The surrender of the bill of lading 'duly endorsed'

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Attestation clauses commonly require the surrender of one original bill of lading 'duly endorsed' in exchange for the release of the goods. This makes considerable sense for order bills of lading as they are transferred by endorsement and delivery, but an endorsement is ineffective for the transfer of bearer and straight bills of lading. Still, the requirement in the attestation clause to surrender the bill of lading 'duly endorsed' indiscriminately applies to all different bills of lading. This article explores the ratio behind the 'endorsement' and offers an (alternative) explanation.

Introduction

The attestation clause is a common clause on the face of a bill of lading.[1] The clause certifies the issue of (three) original bills of lading, it ensures that the remaining originals stand void once one original has been accomplished, and it prescribes the surrender of an original bill of lading 'duly endorsed' to obtain the release of the goods:

> IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order.[2]

The required endorsement of an order bill of lading has never really raised any questions in literature and case law. The endorsement of a bearer or straight bill of lading, however, might seem to make less sense as its transfer does not require an endorsement.[3] All the same, the attestation clause does not discriminate between order, bearer and straight bills of lading and prescribes that they are surrendered duly endorsed in exchange for the goods.[4]

This article deals with the ratio behind this requirement. It offers an (alternative) explanation for these seemingly 'ineffective' endorsements, but also highlights a welcome side-effect for the carrier.[5] It is submitted that these endorsements do not relate to any transfer of the bill of lading, and that they are by no means ineffective. On the contrary, they are extremely effective as the receiver's signature (or endorsement) on the reverse of the bill of lading not only confirms the receipt of the goods in the port of discharge, but also reveals the identity of the receiver.

* I am grateful for Professor S D Girvin's comments on an earlier draft version of this article. Any mistakes or inadequacies, however, are and remain obviously my own.

[1] N J J Gaskell, R Asariotis and Y Baatz *Bills of Lading: Law and Contracts* (LLP 2000) 420.

[2] This is the text of the attestation clause in *The Rafaela S* [2005] 1 Lloyd's Rep 347.

[3] G H Treitel, F M B Reynolds *Carver on Bills of Lading* (Sweet & Maxwell London 2011) 229.

[4] The bill of lading in *The Rafaela S* (n 2) is in fact a straight bill of lading.

[5] The article is written from an English law perspective but with due attention to Dutch law, partly because it is instrumental in illustrating this side-effect and also because of the explicit provision in art 8:481 of the Dutch Civil Code (DCC).

The relevance of this lies in the working of the presentation rule on the one hand and the attribution of an exclusive right of suit under the Carriage of Goods by Sea Act 1992 on the other. The presentation rule requires the carrier to release the goods against the presentation of an original bill of lading. The carrier in possession of an 'endorsed' original can thus easily prove his compliance with the presentation rule, but he can also prove the identity of the presenter/receiver.

At the same time, however, the holder of the lawful bill of lading is the only one who has acquired the rights of suit and assumed the liabilities under the bill of lading contract.[6] The 'endorsed' original may therefore become a valuable asset as it allows the carrier to verify whether the claimant for damages indeed has title to sue or to establish against which of the potential defendants he should direct his own claim for damages.

The endorsement of a bill of lading

The endorsement of a bill of lading has a specific connotation:[7] it relates to the transfer of an order bill of lading. The endorsement of the bill of lading together with its delivery to the endorsee is required for a valid transfer.[8] The order bill of lading may be endorsed to a subsequent order/endorsee; however, the order bill of lading may also be endorsed in blank.

In the case of an endorsement to order, the shipper or subsequent holder to whose order the bill of lading is issued respectively endorsed then writes on the reverse of the bill of lading 'deliver to X or order',[9] or alternatively 'from me to the order of Y'.[10] The endorser then signs the reverse of the bill of lading,[11] and usually also places his company stamp for further clarity. With such an endorsement, the bill of lading remains an order bill of lading. Subsequent transfers of the bill of lading then again require an endorsement and delivery of the bill of lading.

The endorsement is required as a general rule, but this rule does not apply to the delivery by the (documentary) shipper to the party to whose order the bill of lading has been issued.[12] The delivery between these two parties is form free. The (documentary) shipper may then deliver the bill of lading without an endorsement; he just hands it over.[13] This form free delivery makes sense as the bill of lading is clearly meant to be endorsed by the party to whose order it was issued, and not by the (documentary) shipper. Nevertheless, in practice shippers sometimes do endorse such a bill of lading but without any effect.[14]

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[6] The COGSA 1992 does not treat a straight bill of lading as a bill of lading but in fact as a sea waybill; see the report of the Law Commission *Rights of Suit in Respect of Carriage of Goods by Sea* (HMSO 1992) 20. Whereas COGSA 1992 s 2(5)(a) ensures that the shipper loses his rights of suit with the transfer of the bill of lading, this is 'without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill . . .'.

[7] Other than the common meaning of the word, think for example of the endorsement as a recommendation, the practice of endorsing someone's expertise on LinkedIn or as an approval or an expression of agreement, the television spots in American election campaigns: 'My name is Barack Obama, and I endorse this message'.

[8] This practice can in any case be traced back to the 18th century, eg *Caldwell v Ball* [1786] 99 All ER 1053 and *Lickbarrow v Mason* (1794) 5 TR 683, but was probably already in place well before that time, see W P Bennett *The History and Present Position of the Bill of Lading as a Document of Title* (Cambridge University Press 1914) 11, but also the reference to the endorsement of the 1539 (straight!) bill of lading in *The Mary Martyn* in R G Marsden *Select Pleas in the Court of Admiralty* (vol I Bernard Quaritch 1894) 88–89.

[9] S D Girvin *Carriage of Goods by Sea* (2nd edn Oxford University Press Oxford 2011) 66.

[10] Or similar words provided the intention is clear.

[11] En dos = on the back.

[12] The documentary shipper is the party mentioned in the shipper's box on the face of the bill of lading. This is not necessarily the shipper in the meaning of art I(a) Hague-Visby Rules, ie the contractual counterpart of the carrier. The documentary shipper will usually be the seller in the underlying sale contract, and he needs the bill of lading to present it to the buyer's bank (under a letter of credit or other 'cash against documents' arrangement). See also Rotterdam Rules art 1(9).

[13] C Debattista *Bills of Lading in Export Trade* (3rd edn Tottel Publishing 2009) 100; M Bridge *Benjamin's Sale of Goods* (Sweet & Maxwell London 2010) 114; Girvin (n 9) 65–66; Carver (n 3) 11–12. However, the delivery needs to be accepted; see *The Erin Schulte* [2014] EWCA Civ 1382.

[14] *East West Corp v DKBS 1912* [2002] 2 Lloyd's Rep 182.

The order bill of lading may also be endorsed in blank. The endorsement then consists of the mere signature and company stamp, without any further remarks or names.[15] This endorsement in blank converts the order bill of lading into a bearer bill of lading.[16] The endorsement in blank is common practice.[17] The last holder of the order bill of lading will often be a merchant (or a bank) without any physical presence in the port of discharge. The endorsement in blank then allows (any representative of) the freight forwarder to receive the goods on his behalf. The consignee of a bearer bill of lading is then simply its bearer; that is, the party presenting the bill of lading in the port of discharge.

