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Documentation in the 2007 Draft convention on the carriage of goods wholly or partly by sea

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1.Introduction

On 13 February 2007 the United Nations Commission on International Trade Law Working Group III (Transport Law) published the Draft convention on the carriage of goods wholly or partly by sea¹ applying to contracts of carriage in which the place of receipt and the place of delivery are in different countries and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different countries. The wording and phraseology are new and do not follow either the Hague/Visby Rules or the Hamburg Rules. The Draft convention defines that "Contract of carriage" is a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another. The Draft convention lacks of definition in which document the carrier's terms of carriage are incorporated, and so its acceptance to conclude the contract of carriage. It should be taken into account that the provisions of the Draft convention are contractual terms, which must be considered together with the terms of the contract. Bills of lading, or bills of "loading" as they were once called, have existed for Centuries and are one of the oldest and most international forms of contract under both the common law and the civil law². Transportation contracts began to appear in the form of independent bills of lading of the master or ship-owner in the thirteenth century, although the earliest published versions he refers to date from 1337 and 1390³. It seems that it has taken the approach of the freedom of contract applying in national contract law which is not suitable for international conventions instead of an introduction of a standard type of contract of carriage such as a negotiable bill of lading established as the contract of carriage in maritime transportation through its use for centuries.

The history of the law of carriage of goods by sea is the history of the gradual introduction of mandatory rules on liability. By the late nineteenth century, freedom of contract was being used broadly and forcefully by ship-owners to unduly diminish their liabilities for cargo loss or damage⁴. To combat such

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¹ UN General Assembly A/CN.9/WG.III/WP.81

² W.P. Bennett, *The Bill of Lading as a Document of Title To Goods*, Cambridge, 1914 at p. 4.

³ F. Sanborn, *Origins of the Early English Maritime and Commercial Law*, The Century Co., New York & London, 1930, reprinted 1989, at pp. 98 and 214

⁴ G Zekos, Contractual role of documents issued under the CMI Draft Instrument on Transport Law 2001, 2004 *Journal of maritime Law and Commerce* 99, USA. www.jmlc.org *In the 19th century it was an established practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package. See 2A M. Sturley, Benedict on Admiralty §11, pp. 2-2 to 2-3 (1995); 2 T. Schoenbaum, Admiralty and Maritime Law*

practice, in 1893 the United States introduced the Harter Act, a mandatory regime governing trade with the country followed in 1924 with the signing of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, which presently forms the foundation of the law on carriage of goods by sea. The move, through the mechanism of volume contracts, from a fundamentally mandatory regime to a largely derogative regime represents a major change. Thus, there is an emphasis on freedom of contract.

Customarily, the document constituting the contract of carriage is either a charter party or a bill of lading, depending on the mode in which the ship has been employed. A bill of lading is a contract in relation to the goods, whereas a charter party is a contract in relation to the ship. The use of electronic charter-parties in the era of electronic contracting should be established in a global market of maritime transportation and so the use of e-bills of lading under e-charter-parties should emerge as the electronic contracts of carriage. The bill of lading is the more extensively used document by shippers, carriers, and banks, and consequently is an essential part of the set of documents required in documenting the transaction.

Is there a need for the transport document in the 2007 Draft Convention to have a specific name in order to achieve standardization and so harmonization? Is it significant the determination of the contractual role and functions of the issued transport documents under the 2007 Draft convention? Aim of the analysis is the investigation of the contractual role and function of the documents issued under the draft convention in comparison to bills of lading.

2. Application of the 2007 Draft Convention

The Hague Rules were adopted in 1924, the Hague/Visby Rules in 1968 and 1979 and the Hamburg Rules in 1978 and each international convention in turn attempted to broaden its application in order to avoid lacunae, to encompass all contracts of carriage such as bills of lading, and to permit incorporation by reference. It is in general the practice in those countries to incorporate COGSA or the Hague Rules or the Hague/Visby Rules by reference into the bill of lading. The bill of lading in a negotiable or non-negotiable such as straight bills of lading-waybills is the document issued in maritime transport. The general principle regarding the application of the Hague Rules is that they apply by their own force (*ex proprio vigore*) to contracts of carriage covered by a bill of lading or any similar document of title. Moreover, The Hague/Visby Rules apply when the shipment is "covered by a bill of lading or any similar document of title" (art. 1(b)) and in *Pyrene*⁵ the contract was "covered" by a bill of lading and was a "contract of carriage" within the meaning of article 1(b) of the Hague/Visby Rules. The Hamburg Rules apply to "all contracts of carriage by sea" (art. 2(1)) and not merely to bills of lading or similar documents of title. The Hamburg Rules do not apply to charter-parties by art. 2(3), but do apply to bills of lading pursuant to a charter-party when the bill of lading governs the relations between the carrier and the third party holder of the bill of lading. This is similar to article 1(b) and Article 5, paragraph 2, of The Hague and Hague/Visby Rules. It should be taken into

⁵10–13 (2d ed. 1994); Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 *Tulane L. Rev.* 1238, 1239–1240 (1983).

⁵ *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* [1954] 2 QB. 402 at pp. 419–420, [1954] 1 Lloyd's Rep. 321 at p. 329.

account that the bill of lading is the original contract of carriage in those occasions and not merely evidence of a part of the original contract of carriage.

According to Article 5.1, the Draft convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different countries, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different countries, regardless of the vessel's nationality, the carrier, the performing parties, the shipper, the consignee, or any other interested parties. Moreover, the draft convention does not apply to charter-parties or other Contracts for the use of a ship or of any space in liner transportation. This Convention does not apply to contracts of carriage in non-liner transportation apart from the case that there is no charter-party or contract for the use of a ship or of any space thereon between the parties, and the evidence of the contract of carriage is a transport document or an electronic transport record evidencing the carrier's receipt of the goods.

The application of transport conventions has been tied to the issuance of a particular type of transport document, such as a bill of lading. Over time, other, often non-negotiable, documents namely straight bills of lading-waybills have replaced negotiable bills of lading⁶. Moreover, with the growth of electronic commerce the emergence of electronic contracts of carriage and the relevant to paper documents electronic ones is obvious and so there is a need for reference to electronic contract of carriage and electronic bills of lading. Article 36 refers to the Issuance of the transport document or the electronic transport record where indicated that the shipper and the carrier might agree not to use a transport document or an electronic transport record and so the convention might apply to any oral contract of carriage and instead of achieving certainty and uniformity the carriers will have a total freedom to manipulate things especially through the named "volume contract" and so it could be argued that there is a move back to the time prior the introduction of any convention. The common thing to have been done was a reference to bills of lading and electronic bills of lading as the documents expressing the contact of carriage.

3. Bill of lading Versus the Transport Document

Is the bill of lading accepted by the shipper for the carriage of the received and loaded cargo the contract of carriage? Carriage of goods means the transport of the received cargo to its destination and from its receipt until delivery at its destination. It should be taken into consideration that a contract of carriage can be concluded prior the carrier receive the cargo for a quantity of goods to be transported under the terms of the carrier's bill of lading but the contract of carriage refers to the received cargo and not to an unidentified quantity of goods which means that the contract of carriage cannot be concluded prior the receipt of the cargo and many of the terms of the bill of lading are never negotiated and so the contract of carriage cannot be concluded prior the issue and acceptance of the bill of lading which is supposed to happen with the receipt of the cargo. It has to be taken into consideration that a bill of lading has commonly been said to have three characteristics: 1). a contract for the carriage of the goods 2). an acknowledgement of their receipt and 3).

