idea behind the creation of the B/L was to open up a possibility for merchants to sell and buy the goods carried also when they are *in transitu*. This is possible by using the representative function of the B/L. The document then functions in principle *as if* it were the physical cargo. But this symbolic function cannot be argued one hundred per cent. In cases where the physical possession of the goods is in the hands of another person than the holder of one original B/L, the physical possession of the goods is ranking higher than the holding of the document only. Such supplementary rules will always be necessary.

Under modern legal texts, like the Uniform Commercial Code (UCC) sec 2–509, the risk shall pass on delivery of the goods, which means that the

buyer or his agent acquires custody of the goods and thus is enabled to exercise effective control over them. As the time for delivery of the goods and passing of the risk under such circumstances coincide, there is no need for a clause in the contract of sale, regulating separately the passing of the risk.

The Vienna UN Convention on Contracts for the International Sale of Goods 1980 contains a more detailed regulation, where the handing over of the goods as well as the delivery plays an important role, but in some situations the conclusion of the contract or placing of the goods at the buyer's disposal are used as relevant circumstances (Arts 67–69). The basic idea, however, still is to draw a line of distinction at the very point of time when the goods leave the seller's sphere of influence and enter into the buyer's sphere of influence. Such a line of distinction obviously can be understood as referring to the B/L original finally giving access to the goods themselves. The more detailed such rules are, the more problems arise when coordinating the rules of the sales contract and the rules of the contract of carriage.

Under some legal systems the risk of accidental loss of the goods passes *prima facie* when the right of property passes. With this in mind it might be deemed most prudent to require the passing of property and not the passing of risk only.

Here we meet new intricate legal problems. Under many legal systems the parties are free to decide that property passes as they intend it to pass. As to English law, to take one example only, the delivery of the goods to the buyer or to the carrier is presumably the act which passes the property to the buyer, where no B/L is involved and there is no indication to some other intention of the parties. The same border line is used as that which is relevant to delivery of the goods and passing of the risk.

When the passing of the property element is necessary, it can be asked if it refers to the acquisition by the buyer of the actual possession of the goods themselves. Or is it enough that the buyer holds such transport documents by which he controls the goods that are still in the custody of the carrier? The answer is definitely in the affirmative. The buyer having acquired his B/L original deprives the seller from his right to control the goods when *in transitu* and thus has acquired possession of the goods in the sense, that he as holder of one B/L original has the right to demand delivery of the goods at the place of their final destination against the simultaneous surrender of the B/L original. This seems to be satisfactory but surely opens up legal questions of uncertainty and complications.

6. *The bill of lading and letters of credit*

Perhaps the most important motive for using Bs/L is to finance the whole transaction with the goods carried as security. Traditionally, this end is

reached by using a letter of credit. The goods are thus pledged to the bank in security for the payment. This is done by some clause in the financing agreement, which is used as the base for a letter of credit or a collect mandate to the bank.

How this can be done gives rise to a great many legal problems. The basic idea is still that the B/L is the object traded and that the banks must have "the grip on the cargo" in order to rely on it as security. The law on letters of credit is a very formal and complicated part of the legal system. It seems to have had the effect of freezing many old-fashioned routines and thus creating extra difficulties for developing streamlined routines acceptable to modern trade. Still it is the merchants themselves who have created their own routines and now feel it difficult to get rid of them when they find them inefficient.

Without going into details it is possible to state generally, that the B/L has been further complicated by its role as a central element for letters of credit.

Ch 3

The Rise of the Waybill

1. *The birth of transport documents*

We have found that the document of title-function, unique for Bs/L, is not older than about two hundred years. But the other two main functions, viz the receipt function and the evidence of contract-function, date back to the very beginning of transport activities as soon as merchants did not any longer accompany their own cargo.

Efficient land transportation systems existed already two thousand years ago. In the ancient Roman Empire the *cursus publicus* speeded up carriage of official persons and valuable cargo. In Austria and France during the 16th and 17th centuries transports by roads were important and transport documents developed with very much the same contents as described before.

But there is one very important difference. The main characteristic of transport documents of the olden days is that *the mechanism for releasing the goods is entirely independant from any paper document at all.* One reason why things developed in this way was that *waybills* (or consignment notes, as they were also called) originally did not manifest any promise by the carrier to deliver the goods to a certain person but *only constituted a notice from the sender to the receiver* in the shape of a letter (compare Fr *lettre de voiture*, Germ *Frachtbrief)*, not involving the carrier. This was reflected in the text of traditional land waybills from the 17th century: "Dear Sir. Today I have delivered one drum of tar, weighing 20 pounds, to the coach man X in town A and ordered him to carry it to town B, where you can have it delivered to you by asking his agent Y for it as soon as the goods have arrived. Your humble servant." Consequently it was up to the consignor (sender of the letter) to issue such waybill. (Cf Hammarskjöld, *Om fraktavtalet och dess vigtigaste rättsföljder*, 1886, p 18.)

Later on, carriers grew more and more interested in what particulars were given by senders when writing letters to receivers. The first step in the direction of involving the carrier seems to have been that the sender showed the letter to the carrier and had him confirm the correctness of the particulars given by writing a short sentence of confirmation and his name on the waybill. The next step was that the carrier himself issued the waybill, which thereby was based on the contract of carriage and thus also included a promise from the carrier to deliver the goods to the person indicated in the waybill or to any other person indicated by the consignor (Lat *tibi vel cui mandaveris*). Still, the filling in of all details in the waybill is usually made by the consignor like in the olden days, and the waybill is only signed by the carrier.

2. *The waybill pattern*

Let me now outline the prerequisites for the consignee having the goods delivered to him. As has been stressed, they are not tied to the existence of a certain paper document but to the simple facts that

(1) *the goods have arrived at their final place of destination* and
(2) *the person demanding the delivery of the goods identifies himself as the consignee* named in the waybill, the contents of which is known to the carrier.

The purpose of this pattern is not to make further selling and purchasing of the goods easier when *in transitu*. It is *not intended to change the name of the consignee*. No need was felt for transferring the goods to some other person during the short transit periods in land and air transportation; only maritime transits were sufficiently long as to create a practical need for further transactions during the period of time necessary for the carriage. This means that a W/B is *non-negotiable* in the sense that it *does not represent the goods* like the B/L – in this respect the W/B comes very close to the American concept of *straight B/L*. Under US law such a document need not to be produced when the receiver claims the delivery of the cargo by the carrier (cf the case reported in *Oslofjord* 1956 ND 83 as well as Basedow in *Abschied vom Wertpapier*, 1988, Arbeiten zur Rechtvergleichung 137, p 81), but under European legal tradition it clearly constitutes a waybill.

As has already (*supra* 1.7) been pointed out, the right to demand the delivery of the goods at their final place of destination and the right to control the goods when in transit are necessarily linked to each other. The W/B pattern being completely independant of the transport documents themselves thus requires that *the right to control the goods is equally independant of the documents*. As a consequence, the main rule concerning the control of

the goods must be that *the consignor has the right to control the goods until (1) they have arrived at their final place of destination and (2) a person identifying himself as the named consignee has demanded their delivery.* No change of person is made and the situation is kept within the original frame from the start until the end.

Experience soon proved that such a rule was too rigid to meet the practical needs of commercial life. Even when the identity of the consignee did not change and was never intended to be changed, *consignors wanted to have a possibility of transferring their "grip on the cargo" to their consignee* at some convenient point when this person had paid for the goods and needed to have the possibility of giving instructions to the carrier. In other words, there existed a need to adapt the contract of carriage to the individual particulars of the contract of sale and the contract of financing the sale.

The wishes of the trade went even further. When grain was exported from Italy to Northern Europe by rail during the second part of the 19th century, transit times were rather long and at the time of issuance of the rail waybill it was often not known for certain, which point of final destination was to be used or who ultimately could prove to be the actual buyer. In other words, there existed just the same need for *trading with the goods* in rail transport as in long maritime carriage of commodities.

The solution to these problems was *the introduction of the duplicate (first copy)* of the waybill. In the middle of the 19th century there existed, under European national rail legislations and usages, at least five different systems of solving the problem of controlling the goods when in transit. The codification made in the European Rail Transport Convention 1890 contains a mixture of the German principle of reserving the right of control for the sender as long as possible and the French system of linking the right of disposal with the possession of the duplicate in a way that comes close to the effects of Bs/L (*das System des Frachtbriefsduplikats mit konnossements-ähnlicher Wirkung*). (This expression was used by Rosenthal in his classic book *Internationales Eisenbahnfrachtrecht*, 1894, p 126.) Later on, the duplicate system was adopted for aviation by the Warsaw Convention 1929 and for road transport by the CMR Convention 1956 (*infra* 3.4).

How can these functions be fulfilled effectively by attaching the right to control the goods during transport to the possession of the duplicate of the waybill? As long as there is no change of the name of the consignor, there are obviously no problems to achieve new instructions to the carrier (the positive function) by producing the duplicate, just like a full set of Bs/L. The same is true as to assuring the person possessing the duplicate that no person outside can intervene in the regular performance of the carriage (the negative function). It might be difficult to understand how it can be possible to imitate

the functions of transferability to a type of document that is not intended for transfer. *As long as the goods have not arrived at their intended final place of destination, a change of "the actual consignee" can be made by surrendering the duplicate to the new purchaser* of the goods (combined with a written notice to the carrier to deliver the goods in transit to the new person). But what about the situation *when* this person lives at the place of final destination and *the goods already have arrived*? Here it must be kept in mind that there are two distinct prerequisites for the coming to an end of the right to control, the second being that the named consignee demands the delivery of the goods. As long as the consignee does *not* appear, the person having the right of control can exercise his right also at the place of final destination. In other words, *the buyer of the goods exercises his right of control instead of demanding the delivery of the goods*, as he is not the consignee, and the consignee refrains from appearing and claiming the goods. In this way, the functions of transferability (or quasi-negotiability) is achieved. (As to these terms see Schmitthoff, *The export trade*, 7th ed 1980, p 353. Cf Gorton in *Modern transport and sales financing*, ed *Grönfors* 1974, Gothenburg Maritime Law Association 48, p 62.) Still there has been no shift of the named consignee to a new named consignee.

3. *The bill of lading pattern and the waybill pattern are both created by usages of the trade*

The patterns as now outlined have not been originally created by any legislation, national or international. They are the result of international trade usages, developed by merchants during centuries and adopted more or less universally. Such rules are often referred to as belonging to the *lex mercatoria*, the global law merchant (cf *supra* 1.1). Rules of the same kind are governing letters of credit, bills of exchange and the meaning of trade terms and other "technical parts" of international trade.

Such rules are shaped in a fashion that is supposed to make their functions possible in practical life. Various parts of the pattern are thus functionally interrelated and the rules have to be described, understood and anlyzed from the angle of a functional approach.

4. *Codification of the waybill pattern*

The development of railways all over Europe during the last half of the 19th century gave rise to national legislations of all kinds, including legal rules on rail waybills. The need for unification in order to facilitate international rail transport resulted 1890 in the European Convention CIM. All these codifications were based on the pattern created by usages of the trade.

However, they were more detailed and further elaborated, including that instructions to the carrier must be given in writing on the duplicate of the rail waybill. The duplicate was described as a *Legitimationsurkunde* or *a document of identification* and it was repeated by adding that it *keine dingliche Rechte am Gut verkörpert.* In practice, however, it became quite usual to pay *netto Kassa gegen Frachtbriefdoppel.* (Cf "the Bible of railway law" Nánnássy, *Das internationale Eisenbahnfrachtrecht*, Wien 1956, pp 189–191.) This means that some functions like those typical for a B/L could be imitated (*supra* 3.2).

The railway pattern was followed when the 1929 Warsaw Convention on air transport was made. Even if the model clearly was the 1890 Rail Convention, this was not copied word by word. The text was much shorter and routines also simplified in details – drafting traditions in rail law and air law differred. A few articles corresponded to a much longer text in the 1890 Convention. Still both texts were firmly based on the waybill pattern as created by usages of trade and followed the mainlines as already presented (*supra* 3.2).

The next transport system to be provided with codified rules on waybills was the road transport system as regulated internationally by the European Road Transport Convention 1956. Here both rail and air law texts were kept in mind – perhaps more rail than air. The text was kept shorter than in the Rail Convention but definitely longer than in the Warsaw Convention. But the mainlines still followed those created by trade usages.

This underlying common model, in spite of varying languages by different groups of lawyers from different periods of time, influences the interpretation of the varying texts.

5. *The importance of the law merchant when interpreting the codifications of land and air waybills*

A detailed study of differences as to the details and the language has no sense, when interpreting the codification texts on land and air waybills. To take one example only, the CIM (now COTIF Annex B) mentions the two prerequisites for the ending of the right of control, viz (1) that the goods have arrived to the place of final destination and (2) that the person named as consignee demands their delivery. The Warsaw Convention (Art 13 § 1) explicitly mentions the first prerequisite only. But the idea clearly was to apply the land transportation pattern to air transport: *Man hofft dadurch dem Empfänger als Käufer den Entschluss zu Vorausbezahlung der Ware gegen Einhändigung des Frachtbriefsdritts zu erleichtern.* (Wüstendörfer, *Wege und Ziele des kommenden Weltluftsrechts*, Hamburg 1930, p 23.) As a matter of course, the established usages of the two prerequisites is the general

background for understanding the Warsaw text, which thus must not be construed *e contrario* as compared to the CIM text.

The correctness of this attitude is proved by the fact that it alone satisfies the functions necessary to have the system work properly. The sender is entitled to claim his right of control to the goods in transit as long as the receiver has not claimed his right to have the goods delivered to him at the place of final destination. Before this point of time there is no competition between the sender's right of control and the receiver's right to demand delivery of the goods. After this point of time the receiver's right to demand delivery always wins against the sender's right of control, which then is used too late. If the receiver does not cooperate by taking care of the goods, the carrier has the right to go back to the sender in order to have the contract of carriage finalized. The requirement that the receiver has the right to *demand* the delivery of the goods implies the duty of the carrier to hand over the goods physically – the fulfilment of this duty presupposes that *the receiver cooperates*. This *functional analysis* points to the only solution acceptable as compatible to the system as a whole.

Ch 4

The Bill of Lading Goes Ashore

1. *Stretching the document*

When the container revolution made it imperative, as argued by those active in international trade and banking, to stretch the liability from the very beginning to the very end of the total transit in order to cover it completely, no gaps and loop-holes permitted, this was immediately accepted. As a parallell in order to avoid separate transport documents for each leg of the transit, the document evidencing a multimodal transport and in need to cover the complete transit should preferably be of the traditional type used by the carrier in his traditional business. As sea carriers were the first on the commercial scene to offer their customers multimodal carriage, the development started by their issuing Bs/L, covering also pre- and oncarriage by land transportation and thus including transportation outside the traditional maritime milieu. As the ultimate goal some visionaries phrased the slogan "one transport – one liability – one document – one insurance."

The legal technique of stretching one type of document outside its own traditional milieu had already been used in some international unimodal conventions.

The CIM Railway Convention permits the use of rail waybills even if part of the transport is made by boat, viz a railway ferry on a route included in a special list kept in Berne (Art 48). The Warsaw Convention permits the insertion in the air waybill of conditions referring to other modes of transport, although the air convention refers only to air carriage (stated already in the title of the 1929 Convention as well as in Art 31). This opens up the use of one transport document in relation to the customer.

The CMR European Road Transport Convention states that it in principle covers the whole carriage, if the truck is loaded on board a ship, and the

road waybill consequently covers the whole transit, also the sea leg. (Art 2, a provision that can give rise to complicated problems of causation and interpretation.)

Obviously, the same legal techniques could be used with a B/L, thus stretching it to cover the whole multimodal operation with one document.