The endorsement of a bearer bill of lading is ineffective for its delivery. The bearer bill of lading can be delivered as any other chose in possession, ie by handing it over to the transferee without further formalities. The endorsement of a straight bill of lading is ineffective as well.[18] A straight bill of lading is not negotiable;[19] it cannot be transferred as an order bill of lading, ie by endorsement and delivery.[20] The straight bill of lading is furthermore not transferable beyond the named consignee.[21]

So far, general consensus exists in shipping trades around the world. These rules on the endorsement of bills of lading are solidly anchored in mercantile practice, recognised in case law and codified in (civil law) legislation.[22]

Several originals of the bill of lading

A bill of lading is usually issued in three originals.[23] This practice of issuing bills of lading in several originals probably surfaced at the end of the Middle Ages when the merchants stopped travelling with their goods.[24] The single registration in the Book of Lading was under these circumstances no longer sufficient; copies signed by the master now had to be distributed to the shipper, the consignee and other interested parties: [25]

[15] Although such an endorsement is not used in the commercial practice, an endorsement to Z without any reference to words like 'or order' or 'to the order of' should in theory also be possible. The rule on restrictive endorsements of bills of exchange could perhaps be applied in analogy, see Bills of Exchange Act s 35. The order bill of lading could also be converted into a straight bill of lading, just as the endorsement in blank converts it into a bearer bill of lading.

[16] Girvin (n 9) 66; J H J Teunissen and others *Tekst en Commentaar Burgerlijk Wetboek* (7th edn Kluwer 2007) 3783.

[17] Bearer bills of lading could in theory also be issued as such but they are in practice invariably former order bills of lading endorsed in blank.

[18] See the Gard Guidance on Bills of Lading www.gard.no. At clause 1.3.4.3 it is stated that 'the laws of some countries permit straight bills of lading to be negotiated by endorsement'. The Guidance does not mention which countries.

[19] Non-negotiable in the sense of *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439, ie not transferable by endorsement and handover. Bills of lading (irrespective of the form) are not negotiable instruments that can put the transferee in a better position than the transferor had, such as for example bills of exchange or promissory notes.

[20] A straight bill of lading is certainly transferable but only once, ie between the documentary shipper and the named consignee; see eg W Tetley *Marine Cargo Claims* (3rd edn Montreal 1988) 184, C Murray, D Holloway and D Timson-Hunt *Schmitthoff's Export Trade* (11th edn Sweet & Maxwell 2007) 310 and Girvin (n 9) 43. The transfer of the straight bill of lading between the shipper and the named consignee can be achieved by its mere delivery (transfer of possession).

[21] The rights under the straight bill of lading contract can, however, still be assigned as choses in action.

[22] See eg arts 3:93 and 3:94 of the Dutch Civil Code (DCC) for the delivery requirements of respectively bearer, order and straight bill of lading. The articles do not specifically refer to bills of lading, but art 8:416 DCC (on the delivery of order bills of lading) refers to these two general proprietary law articles reading respectively: 'The delivery required for the transfer of a right to bearer whereby the bearer document is under the control of the alienator, is achieved by delivery of the document in a way and with the consequences indicated in arts 3:90, 3:91 and 3:92. For the transfer of a right to order, whereby the order document is under the control of the alienator, the same applies, with this understanding that the delivery also requires an endorsement. In other cases than those provided for in the previous article rights to be exercised against one or more specific persons are delivered by a deed for that purpose, and the notification thereof to those persons by the alienator or acquirer'. The wording of these articles underscores the difference in approach between English and Dutch law. Whereas the COGSA 1992 s 5(2)(b) refers to 'completion, by delivery of the bill, of any endorsement', the endorsement is under Dutch law one of the requirements for a valid delivery, in turn required for a valid transfer of the bill of lading (art 3:84(1) DCC).

[23] The mercantile community can safely be labelled as rather conservative; see Lord Blackburn with great foresight saying as early as 1882 in *Glyn Mills & Co v East and West India Dock* [1882] 7 App Cas 591 at 605: 'because, as I suspect, merchants dislike to depart from an old custom for fear that novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out'.

[24] Bennett (n 8) 6–7.

[25] ibid 12.

> It was no longer the custom of the merchant to travel with his merchandise, which was now consigned to his factor or to his assigns. The bill of lading was no longer a part of the ship's register but a separate and independent document drawn in sets of three . . .

This practice was later codified in national legislation. The French Ordonnance de la Marine of 1681 ensured the issue of three original bills of lading in Titre II, Article III.[26] Article 509 of the Dutch Commercial Code of 1838 even explicitly prescribed the issue of at least four original bills of lading:

> Of each bill of lading at least four originals are made:
> One for the charterer or consignor
> One for those, to whom the merchant goods are consigned
> One for the master
> One for the owner or owners of the ship.

The ratio behind the issue of several originals is obvious; it diminishes the chances that the sole original is lost, burnt or otherwise damaged, and as a result can no longer be presented for the delivery of the goods in the port of discharge. Equally obvious, this practice protects the interests of the merchants. Lord Cairns said in *Glyn Mills v East and West India Dock*:[27]

> For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner, or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or the consignee.

Whereas the existence of multiple originals indeed has an added value for the merchant, it at the same time increases the risk of abuse and fraud.[28] The mere existence of multiple originals implies that several parties might claim delivery of the goods in the port of discharge.[29] Under such circumstances the carrier could easily be exposed to claims for misdelivery.

In view of these potential liabilities, the carrier needed to strengthen his position, hence the appearance of (extended) attestation clauses in bills of lading in the 16th century. Whereas the issue of the bill of lading in several originals clearly protects the interests of the merchant, the attestation clause clearly protects the interests of the carrier.[30]

Attestation clauses

The use of attestation clauses to protect the carrier can be traced back to 1539. The attestation clause on the bill of lading in *The Mary Martyn* is still rather basic:[31] it does not explicitly require the surrender of the bill of lading, but it does ensure that the remaining originals stand void once one has been accomplished.[32] The attestation clause in *The Mary Martyn* reads:[33]

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

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[26] The article prescribes that '*Chaque Connoissement fera fait triplé*', one for the shipper, one for the consignee and one for the master.

[27] *Glyn Mills & Co v East and West India Dock* (n 23) 591 at 599 (Lord Cairns).

[28] This is in fact one of the reasons for reducing the number of original bills of lading from four to three in the Commercial Code of 1927; see W L P A Molengraaff *Herziening van het Tweede Boek van het Wetboek van Koophandel* (Belinfante 1914) 169–70.

[29] Several of the classic cases also illustrate this, eg *Lickbarrow v Mason* (n 8) 683, *Barber v Meyerstein* [1870] Lloyd's Rep 4 HL 317, *Glyn Mills & Co v East and West India Dock* (n 23).

[30] The carrier was also protected under the Ordonnance de la Marine of 1681. Titre II, Article V reads: 'The Factors, Commissioners & others who will receive the goods mentioned in the Bills of Lading or Charter Parties will be held to give a receipt to the masters upon their demand . . .'.

[31] Note 8.

[32] ibid. This part of the attestation clause has hardly changed over the years; see eg the Conline Bill of Lading 1978: 'One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order. IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void'.

[33] See Marsden (n 8).

The attestation clause in this form must since then have been commonly used as Lee J is 200 years later reported to have said in *Fearon v Bowers* that the bill of lading contained 'the usual clause, that one being performed, the other two should be void'.[34]

Bowers was the master of the *Tavistock*, carrying olive oil from Spain to England and Askell was the shipper. Askell sent one original bill of lading together with the invoice to Hall, the intended buyer of the oil. Askell, however, also sent a second original bill of lading to his business partner Jones, together with a bill of exchange drawn on Hall for the payment of the purchase price.