⁶ G Zekos, "Seawaybills: A New Marketable name for straight bills of lading", 1994, *Il Diritto Marittimo*, 714, Italy.

documentary evidence of title.⁷ Moreover, J Spanogle⁸ and F Potamianos⁹ said that the bill of lading is a contract with the carrier.

Has the newly introduced transport document disconnected from the above three functions of the bill of lading in maritime transport? Are not useful for the maritime transport the three functions of a bill of lading to be attributed to a transport document any more?

This author¹⁰ supports the view that a bill of lading accepted by the shipper without any complaint and in absence of a clause within its content that the bill of lading is not the contract is the original contract of carriage transferred by the endorsement of a negotiable bill of lading. According to the Greek law the bill of lading is the conclusive evidence of the contract of carriage¹¹. However, there is an uncertainty and dispute about its contractual nature.¹²

⁷ C McLaughlin "The Evolution of Ocean Bills of Lading" 35 Yale L J 548 p. 555, p. 556 "When became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract ... Accordingly, the view that a bill of lading does not constitute the contract, but is evidence of it, would seem to be unsound and it may safely be said that since the bill of lading involves a promise to perform on the part of the carrier in both ocean and railway shipments, it is a contract." . Before the era of international maritime conventions the general understanding of the role of a contract of carriage was explained in *Hansson v Hamel & Horley Ltd* 1921 Lloyd's List LR 432 at 433, as follows: " ... What is meant by the expression 'Contract of Affreightment'? In my opinion, to satisfy the requirements with reference to contract of affreightment, the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer and which when transferred will give the buyer two rights: (a) a right to receive the goods, and (b) a right against the shipowner, who carries the goods, should the goods be damaged or not delivered'"

⁸ J Spanogle "Incoterms and UCC article 2: Conflicts and Confusion" 1997 *International Lawyer* 111 p.125. W Tetley "Sea Way-bills: The Modern Contract of Carriage of Goods By Sea" 1983, *JMLC* 465 p. 465 "'The bill of lading' or 'bill of loading' is the classic contract of carriage of goods ... The bill of lading is a contract in respect to the goods, the charter-party is a contract in respect to the ship" p. 466 "The bill of lading is one of the earliest forms of contract of adhesion ... The bill of lading has three characteristics: it is a receipt, a contract of carriage and a negotiable document of title". W Tetley "*Marine Cargo Claims*", 3rd ed, International Shipping Publications, p. 215 "Bills of lading ... have existed for centuries and are one of the oldest and most international forms of contract *under the common law and the civil law* ... A bill of lading is not merely a contract of carriage".

⁹ F Potamianos "*The Contract of Carriage by Sea*", Vol. 1, 1962, Athens pp. 40-44. B Milhorn "*Vimar Seguros v M/V Skyrefer. Arbitration clauses in bills of lading under COGSA*" 1997 *Cornell International Law Journal* p.173 "The bill of lading is a contract of carriage".

¹⁰ G Zekos "Judicial analysis of the contractual role of bills of lading Under Greek, English and United States law" 1998 PhD Thesis, University of Hull.

¹¹ A Yiannopoulos "*Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems*", 1995, Kluwer Law International. p. 200 A Kiantou-Pampouki "According to Greek law ... From this viewpoint, the bill of lading is the carriage contract itself", p. 4 Yiannopoulos "The bill of lading is evidence of the contract of carriage between the parties", p. 229 R. Japikse "Section 412 provides that a bill of lading should... state or

Mr Justice Clifford delivered the opinion of the US Supreme Court in the leading case of *Delaware*¹³ where it is stated that: “Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgement, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing and cannot be contradicted or varied by parol evidence ... Verbal agreements, however, between the parties to a written contract made before or at the time of the execution of the contract, are, in general, inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract ...”. Moreover, in *Vimar Seguros Y Reaseguros, S. A., Petitioner V. M/V Sky Reefer, Her*

indicate the terms of carriage”, p.90 K Bernaw “A bill of lading on the contrary requires a written document, p. 91 “The courts hold by accepting the bill of lading, the shipper agrees with its stipulations”.

¹² *Scrutton on Charter-parties and Bills of Lading*, 1984, Sweet & Maxwell p. 55 “The bill of lading is not the contract”. L Curzon “*Dictionary of Law*”, 1996, Pitman, p. 41 “It ... is evidence of the contract for their carriage”. J Rosenberg “*Dictionary of Banking and Financial Services*”, 1985, John Wiley & Sons p. 7-6 “Bill of lading: a statement whereby the carrier acknowledges receipt of freight, identifies the freight and sets forth a contract of carriage”. *Oxford Dictionary of Law*, 1997, Oxford University Press p. 47 “Bills of lading it summarises the terms of the contract of carriage”. *Collins Dictionary of Law*, 1996, Harper Collins Publishers p.44 “A bill of lading is used both as a contract of carriage and a document of title”.

¹³ 20 Led 779. *The Delaware* 20 Led 779 pp. 781-784. *Pollard v Vinton* 26 Led 998 p. 999, *Corpus Juris Secundum* (CJS), 1975, West Publishing Co Vol. 13 Carriers p. 233 “A bill of lading is twofold in its character ... and a contract to transport and deliver the goods to the consignee or other person therein designated on the terms specified in such instrument”. The supreme court of the United States delivered its decision in *The Thames*, where it has consolidated the incorporation of the contract of carriage in bills of lading 20 Led 804 p. 805 “the contract between the ship and the shipper is that which is contained in the bills of lading delivered”, *Hundai Corp v The Hull Insurance Proceeds of M/V Vulca* (1992) 800 FSup 124 Shipper brought action against charterer to recover for loss of cargo. p. 127 “A bill of lading ... provides a contract of carriage between the shipper of cargo and the carrier of the cargo”. F Berlinger “Cargo Claims under Voyage and Time Charter parties” 1990 *Il Diritto Marittimo* 3 p. 3. *EF Operating Corporation v American Buildings* . 993 F2d 1046 “The bill of lading operates as both the receipt and the basic transportation contract between the shipper-consignor and the carrier, and its terms and conditions are binding ... As a contract, it is subject to general rules of construction under contract law ... And as a contract of adhesion between the carrier and shipper, it is strictly construed against the carrier”. *US v M/V Santa Clara* (1995) 887 F Sup 825 p. 832 “A bill of lading is a contract governing the rights of the cargo owner and the shipowner ... It is well recognized that bills of lading are contracts of adhesion” *Vimar Seguros v M/V Sky Reefer* [1995] 132 Led2d 462, p. 483 Justice Kennedy held that “a bill of lading, besides being a contract of carriage, is a negotiable instrument that controls possession of the goods being shipped ... Disuniformity in the interpretation of bills of lading will impair their negotiability”. *Pollard v Vinton* 26 Led 998

Engines, ETC., ET AL¹⁴ the US Supreme Court indicates that “a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around these no-liability clauses”. To that extent a bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis¹⁵. Furthermore, the bill of lading considered to be the contract of carriage between shipper and carrier¹⁶ and so there is always a need to give effect to the intents and understandings of the parties to a bill of lading by appropriately interpret the content of a bill of lading¹⁷. Parol evidence could be used to resolve the ambiguity in the Bill of Lading and not alter the plain language of a bill of lading¹⁸. Marek Dubovec¹⁹ argues that “authorities and courts have expressed different opinions as to whether the bill of lading is the contract of carriage or mere evidence of the contract. In either capacity, the bill of lading anchors contractual liabilities, obligations of the parties, and confers contractual rights and remedies”. On the other hand, the endorsement of a negotiable bill of lading merely evidence of part of the contract of carriage between the shipper and the carrier transfers merely the evidence of the contract as contained in the bill of lading and so the third party gets only the

¹⁴ No. 94–623 *Vimar Seguros y Reaseguros, S.A. v. MV Sky Reefer* 515 U.S. 528

¹⁵ See Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 *Vand. J. Transnat'l L.* 365, 368 (1973); *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 442 (1889). at 441 In support of its holding in *Liverpool Steam*, the Court observed: “The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higggle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.” *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), “bills of lading that are commonly recognized as contracts of adhesion”.