But could such a document also be made to keep its quality of negotiability, or preferably transferability? Historically this type of document was up to now used only in connection with port-to-port shipments and thus tied to its traditional maritime milieu. Could you possibly include land transportation? One way of arguing was that the B/L did not necessarily have to be an *on board* B/L but could also be recognized in the shape of a *received for shipment* B/L. This meant that it was since long accepted that a B/L covered also a land period, including pick-up and delivery service as well as storage of the goods at the sea terminal. But this argument was not felt to be very convincing, as a multimodal transport covers much more than that, namely land transportation from the inland terminal and land transportation from the ocean port of discharge to the final point of destination of the goods. In order to strengthen his position, one Swedish land carrier added to his B/L a special negotiability clause in order to make the negotiability accepted by Swedish courts. This clause, as introduced by Wilson & Co, went like this: "Against the return of the document to Wilson & Co AB and the payment of freight and other charges resting upon the goods the holder of the original of this document has the right to claim the goods or, in case of loss of the goods, damage thereto or delay, to use the rights following from the General conditions of carriage overleaf. Wilson & Co AB having signed the document shall have the right to tender the goods or, in case of loss of the goods, damage thereto or delay, to give compensation therefore to the party presenting the document. Wilson & Co AB shall under no circumstances whatever be obligated towards the first holder or subsequent holders in case the goods or compensation as aforesaid have been tendered to the holder presenting the document."

This way of arguing, however, is based upon the principle of "safety first." But, negotiability is a quality that is created by recognizing the unique B/L mechanism for releasing the goods and thus creating the representative function. This is typical for *any* paper calling itself a B/L or containing the words "against surrender of the document." (Cf *supra* 1.4.) By transferring the B/L pattern from its original maritime milieu in this way, the negotiability function is reached as well. And this philosophy was rapidly accepted in most systems without any legal objections; no need was found to add extra "negotiability clauses."

2. *The first effort: the North Sea Trade*

Still, the all-embracing liability was called for. The legal technique for satisfying this requirement was to introduce special liability clauses in the general conditions for the multimodal carriage. Here the one covering the whole transit was used in its capacity of evidencing a contract of carriage.

It has already been underlined that international trade and banking required that one person should be liable for the whole transit in relation to the customer and that there did not exist any gaps and loop-holes with regard to this liability. Otherwise, the document would not offer the security necessary for letting it represent the goods themselves and thus would not be bankable for credit purposes or for selling transactions when the goods are *in transitu.*

When Swedish Lloyd initiated the first modern Scandinavian container B/L, this requirement was met by the introduction of a clause, according to which the shipowning company assumed liability for the whole transit in the same way as had the customer contracted separately and directly with each performing carrier as to his part of the voyage. This technique has later been described as "the Network System" or "the Network Principle" and influenced the work on an international convention concerning combined transports. The shipowning company was naturally free under the national law applicable to make recourse actions against the performing carriers used, a subject dealt with in its contract with the sub-carrier, but such recourse actions had no effect in relation to the shipper/consignee.

Two additional problems had to be expressly dealt with in the clause in order to comply with the wishes of international trade and banking.

The first was to solve the problem of concealed or unlocalized damage, which must occur also within an efficiently operating container service. Breakage of the goods in a locked container, which is not unlocked until it has arrived at the place of final destination, can be the result of bad road conditions as well of rough weather on the maritime leg of the transport. In this particular case, where the carrier's responsibility against the customer was intended to be placed on the shipowning company, it seemed natural to presume that concealed damage had occurred on the sea leg and thus was covered by the shipowning company's own rules of liability.

The second problem was to fill the gaps and loop-holes as regards the system of liability created by the application of the Network Principle. The period of responsibility of the first carrier might come to an end before the period of responsibility of the second carrier begins; the loading, unloading and storage represent the weak points, where there can be no responsibility at all or a responsibility unlimited up to the sky, contrary to the situation at all other parts of the transit. The solution chosen was to desert the old tackle-

to-tackle pattern and extend the Hague Rules by means of a Paramount Clause. These rules are therefore said to cover terminal periods in port terminals, and the result is thereby the same as reached by Harter Act. As the shipowning company's period of liability thus covered the whole transit from the time the goods are taken in charge by his agent (perhaps the first performing carrier) at the inland terminal to the time when the goods are delivered at the inland terminal at the place of final destination, the system of liability was guaranteed to constitute one integrated whole.

(The clause introduced in order to reach this result was phrased like this: "5. RESPONSIBILITY. The Carrier shall not be responsible for loss of or damage to the goods during the periods before receipt of the goods at the sea terminal at the port of loading or after delivery of the goods in question from the sea terminal at the port of discharge. The appropriate Carriage of Goods by Sea Act is hereby deemed to apply to the B/L during the entire period the goods are laid at the sea terminal. Nevertheless where by the nature of this B/L the contract of carriage is in respect of through-transit of containerized or otherwise unitised goods commencing at and terminating at interior places which are expressly stated in the B/L, the Carrier shall, notwithstanding anything herein or otherwise expressed to the contrary, be responsible for the goods in the manner herein provided from the time they are received for shipment by his agents or servants, being sub-carriers or not, at the specified first place of despatch until delivery by his agents or servants, being subcarriers or not, at the specified place of final destination. During the periods before receipt of the goods at the sea terminal of the port of loading or after delivery of the goods at the sea terminal at the port of discharge, the Carrier hereby accepts the same liability in respect of the goods as would have existed if every participating sub-carrier had made a separate and direct contract of carriage with the Merchant in respect of that part of the through-transit undertaken by him. If it cannot be established in whose custody the goods were when damage or loss occurred the damage or loss shall be deemed to have occurred during the sea voyage and the appropriate Hague Rules legislation shall apply.")

Simultaneously with the introduction of the Swedish Lloyd B/L, Swedish forwarding agents and road carriers (Wilson & Co and Scanfreight) introduced a similar document according to which the road haulier or forwarding agent assumed liability for the whole transit, each leg of which was to be governed by its own rules (with the exception that no distinction was made between rail and road). As to concealed damage, the presumption was that the damage occurred during the landcarriage. The legal technique used obviously is the same as in the Swedish Lloyd B/L, but the other way around so to say, as land carriage rules were used *in dubio*.

A series of container Bs/L were later modelled on this pattern, which was further elaborated and especially adopted to the requirements of the traffic in question.

3. *The second effort: the North Atlantic Trade*

The liability clause just described was meant as an experiment in small scale before the initiation of the large scale operation on the North Atlantic Trade. As the experience of the North Sea liability clause was considered satisfactory, the same solution was studied by US lawyers. One objection was that the reference to the same conditions as if a separate and direct contract of carriage had been made with the Merchant would require them to keep in stock thousands of standard conditions for road hauliage in order to check what liability they had contracted for. When the clause originally was made, the situation in England was that there existed no codification of road hauliage, only various standard conditions. In the meantime, however, United Kingdom accepted the CMR Convention, a fact that completely changed the situation.

Time was ripe to follow the US recommendation to pin-point one decisive system of liability for each mode of transport. American lawyers first agreed to use the CMR Convention as the liability system for trucking also on the American side, in spite of the fact that United States was no party to the CMR Convention, this in fact being a convention for the European Community and its neighbours, like Norway and Sweden. Finally, however, bearing in mind the regulation of road traffic, trucking in the US was declared subject to the inland carrier's contracts of carriage and tariffs. Some details were also changed in order to adapt the clause to the factual requirements of the North Atlantic trade. In this way the Atlantic Container Line (ACL) Bill of Lading was created and further inspired a number of Bs/L in international use. It has rightly been characterized as "the most elaborate" of the responsibility clauses. (Schmitthoff in the 9th ed of his leading book *The Export Trade*, 1990, p 616.) The clause runs as follows:

"3. RESPONSIBILITY. I. ACL shall be responsible for the goods from the time when the goods are received by ACL at the sea terminal at the port of loading to the time when they are delivered or despatched by ACL from the sea terminal at the port of discharge and also during any previous or subsequent period of carriage by water under this Bill of Lading subject to the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August, 1924, and any legislation making those rules compulsorily applicable to this Bill of Lading, including the Carriage of Goods by Sea Act of the United States of

America, approved 16th April, 1936. It is agreed, that such Rules and Act shall also apply to deck cargo.

II. When either the place of receipt or place of delivery set forth herein is an inland point in the USA or Europe, the responsibility of ACL with respect to the transportation to and from the sea terminal ports will be as follows:

(a) Between points in Europe, to transport the goods

1. if by road, in accordance with the Convention on the Contract for the International Carriage of Goods by Road, dated 19th May, 1956 (CMR);

2. if by rail, in accordance with the International Agreement on Railway Transports, dated 25th February, 1961 (CIM);

3. if by air, in accordance with the Convention for the Unification on certain Rules relating to International Carriage by Air, signed Warsaw 12th October, 1929, as amended by the Hague Protocol, dated 28th September, 1955.

(b) Between points in the USA, to procure transportation by certain (one or more) authorized competent authority to engage in transportation between such points, and such transportation shall be subject to the inland carrier's contracts of carriage and tariffs. ACL guarantees the fulfilment of such inland carrier's obligations under their contracts and tariffs.

III. As to services incident to through transportation, ACL undertakes to procure such services as necessary. All such services will be subject to the usual contracts of persons providing the services. ACL guarantees the fulfilment of the obligations of such persons under the pertinent contracts.

IV. When the goods have been damaged or lost during through-transportation and it can not be established in whose custody the goods were when the damage or loss occurred, the damage or loss shall be deemed to have occurred during the sea voyage and the Hague Rules as defined above shall apply.

V. ACL does not accept responsibility for any direct or indirect loss or damage sustained by the Merchant through delay, unless ACL is liable for consequences of delay under any laws, statutes, agreements or conventions of a mandatory nature.

VI. No servant or agent of ACL or any independent contractor or sub-carrier employed by ACL to carry out any of its obligations hereunder shall, in any circumstances whatsoever, be under any greater liability to the Merchant than ACL for any loss, damage or delay howsoever caused to the goods, but shall be entitled to the benefit of every exemption, limitation, condition and liberty herein contained in favour of ACL. For the purpose of this provision all such persons shall be deemed to be parties to the contract evidenced by this Bill of Lading made on their behalf by ACL."

4. *The third effort: the TCM Draft Convention*

The problem of Combined Transports was tackled by some international organizations in order to create an international convention on the subject and to facilitate uniformity and ensuring legal effects for persons outside the contract. The Rome Institute for the Unification of Private Law (UNIDROIT) since the 30's has been working on such a project under the leadership of the Swedish Judge Algot Bagge. (Cf Bagge in *Rabels Zeitschrift* 1936 pp 463 *et seq*, *Nordisk försäkringstidskrift* 1947 pp 16 *et seq* as well as *Svensk juristtidning* 1955 p 396–397, 1960 p 248–249 and 1965 p 249 footnote 4.) Comité Maritime International (CMI) has contributed by developing a series of projects since 1965 under the chairmanship of the Swedish Average Adjuster Kaj Pineus, formally culminating in the Tokyo Rules, 1969. (See *CMI Container* 1–5, 1965–1967 and *CMI Documentation 1969 III Tokyo*, 1969.) The two projects were amalgamated through the Round Table Conference in Rome 1970, resulting in the TCM Draft Convention. (TCM stands for Transports Combinés des Marchandises. The text has been published in its English version in the booklet *Draft Convention on the International Combined Transport of Goods (TCM Convention)*, Chamber of Shipping of the United Kingdom, London 1970.) It is this text that was further considered by the Inter-Governmental Maritime Consultative Organization (IMCO), nowadays known as International Maritime Organization (IMO), and the Economic Commission of Europe (ECE), with a view to introducing a final draft text before an international diplomatic conference.

The Network System was adopted as the basic element in the liability system of the Draft TCM Convention. But it was necessary to solve the problems of filling gaps and of covering cases of concealed damage. As the convention was designed to be all-embracing and not intended to cover only land-sea-land carriage, the extension of the Hague Rules did not offer the general solution needed. The technique of presuming that damage occurred on one leg of carriage and thus covered the cases of concealed damage was found insufficient in those cases where the same system was meant to apply irrespective of the fact who was the contracting carrier: a shipowner, a land carrier, a forwarding agent or anyone else. In order to provide the best possibilities for all to compete on equal footing, the concept of Combined Transport Operator, or CTO for short, was launched.

As to loop-holes and concealed damage the CTO is responsible to the uniform liability rules set out in the TCM Convention and representing a fair average liability as compared to existing rules in transportation law. In other words, the TCM Convention covers the combined transport as a unity with an umbrella of TCM liability, thus offering a guarantee that there is always sufficient mandatory liability. If it is known, however, where loss or damage

occurred, and this stage of the transport would have been governed by mandatory rules if the customer had contracted separately and directly with that particular carrier, the customer is placed in the same position as if he had contracted in this way: the Network System.

5. *The problem of conflicts of conventions*

Having arrived that far in our study on how progress was made, time is ripe to address a few remarks to the principal objection always made when trying to create liability for multimodal transport. The argument was advanced on all stages of the work that new liability rules would come in conflict with existing unimodal conventions on mandatory responsibility.

The desirability to avoid such conflicts obviously is founded on the simple fact that circumstances already governed by a mandatory international convention should not be covered by a new mandatory international convention or be set aside by contract. If this principle was not upheld, a state having adhered to and ratified both conventions would be guilty of breach of its duties to apply the one convention when applying the other. And parties cannot contract out of a mandatory convention. The situation would furthermore lead to confusion by creating uncertainty which rule in fact will be applied. True enough, in a new convention the second rule can be combined with a superseding clause, a clause that is accepted sparsely and for special cases only, such as referred to in the international convention on nuclear ships. However, conventions incorporating such clauses are undesirable and do not attract ratifications.

Now, how can a convention on combined transports be said to operate on collision course with already existing conventions on transportation law? The line of argument is this. When a CTO contracts for a combined transport rail-sea-road, to take one example, he acts in relation to the customer as a railway company for the first part of the transport, as an ocean carrier for the sea leg and as a road haulier for the last leg of the transit. The mandatory conventions on rail, sea and road carriage are thus to apply, and a new convention on combined transports must not contain any rules deviating from those mandatory conventions.

But does not the Network System lead to exactly this result? When it is proved where loss or damage occurred, the rules of the mandatory convention governing that part of the voyage is applied. As to concealed damages the point is, that it has not been proved where loss or damage occurred, and no other convention has a better right to govern the case. And as far as gaps and loop-holes in the system are concerned, they obviously are not covered by the other mandatory conventions. Then, what is the problem?

Well, this might be true, but it refers only to the prerequisites for the

liability concerned. What about its extension and its end? Take the example of time bar. The rail, road and sea conventions stipulate one year, the air carriage convention two years. If the convention on combined transports stipulates one year, this is fair enough as long as surface transportation is concerned, but it is clearly against the mandatory two years time bar for air carriage. The obvious thing to do is then to include a two years limit in the combined transports convention, which does not take away the rights guaranteed to customers as to air carriage and giving them an even better standard than the surface transportation conventions ensure.

But here we are suddenly faced with a new complication. The European Road Transportation Convention, the CMR, unlike all the other conventions, does not permit any inconsistencies at all with its rules, not even to the benefit of the customer. There is in other words sort of a restrictive trade practices rule included in a regular private law convention on transportation law, something that is most astonishing and also most undesirable from the consumer's point of view. Sweden therefore suggested a revision of the CMR convention on this point; but other nations have been against this suggestion. As long as things are what they are, we have been caught in a blind alley.

Thus, we are up to conflicts of conventions without having the possibility to avoid them or to solve them – I take it for granted that we do not wish to refuge to the last resort: a superseding clause.

In order to get over this dead-lock, there was a need for a new philosophy concerning the consequences of the principles of liability for combined transports.