Hall did not pay the purchase price and the bill of exchange was dishonoured. Nevertheless, Hall transferred his original to Fearon, who presented the bill of lading to Bowers in the port of discharge. Bowers, however, decided to release the oil to Jones as the holder of the second original. Sued by Fearon for damages, Bowers argued that he was free to release the goods to any holder of an original bill of lading, whether this was the holder with the best right to the goods or, indeed, any holder at all. The court agreed,[35] and held that 'according to usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done'.

The protection of the carrier under the attestation clause was at that time almost absolute. Since the bill of lading was typically issued in three (or more) originals, the carrier should not have to establish which of the holders in fact has the best title to the goods. The carrier could simply release the goods to any holder of the bill of lading, irrespective of whether the holder was entitled to the goods or not, but also irrespective of his own knowledge as to the entitlement of the holder to the goods.

The carrier-friendly judgment in *Fearon v Bowers* survived for more than a century,[36] only to be overruled in 1882 when the Privy Council held that the carrier has an obligation to deliver the goods to the rightful holder when he is or could have been aware of a subsequent endorsement of the bill of lading.[37]

The carrier's knowledge

In *Glyn Mills v East and West India Dock*,[38] Cottam & Co (or their assigns) were the consignees of a shipment of sugar, carried by the *Mary Jones* from Jamaica to London. In need of an advance from the company's bank, Cottam & Co gave (only) one original bill of lading endorsed in blank as security to Glyn Mills & Co in consideration of the loan.[39] The bill of lading contained the usual attestation clause.[40]

Once the *Mary Jones* had arrived in London, the sugar was discharged at the facilities of East and West India Dock, with the master's instruction to be detained there until the freight had been paid. Three days later, Cottam & Co reported to the dock company, produced an original bill of lading[41] and the company was duly registered as the owner of the goods in the dock's books. Cottam & Co then also paid the freight a few days later, and East and West India Dock finally released the sugar to Williams & Co against the presentation of a delivery order signed by Cottam & Co.

Glyn Mills & Co initiated proceedings against East and West India Dock, arguing that the dock company was liable for the damages. The dock company relied on the authority of *Fearon v Bowers* and *The Tigress*, but in vain. The Privy Council was of the opinion that this rule would give the master too much power; it restricted the master's freedom to deliver to any bill of lading holder and

[34] *Fearon v Bowers* [1753] 1 H Bl 365.
[35] ibid.
[36] Affirmed in *The Tigress* [1863] Bro & Lush 43.
[37] *Glyn Mills & Co v East and West India Dock* (n 23).
[38] ibid.
[39] This original in fact stipulated that it was the 'first'.
[40] 'In witness whereof the master of the ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.'
[41] This original stipulated that it was the 'second'; it was not endorsed.

held that where 'he has notice or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder, or interplead'.[42]

The decision in *Glyn Mills & Co v East and West India Dock* did not merely overrule *Fearon v Bowers* and *The Tigress*; it also provided the carrier with the necessary guidance on the delivery in good faith, ie the delivery to the holder of the bill of lading in the absence of the carrier's notice or knowledge of any endorsement. Lord Blackburn very specifically contemplated that the bill of lading itself functions as a source of such notice or knowledge:[43]

> But where the person who produces a bill of lading is one who – either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill – would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to someone else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

The obligation to deliver to the rightful holder thus effectively encompasses an obligation to deliver to the rightful and regular holder,[44] the latter being that holder to be identified by the information on the bill of lading itself. The carrier does not have to conduct a full investigation; he may assume that the holder of the bill of lading is entitled to the delivery of the goods, unless (i) he can derive from the bill of lading that the holder is not a regular holder, eg when the chain of endorsements on the reverse identifies a different holder, or (ii) when he does not act in good faith, eg when he knows or could have known that a different holder has a better title to the goods.[45]

The judgment in *Glyn Mills & Co v East and West India Dock* thus shows that the carrier cannot simply rely on the presentation of an original bill of lading alone to escape liability for misdelivery. The mere release against presentation of the bill of lading is not enough to be safe from liabilities. The carrier must also verify whether he is releasing the goods to the 'regular' holder, as indicated on the bill of lading itself.[46]

The decision in *Glyn Mills & Co v East and West India Dock* has retained its value over the years. Stuart-Smith LJ cited the relevant authorities since 1882 in the Court of Appeal judgment in *Motis v Dampskibsselskabet*, and concluded that: 'under a bill of lading contract a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided he has no notice of any other claim or better title to the goods'.[47]

The carrier does not have an absolute discretion to deliver the goods to the holder of the bill of lading of his choice. Where he has notice or knowledge of another claim or even a better title to the goods,[48]

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[42] *Glyn Mills & Co v East and West India Dock* (n 23) 591 at 611 (Lord Blackburn).

[43] ibid.

[44] Whereas the COGSA 1992 simply refers to the 'lawful' holder, art 8:441(1) DCC (see the next paragraph for the text) in fact refers to the 'lawful and regular' holder.

[45] This approach is also in line in with the rules of general contract law: a bona fide debtor relying on the authority of his creditor to collect the sum is discharged from subsequent claims for payment of the debt; see eg art 6:34 DCC: 'The debtor who has paid to someone who was not authorized to receive the payment, may against the person to whom the payment had to be made, argue that he is released from the obligation, if he has assumed on reasonable grounds that the recipient of the payment was entitled to the performance or the payment was to be made to him on other grounds'.

[46] The Dutch Supreme Court (DSC) has identified the regular holder in *The Heliopolis Star*: 'With a the bill of lading as the one at hand, which is made out to the order of a named consignee, the shipper mentioned in the bill of lading qualifies as the regular holder with respect to the carrier as long as he has not sent the document to the consignee . . . Once the bill of lading has been handed over to the consignee, the regular holder is the consignee, alternatively his order, ie the one who holds the bill of lading and to whom it was also endorsed in a regular series of endorsements (see art 8:416 in connection with art 3:93, second sentence)'. See DSC 27 January 1995, NJ 1997, 194 (ann. M H Claringbould), S&S 1995, 40 (*The Heliopolis Star*).

[47] *Motis v Dampskibsselskabet* [2000] 1 Lloyd's Rep 211 at 216.

[48] The last sentence of § 521(2) of the German Commercial Code (GCC) reads: 'However, the carrier may not deliver the goods to the rightful holder of the bill of lading if the carrier is aware, or gross negligently unaware, that the rightful holder of the bill of lading is not also the person entitled by virtue of same'.

he should either interplead,[49] or trust his judgment to deliver the goods to the rightful holder (and accept the consequences if he releases to another holder).

The presentation rule

The presentation rule allows the carrier to release the goods against the surrender of the bill of lading and at the same time requires the carrier to release the goods against the surrender of the bill of lading. Whereas the presentation rule may have had its origin in a contractual stipulation, its application now no longer depends on the presence of an attestation clause in the bill of lading.[50] The presentation rule has evolved into a general rule,[51] applicable irrespective of an attestation clause in the bill of lading.[52] For example, Article 8:441(1) Dutch Civil Code (DCC) stipulates:[53]

> If a bill of lading has been issued, only its regular holder, unless he has not become holder lawfully, has the right to demand delivery of the goods from the carrier under the bill of lading in accordance with the obligations incumbent upon the carrier; . . .