¹⁶ *Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd.*, 259 F.3d 1086, 1092 (9th Cir. 2001); *Henley Drilling Co. v. McGee*, 36 F.3d 143, 148 n.11 (1st Cir. 1994) “Since the bill of lading is the contract of carriage between shipper and carrier, familiar principles of contract interpretation govern its construction.” “Contract terms are to be given their ordinary meaning,” and “[w]henever possible, the plain language of the contract should be considered first.” *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000). Contract interpretation is a question of law we review de novo. *Mendler v. Winterland Prod., Ltd.*, 207 F.3d 1119, 1121 (9th Cir. 2000). George F. Chandler, III, *Maritime Electronic Commerce for the Twenty-First Century*, 22 *TUL. MAR. L.J.* 463, 470 (1998); GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 93 (2d ed. 1975);

¹⁷ To properly interpret a bill of lading we must “effectuat[e] the intents and understandings of the parties to the bill of lading.” *Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration*, 137 F.3d 94, 104 (2d Cir. 1998). “The most obvious place for us to begin our search for the intent of the contracting parties is, of course, the bill of lading.” *Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 485 (2d Cir. 1985).

¹⁸ *Francosteel Corp. v. M/V KAPETAN ANDREAS G*, 1993 WL 496893, at *3 (S.D.N.Y. 1993) (“The Court recognizes that it can look to parole [sic] evidence to resolve the ambiguity in the Bill of Lading . . .”). If the bill of lading fails to evince the clear intent of the parties, we may consider collateral evidence of the parties' intentions, including “other shipping documents.” *Royal Ins. Co. v. M.V. ACX RUBY*, 1998 WL 524899, at *8 (S.D.N.Y. 1998);

¹⁹ Marek Dubovec, *The Problems And Possibilities For Using Electronic Bills Of Lading As Collateral*. 2006 *Arizona Journal of International & Comparative Law* Vol. 23, No. 2 437 at 441

terms incorporated in the bill of lading and not the rest of the terms of the contract of carriage not contained in the bill of lading. The third party by the endorsement of a negotiable bill of lading, as in bills of exchange, becomes part to the contract as contained in the bill of lading. It has prevailed in theory and practice that the bill of lading is the original contract of carriage between the third party and the carrier. Thus, there is a legal gap and anomaly to accept the negotiable bill of lading merely evidence of part of the contract between the shipper and the carrier and its endorsement to transform the bill of lading as the whole original contract of carriage between the third party holder of a negotiable bill of lading and the carrier. It is characteristic that Rix LJ in *J I MacWilliam Co Inc v Mediterranean Shipping Co SA*²⁰ argues that once a bill of lading is transferred into the hands of a third party, then "it springs into life as a separate contract of carriage", but the endorsement of a negotiable bill of lading cannot spring a new contract of carriage but merely the contained contract of carriage is transferred to the third party which means that if there is no contract contained in the bill of lading then no contract be transferred to any third party. Contracts are concluded among parties after an offer and acceptance has taken place. Even in contracts of adhesion/standard form contracts we have offer and acceptance. The endorsement of a negotiable instrument cannot be considered to be an offer and acceptance of a contract. The legal principle of endorsement cannot be distorted in order to cover wrong views and wrong precedents.

According to Tetley²¹ a bill of lading is not essentially the contract of carriage, but is usually the best of evidence of the contract and the contract is the advertisements, the booking note, the freight tariff, certain practices of the carrier known and accepted by the shipper all taken together. So, if a shipper wants to know the terms of his/her contract he must read and examine all the papers issued prior the issue of the carrier's bill of lading and the whole history of the carrier's terms and practices. It is worth mentioning here that Tetley²² referring to the history of the bill of lading identifies that "Bills of lading, or bills of "loading" as they were once called, have existed for centuries and are one of the oldest and most international forms of contract under both the common law and the civil law... The carrier and the shipper are parties to the bill of lading contract of carriage... It is a three-purpose document: a contract of carriage, a receipt, and a document of title. It is really not the contract of carriage but the best evidence of the contract. Under the common

²⁰ *J I MacWilliam Co Inc v Mediterranean Shipping Co SA* [2004] QB 702 at 723F, para 51. Rix LJ explained with reference to articles I(b) and V that once "the bill of lading is transferred into the hands of a third party, then it springs into life as a separate contract of carriage, which is why it must comply at the outset with the requirements of the Rules"

²¹ W. Tetley, *Marine Cargo Claims*, 3 Ed., 1988 Chap. 1: "Application of the Rules Generally". In addition to the bill of lading, the contract may comprise such components as the booking note, the carrier's advertisement and tariff, the oral arrangements and correspondence between the parties, and even customs and usages of the ports of loading and discharge which are known to, and accepted by, the shipper.

²² Chap 9. "The bill of lading contract of carriage is thus a tripartite contract involving the shipper, the carrier and the consignee... while the various bills of lading statutes give to the endorsee the rights of action that the shipper originally had under the bill of lading contract...The bill of lading is an extraordinary international contract... the ocean bill of lading is a tripartite contract: involving the shipper, the carrier and the consignee." tetley.law.mcgill.ca

law the bill of lading contract still requires an offer, an acceptance and a consideration.”(Stress added) The inconsistency in the terminology and the attributed contractual role is obvious. Besides, bills of lading have been introduced to play the role of contracts in maritime transport achieving certainty regarding the contractual terms not allowing carriers to insert new contractual terms. As since 1887²³ specified the general principles of contract law should not apply to bills of lading contracts but emphasis must be given to their historical usage and necessity for their entrance in maritime transport that was to make certain the terms of the contract of carriage balancing the weak position of the shippers against carriers. Furthermore, the bill of lading as a legal document is invented as being a formal contract²⁴ with the special characteristic of being at the same time, both a receipt and a document of title, and the bill of lading can be transferred to any third party.

An agreement between parties can rescind an earlier agreement between the same parties, which is the occasion of a bill of lading issued for the transport of the received and loaded cargo²⁵. The bill of lading is a contract of carriage and its terms cannot be varied by parol evidence²⁶. It is worth mentioning that the US legal system has arisen from the common law tradition²⁷. By contrast, it is doubtlessly expressed as the *ratio decidendi* in the *Ardennes*²⁸ case the fact that the bill of lading in the hands of the shipper contains the evidence of

²³ TES “Notes” 1887 LQR 471 p. 472 “bills of lading whose true explanation is usually to be found no in the ordinary way, but by consideration of history and business usage”(Stress added).

²⁴ J Crump “General Average, Salvage and the Contract of Affreightment” 1985 LMCLQ 19 p. 19 “It was not until the 14th or 15th AD that merchants are found it necessary to invent contracts, like bills of lading and bills of exchange”.(Stress Added).