All objections arguing conflicts of conventions are based on what might be called an one-level thinking; the situation governed by the rules of a new convention is in fact covered already by the provisions of an existing convention. This way of thinking is also well adapted to the traditional pattern followed when arranging a combined transport. According to this, a carrier contracts with the customer to perform one leg of the transit himself and to procure the rest of the transit to be performed by some other carrier or carriers. He assumes the liability of a carrier for his own part; for the rest of the carriage he contracts as a forwarding agent only with the customer, meaning that he has brought the customer in direct contractual relationship to the performing carriers. (Cf Grönfors, *Transporträttsliga studier,* 1975, Gothenburg Maritime Law Association 50, pp 211 *et seq*, with graphic illustrations.)

However, the pattern inspiring the drafters of the TCM is based on a quite different way of thinking, a pattern of liability systems developing in two levels and thus of another "anatomy." This new situation can be best characterized by considering a practical example in some detail.

Let us assume that the customer contracts for the carriage of goods from

point A to point B, notwithstanding the fact that different modes of transport are going to be used. The party contracting with the customer provides or procures the complete multimodal operation and assumes liability similar to that of a carrier for the whole transport, the terminal periods included. Obviously, he is doing more than a forwarding agent only; on the other hand, he is definitely not a carrier by sea, road, rail or air (which the case may be) in the traditional sense of the term. *For he is contracting for a combined transport as one integrated whole,* which really is something new and not equivalent to the mere technique of adding, for instance, the capacity of a road carrier for part of the voyage to the capacity of a sea carrier for the other part of the voyage. *In fact, he is a new sort of person, a Combined Transport Operator (CTO).* The customer has a contract with the CTO only. The CTO, in his turn, contracts with different sub-carriers for the various legs of the transport, for instance with a railway company, a shipowner and an air carrier. Furthermore, let us assume that the contracting airline does not perform the transport itself but charters an airplane with crew from another air carrier, who is thus the performing (or actual) air carrier? The goods are taken in charge by the CTO's agent at the place of shipment, and the agent delivers them to the first carrier. When the goods have arrived at their final place of destination, the last carrier delivers them to the CTO's agent on this place, and the agent eventually delivers them to the consignee.

This example shows that the *mandatory conventions now in operation have got adequate space for their application without colliding with other mandatory conventions.* The performing air carrier is covered by the Guadalajara Convention, which brings him under the scope of the Warsaw Convention, the same regime as that governing the contracting air carrier. The shipowner falls under the scope of the Hague Rules and the railway company under the CIM Convention (of course, all this subject to the reservation that these conventions are applicable). The last carrier, in the case here discussed the air carrier, delivers the goods to the agent of the CTO according to the rules of the Warsaw Convention, and this agent then delivers them to the CTO's consignee according to the rules of the TCM Draft Convention.

This means that the CT contract must be looked upon as an integrated whole and thus cannot be divided into minor parts, each constituting a separate contract of carriage. In fact, *the CT contract constitutes a new type of contract in transportation law.* Thus, the liability of the CTO has been developed as a uniform liability for the whole transit. Only in case it can be proved where the damage occurred, the liability of the CTO takes on the shape of the rules governing that part of the transport, as if he had made a separate and direct contract with the customer for that part.

This does not mean that the mandatory convention governing that part of the voyage directly applies to the CTO in his capacity as such, but merely that the *liability rules of the underlying convention reflect on the CTO level,* The reason for this exception from the otherwise uniform CTO liability is found in economic evaluations concerning the insurance aspect, not in the necessity of avoiding conflicts with existing conventions. The liability of the CTO will be the same as governing the recourse action of the CTO against the performing carrier responsible. Thus, the insurance market is not unreasonably disturbed. If an underlying convention is revised and ratified in a new version, such alteration automatically fits into the liability system of the TCM combined transports convention without creating a need for revision of this convention as well. For the rest, the uniform liability, still constituting the main rule, takes care of all cases of concealed damages and all possible gaps of liability during terminal periods etc. It is the umbrella of CT liability that covers the whole transit.

In the example now discussed, each person or legal entity has fulfilled one function only. This is not necessarily the case in practice, where two or even more functions can be performed by one and the same person or legal entity. The shipowning company may at the same time be the CTO, the railway company performing the first part of the carriage may at the same time be the agent of the CTO at the place of shipment, and the carrier for the last part of the voyage may also function as the agent of the CTO at the final place of destination. But this does not affect the validity of the model, for it is the functions as separate phenomena that are decisive, not the quality of being a person or a legal entity. If the shipowner performing the sea voyage also plays the role of the CTO in relation to the customer, this must not create a result different from that when he forms his own CTO company and thus splits up his legal personality into two persons, each with one function only. And the airline company can at the same time be an air carrier as well as the agent of the CTO, without separating these two functions and attaching them to different legal persons. In just the same way, the carrier in the traditional pattern of combined transport plays and has always played two roles at the same time, namely that of a carrier for the part of the voyage he performs himself and that of a forwarding agent for the other part.

It has been said that the arrangement with a CT Document does not mean anything but adding one new document to the other documents already required – a very bad effect of the two-level thinking. This argument, with respect, is inconsistent with facts. In order to illustrate this objection, the following example may be offered. Fifty different consignments, each evidenced by one CT Document, can be taken in charge by the CTO's agent and consolidated in one container. This container is then delivered to the first

performing carrier, passed on to the second carrier and delivered to the third carrier, who again delivers the container as is to the agent of the CTO at the final place of destination. Each stage of this container transport is covered by one document only. The agent of the CTO at the final place of destination opens the container and delivers each consignment to each consignee, presenting his CT Document. This means only three documents *en route* instead of fifty for each carrier, a gain of fortyseven documents and surely a simplification. Nothing prevents the CTO from agreeing with his carriers not to issue any transportation document at all but only a very simple receipt, an arrangement that would simplify matters even further.

If one follows the way of one single CT Document, the result may well be as follows. The CT Document is the object of a purchase by someone at the final place of destination. The bank at the shipper's place opens a letter of credit and uses as correspondent a bank at the final place of destination. The purchaser is at the same time the consignee in relation to the CTO. He presents his document, and the agent of the CTO hands over the goods according to the rules of the TCM Draft Convention.

This example shows that the CT Document does not in any respect whatsoever interfere with the functions of the underlying transportation documents which may be issued by the carriers engaged in the transport. There is no conflict of conventions, neither as to liability nor as to documentation.

I have now tried to elaborate the philosophy behind the Draft TCM Convention. It is only fair to ask who are right, those who argue this two-level thinking or those who object referring to the problem of conflicts of conventions and thus adopting the one-level pattern? Are there any decisive arguments when choosing between these two ways of thinking?

Many pros and cons can be put forward for the purpose of discussing this matter, but to my mind one argument is absolutely decisive: the two-level thinking only is capable of leading us out of the blind alley of conflict problems of liability for combined transports. In the choice between two standpoints, even if they both are equally arguable, the positive one must be preferred. After all, legal science has to be pragmatic. It is the hallmark of a good lawyer not to ask: "Why is this impossible?" but to put the question like this: "How can this be done?"

This philosophy might be summarized like this. A multimodal transport contract is more than mere adding two or more mandatory unimodal responsibility conventions to each other. The multimodal transport contract is a new type of contract covering the whole multimodal transport operation, including terminal periods without permitting any gaps or loop-holes. Indirectly the Geneva Convention 1980 on multimodal transport offers support for this outlook by expressly stating that unimodal conventions referring in

some provisions to carriage by more than one mode of transport are meant to stay completely outside the scope of application of the multimodal convention (Art 30 para 4).

In order to accomodate a judge who cannot entirely conform with this attitude the Geneva Conference 1980 in the very last minute added, in response to a wish of the Dutch delegation, *the last resort clause* in Art 28 para 4. This provision is very difficult to understand, perhaps even non-sensical, but its purpose obviously is to make it possible for a judge, who does believe that there exists a conflict of conventions, to fully compensate any claimant considered to be a victim of such a collision. Also the most sensitive legal conscience can thus be taken care of.

6. *The fourth effort: Combiconbill and FIATA B/L*

The TCM Draft Convention met with much approval by international trade circles. In spite of the fact that it still not represented the final text of an international convention, it was adopted as the basis for new container Bs/L. The forwarding agents' international organization FIATA issued the FBL, and the Baltic and International Maritime Conference BIMCO introduced the Combiconbill. The Australian Conference B/L and the PAD Line B/L can be looked upon as forerunners. (As to the Combiconbill further details can be studied in the paper by Grönfors in Law and International Trade, *Festschrift für Clive M Schmitthoff*, 1974, pp 187 *et seq*, reprinted in Grönfors, *Transporträttsliga studier,* 1975, Gothenburg Maritime Law Association 50, pp 223 *et seq.)*

These two container Bs/L have included most TCM articles transformed into contract clauses and have furthermore chosen similar solutions to problems outside the scope of the Draft Convention. The BIMCO Documentary Council, as well as the Working Party entrusted with the task of drawing up a new B/L, obviously took a positive attitude towards the principles followed in the TCM Draft. The same attitude was taken by the forwarding agents' international organization FIATA when creating their new B/L for combined transports. This meant that the rules in the TCM Draft were made operational thanks to a new standard contract in practical use. Few draft conventions have been met with approval by the business world even before it had been finished.

The Combiconbill was characterized by the Norwegian expert on documents Per Gram as "the best written liner bill hitherto produced" (Tulane Law Review 49, 1975, p 1091).

7. *The fifth effort: ICC Rules for a combined transport document*

The international legislative project went on but much slower than expected by international trade and banking. Thus the idea was launched to speed up the procedure by getting the stamp of the International Chamber of Commerce on the TCM draft. This goal was reached by issuing the ICC Uniform Rules on Combined Transports 1973 (Brochure 273, new ed 1976, Brochure 298).

The text of the ICC Rules was not fully compatible with the TCM draft which could cause confusion. Some minor differences can be characterized as deficiences of language or purely editorial. Others are more important. Most confusing is the shortening of the timebar from one year to nine months. The purpose was to provide for sufficient time for the CTO to start recourse actions against sub-carriers.

8. *The sixth effort: Combidoc*

The initiative of the ICC inspired BIMCO to issue a new combined transport document based on and referring to the ICC Rules. At the same time, the International Shipowners' Association (INSA), Gdynia, Poland, wanted to introduce a new combined transport document and thus took part in the BIMCO project. The new document resulting from this joint effort was remarkable in so far that one West and one East European shipping organization for the first time recommended the same document, also bearing the logo of the ICC as an global organization.

The Combidoc was recommended as an alternative document to the Combiconbill for those who wanted to base their general conditions on the ICC Rules instead of the TCM draft itself. As to this point it was astonishing that the form did not contain an incorporation clause referring to the ICC Rules which were easily accessible unabridged in wide-spread Brochures, but contained all the text on the back just like traditional bills of lading.

In some respects Combidoc has serious shortcomings in comparison to the Combiconbill. As to the delay clause, its principal object seems to be to exclude all liability whatsoever, when such liability is not mandatorily prescribed by an underlying convention applicable. From a policy point of view this solution is questionable, as the form aims at being used in fast express services, where the time factor is of essence – this fact is not in harmony with the attitude of denying all liability. Some difficulties occurring in combined transports when deciding the concept of delay (see my paper in the *Journal of Maritime Law and Commerce* 5, 1974, pp 483 *et seq)* had not been taken care of. A time-bar of nine months – prescribed in order to give the CTO sufficient time to start recourse actions against sub-carriers – seems

to be unacceptable because of the one year period mandatorily prescribed by the Hague Rules. As long as the heading says that the form was strictly "subject to the ICC Rules", it was considered impossible to change this part of the text to at least the eleven months period (as included in the Combiconbill).

9. *The seventh effort: the 1980 Geneva Convention on multimodal transports*

The international conferences still had a long way to go on its *via dolorosa*. The United Nations Container Conference, held 1970 at Geneva, asked for a joint study of the topic by IMCO and ECE. After four sessions a new version of the TCM draft was reached. Yet time was not ripe for a Diplomatic Conference. UNCTAD formed an International Preparatory Group, that produced a new draft after six sessions (one of them in two phases) as well as quite a few studies made by members of the secretariat as well as by external experts, e g on possible economic implications for developing countries. In 1979, the UN invited to a Diplomatic Conference held at the UNCTAD headquarters at Geneva. The second session of this Conference finally agreed 1980 on a convention on multimodal transport of goods. As the special excuse of nautical error had been deleted in the Hamburg Rules 1978, it was now less complicated to build the 1980 Convention on the foundation laid in the Hamburg Rules, which were used as a drafting model.

The new convention changed terminology, as far as the term combined transports was rephrased multimodal transports. As a consequence the Combined Transport Operator (CTO) changed its name to Multimodal Transport Operator (MTO) and the Combined Transport Document (CTD) to Multimodal Transport Document (MTD). The new terminology was felt to mark a line of distinction towards the earlier efforts. This was a new effort made by both developed and developing countries, jointly and severally.

One disadvantage inherent in the Network System as used hitherto was that the customer might be covered not up to one and the same limit for the whole transit but had to follow the ups and downs of a switch-back railway in an amusement park. And as far as legal relationships are concerned this is not at all amusing. I want to dwell shortly upon this problem.

In international transportation law, different limitation systems are used. Every system contains its own limitation sum and the figures vary considerably. The reason for these differences between the limitation sums used are difficult to grasp, even to explain. Often there seems to be no very convincing rationale behind, but more of accidental circumstances.

As the convention was based on the Network Principle, the differences

between the limitation sums had the effect that the cover of the claimant varied substantially, depending on where the damage could be proved to have occurred during the transit. This could encourage claimants to sue their MTOs, trying to establish that damage occurred during that part of the transit where the highest limitation amount applied. Furthermore, the MTOs could be expected to try recourse actions against sub-carriers with a high limitation figure. Considerable differences with respect to the extent of the limitation amounts might thus generate disputes, which from a general point of view seemed to be both impractical and uneconomical. It might also turn out to become more and more difficult for those who sell combined transports to explain to the customers why their protection must vary so considerably during the various stages of the transport.

The Hamburg Rules cleared the way for introducing *a truly uniform MTO liability* without exceptions for nautical fault and other specialities in order to respect traditional maritime law peculiarities reflecting on the level of MTO liability. The limitation of liability provided for in Art 18 paras 1–3 is overruled as far as a localized damage is concerned *only* where a *higher limit of liability* is provided for by an applicable international convention or national law (Art 19). Other rules of liability than this one on limitation are *never* reflected on the MTO level. The disadvantage of the switchback railway in the amusement park had at last been overcome.

10. *The eight effort: UN aligned form for multimodal transport document (MTD)*

If the ACL B/L is considered to be one example of the first generation of multimodal transport documents, and those building on the TCM Draft forming a second generation, the third generation will be new documents based on the 1980 Convention on multimodal transports.

Like other conventions nowadays the Geneva convention avoids to include some model document. The reason for this is that otherwise formal amendment procedures might have to be initiated only because of minor changes in detail, caused by technical developments and not affecting the substance of the provisions on which the forms are based. In these cases, however, recommended or prescribed forms have been introduced through decisions on the administrative level.

As far as the multimodal transport document (MTD) is concerned, it was felt that future Contracting States to the 1980 Convention might find it helpful to have some guidance on how such documents could be designed, reflecting the provisions of the Convention and based on international standards regarding aligned forms in general and those in the transport industry in particular.

The Layout Key for Trade Documents, originally adopted within United Nations Economic Commission for Europe (ECE), is nowadays followed on a world-wide basis and known as the United Nations Layout Key. Thus it seems almost self-evident that the new MTD should be drawn up in the same manner. It is produced in two versions, one negotiable and one non-negotiable. The term "negotiable" obviously is meant to be read as "negotiable in the same sense as a traditional B/L." Although this form does not contain the term B/L, as the term document under the Convention also covers the negotiable version, or "against surrender of the document" or words to the same effect, the B/L mechanism for releasing the goods has to be followed.