The presentation rule indeed protects the bona fide carrier, yet also imposes a duty on the carrier not to release the cargo to anyone else. This side of the presentation rule was discussed in *The Stettin*,[54] a decision handed down only a few years after *Glyn Mills v East and West India Dock*.[55] The consequences of the presentation rule in *The Stettin* were subject to German law, but the decision nevertheless has (retained) common law authority. Butt J concluded that German law was essentially the same as English law, and described the carrier's position under English law as follows:

> According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. I hold that the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted.

The decision in *The Stettin* still stands. In fact, it has consequently been affirmed over the years.[56] The recent decision in *The Erin Schulte* forms the latest contribution to the consistent series of authorities on the working of the presentation rule:[57] 'Thus the shipowner, by discharging and delivering the goods without production of the bill of lading, committed a breach of the contract of carriage contained in or evidenced by the bill of lading'.

The presentation rule is very strict, and does not allow many exceptions. The exceptions that might succeed relate to either local rules in the port of discharge requiring the carrier to release the goods other than against presentation,[58] or 'an appropriately worded clause' exempting the carrier from liability for the release of the goods against a forged bill of lading.[59]

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[49] Although interpleading is not entirely without risks either; see *The Lycaon* [1983] 2 Lloyd's Rep 548 (*Elder Dempster Lines v Zaki Ishag*).

[50] Not even in the case of a straight bill of lading, see *Carewins Development v Bright Fortune* [2009] 3 HKLRD 409.

[51] R Aikens, R D Lord & M Bools *Bills of Lading* (Informa 2008) 102: 'Therefore, as a general rule, in all cases the carrier is bound to deliver against production of the bill and is liable to the holder if he does otherwise. In such circumstances, it is reasonable that he should be immune from liability to third parties where he delivers the goods to the presenter of a negotiable bill'.

[52] Several (civil law) countries have codified the presentation rule in their national legislation, eg Russia (see *The Sormovsky 3068* [1994] 2 LR 266 at 281), Germany (see GCC § 521(2)), China (see art 71(1) MC) and the USA (see s 80110 USCA).

[53] Article 8:441(1) DCC has a wider scope than the text suggests. The regular and lawful holder of the bill of lading is not the only party entitled to the release of the goods; he is also the only party entitled to sue the carrier for damages; see the discussion later in this article of DSC 8 November 1991, NJ 1993, 609 (ann. J C Schultsz), S&S 1992, 37 (*Brouwersgracht*).

[54] *The Stettin* [1889] Lloyd's Rep 14 PD 142.

[55] *Glyn Mills & Co v East and West India Dock* (n 23).

[56] *Carlberg v Wemyss* [1915] SC 616; *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576; *Barclays Bank v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81; *The Sormovsky 3068* (n 52); *The Houda* [1994] 2 Lloyd's Rep 541; *Motis v Dampskibsselskabet* (n 47).

[57] *The Erin Schulte* [2013] 2 Lloyd's Rep 336.

[58] *The Sormovsky 3068* (n 52); *East West Corp v DKBS 1912* (n 14) and *Postlethwaite v Freeland* [1880] Lloyd's Rep 5 App Cas 599 requiring the custom to be a 'settled and established practice'.

[59] *Motis v Dampskibsselskabet* (n 47) (Mance LJ).

Other exceptions have often been argued but always unsuccessfully. The carrier releasing the goods other than against presentation of an original bill of lading cannot rely on: (i) a reasonable explanation for its absence;[60] (ii) dissenting instructions from the shipper and/or charterer;[61] (iii) the before and after clause in the bill of lading;[62] or (iv) the issue of a letter of indemnity.[63]

This strict observance of the presentation rule makes considerable sense. The bill of lading is a document of title, which has to be presented to obtain the delivery of the goods.[64] The transfer of bill of lading transfers the symbolic possession of the goods, and the transferee acquires actual possession of the goods against the presentation of the bill of lading; see eg Neill LJ in *The Houda*:[65]

> The case for the owners is based on the general principle that once a bill of lading has been issued only a holder of the bill can demand delivery of the goods at the port of discharge. It is because of the existence of this principle that a bill of lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge.

A bona fide transferee of the bill of lading relies on the unaffected working of the presentation rule,[66] and with good reason.[67] The presentation rule is open to only a few exceptions that are either circumstances beyond the carrier's control (ie local rules/customs) or that are explicitly reflected in the bill of lading itself ('an appropriately worded clause' in the case of a forged bill). In all other cases, the carrier will probably not be able to escape liability.[68]

Given the working of the presentation rule, therefore, the bill of lading does not function only as a document of title for the shipper and/or consignee but also appears to function as a document of title for the carrier. The delivery of the goods in accordance with the presentation rule provides the carrier with an original bill of lading, the best possible evidence of the release of the goods against the presentation of an original bill of lading.[69]

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[60] Suggested in *Barclays Bank v Commissioners of Customs and Excise* (n 56) and *The Sormovsky 3068* (n 52), but set aside in *Motis v Dampskibsselskabet* (n 47) and *East West Corp v DKBS 1912* (n 14). See also *Carver* (n 3) 330: 'the suggestion . . . has been rightly doubted . . .'.

[61] *The Houda* (n 56); *The Stone Gemini* [1999] 2 Lloyd's Rep 255, but the observance of such instructions will provide a valid defence in the relation between the shipper and/or charterer and the carrier; see *Chilewich v MV Alligator Fortune* [1994] 2 Lloyd's Rep 322.

[62] *Sze Hai Tong Bank v Rambler Cycle Co* (n 56); *Motis v Dampskibsselskabet* (n 47).

[63] *The Houda* (n 56); *The Nordic Freedom* [1999] 3 SLR 507; Gaskell and others (n 2) 425: 'Indeed, the existence of some form of indemnity merely reinforces a general conclusion that the shipowner will be liable in these circumstances'.

[64] This is the lenient approach of a document of title, favoured by Neill LJ in *The Houda* (n 56), but also by Lords Steyn and Bingham in *The Rafaela S* (n 1). See on the other hand *Carver* for a strict approach on a document of title at common law (n 3) 325, saying that 'Clarity would best be achieved by using the expression "document of title" in the common law sense to refer to a document which has the quality of "negotiability" (or "transferability"), and so can perform the "conveyancing" function described . . . above'.

[65] *The Houda* (n 56).

[66] In fact the courts could come to rely on the working of the presentation rule; see eg Hallgarten QC holding: 'As I see it, at this date the original documents were probably in the banking chain, but I can conclude that payment was probably made on May 28 or 29, 1993, because it was on the latter date that PFE provided the "Release/Removal Authority", identifying WM. I do not believe this would have happened without presentation of the VTP bill of lading'. See also *Sonicare v EAFT* [1997] 2 Lloyd's Rep 48 at 52.

[67] The Dutch Supreme Court judgment in *Bosman v Condorcamp* covers the same ground as the Court of Appeal judgment in *The Houda* (n 56), although the circumstances are completely different. Whereas *The Houda* relates to instructions to release without presentation, *Bosman v Condorcamp* relates to the establishment of a right of pledge on the goods by the shipper. The Supreme Court considered the pledge ineffective where it concerns the third party holder of the bill of lading acting in good faith. The Supreme Court held: 'The rule is in line with the therein regulated protection of the regular holder of the bill of lading, against whom, in as far as he is acting in good faith, counter evidence against the contents of the bill of lading is not allowed and who is not held to the contract of carriage or other agreements to which he is not a party and which do not follow from the bill of lading'. DSC 26 November 1993, NJ 1995, 446 (ann. W M Kleijn), S&S 1994, 25 (*Bosman v Condorcamp*).