²⁵ *West India Inds. v. Tradex*, is a most useful decision on the superseding clause in the context of a shipper wishing to rely on it. The clause was upheld by Rubin Ct. J., who pointed out that an agreement between parties can rescind an earlier agreement between the same parties and that furthermore there was consideration for the new contract evidenced by the bill of lading. 664 F.2d 946 at p. 950, 1983 AMC 1992 at pp. 1997-8 (5 Cir. 1981).

²⁶ *Peterson v. Lexington Insurance Co.*, 1985 AMC 2215, 753 F.2d 1016 (11 Cir. 1985). See, e.g., *Internatio, Inc. v. M/V Yinka Folawiyo*, 480 F.Supp 1245, 1252 (E.D. Pa. 1979). In *Belize Trading Lim. Procs.*, 1991 AMC 2947 (S.D. Fla. 1991) two bills of lading clearly identified the containers as the packages, and the two plaintiffs sought to introduce other evidence of the number of cartons packed in each container, using various documents which were incomplete in one case and contradictory in the other, it was held: “It is well settled that parol evidence may not be used to contradict the terms of an unambiguous written contract.

²⁷ M Crutcher “The Ocean Bill of Lading - A Study in Fossilisation” 45 *Tulane LR* 697 p. 703 “there are some generalisations about bills of lading established by reference to the circumstances existing both in England and American before 1800 which deserve attention; a. the bill of lading purports to be a contract of carriage of goods on a particular ship; b. it purports to be a contract for carriage only by water; c. it is in effect a contract with the master as well as the unidentified ship owner”.

²⁸ [1951] 1 KB 55.

the contract. This author²⁹ has argued against the judge's view in this case because if the contract is concluded prior the issue of the bill of lading then all the terms of the contract should be oral and not half of them oral and the other half written in the bill of lading. If we accept that the contract is partly oral and partly written in the bill of lading then the written terms contained in the bill of lading as posterior to the oral ones means that their acceptance changes the previous oral terms of the contract³⁰. So, prior negotiations and oral agreements between the parties are merged therein the content of the accepted bill of lading. It is submitted that if *the Ardennes* case were to be tried in a US court then the bill of lading would be found to be the contract of carriage, which has superseded any oral promises or agreements. Moreover, in the preliminary note of the Carriage of goods by sea Act 1992³¹ it is stated that: "S 2 allows the lawful holder of a bill of lading ... to sue the carrier under the original contract of carriage even though he may not have been party to the original contract". The 1992 Act does not seem to transfer new contract as the 1855 Act³² did either. Hence, the transferee steps into the shipper's shoes as if he had been a party to the original contract of carriage. It is well established that the bill of lading is the contract of carriage itself for the holder of the bill.³³ So, the holder becomes party to the contract of carriage

²⁹ See G Zekos "The contractual role of bills of lading under Greek, United States and English law" 2001 Barmarick Publications, England at p 89, 91.

³⁰ In *Jean Jadot* (14 Fsup 161) the court has not accepted any oral evidence to show that the parties orally agreed upon a different route from the one expressed in the bill of lading contract. p. 162 "it has been held that parol evidence cannot be received to contradict the terms of a bill of lading by showing that the parties orally agreed upon a different freight rate, a different route or destination, or a different valuation agreement from that expressed in the contract".

³¹ Carriage of Goods by Sea Act 1992, *Halsbury's Statutes*, 4th ed, Current Statutes Services 39 Shipping p.131. F White, R Bradgate "The Survival of the Brandt v Liverpool Contract" 1993 *LMCLQ* 483 p. 484 "The Act does not appear to transfer the contract as varied". C Debbatista "*Sale of Goods Carried by Sea*", 1990, Butterworths p. 169. Debbatista states that section 1 of the Bills of Lading Act 1855 merely transfers contracts "but it does not create them: If the bill of lading performs no contractual function on its issue, then its transfer can pass no contract where none exists". J Ramberg "Charter-parties: Freedom of Contract or Mandatory Legislation?" 1992 *Il Diritto Marittimo* 1069 p. 1071 "One may well ask from a theoretical point how it is that the bill of lading as a mere receipt all of a sudden can be converted into a contract of carriage upon the endorsement and transfer to the consignee". T Howard, B Davenport "English Maritime Law Update 1992" 1993 *JMLC* 425 p. 426 "The shipper makes the bill of lading contract with the carrier". G Treitel "Bills of Lading and Third Parties" 1986 *LMCLQ* 294 p. 296 "The bill of lading is already a contract between shipper and carrier to deliver the goods to the consignee or order". W Tetley "*Marine Cargo Claims*", 3rd ed, pp. 220-21 "While the various bills of lading statutes give to the endorsee the rights of action that the shipper originally had under the bill of lading contract".

³² The 1855 Act provided: "Whereas, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner;" (stress added).

³³ *Benjamin's Sales of Goods*, 4th ed, p. 930 sec 18-014 "Thus in the hands of a buyer to whom a bill of lading has been transferred by the seller the bill of lading will normally be the contract of carriage". T Howard "The Carriage of Goods Act 1992"

contained in the bill of lading and not to the one merely evidenced by the bill of lading. Lord Bingham of Cornhill³⁴ said that "carriers, in issuing bills of lading containing or evidencing the terms of carriage contracts, had routinely included conditions exonerating themselves from liability to an extent which was unacceptably prejudicial to the other parties to such contracts". On the other hand, this author³⁵ agrees with Messrs Justice Reed³⁶ and Henderson³⁷ in the distinction of the bill of lading being some times the contract and at other times merely evidence of it as "metaphysical" and anomalous. N. Gaskell³⁸ argues that the bill of lading in the hands of the endorsee is conclusive evidence of the terms of the contract of carriage but at the same

1993 JMLC 181 p. 188 "The lawful holder of a bill of lading is entitled to enforce the bill of lading contract".. T Howard, B Davenport "English Maritime Law Update 1992 "1993 JMLC 425 p. 426 "The receiver was not party to the original bill of lading contract ... The 1992 Act enables any lawful holder of the bill of lading to sue for breach of the bill of lading contract". P Dobson "*Charlesworth's Business Law*", 1997, Sweet & Maxwell p. 659 "The lawful holder until the COGSA 1992 the transferred contract is contained in the bill of lading". *Corpus Juris Secundum*, 1975, Vol. 13, West Publishing Co. p. 253 "As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law". According to UNCTAD Secretariat "Existing mandatory liability Conventions do not apply to charterparty contracts, primarily because these contracts are, in contrast to bill of lading contracts" Draft instrument on transport law Comments submitted by the UNCTAD Secretariat Art. 3.3.1 See www.unctad.org

³⁴ J I MacWilliam Company Inc (Respondents) v. Mediterranean Shipping Company SA (Appellants) [2005] UKHL 11 § 8 p6. On the other hand, in the same case Lord Steyn said that "The bill of lading evidenced a contract for the carriage of the cargo to Felixstowe and for on-carriage to be subsequently arranged to the final destination at Boston". J I MacWilliam Company Inc (Respondents) v. Mediterranean Shipping Company SA (Appellants) [2005] UKHL 11 § 31 p16. §37. One must start with the function of the bill of lading in international trade. Through the centuries that role has changed. What started as a bailment receipt of goods developed into a receipt containing the contract of carriage, and in the course of time acquired a third characteristic, that of a negotiable document of title. It has long been understood that negotiability in this context is used in a special sense: it does not involve the idea that the endorsee gets a better title than his assignors. But it means that the document is transferable by endorsement not only to the consignee but successively to others.