The form is of the modern "blank back" type and thus contains on its face an incorporation clause, in fact running like the one recommended by ECE and International Chamber of Shipping (ICS). Technological developments include new methods for simplified documents production through modern copying techniques, and the replacement of traditional documents by electronic or other methods of data transfer. Such methods make it virtually impossible to include complete sets of clauses and conditions, which instead will have to be referred to by the means of special reference clauses (incorporation clauses).

These rather loose recommendations will of course be followed, when the Convention is in force and the first MTD's will come into operation.

Ch 5

The Waybill Goes to Sea

1. *The inverted development*

As has been shown in Ch 4, sea carriers succeeded in using their traditional B/L in a way that allowed it to cover also land carriage. Of course, the logical reply from the land carriers' point of view was to adapt their traditional waybill for use on maritime carriage of goods. This inverted development will be described in this chapter.

It is a basic fact that this development did not start from scratch. For land carriers it was a matter of pride to impose their documentary traditions on the maritime milieu in the same way as Bs/L were conquering the land transport industry.

Historically, the B/L pattern was used exclusively in the maritime milieu and the W/B was used in relation to land and air carriage only. I have shown how the line of distinction between the two patterns nowadays exclusively is tied to the differences as to the mechanism for releasing the goods. So, *in principle*, there does not exist any legal obstacle to the introduction of the W/B pattern into the maritime milieu and, *vice versa,* to the use of the B/L pattern in land and air transportation. The integration between different branches of carriage, speeded up by containerization and the wide-spread use of multimodal transport, makes this imperative. Nowadays, only commercial reasons for documentation must be decisive for the choice between the one or the other mechanism for releasing the goods.

When discussing which type of document you need for a specified type of commercial operation, you must keep the two types of commercial patterns in mind. In my view you can not start from scratch and raise questions like "what type of liability?", "which rules in detail as to the right to control?", etc. (But see *Tetley,* "Waybills: The Modern Contract of car-

riage of Goods by Sea", *Journal of Maritime Law and Commerce* 14, 1983, pp 465–511 and 15, 1984, pp 41–68.) You have the choice between two established patterns, already created by international trade after centuries of commercial experience, and these patterns must at least be the starting point for all deliberations on the need for new types of documents. (An excellent analysis in detail of both combined transport bills of lading and seawaybills under English law from the seller's and the buyer's point of view offers Debattista, *Sale of Goods Carried by Sea*, Lond etc 1990, pp 187–228.)

2. *The usefulness of the waybill pattern*

The W/B pattern offers one important merit in order to facilitate ocean transport documentation. The mechanism for releasing the goods is completely independent of the possession of any unique piece of paper. The delay of postal services thus cannot embarrass the system any more.

As a consequence, *sea waybills* (S/Ws) were introduced in the late 60's and have become a type of document more and more frequent in fast liner services. The goods do not any longer depend on the arrival by mail of any piece of paper (one original) but on the simple facts that the goods have arrived and that someone identifies himself as the consignee when he claims their delivery. This new trend in maritime documentation has been observed in the Hamburg Rules, which contain (in Art 18) the following short statement: "Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described." This provision covers also simple receipts that cannot *per se* qualify as sea waybills, e g the receipt under the Atlantic Container Line Datafreight Receipt System (in operation successfully since May 1971). This system includes a paper receipt at the one end of the transit and a paper notice of arrival at the other end, both linked together by computer terminals, a central computer record and an electronic network. What is contained in the record of the computer concerning the individual consignment forms the *electronic transport document* (further dealt with in Chs 6–8).

A sea waybill is *non-negotiable* and *does not represent the goods* like the B/L, as stated above. But when there is no need for trading the goods when *in transitu,* the non-negotiable document is quite sufficient. When a carriage of a complete drilling rig from Scandinavia to Australia by a lifting vessel was manifested in a B/L, this obviously was non-sensical. And 80 % of the westbound cargo from Scandinavia to the United States is not meant for selling in transit but represents in-house trading like cars and machines for

export to agents or daughter companies in the States and so on. The S/W turns out to be the right kind of transport document in such cases.

The fact that the pattern of waybills thus has been moved into the maritime milieu does not make it necessary to copy this pattern one hundred per cent. The patterns of rail, road and air waybills are not even quite identical, for some differences exist *in details.* (These differences have been further dealt with by Hjorth in a Report in the Swedish language to the Swedish Council of Transport, TFD, with the title *Förfoganderätten till gods under transport*, Gothenburg 1980.) However, the *main pattern* is the same, even so far it is of course not mandatory to follow this main pattern completely when adopting W/Bs to maritime carriage of goods. If there is some reason for a modification in part such a modification can possibly be made. One important change has already been made in practice.

Sea waybills as used today have no duplicates, which means an important simplification in handling routines. But then, what about the right of control, which is attached to the possession of a specific document, the duplicate (first copy)? Is it attached in the same sense as the right to get the goods delivered under the B/L pattern? The answer to this question is definitely No. The possession of the duplicate is used only as an easy way of proving who has the right of control but not as a necessary condition for having such right. *The handing over of the duplicate* from sender to receiver is construed as an implied declaration of intention saying, that the former assigns his right to control the goods in favour of the receiver (consignee). Of course, the same result can be achieved by an *express declaration* to the same effect. (This fact is further elaborated on *infra* 6.6.) In both cases the consignee or his bank (financing institution) can be sure that no outsider is entitled to intervene and consequently disturb the regular performance of the contract of carriage. This construction of the legal function of the duplicate is proved also by the fact that, as a rule, duplicates are not issued to S/Ws and in computerized systems are substituted by an express declaration of intention in order to secure the position of banks and other financing institutions. (For further details, see my book *Cargo Key Receipt and Transport Document Replacement,* 1982, Gothenburg Maritime Law Association 63.)

3. *The first sea waybills in the North Sea Trade*

The introduction of W/Bs historically was coupled to the acceptance of incorporation clauses and the complete lack of conditions of carriage on the back, an administrative technique equally adaptable to Bs/L. Such documents were called blank back documents (BBDocs) and introduced on the market in the autumn 1975 by the Swedish Broström Group. They were not

intended to constitute a sort of short forms, because there was no long form available. The back of the document is completely clean, relieved as it is of all clauses. The front contains all data included in a usual B/L or W/B and, in addition, a general reference to the Broström Standard Conditions of Carriage. These are printed separately and copies are provided to customers, banks, underwriters and other interested parties. When there is a need for copying a single document, only the front page must be copied, which reduces administrative costs. The whole scheme was introduced simultaneously to important international fora and the various advantages for the practical handling procedure were explained in detail (See ECE Doc TRADE/WP 4/INF 31, UNCTAD Doc TD/B/ASTF INF 31, 8 November 1974, cf ECE Doc TRADE/WP 4/GE 2/R 42, 23 August 1974, ECE Doc TRADE/WP 4/TFN, 27 October 1978, p 3.)

A similar Standard Liner Waybill in design, principle, and operation, has been available since January 1977 in the United Kingdom for a number of shipping trades (much information is contained in ECE Doc WP 4/INF 47, UNCTAD Doc TD/B/FAL/INF 47). The Japanese Shipowners' Association recommended its members to use the same sort of simplified documentation as adopted at a meeting of July 19, 1978. Shippers on the Japan/US West Coast and Japan/Australia routes also urged the use of the waybill. The S/W is rapidly growing popular in world trade.

The old rules issued by the International Chamber of Commerce (ICC) on letters of credit were not favourable towards short forms in a manner that includes the BBDoc type. The rules now in force, however, have defined the term short form in a manner that includes the BBDoc type. This type is thus now accepted as a basis for letters of credit without additional instructions.

It is easy to understand that S/Ws originally were introduced in trades where transit times were very short and the shortcomings of Bs/L thus were particularly harmful. In such trades, the W/B pattern convincingly showed its usefulness to the actors on the market and spread to other trades. (Cf Bravo Vocos, "La Carta de Porte Maritimo", *Annuario de Derecho Maritimo* 1989, pp 228–230.)

The introduction of S/Ws was accompanied by lots of marketing materials, presentation at branch seminars and so forth with a wish to spread information among the widest groups of persons involved. The goal was to have the market accept this new type of transport documents.

The terminology used in the beginning was often liner waybills, sometimes ocean waybills or words to the same effect. Nowadays, the term almost commonly used is sea waybills (S/Ws), which seems to be most appropriate as compared to the corresponding terms rail, road or air waybills.

4. *Acceptance of sea waybills by the market*

During the 80's the S/W was introduced in worldwide ocean trades by a number of big carriers, such as Nedlloyd and P&OCL (P&O Container Ltd).

It is common for all these S/W forms that they look very much alike. The layout on the face is the usual one for Bs/L and thus gives the over-all impression of a traditional maritime document. Of course, the title is not bill of lading but sea waybill with the words non-negotiable clearly added. The sentence containing the promise to carry does not end by words like "against surrender of the document" or "must be surrendered duly endorsed in exchange for the goods" but "goods to be transported, delivered or transhipped as provided herein" or "delivery will be made to the Consignee named or his authorized agent, on production of proof of identity" or words to the same effect. It is printed out that the contract evidenced by the S/W is ruled by the Hague (Hague-Visby) Rules in spite of the fact that the W/B is not a document of title to the goods. All this creates an effect that the *document,* though not a B/L, "somewhat smells of salt and tar" and thus gives a comforting feeling to customers of remaining in the marine environment and representing something well-known. Thus, it might be easier to accept.

This psychological approach was closely followed in marketing materials issued by the Swedish Broström Group under the title "easy going." Three documents were introduced together, viz a B/L and a W/B, both Blank Back Documents, and as a third form the unabridged standard conditions of carriage covering both Bs/L and W/Bs. Both types of paper documents were designed to be used both in port-to-port traffic and – which is clearly essential – multimodal transport. In fast operating transport services, involving also terminal cargo handling, such kind of documentation opens up a greater flexibility urgently needed today. One set of forms can be used for several lines cooperating with the same Standard Conditions which simplifies stock-keeping. He who has seen a shipping agent's office at Alexandria, Egypt, with one wall of one hundred seventy pigeon holes containing separate liner Bs/L in spite of the short transit times in Mediterranian traffic and heard how many times a day the wrong form is used, and thus other conditions than the carrier's appear printed on the back side, he understands well the important need for facilitation.

5. *The legal ground for the acceptance of the sea waybill by the market*

So far, the introduction of W/Bs in the maritime milieu had not been facilitated by any possibility of referring to some provisions in statutory materials on this type of document and its legal consequences. Instead, the principle of the main commercial pattern used for waybills in land and air

transportation was followed also by sea carriers where this was considered practical. Only by analogy to land and air waybills you could find the guidelines for deciding the legal character and legal consequences of S/Ws. As such rules initially were created by established commercial usages (cf *supra* 5.1), the task to find legal guidance by this method could not possibly meet overwhelming difficulties for the commercial world. The power behind this development was the practical need for facilitation. Practical needs now and then succeed in overcoming even legal barriers!

Some lawyers, however, do feel insecure without having the support of explicit rules in the legislative material, spelling out more or less in detail the rules to be applied to the new type of maritime document. Where does the law order this? Can you point out to me where I can read in legal texts about the meaning and legal functions of a S/W? This attitude of *Rechtspositivismus*, i e the wish for support by explicit legal rules, in commercial daily life might not be too difficult to understand.

Therefore, it was felt as a kind of support, when the Hamburg Rules 1978 for the first time in the text of an international convention very shortly observed the existence of sea waybills in Art 18: "Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described." (Cf *supra* 5.2.) No further particulars are described. Some suggestions to amendments, regulating especially the important right of control to the goods, were put forward but turned down by the diplomatic conference. Most delegations did not feel that time was ripe to work out details, although the conference wanted to recognize the existence of new routines of documentation and to stamp them as legally accepted in principle. (Cf as to the amendments suggested *The Hamburg Rules on the Carriage of Goods by Sea,* ed Mankabady 1978, p 343.)

The Geneva Convention of Multimodal Transport recognizes *non-negotiable* transport documents, e g sea waybills, and these shall indicate a named consignee. The multimodal transport operator named in such document shall be discharged from his obligation to deliver the goods, if he makes the delivery thereof to the named consignee or to such other person as he may be duly instructed, as a rule in writing. These last words in Art 7 para 2 go a short step further by indicating that someone may have the right to point out another person as entitled to take delivery of the goods. If other documents are lawfully issued, this shall not, according to Art 13, affect the legal character of the multimodal transport document. Also such phrases indicate the legal possibility of using such documents as S/Ws. So far, they

encourage the further use of S/Ws in practice. Nevertheless, a more detailed regulation of this type of document was lacking.

6. *Sea waybills and their financial function*

It is a common characteristic of all land and air W/Bs that the right to control the cargo in transit is tied to the first copy of the W/B, often called the duplicate. The first holder of the duplicate is always the consignor; as long as he keeps it he is entitled to the right of control during the whole transit until the goods arrive at their final point of destination and the consignee claims delivery of the goods. The consignee is thus entitled to demand the immediate delivery of the goods as soon as they have arrived at their final point of destination.

A bank, offering to finance credit with the cargo transported as security, has no legal possibility of imposing restrictions to this main rule. This means that the consignee has priority before the bank or the seller, as soon as the cargo has arrived. For security reasons any waybill system for safe payment calls for a mechanism for releasing the goods corresponding, more or less, to the traditional one under Bs/L, but adapted to the specifics of the W/B situation.

One way of achieving this, without tying the delivery of the cargo to the production of a unique piece of paper as a physical object, is to accept the pattern used since long when W/Bs (especially air waybills) are accepted by banks as a basis for credit under documentary credits or in collection cases, viz

(1) the bank is named as consignee and the buyer as notify address only;

(2) after having been paid by the buyer, the bank assigns all its rights as consignee to the buyer, who is entitled to have the goods delivered to him as soon as he produces this assignment to the carrier.

Such a mechanism for releasing the goods has the same effect of creating a *Zug-um-Zug* operation as has the traditional pattern under Bs/L. The position of the bank remains a safe one.

There still exists one minor complication, when translating the normal W/B procedure to cases with the new document S/W. This new document has not been complicated by introducing a duplicate as carrier of the same legal functions as duplicates used for land and air waybills. (Cf *supra* 5.2.) This requires some special arrangement for making it possible for the consignor to assign his right of control to the named consignee.

The Swedish Trade Procedures Council SWEPRO, in co-operation with carriers and banks, introduced in the middle of the 80's a type of S/W capable of being used with the financial function built into it. The main idea was fetched from the Cargo Key Receipt pattern used as a basis for electronic

procedures (*infra* Ch 6), viz that the tacit declaration of assigning the right of control by the handing over of a duplicate can be substituted by the *express declaration* to the same effect. In the form suggested it is expressly stated that the document is not a document of title and that the goods shipped thereunder will be delivered when they have arrived at the place of delivery to the party who demands their delivery and can identify himself as the person either named as Consignee or authorized by the Consignee to receive the goods. A box, containing the code word NODISP, is expressly explained to mean the following. Unless the word NODISP in the box has been deleted, the following shall apply:

1. The shipper has irrevocably declared that he has assigned his right to control the goods during transport to the named consignee.

2. The carrier has agreed to hold this consignment in security and as collateral for the named consignee subject to any lien in favour of the carrier.

In a brochure informing the market it is stated, i a: "In fact, many banks accept sender's copies of waybill for land and air carriage as security during the transport, provided the banks themselves are named as consignees. The banks should feel even more secure under the system here presented, as perfectly clear stipulations regarding both right of control and manner of release of the goods are specified in the actual document and as – in addition – the document contains an express undertaking by the carrier that he will hold the goods in security for the consignee named."

So far as I know, this is the very first attempt ever made to provide a S/W with the financial function and thus broadening the area of application.

7. *Sea waybills in national codifications*

One of the earliest efforts to include sea waybills in national legislations was made by Nordic Committees in their joint draft on the carriage of goods by sea 1990. (Secs 308–309, see further the Swedish Committee Report *Statens offentliga utredningar* 1990:13, pp 166–167.)