[68] The Gard Guidance explicitly flags this risk under cl 1.3.4.2.

[69] *The Houda* (n 56) 541 at 556 (Millett LJ): 'He does not obtain a good discharge unless the person to whom he delivers the goods is the person entitled to them, and he has no means of satisfying himself that he is the person entitled except he produce the bill of lading. In a case like the present, where bills of lading have been signed in triplicate, the others to be void when one is accomplished, he has no means of defending himself against a later claimant who produces a copy of the bill of lading unless he has obtained a copy himself from the person to whom he delivered the goods'.

Nevertheless, whilst the original bill of lading certainly proves that the goods were released against presentation, this does not necessarily prove that the goods were also delivered to the lawful holder of the bill of lading, ie 'without notice of any other claim or better title to the goods'.[70] This is where the last part of the attestation clause on the bill of lading comes in.

Duly endorsed

The usual attestation clause requires that the bill of lading is surrendered duly endorsed. This requirement has caused some confusion, especially in relation to a bearer or straight bill of lading.[71] Bearer and straight bills of lading cannot be transferred by endorsement,[72] and the question then is how this requirement should be interpreted.

The question surfaced in *The Rafaela S*.[73] The bill of lading in *The Rafaela S* was a 'dual use' bill of lading.[74] The bill of lading could have been used as an order bill of lading but it might just as well be used as a straight bill of lading. The final qualification depended on the information in the consignee box reading: 'Consignee (not negotiable unless 'ORDER OF')'. In this case the name of J I MacWilliam Company Inc was inserted in the consignee box, without any further reference to 'order of', and Lord Bingham held: [75]

> In box (2) are the printed words 'Consignee: (B/L not negotiable unless "ORDER OF")'. In this box the buyer's name and address were inserted. The words 'order of' or their equivalent were not added. It was this omission which made this a straight bill.

In absence of a specific reference to 'order of', the default rule applies. The bill of lading is not negotiable; it is a straight bill of lading. Since it is a straight (or non-negotiable) bill of lading, it cannot be delivered as an order bill of lading, ie with an endorsement and handover. As a result, its endorsement would seem to be ineffective.[76] Why would the bill of lading then nevertheless require its endorsement,[77] and what does 'duly endorsed' in this context mean? Sir Guenther Treitel raised the question discussing the Court of Appeal decision in *The Rafaela S*:[78]

> It may be noted, in passing, that it is hard to give any effect to the words "duly endorsed" in the case of a straight bill of lading; even an order bill need not be endorsed for the purpose of transfer to a named consignee.

The carrier argued before the House of Lords that the reference to the surrender 'duly endorsed' suggested that the attestation clause exempted the straight bill of lading from the application of the presentation rule. Lord Steyn disagreed and explicitly concluded that the presentation rule also applied to this straight bill of lading. Since the reference to an endorsement could not, however, apply to the transfer of a straight bill of lading, Lord Steyn suggested that the reference only takes effect when the (dual use) bill of lading is actually used as an order bill of lading, and not as a straight bill of lading or as a requirement for their delivery:[79]

> The words 'duly endorsed' merely indicate that the bill of lading must be endorsed if appropriate or as may be necessary to perform the right of the presenting party to claim delivery.

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[70] *Motis v Dampskibsselskabet* (n 47) 211 at 216; see also *Glyn Mills & Co v East and West India Dock* (n 23).
[71] As in the case of *The Rafaela S* (n 1).
[72] See the discussion on the endorsement of the bill of lading earlier in this article.
[73] *The Rafaela S* (n 1).
[74] See in this respect Rix LJ in the appeal decision in *The Rafaela S* [2003] 2 Lloyd's Rep 113.
[75] *The Rafaela S* (n 1).
[76] *East West Corp v DKBS 1912* (n 14).
[77] The clause is cited above the introduction to this article.
[78] G H Treitel 'The legal status of straight bills of lading' (2003) 119 *LQR* 613.
[79] *The Rafaela S* (n 1) at 359 (Lord Steyn).

Sir Guenther Treitel and Lord Steyn thus both primarily appear to read 'duly endorsed' in connection with the transfer (and delivery) of the bill of lading.[80] There is, however, also another possibility,[81] ie that the endorsement does not see to the transfer of the bill of lading but that the endorsement should be read in the regular meaning of the word. The signature on the reverse does not aim to (comply with the delivery requirements to) transfer the bill of lading, yet confirms that the carrier has indeed delivered the goods against the presentation of one of the original bills of lading.[82]

Reading the reference this way, the use of the word 'endorsed' is perhaps still unfortunate but the reference now in any case makes considerable sense.[83] In fact this interpretation is fully in line with Dutch law,[84] as Article 8:481(1) DCC specifically prescribes that the bill of lading contains a discharge: 'The holder of the bill of lading, who has reported for the receipt of the goods, is held, before he has received these, to mark the bill of lading with a discharge and to surrender it to the carrier'.

According to the explanatory notes of Schadee,[85] the draftsman of Book 8 of the Dutch Civil Code, the article reflects the common practice to present the bill of lading already signed for receipt on the reverse.[86] The added value of this practice for the carrier is obvious. With the signature of the receiver on an original bill of lading, the carrier can not only prove the delivery of the goods against presentation of one of the originals but he can also prove that he released the goods against presentation of one of the originals to the 'regular' holder of the bill of lading without notice or knowledge of a better title.[87]

This provision in the DCC explicitly covers the delivery of goods carried by sea under a bill of lading. However, the overriding principle – release against receipt – also applies beyond carriage under a bill of lading. Article 13(1) CMR, for example, stipulates that 'the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods',[88] and the Rotterdam Rules hold a similar provision in article 44 RR:

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[80] See also Gaskell and others (n 2) 420: 'It might be said that the reference to "duly endorsed" indicates that the term only applies to negotiable and not straight bills. The better view is probably that the carrier is only requiring that any bill presented should apparently entitle the holder to claim delivery (as with a bearer bill), so there is no reason to restrict the application of the clause to negotiable bills when it is well known that the forms could easily be used as non-negotiable documents, eg straight consigned bills'.

[81] A possibility to which Lord Steyn may have been hinting providing the second alternative: 'or as may be necessary to perform the right of the presenting party to claim delivery'.

[82] The original bill of lading signed for receipt would in fact under Dutch procedural law qualify as a deed; see art 156(1) DCCP: 'a signed document, intended to serve as evidence'. Article 157(2) DCCP then prescribes that a deed gives conclusive evidence between the parties involved, ie the receiver/lawful holder and the carrier in the case of carriage of goods under a bill of lading.

[83] See also the discussion in *Coli Shipping v Merzario* [2002] 1 Lloyd's Rep 608 at 614, relating to the duly endorsement of a consignment note: 'The question arises whether such terms were subject to some express agreement whereby it was a condition precedent to recovery that a CMR note, duly signed by the consignee be presented. The evidence in relation to this was tenuous in the extreme and in my view Mr. Bugden in his final speech rightly abandoned reliance upon the point. He was reduced to submitting that what had to be provided was evidence equal in cogency to a duly endorsed CMR note . . .'. Surely this can only mean 'signed for receipt' as the consignment note is not a document of title (in any way).

[84] As well as German law; the first part of the first sentence of § 521(2) GCC reads: 'The carrier shall be obliged to deliver the goods only in exchange for a bill of lading in which delivery has been confirmed . . .'.