³⁵ G Zekos " The Bill of Lading Contract: is it the contract of carriage or a metaphysical phenomenon?" 2002 IL Diritto Marittimo 161, Italy G Zekos, The e-bill of lading contract :An e-standard form contract of carriage or merely an evidential document, Neptunus Law Review, summer 2005 Vol.11-2 http://www.droit.univ-nantes.fr/labos/cdmo/nept/nep32/32_3.pdf ,

³⁶ *The Roseline* [1987] 1 Lloyd's Rep 18 p. 20 "I have come to the conclusion that this distinction seems somewhat metaphysical".

³⁷ J Henderson "*Carver's Carriage of Goods by Sea*", 1925, Stevens & Son p. 73 "The bill of lading purports to be a statement of the contract and it would be anomalous and inconvenient that a formal document, accepted by the parties, and apparently expressing the relation between them, should be only evidence, liable to be rebutted, of that relation".

³⁸ N Gaskell "Transport document and the CMI draft outline Instrument 2000", 2001 II Diritto Marittimo 573. 592-3.

time “the third party’s rights and obligations will be governed entirely by the bill of lading contract”(Stress Added). Is a bill of lading something different than a bill of lading contract? Taking into account the legal principle of endorsement of negotiable instrument, professors Gaskell, Tetley and other professors and scholars have not explained how the endorsement of the bill of lading transforms the bill of lading merely part of the original contract of carriage into the original contract of carriage. It is worth mentioning here that judges and scholars regardless that consider the bill of lading as merely evidence and part of a contract of carriage in their effort to define the contract of carriage refer to the bill of lading contract, which for this author is not understandable when they must identify and refer to the contract of carriage (the advertisements, conversations, the booking note, the freight tariff, certain practices of the carrier known and accepted by the shipper all taken together). In addition, a bill of lading a standard form contract printed by the carrier, is normally interpreted against the carrier³⁹.

The 1992 Act specifies that the contract of carriage is contained in or evidenced by the bill of lading (S. 5(1)) and this dual perception of its contractual role seems to be transferred in the wording of the 2007 Draft Convention about the transport document. The Draft Convention has to define a single contractual role for the transport document as mandatory law regardless if the parties with the incorporation of a clause can regard it merely as evidence in accordance with contract law. Any time carriers can claim that oral contractual terms have been agreed and not contained in the transport document as long as the draft convention does not identify a single specific contractual role for the transport document.

A unique feature of the order bill of lading is its character as a document of title. That means a need for surrender of the document against delivery.⁴⁰ This characteristic of order bills of lading causes problems in situations where the document arrives after the ship's arrival in the delivery destination. In these circumstances the ship cannot deliver the cargo without the production of the order bill of lading. So, there was a need for the introduction of a document where its presentation was not necessary for the delivery of the goods, namely

³⁹ In *Leather's Best v. S.S. Mormaclynx*, Judd D.J. stated that: “A bill of lading, as a contract of adhesion is construed strictly against the carrier.” In the relatively unusual situation, however, where the shipper uses his own form of bill of lading, the interpretation is against the shipper. A contract of adhesion is much like a train ticket, a bus ticket or a coat check ticket. Nothing is added to the form by the parties. A standard form contract, on the other hand, requires that certain details be added to the form such as in the case of a bill of lading, the name of the ship, the description of the cargo and the voyage. This distinction is sometimes disregarded, unfortunately, in decisions treating a bill of lading as a contract of adhesion. 313 F. Supp. 1373 at p. 1380, 1970 AMC 1310 at p. 1322, [1970] 1 Lloyd's Rep. 527 at p. 534 (E.D. N.Y. 1970). *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro* 775 F.2d 476 at p. 482, 1986 AMC 826 at 832 (2 Cir. 1985): “...bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier;” *Crowley American Transport, Inc. v. Richard Sewing Machine Corp.* 1997 AMC 1798 at p. 1802 (S.D. Fla. 1996): “The terms and conditions of a bill of lading are terms of adhesion, as they are a standard part of the contract between the parties and are not subject to negotiation.” *The Caledonia* 157 U.S. 124 at p. 137 (1895); *Navieros Oceanikos, S.A. v. S.T. Mobil Trader* 554 F.2d 43 at p. 47, 1977 AMC 739 at p. 746 (2 Cir. 1977); *Vistar S.A. v. M/V Sea Land Express* 792 F.2d 469 at p. 471, 1986 AMC 2382 at p. 2384 (5 Cir. 1986).

⁴⁰ See 49 USC 89 (c), J Wilson " Carriage of Goods by Sea " (1988) Pitman at 154. G Zekos "The Contractual Role of Bills of Lading under Greek, United States and English Law" 2001, Barmarick Publications, England.

the straight bill of lading consigned to a named person, and which operated in tandem with the order bill of lading.⁴¹ In continental legal systems the straight bill of lading was well known and treated as a bill of lading⁴². Despite of the existence and use of straight bills of lading for some years, a new non-negotiable document," the sea waybill", emerged in international trade. It seems that firstly the sea waybills issued in 1970 by the Atlantic Container Line.⁴³ Organizations such as the International Chamber of Commerce, the International Chamber of Shipping and the Economic Commission for Europe have recommended that the use of bills of lading in ocean transport should be avoided,⁴⁴ in cases where the resell of the goods in transit was not expected. Prof. W. Tetley regards a waybill as a straight bill of lading.⁴⁵ Consequently, a sea waybill has to be a transferable document of title and a contract of carriage as well. T Schoenbaum on the other hand considers that "the waybill is not a document of title, but merely conveys information".⁴⁶ However, at the same time he accepts that "as a non negotiable bill of lading the liner waybill is subject to the Pomerene Act ... under American law".⁴⁷ As a non-negotiable bill of lading the liner waybill is a straight bill of lading. The term "straight bill" (or "straight consigned bill") is also sometimes used in England, where it is treated as a waybill⁴⁸. So, it is a contract of carriage and an assignable document of

⁴¹ See *Illinois Steel Co v Baltimore & Ohio R R* 88 Led 259. *Henderson v Comptoir d'Escompte de Paris* (1873) LR 5 PC 253,259

⁴² Tiberg, Legal Qualities of Transport Documents (1998) 23 Mar. Law 1 and Treitel, The Legal Status of Straight Bills of Lading, (2003) 119 LQR 608.

⁴³ See R Vocos " The sea waybill: A new innovation in the Carriage of Goods by Sea" (1988) Cargo claims analysis 132 at 133

⁴⁴ H Kindred " Modern methods of processing overseas trade " 22 JWT 5 at 5

⁴⁵ See W Tetley " Marine Cargo Claims" (3th Edn) International Shipping Publications at 941, *Project Hope v. M/V Ibn Sina* 250 F.3d 67 at p. 71, 2001 AMC 1910 at p. 1913 (2 Cir. 2001)). In Schmitthoff's Export Trade: The Law and Practice of International Trade, 10th ed, 2000, edited by Leo D'Arcy and others, a sea waybill is described as follows (paras 15-033, at p 281): "A sea waybill is a non-negotiable transport document and its great advantage is that its presentation by the consignee is not required in order for him, on production of satisfactory identification, to take delivery of the goods, thus avoiding delay both for him and the carrier where the goods arrive before the waybill. It is not a document of title but contains, or is evidence of, the contract of carriage as between the shipper and carrier in that it incorporates the standard terms of the carrier on its face. However, unlike a bill of lading, these terms are not detailed on the reverse of the waybill which is blank. A waybill is usually issued in the "received for shipment" form but may, like a bill of lading, be notated once the goods have been loaded."