The sea waybill is defined as evidence of a contract of carriage and receipt of the carrier's taking in charge of the goods for transport. Furthermore, it constitutes a promise by the carrier to deliver the goods to the consignee named in the document.

The consignor has the right of control to the cargo provided that he has not waived this right in favour of the consignee or the latter has not yet demanded his right to the cargo. The consignor can demand the issue of a bill of lading as long as he has not waived his right of control. Were such a change of documentation allowed at an even later stage, the functions of documentation would risk to be disturbed.

The few particulars necessary to include in a S/W are moreover specified.

Failing proof to the contrary, the S/W evidences the contents of the contract of carriage and of the receipt of the goods as described in the document.

8. *CMI Uniform Rules for Sea Waybills*

History. The starting point of the project finally resulting in the Uniform Rules on S/Ws was a CMI colloquium held in Venice 30th May – 1 st June 1983. The theme was the deficiencies of traditional documentation routines in the field of ocean carriage of goods. The colloquium unanimously agreed upon a series of Resolutions, the first four of which ran as follows:

"1. The practice of issuing Bills of Lading sets of two or more originals should cease.

2. The practice of carriage of a negotiable Bill of Lading on board and delivery of cargo against that Bill of Lading involves serious risks.

3. The practice of issuing a Bill of Lading when a negotiable document is not required should be discouraged.

4. Uniform rules for incorporation in seawaybills should be prepared and their adoption encouraged."

(*CMI Comité maritime international. Colloquium on Bills of Lading*, 1983, p 83.)

In conformity with this programme, the CMI constituted a small working group in order to explore some guidelines for the future work. In its first paper it stated that the group favoured a limitation of the Rules to cover only the documentary aspects and to leave out other matters which usually are dealt with in Standard Conditions of carriage. Such conditions had to be incorporated by a Standard Incorporation Clause. The documentary aspects would include a definition of the legal character of the S/W and its minimum particulars; the consignor's responsibility for information given in the S/W; its effects as evidence and how reservation should be made; the consignor's right of control by giving instructions to the carrier with respect to the goods; the assignment of such right of control as well as consequences of the exercise of this right. In order to show more concretely what might be the result if such guidelines were followed, the working group introduced some very preliminary rules just as an illustration to the principles advocated. (CMI Docs SWB – 1 and 2, II 84.) A preliminary questionnaire (SWB–4, XII–84) was also distributed and the answers further studied.

After this exploratory phase, the CMI – following its traditional pattern when working on international rules – created a larger International Sub-Committee to follow up the initiative already taken. (SWB–42 XI–84.) In the beginning of its work this Committee laid down some principles that correspond closely to the guidelines suggested by the preliminary group:

1. The rules should be kept simple and short.

2. The scope should be limited to problems exclusive to S/Ws.

3. The choice of legal regime should be neutral to the choice of document (the same liability as if the carrier had issued a traditional B/L, the *as if*-rule).

4. The rules should be applicable also to multimodal operations.

The national CMI associations were invited to comment upon a circulated draft, and in the light of the opinions received a first draft. (SWB–58, XI–87.) The received draft was circulated once more, and after some polishing it was handed over to the Executive Council of the CMI, which decided to produce the Draft to the CMI Paris Conference in June 1990.

Contents. The short Rules focus on the *prima facie* evidence as to the quantity or condition of the goods as received and on as being conclusive evidence of the goods as is stated in relation to the consignee who has acted in good faith. The very kernel is the shipper's right of control as well as his option to transfer this right of control not later than when the goods are received by the carrier. By using this option the same result is produced as when the duplicate of an land or air waybill is handed over to the consignee, thus depriving the shipper of his right of control. Delivery of the goods after their arrival at destination shall be made "upon production of proper identification" to the consignee claiming delivery, which means that this person has to identify himself as the named consignee. This reflects the waybill pattern as conforming to customary routines.

Evaluation. The main importance of this effort is to take away any doubt in the minds of commercial circles that it would be possible to issue W/Bs also in port-to-port shipments and consequently in multimodal carriage of goods. A kind of uniform opinion is created by the mere existence of these Rules and the recommendation to use them endorsed by such influential international organizations as CMI and ICC. The operation of merely transferring customary rules from the fields of land or air transportation to ocean transport does not need in itself more than an agreement between the parties. This is proved by the wide-spread use of S/Ws already today. But psychologically it can be felt as a relief for people involved that they now can point out some short text in print spelling out the legal effects.

9. *Elaborating the Waybill pattern*

Merely adopting the W/B pattern as used today in land and air transport, meaning to use its mechanism for releasing the goods, cannot fully meet with the requirements of international trade to use the W/B instead of the B/L when trading with goods. Some functions of a B/L can be imitated and perhaps substitute a regular paper B/L in a special field of mercantile transactions. But in other fields the W/B is not enough to constitute a practical alternative to a B/L – it offers a solution only in cases where the

parties do not intend to sell the goods when in transit to someone else. As a consequence, I have raised the question if the W/B pattern could be further elaborated in the direction of getting closer to the B/L pattern, without accepting the serious deficiency of its mechanism for releasing the goods. (See my report "Towards a transferable sea waybill", *CMI News Letter*, Special issue May 1985, p 11 *et seq.*)

Provided that *the traditional W/B pattern* is kept intact in so far that there is no change of the named consignee, the same procedure can be used as today in order to reach some degree of transferability. You can sell the goods to a new person by using the right of control, as long as the goods are *in transitu* or at least are not claimed by the named consignee at the place of final destination. If a bank is named as consignee and holds the right to control the goods in transit as well, one can ensure that no one from the outside can intervene in the performance of the contract of carriage. The real buyer of the goods is named as notify address only and has to pay the bank, which then assigns its right to demand the delivery of the goods to the buyer, who produces this assignment to the carrier and then gets the goods delivered. This procedure is standard in cases, where rail, road or air waybills are used as a basis for letters of credit. It would be technically possible to develop this technique further, meaning that the addressee transfers to another person his right to appear to the bank (*cessio*) and thus creates a chain of new persons acquiring the same right. Such a procedure imitates the further sale and purchase of a B/L. This is, in fact, not made in practice and the procedure does not create the same security as offered under the B/L system. Thus, it does not seem possible to achieve more without changing the traditional pattern.

Therefore, what is needed is *to change the name of the consignee*. This is not done under the traditional W/B pattern. In principle, however, there does not seem to exist any legal obstacle against such a *cessio*, only a very important proviso and limitation. It has already been underlined that *the right to claim delivery of the goods and the right to control the goods in transitu are necessarily linked to each other for functional reasons*. It cannot be permitted to separate these two functions by transferring them to different persons – or the whole system would immediately break down. But as long as these two functions are kept together when transferred to a new person, this clearly is a possibility. By using such a legal technique, we would open up the use of W/Bs also in cases where transferability is eagerly needed.

More in detail, such an innovation would work in the following way. By an express declaration to the carrier, the consignor (or his consignee) may at any time, from the time when the goods have been taken in charge by the carrier until they have been delivered, assign his right to obtain delivery to

a named person. The right of control and right to obtain delivery are inseparable and cannot be assigned independently from each other. If the goods carried are used as security by a bank offering a documentary credit or a collect mandate, *the bank must get notice of the assignment* (Lat *denuntiatio*). Such a procedure does not require that the bank itself is named as consignee. Now we are getting really close to the traditional B/L pattern.

Does this mean that we have succeeded in imitating all the B/L functions within the framework of W/Bs? This question has to be answered in the negative. The W/B has been transformed into a *transferable document* (quasi-negotiable paper) in the same meaning as a B/L is transferable, but it is still *a non-negotiable paper* in the strict sense of this term. The very far-reaching protection of new persons *bona fide* acquiring a B/L, labelled negotiability in a strict sense, is lacking as far as W/Bs are concerned. The liability for the correctness of the particulars included in the B/L thanks to the doctrine of estoppel is also lacking in W/Bs, documents being only *prima facie* evidence of the particulars contained under legal systems not extending the doctrine of estoppel to this type of document.

The question can be raised if this is a deficiency or not. These most far-reaching qualities of Bs/L have proved to be just those qualities that make the B/L an extraordinary efficient vehicle for fraudulent actions. (Cf, e g, the book Maritime fraud, ed *Grönfors* 1984, Gothenburg Maritime Law Association 64.) For trading purposes, interest is focused on paper documents only, living their own life when sold or purchased. As the exclusive connection with the goods carried remains the mechanism for releasing the goods *against surrender of the document only*, a mechanism which nowadays fails to work properly, with "the bill of lading crisis" as a result. Do we want to reproduce the same effects within the W/B pattern? Or would the lack of these special qualities prove to be an improvement of a new W/B created in order to meet the demands of modern trade in a balanced way? The W/B pattern focuses on the contract of carriage. The right of control combined with a possibility of transferring the rights of a named consignee to a new person, or even to more new persons in a chain, from the commercial point of view might give enough protection to enable banks and other financing institutions to accept the goods carried as security.

10. *The remaining need for the Bill of Lading pattern*

Commercial circles have expressed no interest at all in adding new functions to W/Bs in order to make them more compatible to the venerable B/L alternative for use in trading with goods carried. It can also be felt as a value *per se* to keep distance between the two main patterns, the Waybill pattern and the Bill of Lading pattern, in order to avoid confusion.

Taking this standpoint as a point of departure, we are forced to recognize the remaining need for keeping the two patterns intact. When starting the work to substitute paper procedures to electronic procedures, we thus have better try to create both an electronic Sea Waybill and an electronic Bill of Lading. This development will be reported in the following two chapters (6 and 7).

Ch 6

The Sea Waybill Goes Electronic

1. *The new infrastructure*

The paper-based distribution of transport data presupposes an efficient mailing service in order to forward the pieces of paper, as physical objects, to the place of destination in time before the goods have arrived. The paper documents preferably have to arrive well before the goods themselves. When this system deteriorates, the transport industry must search for new routines.

Modern technique now offers a completely new infrastructure, built on the combination between computerization and telecommunication. Transport data can be stored into *computers*, these can be linked together by *networks* and coordinated by *switching centers*. Such systems now offer a possibility of an almost immediate distribution of transport data, constituting an enormous progress for the transport industry. The rapid distribution of transport data is a proviso for speeding up the carriage of goods further.

There has been invested an enormous amount of work, both nationally and internationally, in search for methods to use this new technique efficiently.

When these efforts started about thirty years ago, computers were big and expensive. The natural use of of the new technique was that big liner carriers installed their own computer centers, in the beginning mostly in order to keep track on their fleet of containers in order to balance the forwarding of loaded and empty containers. Unused capacity could be used for external documentary purposes also. All new systems thus were *closed systems,* with one central computer record and terminals in all places where the carrier had his main activities.

The development towards micro-technique, however, meant that small

enterprises or even private persons could acquire their own computers. This opened up the possibility of creating *open systems*, allowing customers with their own computers to connect with other computers, to send messages and to confirm messages, even to get directly on line with carriers.

The closed systems developed various standards for computerization and communication. In open systems everyone must use the same standard, or at least standards and procedures compatible with other standards used. When one computer is connected to a great number of other computers and their records, we have further one complication because of the network problems. So many cables are necessary that the pattern will be more like snakes in a snake-pit than anything else. The solution of this problem obviously is the creation of one or more *switching centers* (electronic junctions), just like the case is in a network serving telephones.

As to the necessary common standard for computerization and communication, this problem is often referred to as the *interface problem.*

There has been a tremendous effort to achieve standardisation. One effort was made by the International Organisation for Standardisation (ISO) and aimed at Open System Interconnection (OSI). Data elements have been defined and developed by SITPRO (UK Simplification of International Trade Procedures Board) and other organisations of a similar kind, like SWEPRO in Sweden. FALPRO at Geneva has also been very active in this field. Syntax rules are presently developed within the ECE, taking into account the national experience of various countries. In the autumn of 1986, the differences between the ECE method and the US method began to be bridged by the so-called JEDI-group with the aim to creating a universal syntax and making it an ISO standard. In 1988, this work resulted in the Harmonised ECE and US Syntax Rules, known under the acronym of EDIFACT (Electronic Data Interchange for Administration, Commerce and Transport). I am convinced that anyone looking at these rules from the other side of the year 2000 will find them constituting a milestone. The dream of a common language thus has advanced a long way and will hopefully come through eventually.

As to *network problems,* a few facts might here be drawn attention to.

In Sweden, we have now in full scale operation a switching center, called Transport Data Link (TDL), later changed to Trade Data Link (TDL). Initiators were the Swedish State Telephone Services, the Port Authority of Gothenburg and the Volvo Car Company. A Board of Users were added to the TDL organisation in order to create a direct connection with the users and be informed of their ideas and wishes. The organisation is, of course, neutral to all conflicting interests of commercial life. The TDL organisation operates together with switching centres in other countries, which admits connections more or less on a global scale.

The basic function of the TDL is to operate as a mailbox. Every piece of information is electronically earmarked to arrive at the right address when passing the switching centre and is forwarded according to these electronic instructions. The electronic document as such is sent by electronic mail from shipper (seller) to the consignee (buyer) in such a fashion that it arrives well before the goods arrive. Thus, all kinds of preparatory operations can be arranged in order to speed up procedures. The relevant information necessary is electronically mailed to terminals, Customs authorities, forwarders, sub-carriers, banks, insurance companies, etc.

A switching centre, furthermore, is the natural junction where all the users of a network can adhere to contractual conditions on communication, Uniform Conduct for Interchange of Trade Data by Teletransmission (UNCID), as rules of this kind are called in an international project now under its way. In such a communication agreement the protection of trade data and other security items can be dealt with in a legally binding way. For security can be achieved not only by ingenious technical devices but also by agreements creating legal duties and offering damages for breach of contract.

As to the *electronic customs procedure*, the communication between the customers and the Customs authorities takes the shape of Customs Declarations (CUSDEC) and Customs response (CUSRES). The TDL acts as the receiving function on behalf of the Customs authorities; it authenticates the message, copies it for security reasons, makes the logging and finally puts a receipt into the mailbox of the sender and in the mailbox of the Customs authorities as well. When the customs procedure has come to an end, a final approval is sent to the customers mailbox in TDL, where the customer can pick it up electronically whenever it suits him. These facts might suffice in order to illustrate more concretely, how the customs procedure can be built into an electronic system for transport communication.

A new infrastructure for electronic procedures has thus been designed, offering an enormous potential for speeding up and facilitating administrative routines.

2. *The electronic document*

When switching over from traditional paper-based methods to electronic measures, what can we find corresponding as closely as possible to the traditional concept "paper document"? In other words, what is reasonably meant by the term "electronic document"?

In everyday language the term "document" seems to imply the existence of a piece of paper. Among lawyers the mere word is indicating a paper document, often as carrier of a considerable value in money.

In spite of this, there does not appear to exist under any legal system I know of an express requirement that a piece of paper of some kind necessarily has to be involved. A promissory note contains a promise from someone to pay a sum of money to someone, all main terms spelled out in a text. Such a legal promise could easily be written down with black ink on a white cow and still be legally valid. The main reason why we do not use such a method is, of course, that it would be most inconvenient to have one's promissory notes feeding on green pastures.

A document in a stricter sense of the word obviously refers to the promise and the information contained in the paper, in other words to the totality of what has been written down as one entity. The paper itself is only the carrier of this information, the means by which this information is distributed. With the help of mail services, the handing over of papers and the like, a network is created in order to serve the carriage of goods between two points, often at long distances, with the necessary transport data.

Today, talking about paperless transfer of transport information, we do not mean that transport documents as such are eliminated from commercial procedures, only that the traditional carrier of transport information, a piece of paper, is replaced by the record of a computer as the carrier of the same information. Paper-administrated operations are transformed into computer-based operations. The network intended to cover the carriage geographically is created by telecommunication.