[85] M H Claringbould *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek* (Kluwer 1992) 495.

[86] See in support of the existence of this practice: *The Aramis* [1989] 1 Lloyd's Rep 213, and its discussion by Sir Guenther Treitel in G H Treitel 'Bills of lading and implied contracts' (1989) 2 LMCLQ 162 at 165: 'They [the initial order bills of lading, MS] were endorsed by the shippers and, when the ship reached Rotterdam, were presented to the ship's agents by forwarding agents', and then with the reference to footnote 19: 'Who also endorsed the bill; the purpose of their endorsement is not clear . . .'. Sir Guenther Treitel revisits the issue in *Carver* (n 3) 229 saying: 'The purpose of the second of these indorsements (ie of that by the agents) is far from clear'. This time he does suggest in footnote 144 as one of the options that 'its purpose may have been simply to acknowledge receipt . . .'.

[87] *Glyn Mills & Co v East and West India Dock* (n 23); *Motis v Dampskibsselskabet* (n 47).

[88] The Montreal Convention (MC) does not require a receipt, but art 13(1) MC simply requires the carrier to deliver the goods to the consignee 'on complying with the conditions of carriage'.

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Possible consequences for the title to sue

The presentation rule and the title to sue are closely connected. Whereas the presentation rule allows the carrier to release the goods to the lawful holder of the bill of lading against its surrender, the COGSA 1992 attributes an exclusive right of suit to the lawful holder of the bill of lading. The attestation clause may therefore also colour the discussion on the rights of suit under a bill of lading. The signature and stamp on the reverse of the bill of lading may in fact give the carrier a powerful formal defence against a claim for damages brought under the bill of lading contract. The working of such a defence can probably best be illustrated by the Dutch Supreme Court decision in *The Brouwersgracht*.[89]

The *Brouwersgracht* carried bales of sisal from Brazil to the Netherlands. Stella Azzuri was the seller/shipper of the goods, Thiemann was the buyer. The bill of lading was made out 'to order'. Stella Azzuri endorsed it in blank, thus converting it into a bearer bill of lading. The bill of lading was ultimately presented by Thiemann's forwarding agent CTA for the delivery of the goods, and in line with the existing (Dutch) practice stamped and signed by CTA on the reverse of the bill of lading in the top right corner.

The goods proved to have been damaged during the voyage. Thiemann initiated proceedings against the carrier, who argued that his claim was inadmissible. The bill of lading had been presented by CTA, its lawful and regular holder, and only CTA would therefore have the right of suit. The Supreme Court followed this defence and held: 'In accordance with . . . article 8:441(1) DCC, only the regular holder of a bill of lading is entitled to exercise the rights under that bill of lading against the carrier'.

Thiemann then relied on the agency relation between CTA and himself. CTA obviously acted as a freight forwarder; it had no proprietary interest in the goods and only presented the bill of lading upon Thiemann's instructions. Thiemann argued that CTA had only acted as its agent, and that the bill of lading had therewith effectively been presented by him. The Supreme Court disagreed; the bill of lading holder is the party presenting it for delivery, and this is only different if the authority to represent someone else follows from the bill of lading or was unambiguously disclosed to the carrier either prior to or at the time of the presentation.[90] CTA alone was entitled to sue the carrier for damages, and Thiemann's claim was inadmissible.

Dutch law thus adopts an extremely strict doctrine on the rights of suit under a bill of lading.[91] The lawful and regular holder of the bill of lading is the only one entitled to the delivery of the goods,[92] and he is consequently the only one entitled to sue the carrier for damages.[93]

The knowledge of the bill of lading holder's identity may give the carrier an edge, especially as he avails himself of the only original with the holder's signature.[94] The 'endorsement' of the bill of lading

[89] DSC 8 November 1991, NJ 1993, 609 (ann. J C Schultsz), S&S 1992, 37 (*Brouwersgracht*).

[90] The authority to represent the holder of a bill of lading is therewith subject to a stricter regime than the authority (of an agent) in general: art 3:60 DCC clearly stipulates that an authority to act in someone else's name is form free.

[91] The main flaw from a dogmatic perspective is that the right of suit is under this doctrine linked to the right to release. Whereas the right to release is indeed exclusive (the bill of lading in its function of document of title), the right to claim damages derives from the contract of carriage (evidenced by the bill of lading), see in more detail M Spanjaart *Vorderingsrechten uit cognossement* (Paris 2012) 345–46.

[92] Dutch law does not distinguish between order, bearer and straight bills of lading in this respect; see art 8:441(1) DCC, DSC 29 November 2002, NJ 2003, 373 (ann. K F Haak), S&S 2003/62 (*Ladoga 15*) and DSC 8 November 1991, NJ 1993, 609 (ann. J C Schultsz), S&S 1992, 37 (*Brouwersgracht*).

[93] The title to sue is so exclusive that it also extends to claims under the charterparty and claims in tort; see eg Court of Appeal in The Hague 8 November 2005, S&S 2006, 53 (*Maipo*).

[94] In fact the carrier prior to the proceedings refused to disclose to Thiemann and his insurers who had presented the original.

by CTA in any case played a crucial role in *The Brouwersgracht*. CTA's company stamp with signature confirmed its identity as the lawful and regular holder of the bill of lading, and the absence of any reference on the bill of lading to CTA's authority to represent Thiemann supported the carrier's statement that CTA had presented the bill of lading in its own name. Consequently, Thiemann was not successful in his claim.[95]

The COGSA 1992

The question is whether the case would have produced the same result under English law.[96] Section 2(1)(a) of the COGSA 1992 provides for a statutory transfer of the rights of suit and ensures that 'a person who becomes . . . the lawful holder of a bill of lading . . . shall . . . have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'.[97]

The lawful holder can be a merchant, but also a bank or a freight forwarder presenting the bill of lading for his principal. In his capacity as forwarder, the lawful holder will not have suffered the damages himself. This used to be a problem under the regime of the Bills of Lading Act 1855,[98] but it has now been addressed by the Law Commission,[99] and the COGSA 1992 section 2(4) provides that he 'shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised'.[100]

The COGSA 1992 does not restrict a 'transfer' to those transfers with the intention to pass property.[101] In fact the transfer of the bill of lading with the sole objective to have him arrange for the delivery of the goods provides the freight forwarder/bill of lading holder with the rights of suit under the bill of lading contract.[102]

These rights are exclusive.[103] Section 2(5) of the COGSA 1992 ensures that the shipper or previous holder loses all rights that derive from the contract of carriage with the transfer of the bill of lading.[104] In other words: there is only one person entitled to sue the carrier, and that is the lawful holder of

[95] The practical solution is that lawyers representing cargo interested parties initiate proceedings in the name of all possible entitled parties. Straightforward cargo disputes are thus often simultaneously initiated by the shipper, the consignee, the receiving freight forwarder, the notify party, the owners of the goods and the insurers, all in an attempt to avoid inadmissibility.

[96] This question must obviously be restricted to the rights of suit under the bill of lading contract as the COGSA 1992 (other than Dutch law) does not interfere with claims under the charterparty (Law Commission (n 6) 21, in tort (Law Commission (n 6) 18 or in bailment (*East West Corporation v DKBS 1912 A/S* (n 14)).

[97] The 'contract' in the sense of the COGSA 1992 s 2(1) should thus really read the 'bill of lading contract'.

[98] *The Albazero* [1976] 3 All ER 129.