⁴⁶ T Schoenbaum " Admiralty and Maritime Law " (1987) West Publishing Co. at 301

⁴⁷ *Ibid.* at 301

⁴⁸ See *The Chitral* [2000] 1 Lloyd's Rep. 529 at p. 532;

title as well. W. Tetley⁴⁹ and T. Schoenbaum⁵⁰ recognise the contractual character of waybills. A straight bill of lading contains the standard terms of the carrier on the reverse side of the document but a sea waybill is blank. The presentation of the document at the time of delivery is not required according to these learned authors. Thus, non-negotiable documents named as waybills or sea waybills or liner waybills or liner sea waybills are regarded to be straight bills of lading under United States law. Hence, they do not create any significant problems and they have the same legal status as straight bills of lading. In common law a waybill is a receipt and a contract but not a document of title. E. Hemley,⁵¹ examining the conception of the term sea waybills, stressed that it is "another term for the non negotiable bills of lading". The view expressed by Lord Justice Scrutton regarding straight bills of lading in *Thrige v United Shipping Company Ltd*⁵² in the Court of Appeal epitomises the situation. He held that " I am not expressing a final opinion, but I do not at present agree that with a statement in the simple form that I have stated it where the property is passed on shipment and the bill of lading is to a named consignee, the agent of the ship owner gets into any difficulties if he delivers to the named consignee without production of such bill of lading. It is also unnecessary to determine whether such a bill of lading is or not a negotiable instrument".⁵³

The transition of the bill of lading from a mere receipt into a negotiable instrument and a document of title emerged from the mercantile practice of arranging the sale of goods while they were in transit.⁵⁴ E Hoppu states that: "The primary object of the Hague Rules was ... to strengthen the value and significance of the bill of lading as a negotiable instrument".⁵⁵ Under English common law the bill of lading does not aspire to the concept of negotiability whereby the transferor can acquire a better title than that of his predecessor⁵⁶. When the word "negotiable" is used in relation to bills of lading, it merely means "transferable",⁵⁷ despite the fact that the mechanism of negotiability-

⁴⁹ Fn 21 at 941 " ... It is a contract of carriage..."

⁵⁰ Fn 22 at 301 "This is a contract for the shipment of goods (including loading and delivery by the carrier) by which the carrier undertakes to deliver the goods to the consignee named in the document"

⁵¹ E Hemley " Negotiable Electronic Bills of Lading" (May 1991) *Global Trade* 36 at 38.

⁵² [1924] 18 Ll L Rep 6

⁵³ *ibid.* at 9

⁵⁴ F Sanborn "*Origins of Early English Maritime and Commercial Law*", 1930, pp. 214-15.

⁵⁵ E Hoppu "The Carrier's Liability Under the Scandinavian Bills of Lading Acts in Case of Concurrent Causes" (1971) 15 *Scandinavian Studies in Law* 109 p. 123.

⁵⁶ G Zekos "Negotiable bills of lading and their contractual role under Greek, United States and English law" 1998 *Managerial Law*, Number 2. G Zekos "The bill of lading contract and the transfer of property under Greek, English and United States law" 1998 *Managerial Law*, Number 5. G Zekos "Electronic Bills of Lading and Negotiability" 2001 *Journal of World Intellectual Property* 977, No6

⁵⁷ Treitel in "*Benjamin's Sales of Goods*", 1992, Sweet & Maxwell pp. 938-39 sec 18-021. *Kum v Wah Tat Bank Ltd* [1971] 1 *Lloyd's Rep* 439 p. 446 "It is well settled that "negotiable", when used in relation to a bill of lading means simply transferable".

endorsement and delivery is used in the same way as in other negotiable instruments. Besides, COGSA⁵⁸ enhances the negotiability of bills of lading. The Uniform Commercial Code (UCC)⁵⁹ introduced the due negotiation of bills of lading. The concept of due negotiation of bills of lading is identical to the concept of the negotiation of a negotiable instrument to a holder in due course.⁶⁰ Bills of lading are classified as formal contracts like bills of exchange.⁶¹ In the first edition of the Restatement of the Law of Contracts⁶² bills of lading are considered as negotiable instruments. In the second edition of the same work bills of lading are regarded as negotiable documents belonging always in the same category, with the negotiable instruments (bills of exchange, promissory notes etc.) of formal contracts. Knauth,⁶³ Kendall,⁶⁴

Curney v Behrend [1854] 3 E & B 622 p. 633 "A bill of lading is not, like a bill of exchange ... a negotiable instrument". *Nippon Yusen Kaisha v Ramjiban* [1938] AC 429 p. 449 "It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is". T Howard "The Carriage of Goods By Sea Act 1992" 1993 JMLC 181 p. 183 Howard says "A bill of lading was not, however, accepted as being a negotiable instrument". P Dobson, C Schmitthoff "*Charlesworth's Business Law*", 1991, Sweet & Maxwell p. 10

⁵⁸*Union Insurance Society of Canton v S S Elikon* 642 F2d 721 p. 723. In *Voss v APL Co Pte Limited* [2002] 2 Lloyd's Rep 707. The issue was whether a straight bill had to be produced by the consignee to obtain delivery, and it was held that it had. The main characteristics of a bill of lading (para 48) were its negotiability and its recognition as a document of title, requiring presentation to obtain delivery of the cargo. In *The Ship "Marlborough Hill" v Alex Cowan and Sons Limited* [1921] 1 AC 444, 453 Lord Phillimore, giving the judgment of the Privy Council, observed at p 452 that "If this document is a bill of lading, it is a negotiable instrument",

⁵⁹ R Anderson "*Uniform Commercial Code*", 1985, Vol. 7, The Lawyers co-operative Publishing Co. p. 584 Article 7-501. *Iowa Packers Inc. v Chicago Railway Co.* 402 F2d 930 p. 934 "The liability of the carrier to any holder of an order bill of lading elevates an order bill of lading to the status of a negotiable document".

⁶⁰ UCC section 7-501:7 p. 589

⁶¹ *Restatement of the Law of Contracts*, Second Edition, 1981, American Law Institute Publishers, Vol. 1 section 6 pp. 18-20 "Formal Contracts: The following types of contracts are subject in some respects to special rules that depend on their formal characteristics and differ from those governing contracts in general ... negotiable instruments and documents ...". "Negotiable documents are such ... bills of lading ... run to bearer or to the order of a named person, or, where recognised in overseas trade, to a named person or assigns".

⁶² *Restatement of the Law of Contracts*, 1932, American Law Institute Publishers Vol. 1 section 10 p. 9 "Negotiable Instruments: Negotiable instruments are such bills of exchange ... By statutes, in many states, bills of lading ... if running to bearer or to the order of a specified person, are negotiable". p. 8 section 7 "Formal contracts are ... negotiable instruments".

⁶³ A Knauth "*The American Law of Ocean Bills of Lading*", 1953, American Maritime Cases Inc. p. 386 "The course of business and legal events have steadily conferred on the order bill of lading an increasing characteristic of negotiability".