This immediately leads us to two basic conclusions.

First, there exists one document only in the strict sense of the word, namely the "electronic document" stored into the record of the machine. All print-outs produced by the machine are copies of the one and only electronic document. A print-out is nothing more than a proof of what in fact was stored into the record of the machine at the very moment before the print-out was made. This basic fact has to be kept in mind. I have experienced quite a few times how lawyers arguing on computerized methods for issuing transport documents have been led astray by the idea that a print-out emerging from the machine is analogous to a traditional transport document and, in fact, functions as such. Clearly, this is not so. Print-outs can be made out any time and in any numbers and their contents might be altered as soon as the electronic document in the record is changed. All traditional paper documents are issued at the same time and contain pieces of information that basically do not change only because one original has been changed, e g by forgery. Secondly, when paper documents have been issued by the carrier, he gives them away to the shipper and to other people (perhaps keeps one piece of paper for himself as carrier's copy, captain's copy). After that he can no longer influence the contents of the document. Where an electronic do-

cument has been issued, at least in a closed system, the carrier, and he only, still holds access to the one and only document during the whole transit of the goods.

This fact makes it necessary for the shipper to be provided with some sort of proof referring to what was stored into the computer at the time the goods were delivered to the carrier. In other words, it shows how important it is to get the first print-out – obviously paperless methods are not one hundred per cent paperless at all. *The first print-out creates the necessary link between the electronic recording and real life.* The delivery by the shipper of the goods to be carried against the first print-out means the recording of what in fact has been delivered. In this way the first print-out constitutes a receipt and as such it is a *prima facie* evidence of the particulars of the goods, just like, for example, a normal waybill.

In the light of all this, the legal concept of "document" nowadays obviously cannot be narrowed down to paper documents but must be appropriately adjusted and understood in a broader sense, meaning both any data medium (the material in, on, or by which data can be recorded and communicated, e g paper documents, magnetic tapes, etc) and a group or set of data recorded as such. (Cf Seipel, *Computing Law*, 1977, p 346.)

The very last words are here of special importance. They point to the fact that the term "electronic document" refers to the *set of data recorded as such.* The electronic document is *not tangible* and thus differs from a paper document. But somewhere runs the limit for what can be considered as *one* electronic document. What keeps together the group or set of data that together constitutes *one electronic document?*

The answer is easy enough to find: each consignment constitutes the limit, just in the same way as is the rule under traditional paper documents. Decisive is how the "document" has been filled in: one container, fifty boxes, 100 factory new cars or whatnot.

Within the framework of the research work carried out in ECE (European Commission of Europe), efforts have been made to define more concretely the legal meaning of the term "electronic document." One suggestion is the following: "An electronic medium designed for carriage and storage of data, containing data that can be read by man and machine, intended to be exchanged according to agreed standards, ensuring at all times that the data content, and the issuer, can be identified, including – when so required – the person responsible for the content of the data." (Doc ECE WP4, GE1 item 4, Hans B Thomsen and Bernhard Wheble, Legal Rapporteurs.)

Obviously, such a definition has attached more flesh to the bones. Additional elements are the purpose, the readability, the use of agreed standards, the authentication and, last but not least, the responsibility for the

contents of the data registered. All these items help to define a transport document in general, not especially what characterizes an electronic transport document as compared to a traditional paper document. Only one addition has a bearing on the special character of an electronic document, namely the element of readability. According to the suggested definition, it is enough that the document is readable at least by machine. Here we are back to the main difference between paper-based documents and electronic documents – this last category of documents are not tangible and consequently must be read by machine. But such an element does not have to be mentioned expressly, being self-evident as a necessary consequence of the technical method used – a print-out of an electronic file is readable by man but obviously not the electronic file itself, consisting of impulses registering numbers and symbols in a long row. Just this fact scared some actors on the transport scene and caused the addition in one international convention that the carrier (multimodal transport operator), after having taken the goods in charge, shall deliver to the consignor *a readable document* containing all particulars recorded. (The Geneva Convention on International Multimodal Transport of Goods 1980 Art 5 para 4.) Such a document can be manifested in the shape of the first print-out or the by eye readable message on the screen.

The additional elements in the definition clearly are included in the concept of electronic document, as long as you keep in mind that the traditional paper-based transport *document* is replaced by an electronic *document.* The characteristics typical for a traditional paper document still must be kept intact. What is new is only the electronic method for distributing transport data and making it possible to keep intact the legal functions of traditional paper transport documents in general.

3. *Consequences of non-tangibility*

What has been said about the electronic document immediately leads us to some important consequences. Provisions under some legal systems might create *obstacles* to the use of computerized routines.

If an international Convention on carrier's liability includes a specimen copy of the document which is mandatory to issue under the Convention, such Convention forces the parties to stick to paper documentation. In other words, all documents must be tangible. This was the case under the original version of the European Rail Convention 1890. But luckily enough this situation has changed; the model specimen was abandoned when the Convention was revised 1952.

When nowadays a traditional paper document is required, this is often

the result of rules outside the field of transportation. The oil exporter, as an example, is forced to produce a piece of paper on which a stamp indicating the payment of the export tax can be placed. Or the institute or organization financing an export transaction requires the possibility of scrutinizing a set of paper documents in order to give its consent to the disbursement of a loan already granted. Thus, the World Bank follows a complicated procedure of disbursement operations. (As an example can be mentioned that the World Bank, Washington DC, has issued a booklet of 58 pages, containing all sorts of formalities and provisos, *Disbursement Handbook*, 1986.) By special regulations of this kind the parties in practice might be forced to adhere to old paper routines – as always, he who sits on the money can be as formal or as liberal as he wants. Hence, in such cases it seems advisable to stick to the old routines.

However, situations like these are rare, luckily enough. Generally and for all practical purposes the legal systems applicable do not create any significant and unavoidable obstacles to computerization of documentary routines.

The shift from tangible paper-based documents to non-tangible electronic documents creates the following difficulty, however.

Pieces of paper like physical objects can easily be handed over from one person to another, but you can never hand over a piece of the computer in the same way. A piece of paper as carrier of the document in a strict sense, i e the message written on it as an entity, is a handy physical object in everyday life, a computer is not. Instead of a *traditio* there still is the method of *denuntio* left, perhaps combined with a public registry of some kind. (Cf Reinskou, *Bill of Lading and ADP, Description of a Computerized System of Carriage of Goods by Sea*, ECE TRADE/WP4/R 159, November 12,1981, also published in *Journal of Media Law and Practice* 1981; and further Henriksen, *The Legal Aspect of Paperless International Trade and Transport*, 1982.) One has to find ways of translating traditional paper procedures into the computerized techniques offered, without loosing any of the legal functions involved.

Easier to solve is the following consequence of non-tangibility. Reservations like "4 boxes in dispute" or "rusty iron" are written down on paper documents with a pencil. This cannot be done on a print-out as you can have as many print-outs as you want in a second just by pushing a button. In order to insert a reservation in the electronic document itself you have to use the keyboard of the machine itself and thus change the particulars of the electronic document.

Further, *the choice between the B/L pattern and the W/B pattern* as a model for designing a computerized electronic system must be influenced by the non-tangible form of the electronic document. This line of thought has

been rather extensively explained by one very experienced specialist, working within the P&I Container organization: "In times of yore when transits took much longer than they do today and communication was essentially paperborne, a document of title: a cheque for the goods was a prerequisite to a safe international transaction, guaranteeing to the buyer that he would get his goods and to the seller that he would get paid. Such concepts today are as outdated as the horse and cart but still govern international trade involving seabourne carriage. If air, road and rail can operate without a document of title why can't sea and, if it can, how can the security of the documentary credit process be retained without a document of title? It is necessary to address this problem if seabourne carriage and documentary credits involving this mode are to benefit from Electronic Data Interchange (EDI) systems, as the one thing EDI cannot do is to produce a document of title in tangible form at a location remote from the message sender. Thus, if the full advantages of EDI are to be realised in seabourne carriage and documentary credits, a way needs to be found of achieving the requirements of the parties concerned without the use of a document of title." (John W Richardson, *Non-negotiable transport documentation*, 1989, mimeograph.)

This does not mean that the B/L pattern is impossible to translate into an electronic procedure – the problems connected with such an effort will be discussed in the next chapter. But it does mean that the W/B pattern offers a more easily adaptable pattern as long as electronic methods are concerned.

4. *The law of contracts in an electronic world*

The law of contracts is created on the basis of traditional paper-based systems for distribution of data and messages with the help of mail services. It is obvious that this infrastructure has influenced or even decided the design of the legal rules. Documents are legal proofs of declarations of intention and the element of will behind is looked upon as the legally relevant factor. A declaration of intention manifested by a paper document sent by mail offers some problems: it is not immediately known by the sender when it has reached the receiver; in principle, it is forwarded at sender's risk; it might contain unclarities or even misrepresentation; it might take a considerable time and work to clear the situation up; etc.

The new electronic routines are changing this situation in a radical way that appropriately can be described as the creation of a completely new infrastructure. The interchange of messages is carried out almost immediately. Upon receipt of a message, containing e g a booking order, a message in return is transmitted (functional acknowledgement by the machine), which verifies that no syntactical errors have occurred. Immediately the sender knows for sure that the contents in the message has reached the

receiver. After having received the details and determined the acceptability of the conditions, the receiver in his turn transmits his confirmation of the terms, and the original sender then sends a functional acknowledgement by the machine back to the receiver. In a fully automated environment trading partners have developed application software programs which eliminate human decisionmaking with respect to particular transactions. By accepting standard contract rules such trading partners mutually agree that the mere electronic interchange of data shall give rise to contracts as valid and binding as those formed by the exchange of traditional paper documents.

The ability to immediately confirm, by return message, that the receiving party has received the original message and that no errors or omissions occurred in this transmission is a great achievement for international trade. It is possible to resolve immediately ambiguities or misunderstandings, as well as errors in the communication process. Legally this situation resembles the case where an offer is made *inter praesentes* or by telephone orally; according to sec 3 in the Scandinavian Contracts Act such an offer must be accepted immediately. (The same solution in Restatement (Second) of Contracts, 1981, sec 64. Cf *The Commercial Use of Electronic Data Interchange*. A Report Prepared by the Electronic Messaging Services Task Force, American Bar Association 1990, pp 29 *et seq*.)

One consequence of this change of legal infrastructure is that parties must agree on what constitutes an acceptance and thus binds the parties by a contract. The mere acknowledgement of an electronic offer must not be sufficient; an act of acceptance, after an appropriate period of time or an agreed period of time, is required by a defined electronic acceptance document, prescribed by law or by an electronic data interchange trading agreement properly received in return. By preserving the ability of the parties to define by negotiation what constitutes an appropriate Acceptance Document, the necessary flexibility for the commercial life to vary the modes of binding each other by contract has been taken into account.

Of course, contract rules developed with one infrastructure as the firm basis cannot be expected to work in the same way after this infrastructure has been radically changed. Some details might be equally adaptable in the new environment. In paper-based routines it is important for lawyers to be able to decide when a message has been delivered (Sw *kommit till handa*) but not yet examined by the receiver. The "electronic mailbox", e g operated by a data switching center and giving the receiver access as soon as he wants to empty his mailbox, obviously has the same legal status as letters which are delivered to the receiver's office address but the envelopes remaining unopened (*op cit*, p 36). But, as we have observed repeatedly, often severe

problems appear when we try to translate paper-based routines to electronic routines.

In some cases, the legal texts have to be changed to permit trading activity to take advantage of the new technique. In other cases, it might be sufficient to interpret existing rules in a way that permits them still to work efficiently. General conditions as well as special applications might to some extent "do the trick."

5. *The twilight zone*

No legal definition, however ingenious, is capable of solving the legal problems completely without changing the system of rules applicable. Simply by defining the concept of electronic document you cannot force new electronic routines to function with all paper-routine based rules staying unchanged. But there exists a twilight zone, a territory between clear and dark cases where adaption of old rules to new methods do not necessarily require intervention by the legislator but can be made merely by construction. Another illuminating example concerns the rules on evidence. Can a print-out be admitted in court as the proof of the existence and contents of the electronic document as recorded in the machine? The print-out is but a copy of the one and only original, viz the electronic document, but this original can never be produced in court in the same sense as an original piece of paper can be produced.

Being a typical Scandinavian lawyer, I am an extraordinarily pragmatic man. I do not want to watch overcautious lawyers building up unnecessary obstacles to practical solutions. Scandinavian courts freely admit all sorts of evidence; they make it their own task to evaluate the proof produced as to its individual and relative weight. The computerization of transport documents does not represent any special problems as far as the procedural rules of evidence are concerned.

However, the legal system in a country like England has the tradition of a very elaborated and detailed regulation of evidence. Whether the computer-readable form is recognised as carrying the same weight as paper-based records can be disputed. The intricacies and the technicalities of the English rules on evidence could have spin-off-effects of an unwanted character. At least the computer-based record might be presumed to be a correct and accurate reproduction of the original document or recording of the information it relates to, unless proof is given to the contrary. (Bergsten, *Paperless system – the legal issues*. Paper prepared for the Cambridge conference September 2–5, 1986, here citing Council of Europe, Recommendation No RC 8 (1) 20, art 2, of 11 December 1981.)

Perhaps it will be necessary for some national legislators to take initiatives in order to clarify some of the problems caused.

The value of a correct understanding of what is meant by the term "electronic document" is that it points out the direction in which to search for an appropriate solution. In order to replace paper-based routines by electronic routines you have to start out from traditional routines and ask how these could be replaced electronically. In other words, the old routines have to be translated into electronic measures and the replacement of tangible documents must be made by non-tangible documents. This procedure can be described as a *procedure of translation.*

Such a procedure is a very delicate task. When technicians talk directly to lawyers, all sorts of misunderstandings are created. The two *métiers* are talking widely differing languages and do not mentally operate on the same level. There has emerged a need for an intermediary branch in science placed between computer engineering and electronic data processing (EDP) as used for administrative procedures. This intermediary branch is often called *datalogics.* Its actors aim at understanding the wishes and messages of administrators and translating these messages into a language understandable by technicians, and vice versa, hereby acting as interpreters.

One example of the translating procedure and how it works relates to signature. A traditional paper-based document is signed by somebody with the help of a pencil. What is the purpose of this signature? The purpose is that of authentication, which means that the paper document has been issued by someone authorised to do so. In this way the paper document proves that it emerges from the right source and contains the correct information.

Can this authentication in handwriting be replaced by some sort of an electronic signature? Of course, there do exist many methods, the most primitive one perhaps being the answer-back (call-back) system: when contact has been established with the right computer-base, this is confirmed by an acknowledgment message, like a special symbol appearing at the sender's screen. And there exists a variety of more sophisticated systems for establishing electronic signatures, using pass words, encryption keys or telemanouvered machines for signature. All these methods have one thing in common: they are much more reliable than the traditional signature in handwriting and far more difficult to forge.

Against this background, is it necessary to change existing legal texts in order to permit electronic authentication? If you are of a practical and broadminded nature, your answer will of course be No. You simply construe "signature" as referring to "means of authentication" of all sorts. But if you are a very cautious lawyer, anxious to keep within the literal limits of the phrase used and not allowing new wine in old bottles, you might feel uneasy

when using an expression like "the handing over of a signed bill of lading." You might add that new Conventions like the Hamburg Rules 1978 and the Geneva Multimodal Convention 1980 contain an express rule (Art 14 para 3 and art 5 para 3 respectively) stating: "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, 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." Instead of using a phrase like "hand over a signed bill of lading" you could say "issue a bill of lading" or some words to the same effect, more neutral in relation to the question of signature.

6. *The importance of a careful translation*

The task of translating paper routines into electronic routines is an extremely delicate one. It is necessary that the translation is correct. If not, the results achieved might lead to extremely regrettable consequences.