[99] The Law Commission (n 6) explicitly notes at 12 that: 'Transferring rights of suit to the holder of a bill of lading, regardless of the passage of property in the goods to which the bill relates, may give rights of action to those who have actually suffered no loss, such as a forwarding agent acting on behalf of the final holder of the bill of lading'. This last part of the sentence is confusing, however; surely the forwarder is in that case the final holder of the bill of lading.

[100] D Rhidian Thomas 'A comparative analysis of the transfer of contractual rights under the English Carriage of Goods by Sea Act and the Rotterdam Rules' (2011) 17 *JIML* 444.

[101] The requirement of the transfer of property was one of the weaknesses of the Bills of Lading Act 1855; see eg *Sewell v Burdick* [1884] All ER 223.

[102] See also *The Ythan* [2006] 1 Lloyd's Rep 457.

[103] In as far as it concerns the (order/bearer) bill of lading contract. The COGSA 1992 does not touch the charterer's rights under the charterparty; see the Law Commission (1991), p 21 under 2.53. In fact the COGSA 1992 only regulates the position of the lawful third party holder of the bill of lading. The charterer (lawfully) holding the bill of lading issued pursuant to a charterparty is not a lawful holder in the sense of the COGSA 1992; see also *President of India v Metcalfe Shipping* [1969] 2 Lloyd's Rep 476 (*Dunelmia*).

[104] This section reads: 'Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives–

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document . . .'.

the bill of lading.[105] His identity is then outlined in section 5(2) of COGSA 1992;[106] the lawful holder is 'a person with possession of the bill as a result of the completion, by the delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; . . .'.[107]

The combination of these stipulations thus ensures that the transfer of the bill of lading to a freight forwarder in order to secure the release of the goods provides him with all rights of suit as if he were an original party to the bill of lading contract. As the bearer of a blank endorsed order bill of lading, the forwarder has the exclusive right to sue the carrier under the bill of lading contract. When the proceedings are nevertheless initiated by the forwarder's principal (or his insurers), the signature on the reverse of the bill of lading may serve to disprove the claimant's right of suit under the bill of lading contract.

The agency argument

The next question then is whether the forwarder's principal could successfully argue that he (as the principal) and not the forwarder (as the agent) in fact has the exclusive right to sue the carrier.[108] The authors of *Carver* seem to keep the door ajar:[109]

> Where, indeed, the bill names the agent as consignee or bears a personal indorsement to, and is in the possession of, the agent, then the principal could not be a 'holder' of it for the purposes of the Act; . . . It is less clear whether rights of suit are similarly transferred to the agent where he is not named either in the indorsement or in the bill: ie where the bill is a bearer bill or an order bill that has been indorsed in blank.

The argument was raised before the Court of Appeal in *East West v DKBS*. In this case, the bills of lading had been transferred by East West to the order of several Chilean banks,[110] not as a security for a loan but just to hold on to these bills of lading pending further instructions by East West.[111] Just as Thiemann (and not CTA) in *The Brouwersgracht*, East West (and not the Chilean banks) had initiated the proceedings against the carrier, arguing that the principal (East West) and not the agents (the Chilean banks) had the exclusive right to sue DKBS under the bill of lading contract.

The argument failed. The Court of Appeal established that the bills had been transferred and that the banks were their lawful holders in the sense of the COGSA 1992. Mance LJ (as he then was) had no doubts as to the ratio behind section 2(4) COGSA 1992:[112]

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[105] The rights of suit are exclusive, but so are the liabilities under the bill of lading contract. This is in line with the reciprocity idea behind the COGSA 1992, highlighted in *The Berge Sisar* [2001] 1 All ER 193, UKHL 17.

[106] Paragraph 519 GCC reads: 'The claims by virtue of a contract for the carriage of goods by sea as confirmed in a bill of lading may be asserted only by the person entitled by virtue of the bill of lading. The presumption shall be that the rightful holder of a bill of lading is also the person entitled by virtue of the bill of lading. A party shall be deemed the rightful holder of a bill of lading if the bill of lading in question meets any one of the following criteria:

1. It is made out to "To Bearer";
2. It is made out "To Order" and identifies the holder as the consignee, either directly or through an unbroken chain of endorsements; or
3. It is made out in the name of the holder'.

[107] Subject to good faith, see the last sentence of COGSA 1992 s 5(2): 'and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith'.

[108] This is a different question to the one whether the presenter acted in a ministerial capacity, eg the employee of the forwarding company actually presenting the bearer bill of lading to the carrier.

[109] *Carver* (n 3) 230.

[110] This triggers the question of how these proceedings would have ended if the bills of lading had first been endorsed in blank by the shipper, and then delivered for safekeeping to the banks by another party further up in the chain. See eg *The Cherry* [2003] 1 SLR(R) 471; [2002] SGCA 49, where the Court of Appeal noted with regard to an endorsement in blank and subsequent forwarding of the bill to Glencore UK: 'The judge found that Glencore UK was holding the bill simply as the agent of the respondents for the transmission of documents and therefore the respondents were the holders of the bill for the purposes of the Bills of Lading Act (Cap 384). On appeal the appellants did not contest this finding'.

[111] This is why the argument makes sense and why the comparison with the position of the freight forwarder is possible. The banks usually hold the bill of lading for their own sake, ie as security for payment made under the L/C. Under those circumstances, they are not holding the bill of lading for someone else but merely for themselves.

[112] *East West Corporation v DKBS 1912 A/S* (n 14).

> It is clear that the 1992 Act contemplates that rights of suit may be transferred to persons who are vis-à-vis the shippers acting as agents. Section 2(4), giving such persons the right to sue for loss or damage suffered by their principals by reason of any breach of the bill of lading contract, caters for such a situation. The Law Commission on whose report and draft bill (Rights of Suit in respect of *Carriage* of Goods by Sea: Law Com. No. 196) the 1992 Act was based, expressly contemplated at paragraphs 2.24–27 that rights of suit would vest in forwarding agents or banks to whom goods were consigned under a bill of lading, and that s. 2(4) would cater for the consequences. I therefore agree with the Judge that the respondents' rights of suit under the contracts of carriage were transferred to the Chilean banks when they became holders of the bills delivered to them by or with the authority of the respondents.

This is indeed the only possible conclusion on the basis of the report of the Law Commission. Inevitably, this interpretation also sealed the fate of East West's agency argument:[113]

> There is nothing in the statutory scheme of the 1992 Act to lend any support to the idea that, after a statutory transfer of contractual rights by a principal to its agent, the principal can still sue in contract in its own name. Section 2(4) and the Law Commission's report pars. 2.24–2.27 here militate against any such idea.

The answer to the question is thus prejudiced by the answer to a preliminary question, ie whether the forwarder holds the bill of lading pursuant to a statutory transfer or otherwise. When the forwarder holds the bill of lading after a statutory transfer, he is in fact the lawful holder of the bill of lading in the sense of the COGSA 1992.[114] The agency argument will then not succeed, irrespective of the cause behind the transfer.[115] When the forwarder however holds the bill of lading for his principal other than pursuant to a transfer, eg because he received the bill of lading from the carrier once the goods were brought on board in the port of lading, his principal is the lawful holder.[116]

Admittedly, it is not always easy or even possible to establish whether a blank endorsed bill of lading is actually transferred or merely passed to the forwarder as the two cannot be distinguished on the basis of the formalities.[117] The uncertainty, however, remains limited to a short period of time, namely up until the presentation to the carrier. The presentation of the bill of lading fixes the positions.[118] A receiving forwarder may perhaps hold the bill of lading for an undisclosed principal but he cannot present the bill of lading for an undisclosed principal. Once he presents the bill of lading, the forwarder identifies himself as its (lawful) holder, and his signature on the reverse of the bill of lading confirms this.