⁶⁴ L Kendall "*The Business of Shipping*", 1983, Cornell Maritime Press p. 248 "The bill of lading thus becomes in practice a negotiable instrument ... In the eyes of the United

Abrahamsson,⁶⁵ Prof. Gilmore and Black⁶⁶ regard the bill of lading as fully negotiable instrument. Prof. T Schoenbaum⁶⁷ defines that a negotiable bill of lading means that it functions as a document of title. One of the identifying characteristics of a negotiable instrument⁶⁸ is that it must strictly comply with the formal requirements of negotiable instruments law to avoid being relegated to the status of an ordinary contract. Has negotiability declined in importance both because good faith purchase rules are generally no longer as important as they once were in commercial transactions, and are business information systems today less likely to rely on possession of pieces of paper as a system of tracking ownership of assets? The use of rules that resemble negotiability to make a new product more marketable in commerce mirrors in many respects the spread of the doctrines of negotiability to encompass many new types of commercial transactions that were documented by Professor Gilmore in 1954.⁶⁹

The Draft Convention defines that “Transport document⁷⁰” is a document issued under a contract of carriage by the carrier or a performing party attributed with both or one of the following features: (a) evidences receipt of goods by the carrier’s or a performing party’s; or (b) evidences or contains a contract of carriage. Thus, we can have first a transport document merely receipt of the goods, second receipt and merely evidence of the contract of carriage and third receipt and the contract of carriage. In other words three types of transport documents and so any document can play the role of the transport document. The draft convention has to give a name and specific contractual role for the transport document. Moreover, article 1 defines that “Negotiable transport document” means a transport document that indicates,

States courts, the bill has been fully negotiable since 1916 when the Federal Bills of Lading Act was passed”. M Crutcher “The ocean bill of lading - A study in fossilisation” 45 *Tulane L R* 697 p. 702 “The bill of lading is negotiable by the custom of merchants”.

⁶⁵ B Abrahamsson “*International Ocean Shipping: Current Concepts and Principles*”, 1980, West View Press p. 84 “If it is directed to the order of someone we have the to order bill of lading, which is negotiable”.

⁶⁶ G Gilmore and C Black “*The Law of Admiralty*”, 1975, The Foundation Press Inc. pp. 94-100. G Gilmore “The Commercial Doctrine of Good Faith Purchases” 63 *Yale L J* 1057 p. 1080 “Bills of lading are throughout the country fully negotiable”.

⁶⁷ T Schoenbaum “*Admiralty and Maritime Law*”, 1987, West Publishing Co. p. 299 “The negotiability feature of the order bill of lading means that it functions as a document of title”.

⁶⁸ G Zekos “EDI and the computerised (Electronic) bills of lading” 1999 *Managerial Law*, Number 6.

⁶⁹ Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 *Yale L. J.* 1057, 1064-66 (1954). Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 *Ga. L. Rev.* 605, 611 (1981). Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 *Creighton L. Rev.* 441, 447 (1979)

⁷⁰ *Article 1. Definitions*16. “Transport document” means a document issued under a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions: (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; or (b) Evidences or contains a contract of carriage.

by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “nonnegotiable” or “not negotiable”” and so a negotiable bill of lading could be a negotiable transport document under the definition of the 2007 Draft Convention. Is there any other document circulating in maritime transportation with these characteristics or a new negotiable document is created by the draft convention in order to be used in the maritime transportation? Is there any reason not specifically to be indicated in the Draft Convention the issue of a negotiable bill of lading well established in international trade and transportation? Furthermore, it is possible to have a “Non-negotiable transport document” which is a transport document that is not a negotiable transport document as mentioned earlier. Can a transport document be firstly a receipt and a negotiable or non negotiable document, secondly a receipt, merely evidence of the contract of carriage and a negotiable or non negotiable document and thirdly a receipt, the contract of carriage and a negotiable or non negotiable document? It seems that we can have three types of negotiable transport documents. Can a negotiable document be merely a receipt with no contractual role? Does the draft convention introduce a negotiable receipt of the goods issued by the carrier? Does the principle of endorsement of negotiable documents not apply in this negotiable transport document or there is a creation of a new type of negotiable document and a new principle of endorsement? Are not conferred contractual rights to the third party holder of a negotiable transport document after two endorsements?

In article 78 of the draft convention concerning an arbitration agreement and in article 70 concerning the choice of court agreements specified that “The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises” and so the transport document is evidence of the contract of carriage without mentioning if the contract of carriage is wholly contained in the document and for that reason the contract of carriage is evidenced by the transport document or the electronic transport record. In other words the dual contractual role is omitted.

If the negotiable transport document does not function as a contract of carriage then the third party holder of it after one or more endorsements⁷¹ does not become part of the original contract of carriage and so as the controlling party of the goods has got no contractual relation with the carrier⁷²

⁷¹ Article 59. *When a negotiable transport document or negotiable electronic transport record is issued* 1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person: (a) If an order document, duly endorsed either to such other person or in blank; or, (b) If a bearer document or a blank endorsed document, without endorsement; or, (c) If a document made out to the order of a named person and the transfer is between the first holder and the named person, without endorsement.174 2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9.175

⁷² Article 53. *Identity of the controlling party and transfer of the right of control* 1. When no negotiable transport document or no negotiable electronic transport record is issued:161 (a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party; (b) The controlling party is entitled

and no contractual rights have been transferred. Does the Draft convention makes the holder of a negotiable transport document or the holder of an electronic negotiable transport record controlling party or the issue and the endorsement of a negotiable transport document or the electronic endorsement of an electronic negotiable transport record transfers the contractual rights to the third party?

4. Electronic bill of lading versus the Electronic record

Parties manifest assent through offer and acceptance. Both natural and legal persons are capable of being parties to contract. Are computers legal persons? At present, computers are not legal persons. There should no objection on treating computers as legal persons. An agreement is a meeting of minds. In deciding whether the parties have reached agreement, the court employs the

to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; (c) The controlling party shall produce proper identification when it exercises the right of control. 2. When a non-negotiable transport document or a non-negotiable electronic transport record has been issued that [provides] [indicates] [specifies] that it shall be surrendered in order to obtain delivery of the goods: (a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document or the electronic transport record by transferring the document to this person without endorsement, or by transferring the electronic transport record to it in accordance with the procedures referred to in article 9. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; (b) In order to exercise its right of control, the controlling party shall produce the document and proper identification, or, in the case of an electronic transport record, shall demonstrate in accordance with the procedures referred to in article 9 that it has exclusive control of the electronic transport record. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised. 3. When a negotiable transport document is issued: (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party; (b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 59. If more than one original of that document was issued, all originals shall be transferred in order to effect a transfer of the right of control; (c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 12(a)(i), the holder shall produce proper identification. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.¹⁶² 4. When a negotiable electronic transport record is issued: (a) The holder is the controlling party; (b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9; (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, that it is the holder.¹⁶³ 5. The right of control ceases when the goods have arrived at destination and have been delivered in accordance with this Convention.¹⁶⁴ [6. Notwithstanding article 61, a person, not being the shipper or the documentary shipper, that transferred the right of control without having exercised that right, is upon such transfer discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Convention.]¹⁶⁵

objective test- offer and acceptance⁷³. Parties may make the offer and the acceptance through words or conduct. However, the offer must somehow make a promise, whereas the acceptance need only assent to the terms of the offer. Acceptance becomes a promise through the action of the offer. So, a party may show his acceptance by either promise or performance, though the offeror may in theory dictate the form that the acceptance may take. The acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accepted. Contracting in the electronic world does not usually disturb this traditional model. Most common difficulties, which may seem insignificant, involve the manner of proving the offer and acceptance. If the accepting party confirms the order via e-mail, is the contract formed? In the past, courts have found assent even when the parties have employed different technologies to send their assents. Courts have held that acceptance of a telegraphed offer by a mailed acceptance was reasonable.