One illustrative example offers the construction of the function *right of control.* This right is tied to the possession of one special document, the duplicate (or first copy). In land and air transportation specialized rules have been introduced by the law merchant, and further codified in international conventions and national laws based on these. (*Supra* 3.3–5.) As soon as the consignor hands over this document to the consignee, he is no longer entitled to use his right of control to the goods *in transitu.* If a bank financing the sale with the same goods as security and holds the duplicate, it can be sure that no one will interfere with the performance of the carriage as contracted for. Now, which is the character of this prerequisite of possession? Such prerequisite of course presupposes a tangible document. But the situation obviously is not the same as *against surrender of the document,* the distinguishing quality of the B/L pattern. (*Supra* 1. 4–5.) The handing-over of the duplicate must be characterized as an *implied declaration of intention* by the consignor, by which he assigns his right of control in favour of the consignee. Such a declaration can be replaced, *a fortiori,* by an *express declaration* by the consignor, stating that he irrevocably assigns his right of control in favour of the consignee. The Nedlloyd Sea Waybill explains this in the written text: "Should the consignee require delivery to a party and/or premises other than as shown above in the Consignee box, then written instructions must be given by the consignee to the carrier or his agent. Unless the shipper *expressly waives his right to control the goods until delivery by means of a clause on the face thereof* (italics added), such instructions from the consignee will be subject to any instruction to the contrary by the shipper." This can thus be made by some short code word, like NODISP (see *supra* 5.6), capable of being included in the non-tangible electronic document. (The first time I

launched this idea was in a paper with the title "Förfoganderätt och kreditsäkerhet", published in *Festskrift till Rodhe*, 1976, pp 217 et seq, esp at p 229–230. See later on e g Bravo Vocos, "La carte de porte maritimo" in *Annuario derecho maritimo* Vol 7, 1989, p 249.)

A waybill is not only serving as a carrier of a message, a declaration of intention being written or printed on its face, but also constitutes a physical object, just like a table or a share certificate (one of which can include many "shares" in the meaning "parts" of a corporation). Aunt Agatha's antique cabinet can be pledged in security for a loan; likewise some shares can be handed over to a bank as security. If the waybill is looked upon as a physical object and the rules on such objects are applied, it would mean that the possession of the waybill has to be combined with a declaration of intention by the possessor, stating that he holds this document (which has been pledged by the buyer as owner) as security and as collateral for the bank as Consignee. The least common denominator for making this work under leading legal systems is an express acknowledgment that the possessor (third party) holds the goods on behalf of the pledgee. (See the comparative revue by Rodhe in *Modern Transport and Sales Financing*, ed Grönfors 1974, Gothenburg Maritime Law Association 48, pp 103 *et seq*. Reprinted in Rodhe, *Studier i bolags- och krediträtt*, 1989, pp 58 *et seq*.) A carrier, however, does not hold the transport document as a physical object as security but uses the rules concerning the right of control, as has just been shown. On the other hand, the carrier has *the goods carried* in his possession, just like the bank has the shares in its possession. This might be the reason why banks have argued that they need both the right of control as following from the contract of carriage and an express declaration from the carrier that he holds the goods carried as security and as collateral in favour of the bank having a lien on these goods. (See further *infra* 6.7.) Either set of rules would suffice, but using both sets of rules at the same time seems to be the consequence of an imperfect translation from paper routines to electronic measures. When the document as a tangible object disappears, the attraction of lawyers suddenly is caught by the possession of the physical goods in transit as a "substitute" – in spite of the fact that banks already are well protected and the goods effectively are locked up by the rules concerning the right of control.

7. *Cargo Key Receipt*

This system was designed on the basis of the ACL Datafreight Receipt System (cf *supra* 5.1) with a view to making it possible to use in cases of documentary credit and collect mandate. Thus, the W/B pattern has been adopted. The following elements have been additionally included:

(a) The buyer's bank, who has opened the documentary credit, is named as consignee.

(b) The consignor's NODISP declaration means that the seller in his capacity of party to the contract has irrevocably abrogated from his right of control to the goods during transit in favour of the consignee (the buyer's bank).

(c) The carrier's CLEAN declaration, meaning that the carrier, after having as customary from the outside inspected the goods taken in charge for transportation, has entered no reservation (like "2 bags in dispute", "rusty iron").

(d) The carrier's SECURITY declaration, meaning that he holds the consignment as specified in the receipt in security and as collateral for the bank named as consignee.

All particulars stored into the machine are forwarded from the place of departure to the place of destination by means of telecommunication. The invoice and other commercial documents are sent directly from the seller to the buyer.

The combined procedure of showing the bank as a consignee on the W/B and having the carrier giving his security declaration might astonish. It was meant to constitute an extra security for the bank. The real explanation might be derived from some misunderstanding in the translation procedure, such as just has been mentioned (*supra* 6.4). If the bank does not want to appear as a consignee on the face of the W/B, the actual consignee can be shown instead and the W/B claused to give the bank a lien. Such a lien clause might read: "Delivery of the goods represented by this W/B can only be made against written authority to do so from the X bank who has a lien on these goods." Hereby the bank is also offered the control it needs.

As there does not exist any duplicate, the one and only document is the non-tangible electronic document. The complete system has been successfully tried out in full scale but is not yet regularly used. All details and further information can be found in my book *Cargo Key Receipt and Transport Document Replacement* (1982, Gothenburg Maritime Law Association 63). It has been said that the weakness of this system is that it does not provide a document of title and consequently is unsuited to situations where the consignee intends to sell the goods during transit. (*Wilson*, Carriage of Goods by Sea, 1988, pp 162–163.) This is not a valid argument, as *the system* was *never intended for those cases.*

Ch 7

The Bill of Lading Goes Electronic

1. *The shift to the Bill of Lading pattern*

We have already (*supra* 5.10) found that the commercial world claims the necessity of retaining the W/B pattern as well as the traditional B/L pattern and thus wants to keep the traditional line of distinction between these two patterns. As a consequence, there seems to remain a need for an electronic B/L with the full legal effects of a traditional B/L.

In order to comply with this wish, it seems necessary to create an electronic B/L. This is an even more delicate task than to base oneself on the W/B pattern.

Some have voiced the view that the task must be virtually impossible. Pieces of papers as carriers of legal information and functions must be translated into electronic messages. How can the possession of a tangible and unique piece of paper be converted into a non-tangible electronic message that can be possessed within the same meaning?

2. *The paper Bill of Lading original as a document of title*

The starting point when trying to design an electronic B/L is of course the fact that the paper B/L has acquired the quality of a document of title. This development finally came to an end in the previously cited decision by the House of Lords, *Lickbarrow* v *Mason* (1794) 5 TR 683, see supra 1.4 *in fine*.

In many textbooks, the term "bill of lading" is used with reference to documents issued even before the year 1794 – documents from the medieval ages or even from ancient Rome. (Cf *supra* Ch 5.) This seems to be in contradiction to what has just been said. Dealing with bills of lading, Coing states that a bill of lading also before 1800 *vermittelt Besitz an den Waren; es*

repräsentiert sie. But in a footnote he admits that this *was allerdings bestritten.* (Coing, *Europäisches Privatrecht 1, Älteres Gemeines Recht (1500 bis 1800)*, 1985, p 546.)

The term "representative" is here used in a slightly different meaning. An ordinary negotiable document is negotiable in the sense that the debtor can pay the person producing the document and thus be sure that he will not be forced to pay a second time. The bill of lading automatically falls under the legal rules on negotiable instruments, like some types of promissory notes. Such documents concern the payment of a sum of money, a generic thing, not the delivery of an individual thing: the goods as described in the document and as received by the carrier. Furthermore, typically it involves only two actors (the creditor and the debtor), not three actors one of which is an intermediary like the carrier. The representative function of a negotiable bill of lading is created by other rules, viz by special rules on contracts of carriage.

This observation is an important one. As all paper documents, negotiable as well as non-negotiable, fall under the set of legal rules governing such documents as physical objects, a bill of lading is *per se* also included in this group – although the most characteristic rule for a bill of lading (delivery only against surrender of the document, in other words the representative function) is derived from another set of rules: the rules on contracts of carriage.

The legal effect of representativity, the document of title-function, is tied to the handing-over of a tangible physical object from one person to another.

3. *How to translate the document of title-function with the help of electronic measures*

We have previously found that the electronic document as such is non-tangible (*supra* 6.2) and that this is an important reason for avoiding complications by choosing the W/B pattern as the basis for computerized routines (*supra* 6.3). But this does not necessarily mean that the B/L pattern could never be used as a model, if important reasons were advanced in favour of such a scheme. But then the crucial problem is to find an adequate translation electronically to the possession of a unique piece of paper in the sense of a tangible object.

The possession of a duplicate waybill can be transscribed as equivalent to an express declaration of intention, meaning that the consignor irrevocably assigns his right of control in favour of the consignee (*supra* 6.6).

The possession of a bill of lading creates the representative function as one element of the special mechanism for releasing the goods: the simultaneous exchange of the original B/L against the goods in the consignment. The original B/L is thus the key to the goods, and this has to be electronically

imitated as closely as possible. As long as you use a unique piece of paper or a chip card, that has to be forwarded and handed over to the buyer, you have not improved the situation one bit compared to the use of mailing Bs/L originals. The new infrastructure will be intelligently used only when you create an equally unique *electronic key* necessary to produce in case you want to get access to the record of the computer in order to change the name of the consignee. The key must be truly electronic and possible to transmit over a network system.

The first time an adoption to the idea of a key, giving access to the record of the computer, was mentioned, was in the Montreal Protocol 1975 to the Warsaw Convention. These provisions make it possible to use electronic methods in replacement of air waybills, as such documents do not include the representative function of bills of lading and consequently do not require the production of an original document in order to be entitled to claim the goods at the place of destination. The key giving access to the record is not designed to include complete secrecy. But this can be done by adopting encryption methods or procedures. It allows the possession of the *unique electronic key* to deal with transactions in transit in just the same way as when an original bill of lading is used. It is not the original B/L that is used but a unique electronic key that gives access to changing the name of the consignee in the electronic document and thus constitutes, just like the traditional paper original of the B/L, "the key that alone can give access to the hiding-place where the goods are stored." (*Nytt juridiskt arkiv*, Vol 2 1936, pp 533. Cf *supra* Ch 1.5.) The non-tangible form of a B/L thus provides a non-tangible form of an electronic key that overcomes the difficulty of an instantaneous physical forwarding of a unique object, a physical "thing." This translation from paper routines to electronic routines seems to be quite appropriate.

4. *Other proposals for creating electronic bills of lading*

Sometimes it has been suggested that one print-out should be especially earmarked and treated as the original bill of lading. By this technique all traditional rules could be kept intact and no trouble would be caused as to traditional legal rules. However, this solution does not overcome the bill of lading crisis.

If you tie the legal effect to a unique piece of paper, you do not adjust yourself to the advantage of new technology – the same difficulty exists as under the traditional paper bill of lading original, which has to be mailed and thus arrives too late at the place of final destination. The critical character of the bill of lading is conserved (Doc ECE TRADE/WP 4/R 422, 30 June 1986 Cardis DATABLADING). If you tie it to the possession of a chip card, the

result will be just the same. (Doc ECE TRADE/WP 4/R 397, Microcircuit Cards, "Chipcards.")

The INTERTANKO project, adapted for the special need of the oil trade, offers an example of combining various methods. It started out by the issue of a traditional B/L, forwarded by carrier to a central registration authority. Thus the B/L, the most movable document of all, was immobilized by being locked up in a safe. The authority had to register every transaction by endorsing the B/L. A teleprinter message from the authority to the Master of the ship constituted "the green light" to deliver the oil to the last purchaser, at the same time the person entitled to the oil cargo. This last operation seems quite inconsistent with the kernel of the carrier's promise, viz to deliver the cargo only to the holder of one original B/L against surrender of the document. Apart from this, the courier services necessarily seems rather primitive compared to the information technique available today. The idea of creating a large registration center for world oil trade was found rather dangerous as to the need of security for the trade and the need for protecting the interests of individual oil traders. It is easily understandable that the scheme, irrespective of its merits, did not succeed in getting the acceptance of international trade and banking. From a principal point of view the proposal was built on an imperfect translation from papers to electronics (*supra* 7.2). If you start by using traditional papers, you are forced to use the same technique for releasing the goods by the final delivery.

5. *Electronic documentary credits*

A flow of cargo in one direction without a corresponding flow of money in the opposite direction is of no interest for the international business community. All electronic systems for transport documents thus have to be supplemented by electronic documentary credits. Aware of this need, the ICC (International Chamber of Commerce) Commission on Banking Technique and Practice has set up a special committee to discuss the need for the paperless credit, and come up with possible solutions.

A letter of credit is based on the following principle: "If you fulfil certain conditions with regard to documentation, the bank will pay."

The information has to be transformed into electronic messages and confirmations. The collected bundles of papers for export and import, mailed to and between banks, must be avoided and the number of facts (amount of information required) kept down to a minimum level – this is a since long wanted side-effect of introducing electronic procedures on this field. An effect of avoiding the handling of paper documents in at least one of the involved banks in the documentary credit business is the experimental "Quick Documentary Credit (Scandinavian Banking Partners)." Facilita-

tion like this shows that it must be possible to streamline procedures, also by bringing down the amount of information and not sending presented copies to the issuing bank. It might also be looked upon as a step in the direction of electronic procedures, though it has been developed only with paper-based methods in focus.

6. *CMI Rules for Electronic Bills of Lading*

History. The idea of designing a separate set of rules for electronic documents emerged, as a result of a US initiative, from the CMI work on creating uniform rules on sea waybills. The international sub-committee did not find sufficient time to go deeper into this problem. The Executive Council of the CMI consequently separated the problems of using electronic methods from the sub-committee and entrusted it to a separate sub-committee with the short name *Electrodoc.*

This group rapidly shifted *to the B/L pattern* as the basis for its further work and aimed at the creation of an *electronic Bill of Lading.* One reason was the need felt by commercial circles to have access, also electronically, to all the legal functions traditionally connected with a full-fledged B/L. Another reason might have been that maritime lawyers from education have a tendency to think in terms of Bs/L rather than W/Bs.

After only two sessions and some further intermediary meetings by a working party, a draft was introduced at the CMI Conference in Paris, June 1990. After a few days of intense work they were further refined and adopted.

Contents. These rules are considerably more lengthy than the Uniform Rules for Sea Waybills as it was necessary to explain and also spell out some technical conditions upon which the rules rely and operate.

The legal core of the Rules is the concept of "Holder", he who is entitled to the right of control and transfer. He is said to be the only party who may, as against the carrier,

(1) claim delivery of the goods;

(2) nominate the consignee or substitute a nominated consignee for any other party, including itself;

(3) transfer the Right of Control and Transfer to another party;

(4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of carriage, *as if he were the holder of a paper bill of lading* (italics added).

As there is no tangible piece of paper involved in the electronic procedure, the Holder has to have in his possession instead a *Private Key*, meaning "any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission." The possession of a unique and tangible piece of paper

is in this way substituted by the exclusive and personal knowledge of a non-tangible secret code which alone gives access to the goods carried.

All other rules, e g the right to opt out of the electronic system at a later stage, are implementations only to this basic principle.

Evaluation. Like the case with the Uniform Rules for Sea Waybills, these Rules for Electronic Bills of Lading have the special quality of removing possible doubts in the minds of commercial circles as to the possibility of using such Bs/L. The rules create *a recognized system* of communicating transport data and legal functions without using traditional paper documents. Such an achievement is a big step forward, especially in relation to those experts in the field claiming the impossibility of reaching this goal.

Another important merit of these Rules is that they make it possible either to use a depositary (central registry) as an intermediary (like in the SEADOC project) or just to work in open systems directly with the parties involved. The choice of depositaries is left to the persons acting on the market and not prescribed by the technical restrictions of the system itself.