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[113] ibid.

[114] A bill of lading that is handed to the bank with the instruction to keep it in the safe is held by the bank in a proprietary sense, but not held by the bank in the sense of the COGSA 1992. A bill of lading that is transferred to the bank with the instruction to keep it in the safe is equally held by the bank in a proprietary sense, but this time is also held by the bank in the sense of the COGSA 1992. The cause behind the delivery of the bill of lading would seem to be decisive: any delivery pursuant to a transfer provides the new holder with 'all rights of suit under the contract of carriage as if he had been a party to that contract'.

[115] Provided that the cause is valid of course.

[116] See DSC 27 January 1995, NJ 1997, 194 (ann. M H Claringbould), S&S 1995, 40 (*The Heliopolis Star*): 'In such a situation a forwarder who – as in this case – has received the bill of lading on behalf of the shipper and therewith has held it on his behalf, cannot exercise rights embodied in this document with respect to the carrier, unless the shipper has transferred these rights to him in the manner indicated in Section 2 of Title 4 of Book 3 for choses in action'. See also the recent appeal judgment in *The Erin Schulte* (n 13).

[117] The preliminary test for order and straight bills of lading would then be whether or not the specific delivery requirements are observed. The delivery of a straight bill of lading to another than the named consignee simply cannot have been made pursuant to a transfer. The same applies to an order bill of lading (to the order of the shipper) delivered without any endorsement at all. The test is ineffective however to establish whether the delivery of a blank endorsed order bill of lading is made pursuant to a transfer or not. The cause behind the forwarder's holdership would then have to be determined (and would then also seem decisive). In the absence of clarity on the exact cause, however, it seems likely that the forwarder is the lawful holder. See also B Eder, H Bennett, S Berry, D Foxton and C F Smith *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell London 2011) 43.

[118] See also the COGSA 1992 s 3(1); the forwarder presenting the bill of lading is then also the person who 'takes or demands delivery' and therewith assumes the liabilities.

The liabilities of the lawful holder

The acquisition of contractual rights does not necessarily come with exposure to contractual liabilities.[119] Section 3(1) of COGSA 1992 therefore statutorily ensures that the lawful holder also assumes 'the same liabilities under that contract as if he had been a party to that . . . contract' when he exercises these contractual rights,[120] eg 'takes or demands delivery from the carrier of any of the goods to which the document relates . . .'.[121] The presentation of the bill of lading in the port of discharge obviously qualifies as 'demanding delivery'.[122]

Whereas the exclusivity of the right of suit is statutorily secured in section 2(5) of COGSA 1992, the liability of earlier bill of lading holders is not explicitly excluded in the text of section 3(1) of COGSA 1992.[123] This might suggest that earlier holders of the bill of lading could be liable next to the lawful holder, but Lord Hobhouse dismissed that idea in *The Berge Sisar*:[124]

> When an endorsee of a bill of lading who had both transferred to and vested in him all the rights of suit under the contract of carriage pursuant to section 2(1) and become subject to the liabilities under that contract pursuant to section 3(1), does he cease to be so liable when he endorses over the bill of lading to another so as to transfer his rights of suit to that other? . . .
>
> The liability is dependent on the possession of the rights. It follows that, as there is no provision to the contrary, the 1992 Act should be construed as providing that, if the person should cease to have the rights vested in him, he should no longer be subject to the liabilities. The mutuality which is the rationale for imposing the liability has gone.

The carrier's knowledge of the identity of the presenter/receiver/lawful holder thus again strengthens his position, or at least prevents him from incurring unnecessary costs. Given the mutuality between rights and liabilities,[125] the carrier cannot simply initiate proceedings against each bill of lading holder in the course of the voyage.[126] Once a (then interim) holder transfers the bill of lading to a (new) lawful holder, he loses his rights of suit under the bill of lading contract but he is at the same time free from potential liabilities under the bill of lading contract.[127]

Conclusions

Most bills of lading explicitly require the surrender of an original bill of lading 'duly endorsed' in exchange for the release of the goods. Although the reference to an endorsement may suggest

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[119] *Carver* (n 3) 285.

[120] The CMR and the MC both impose similar obligations; see respectively CMR art 13(2) and MC art 13(1) referring to the delivery 'on payment of the charges due and on complying with conditions of carriage'.

[121] This is only the first option listed under the COGSA 1992 s 3(1)(a). The lawful holder also assumes these liabilities if he '(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c) is a person who, at the time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods . . .'.

[122] Taking delivery is less obvious; it is in any case not a factual but a consensual act; see *The Aegean Sea* [1998] 2 Lloyd's Rep 39.

[123] The Law Commission does not deal with their position either.

[124] *The Berge Sisar* (n 105).

[125] *Carver* (n 3) 286; *Scrutton* (n 117) 48.

[126] The shipper under a bill of lading contract however does not benefit from this mutuality. The COGSA 1992 s 2(5) strips the shipper from any rights under the bill of lading contract but he remains liable as the COGSA 1992 s 3(3) stipulates that the COGSA 1992 s 3(1) is without prejudice to the position of the shipper. The mutuality concept does appear to work for the position of the shipper under a straight bill of lading. As the COGSA 1992 s 3 does not distinguish between bills of lading and sea waybills, the shipper under a straight bill of lading indeed remains liable, yet at the same time maintains his rights under the (straight) bill of lading contract.

[127] The situation is the same under US law. See L Li 'The legal status of intermediate holders of bills of lading under contracts of carriage by sea – a comparative study of US and English law' (2011) 17 *JIML* 106. The situation is also the same under Dutch law, but the underlying reason is different. Under Dutch law the lawful holder accedes to the contract upon presentation. Since only the ultimate (and not the interim) holder presents the bill of lading, an interim holder will not become a party to the bill of lading contract. See in more detail F G M Smeele 'The bill of lading contract under European national laws (civil law approaches to explaining the legal position of the consignee under bills of lading)' in D Rhidian Thomas *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009) 251–280.

otherwise, the surrender of the bill of lading 'duly endorsed' does not relate to the delivery requirements for the transfer of the (order) bill of lading. The endorsed bill of lading instead functions as a receipt. The signature (and company stamp) on the reverse of the bill of lading ensures the proper discharge of the carrier, and is as such equally effective for order, bearer and straight bills of lading. The carrier can prove that he released the goods against the presentation of an original bill of lading; in fact he can actually prove the identity of the receiver.

The identity of the receiver/presenter of the bill of lading may furthermore be relevant to establish who is entitled to sue the carrier for damages, and who has assumed the liabilities under the bill of lading contract. The COGSA 1992 provides that the lawful holder of the bill of lading has an exclusive right of suit (and is exposed to the liabilities) under the bill of lading contract. This lawful holder will sometimes be easy to identify, eg because he is the last in an unbroken chain of endorsements, but this will more often not be so easy at all. An order bill of lading will often finish as a bearer bill of lading, and its lawful holder will in practice then usually be a freight forwarder receiving the goods for his principal. The identity of the presenter/lawful holder may of course be proven by survey reports, correspondence with the carrier or witness statements, but the original 'duly endorsed' bill of lading in possession of the carrier will ultimately be decisive.