If customs authorities invite actors to communicate with them in an open system, this will very swiftly increase the use of electronic procedures.

Nothing in the Rules demands the banks to accept liability for freight and other things. Banks are free to decide if they want to be named as consignee and in this capacity accept consequential liability or if they prefer to act as intermediary for the "real" consignee as agent only.

Ch 8

From Translation to Constructive Thinking

1. *The end of the beginning*

When luck changed in the course of events of the Second World War, people said that this probably would prove to constitute the beginning of the end. Sir Winston Churchill, however, preferred to coin the phrase "the end of the beginning".

These last words seem to give a most accurate description of where we stand today in the development of changing paper-based procedures into electronic methods for documentation in the transportation industry. The Uniform Rules were designed on the basis of accepted commercial patterns and the experience of world trade up to now. Nothing of this material was queried. Instead, the purpose of the new Rules were to translate paper-based methods into electronic procedures without changing traditional routines. The Holder of the Private Key is said to be in the same position as if he were the holder of a paper B/L. The receipt message shall contain, i a, representations and any reservations, in the same tenor as would be required if a paper B/L were issued. This restricted attitude has been considered to have an "educational value": *all functions remain as they are*, the only change being that papers are not any more carriers of information and of legal functions but are substituted by computers, networks and switching centers fulfilling the same function.

The method of pure translation has thus come to an end. But things have to develop further than this.

2. *The need for new commercial patterns*

The old commercial patterns were created for the paper world of 1900. To preserve them by still building on them in the electronic world of today and tomorrow must basically be to turn things upside down. Commercial customs must match the new infrastructure of electronic procedure.

Electronic routines require a completely new infrastructure, operating by interchange of messages. This new pattern has to form the *starting point* for developing new and appropriate commercial usages in order to speed up international trade. The first time I pointed out that this fresh approach is necessary and that time now is ripe was in a lecture held before the Swedish Royal Academy of Sience when the Söderberg Prize was awarded in March 1990. (Published in *Svensk juristtidning* 1990, pp 241 *et seq.*) Almost at the same time the American Bar Association published its *Report on the Commercial Use of Electronic Data Interchange* ending with these words: "Work conducted by the Task Force has convinced its members that technology will continue to challenge the existing boundaries of commercial law by altering the commercial practices which are purportedly within the scope of regulation. Although this Report, together with the Model Agreement, may represent a first step, and will hopefully contribute to further efforts dealing with EDI, new electronic commercial practices will continue to evolve which will require new analysis. The Task Force endorses the continued effort and recommends the development of an ongoing comprehensive strategy to accomplish appropriate legal reform." (*The Commercial Use of Electronic Data Interchange.* A Report. American Bar Association 1990.)

In an important book on EDI, the same idea is stressed by those words: "It is an interesting phenomenon that with the emergency of EDI there remains an implicit assumption that we should preserve all the rules governing documentary transfers and adapt these to the EDI mode. This assumption is one which should be resisted. There is little point in straining to adapt existing legal rules to EDI without first considering whether EDI might not provide an alternative approach which enables some of those rules to be dispensed with." (Bergsten & Goode in *Trading with EDI. The Legal Issues*, ed Hans B Thomsen and Bernard S Wheble, London 1989, p 144.)

So curtain raises for the second act of the drama: the creation of new commercial patterns to match the new electronic infrastructure. This will probably be a time-consuming procedure in itself, because commercial patterns have a tendency to live much longer than underlying reasons for their existence. But eventually practical need uses to prove its value by winning the game; and it certainly will do this once more.

Appendices

Appendix A

CMI Uniform Rules for Sea Waybills

1. *Scope of Application*

(i) These Rules shall be called the "CMI Uniform Rules for Sea Waybills".

(ii) They shall apply when adopted by a contract of a carriage which is not covered by a bill of lading or similar document of title, whether the contract be in writing or not.

2. *Definitions*

In these Rules:

"Contract of carriage" shall mean any contract of carriage subject to these Rules which is to be performed wholly or partly by sea.

"Goods" shall mean any goods carried or received for carriage under a contract of carriage.

"Carrier" and "Shipper" shall mean the parties named in or identifiable as such from the contract of carriage.

"Consignee" shall mean the party named in or identifiable as such from the contract of carriage, or any person substituted as consignee in accordance with rule 6 (i).

"Right of Control" shall mean the rights and obligations referred to in rule 6.

3. *Agency*

(i) The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do.

(ii) This rule shall apply if, and only if, it be necessary by the law applicable to the contract of carriage so as to enable the consignee to sue and be sued thereon. The consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title.

4. *Rights and Responsibilities*

(i) The contract of carriage shall be subject to any International Convention or National Law which is, or if the contract of carriage had been covered by a bill of lading or similar document of title would have been, compulsorily applicable thereto. Such convention or law shall apply notwithstanding anything inconsistent therewith in the contract of carriage.
(ii) Subject always to subrule (i), the contract of carriage is governed by:
(a) these Rules;
(b) unless otherwise agreed by the parties, the carrier's standard terms and conditions for the trade, if any, including any terms and conditions relating to the non-sea part of the carriage;
(c) any other terms and conditions agreed by the parties.
(iii) In the event of any inconsistency between the terms and conditions mentioned under subrule (ii) (b) or (c) and these Rules, these Rules shall prevail.

5. *Description of the Goods*

(i) The shipper warrants the accuracy of the particulars furnished by him relating to the goods, and shall indemnify the carrier against any loss, damage or expense resulting from any inaccuracy.
(ii) In the absence of reservation by the carrier, any statement in a sea waybill or similar document as to the quantity or condition of the goods shall
(a) as between the carrier and the shipper be prima facie evidence of receipt of the goods as so stated;
(b) as between the carrier and the consignee be conclusive evidence of receipt of the goods as so stated, and proof to the contrary shall not be permitted, provided always that the consignee has acted in good faith.

6. *Right of control*

(i) Unless the shipper has exercised his option under subrule (ii) below, he shall be the only party entitled to give the carrier instructions in relation to the contract of carriage. Unless prohibited by the applicable law, he shall be entitled to change the name of the consignee at any time up to

the consignee claiming delivery of the goods after their arrival at destination, provided he gives the carrier reasonable notice in writing, or by some other means acceptable to the carrier, thereby undertaking to indemnify the carrier against any additional expense caused thereby.

(ii) The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above and the shipper shall cease to have such rights.

7. *Delivery*

(i) The carrier shall deliver the goods to the consignee upon production of proper identification.

(ii) The carrier shall be under no liability for wrong delivery if he can prove that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party.

8. *Validity*

In the event of anything contained in these Rules or any such provisions as are incorporated into the contract of carriage by virtue of rule 4, being inconsistent with the provisions of any International Convention or National Law compulsorily applicable to the contract of carriage, such Rules and provisions shall to that extent but no further be null and void.

Appendix B

CMI Rules for Electronic Bills of Lading

1. *Scope of application*

These rules shall apply whenever the parties so agree.

2. *Definitions*

a. "Contract of Carriage" means any agreement to carry goods wholly or partly by sea.
b. "EDI" means Electronic Data Interchange, i.e. the interchange of trade data effected by teletransmission.
c. "UN/EDIFACT" means the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport.
d. "Transmission" means one or more messages electronically sent together as one unit of dispatch which includes heading and terminating data.
e. "Confirmation" means a Transmission which advises that the content of a Transmission appears to be complete and correct, without prejudice to any subsequent consideration or action that the content may warrant.
f. "Private Key" means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission.
g. "Holder" means the party who is entitled to the rights described in Article 7 (a) by virtue of its possession of a valid Private Key.
h. "Electronic Monitoring System" means a device by which a computer system can be examined for the transactions that it recorded, such as a Trade Data Log or an Audit Trail.
i. "Electronic Storage" means any temporary, intermediate or permanent storage of electronic data including the primary and the back-up storage of such data.

3. *Rules of procedure*

a. When not in conflict with these Rules, the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, 1987 (UNCID) shall govern the conduct between the parties.
b. The EDI under these Rules should conform with the relevant UN/EDIFACT standards. However, the parties may use any other method of trade data interchange acceptable to all of the users.
c. Unless otherwise agreed, the document format for the Contract of Carriage shall conform to the UN Layout Key or compatible national standard for bills of lading.
d. Unless otherwise agreed, a recipient of a Transmission is not authorised to act on a Transmission unless he has sent a Confirmation.
e. In the event of a dispute arising between the parties as to the data actually transmitted, an Electronic Monitoring System may be used to verify the data received. Data concerning other transactions not related to the data in dispute are to be considered as trade secrets and thus not available for examination. If such data are unavoidably revealed as part of the examination of the Electronic Monitoring System, they must be treated as confidential and not released to any outside party or used for any other purpose.
f. Any transfer of rights to the goods shall be considered to be private information, and shall not be released to any outside party not connected to the transport or clearance of the goods.

4. *Form and content of the receipt message*

a. The carrier, upon receiving the goods from the shipper, shall give notice of the receipt of the goods to the shipper by a message at the electronic address specified by the shipper.
b. This receipt message shall include:
(i) the name of the shipper;
(ii) the description of the goods, with any representations and reservations, in the same tenor as would be required if a paper bill of lading were issued;
(iii) the date and place of the receipt of the goods;
(iv) a reference to the carrier's terms and conditions of carriage; and
(v) the Private Key to be used in subsequent Transmissions.
The shipper must confirm this receipt message to the carrier, upon which Confirmation the shipper shall be the Holder.
c. Upon demand of the Holder, the receipt message shall be updated with the date and place of shipment as soon as the goods have been loaded on board.

d. The information contained in (ii), (iii) and (iv) of paragraph (b) above, including the date and place of shipment if updated in accordance with paragraph (c) of this Rule, shall have the same force and effect as if the receipt message were contained in a paper bill of lading.

5. *Terms and conditions of the contract of carriage*

a. It is agreed and understood that whenever the carrier makes a reference to its terms and conditions of carriage, these terms and conditions shall form part of the Contract of Carriage.
b. Such terms and conditions must be readily available to the parties to the Contract of Carriage.
c. In the event of any conflict or inconsistency between such terms and conditions and these Rules, these Rules shall prevail.

6. *Applicable Law*

The Contract of Carriage shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued.

7. *Right of control and transfer*

a. The Holder is the only party who may, as against the carrier:
(i) claim delivery of the goods;
(ii) nominate the consignee or substitute a nominated consignee for any other party, including itself;
(iii) transfer the Right of Control and Transfer to another party;
(iv) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.
b. A transfer of the Right of Control and Transfer shall be effected:
(i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and
(ii) confirmation by the carrier of such notification message, whereupon
(iii) the carrier shall transmit the information as referred to in Rule 4 (except for the Private Key) to the proposed new Holder, whereafter
(iv) the proposed new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer, whereupon
(v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.
c. If the proposed new Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such

acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place, The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effect as the transfer of such rights under a paper bill of lading

8. *The Private Key*

a. The Private Key is unique to each successive Holder. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key.
b. The carrier shall only be obliged to send a Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when such Holder secures the Transmission containing such electronic message by the use of the Private Key.
c. The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security password or identification used to access the computer network.

9. *Delivery*

a. The carrier shall notifiy the Holder of the place and date of intended delivery of the goods. Upon such notification the Holder has a duty to nominate a consignee and to give adequate delivery instructions to the carrier with verification by the Private Key. In the absence of such nomination, the Holder will be deemed to be the consignee.
b. The carrier shall deliver the goods to the consignee upon production of proper identification in accordance with the delivery instructions specified in paragraph (a) above; such delivery shall automatically cancel the Private Key.
c. The carrier shall be under no liability for misdelivery if it can prove that it exercised reasonable care to ascertain that the party who claimed to be the consignee was in fact that party.

10. *Option to receive a paper document*

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. Such document shall be made available at the location to be determined by the Holder, provided that no carrier shall be obliged to make such document available at a place where it has no facilities and in such instance the carrier shall only

be obliged to make the document available at the facility nearest to the location determined by the Holder. The carrier shall not be responsible for delays in delivering the goods resulting from the Holder excercising the above option.

b. The carrier has the option at any time prior to delivery of the goods to issue to the Holder a paper bill of lading unless the exercise of such option could result in undue delay or disrupts the delivery of the goods.

c. A bill of lading issued under Rules 10(a) or (b) shall include:
(i) the information set out in the receipt message referred to in Rule 4 (except for the Private Key); and
(ii) a statement to the effect that the bill of lading has been issued upon termination of the procedures for EDI under the CMI Rules for Electronic Bills of Lading. The aforementioned bill of lading shall be issued, at the option of the Holder, either to the order of the Holder whose name for this purpose shall then be inserted in the bill of lading or "to bearer".

d. The issuance of a paper bill of lading under Rule 10(a) or (b) shall cancel the Private Key and terminate the procedures for EDI under these Rules. Termination of these procedures by the Holder or the carrier will not relieve any of the parties to the Contract of Carriage of their rights, obligations or liabilities while performing under the present Rules nor of their rights, obligations or liabilities under the Contract of Carriage.

e. The Holder may demand at any time the issuance of a print-out of the receipt message referred to in Rule 4 (except for the Private Key) marked as "non-negotiable copy". The issuance of such a print-out shall not cancel the Private Key nor terminate the procedures for EDI.

11. *Electronic data is equivalent to writing*

The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the Contract of Carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language on a video screen or as printed out by a computer. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.

37. Sandström, J.: Befälhavareavtal och sjöpanträtt. (1969)
38. Dymling, P.: Haagreglerna och kyltransporter. (1969)
39. Sisula, L.: Containerklausulen i Haag-Visby-reglerna. (1970)
40. Ramberg, J.: Cancellation of contracts of affreightment on account of war and similar circumstances. (1970)
41. Cargo insurance and modern transport. Ed. by K. Grönfors. (1970)
42. Selvig, E.: Om container-konossement og remburs. (1970)
43. Gorton, L.: The concept of the common carrier in Anglo-American law. (1971)
44. Pineus, K.: Le Droit maritime suédois. (1971)
45. Falkanger, T.: Lossing og bortskaffelse av last som er sterkt beskadiget. (1972)
46. Schadee, H.: The draft maritime code of the Netherlands. (1973)
47. Grönfors, K.: Tidsfaktorn vid transportavtal. (1974) ISBN 24-15517
48. Modern transport and sales financing. Ed. by K. Grönfors. (1974) ISBN 24-15543
49. Mustill, M.J.: Pseudo-demurrage and the arrived ship. (1974) ISBN 24-15561
50. Grönfors, K.: Transporträttsliga studier. (1975) ISBN 24-15574
51. Healy, N.J.: The New York Produce Exchange Time Charter. (1975) ISBN 24-15587
52. Pineus, K.: Ship's Value. (1975) ISBN 24-15610
53. Uppsatser i sjörätt. Av S.-G. Alm m.fl. (1976) ISBN 24-15651
54. Gorton, L.: Penningvärdeförändring och partsdisposition. (1976) ISBN 24-15646
55. Rune, Chr.: Rätt till skepp. (1976) ISBN 91-24-15661-2
56. Bernitz, U., Gorton, L., Grönfors, K.: Sjöfart och konkurrensrätt (1976) ISBN 91-24-15692-2
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60. Steneby, J.: Reseavtalet. (1981) ISBN 91-24-15933-6
61. Sundin, K.: Protektionism och bilaterala sjöfartsavtal. (1981) ISBN 91-24-15991-3
62. Rechnagel, H.: Påtalesubjektet. (1982) ISBN 91-24-16035-0
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64. Maritime fraud. Ed. by K. Grönfors. (1984) ISBN 91-24-16190-X
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69. Intermediaries in Shipping. Ed. by K. Grönfors. (1991) ISBN 91-24-16457-7
70. Grönfors, K.: Towards Sea Waybills and Electronic Documents. (1991) ISBN 91-24-16462-3

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