In cyberspace⁷⁴ two main ways of contracting can be used. First, offer and acceptance occurs in e-mail. After receipt, the messages are stored by host computers in <mailboxes>, where the addressee can collect them. The traditional mailbox rule may apply to offers, acceptances, modifications and revocations sent by mail or EDI transmission. Second, online catalogs and order forms are found on the web. When starting to use EDI trading, partners will conclude <master agreement>, regulating their relations. Computers programmed to automatically accept orders and control delivery will then carry out the transactions. Hence, messages may be exchanged directly or via one or more service providers. Computer-based contracting can deal with any subject matter namely sale of physical goods, supply of digitized products and supply of services and facilities. Contracts are based on the decisions and actions of individuals because a contract will come into being if the parties intent. Interactive web sites enable users to transmit information directly by filling an electronic form. Offeror and acceptor must express their willingness to be bound explicitly or it must be implicit in their actions. Where computers make choices without human (the parties) involvement, any concluded contract should be invalid. The responsibility remains with the parties, who decide to use software with the intention of being bound by their declarations via a complex program and sophisticated software. It could be argued that the involvement of a computer has no legal consequences because it is the result of prior human intention. Thus, automated declarations of offer and acceptance should be valid⁷⁵. Moreover, disputes will arise regarding the formation, performance, and payment of contractual obligations.

In order to recognize an electronic document/record as a token of ownership, a computer system does not need to create a physically unique electronic document. If a computer system can so restrict the ability of parties to claim to be owners of the rights described in an electronic document such that there can never be more than one person at any time that can be identified as the owner of the transferable document, then the computer system has reproduced the relevant characteristic of a physical negotiable instrument. The transferable document provisions refer to the ability of a computer system to distinguish the "original copy," control over which establishes ownership, from

⁷³ *First Energy Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 195.

⁷⁴ G Zekos, *Economics, Finance and Law on MNEs*, 2008 Nova Publishers New York, www.novapublishers.com

⁷⁵ *Thornton v Shoe Lane* [1971] 2 QB 163

all other copies of the transferable record. A copy is original because it identifies a unique party as the legal owner, who alone has the authority to make changes to the document or to transfer ownership of it. It is a "copy" because in the digital world, information will inevitably be copied over and over as it is processed within a computer system. A transferable document/record control system must provide a way to distinguish between the original copy and all other copies. The statutory standard will be met if a system can recognize only one copy of the document/record as "original" restricting access to it by rigorous security procedures and distinguishing it from all the other copies of the record, which have no particular legal significance and for which no particular security procedures would be required. Computer systems⁷⁶ can be designed and built today that are capable of so restricting access to resources stored in the computer.

It must be taken into account the difference in the sense of possession between the real world and the electronic one. In other words it has to be understood the difference in the dimension. It could be argued that the possession is important in negotiable instruments law not because tangible tokens are per se valuable, but because only one person can be in possession of a tangible object at one time. Some of the advantages of evidencing obligations in the form of negotiable instruments rather than simply as agreements subject to the general law of contracts are the significant procedural advantages that plaintiffs enjoy while seeking to recover in litigation based on negotiable instruments. Certain doctrines of negotiable instruments law emphasize the importance of form to a much greater degree than is characteristic of modern contract law. Holders of negotiable instruments seeking to recover from the instrument's maker enjoy the benefit of certain liability rules and evidentiary presumptions that make it easier for the holder to recover than would be the case in an action on a general contractual obligation.

The draft convention introduces the use of electronic transport record and negotiable or non electronic transport record⁷⁷. The electronic transport record is not defined as an electronic contract of carriage but merely the

⁷⁶ Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 *Cardozo L. Rev.* 305, 311-12 (1990). David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 *Idaho L. Rev.* 747, 760-72 (1995) (discussing the need for alternatives to traditional paper-based rules in electronic commerce).

⁷⁷ 19. "Electronic communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.¹⁵ 20. "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier or a performing party, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport record, that satisfies one or both of the following conditions: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or (b) Evidences or contains a contract of carriage.

electronic transport record evidences or contains a contract of carriage and not the original contract of carriage. This dual contractual role attributed to the electronic transport record is contradictory because there is no explanation as principle of law when and why some times can be a contract and some times merely evidence. It should be taken into account that the draft convention should *ex proprio vigore* define a certain role for the issued paper or electronic documents. More significantly it must be taken into consideration the electronic conclusion of electronic contracts of carriage and the issue of electronic documents where there is no previous contact between the contracting parties. Automation and electronic contracting means standardization and how standardization can be achieved when there is no single contractual role for the issued electronic transport document. Otherwise, the shipper that supposed is not coming into personal contact with the carrier has to investigate thoroughly the practice, the terms of the carrier incorporated in various papers and oral conversations in order to find his contract of carriage with the carrier. It should be taken into account that both the place where a contract is concluded and where an electronic transport record has been issued may be difficult to be determined in practice. A convention should bring standardization on the terms of the contract by defining the contract and not leave it to the general principles of the law of contract. Moreover, the electronic transport record can have three different and independent functions namely receipt of goods under a contract of carriage, merely evidence of part of an electronic contract and third being the electronic contract of carriage itself. As a principle is not established a single contractual role for the electronic transport record. Can an electronic transport record be considered as the original contract of carriage in an electronic form? Furthermore, "Negotiable electronic transport record"⁷⁸ is an electronic record indicating, by statements such as "to order", or "negotiable", or other appropriate statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of

⁷⁸ 21. "Negotiable electronic transport record" means an electronic transport record: (a) That indicates, by statements such as "to order", or "negotiable", or other appropriate¹⁶ statements recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and (b) The use of which meets the requirements of article 9, paragraph 1. 22. "Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record. 23. The "issuance" and the "transfer" of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record.¹⁷ *Article 8. Use and effect of electronic transport records* Subject to the requirements set out in this Convention: (a) Anything that is to be in or on a transport document pursuant to this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent³⁴ of the carrier and the shipper; and (b) The issuance, control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document. *Article 9. Procedures for use of negotiable electronic transport records* 1. The use of a negotiable electronic transport record shall be subject to procedures that provide for: (a) The method for the issuance and the transfer of that record to an intended holder; (b) An assurance that the negotiable electronic transport record retains its integrity; (c) The manner in which the holder is able to demonstrate that it is the holder; and (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 49, subparagraphs (a)(ii) and (c), the negotiable electronic transport record has ceased to have any effect or validity. 2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.³⁵

the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable". Non-negotiable electronic record is an electronic transport record that does not qualify as a negotiable electronic transport record. How the third party holder of a negotiable electronic transport record after two electronic endorsements will identify the original contract of carriage?

The electronic signature of the carrier or a person having authority from the carrier shall authenticate an electronic transport record⁷⁹. Electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorization of the electronic record. This author thinks that the introduction of personal electronic signatures which are drawn personally by the use of an electronic pen as in the traditional written signature is needed to be introduced immediately and it will make ease the use of a negotiable electronic transport document⁸⁰. At the moment the Bolero electronic bills of lading could be an example for the negotiable electronic transport record⁸¹.

5. Conclusion

The functions of being a contract of carriage, a receipt and a negotiable instrument have been attributed to bills of lading in order to be functional in international maritime transport. The draft convention introduces different characteristics and contractual role for the transport document not bringing standardization and harmonization needed especially for the use of electronic documents. The above analysis shows that different systems will regard the document as the contract of carriage and other merely evidence of it. Other legal systems will consider the transport document as fully negotiable instrument and other merely transferable. This author⁸² considers that all types of paper and electronic negotiable bills of lading should be attributed with the same characteristics and function namely as contracts of carriage, receipts and negotiable instruments in order to achieve uniformity and certainty in international maritime transport. Moreover, the non-negotiable form of paper or electronic bills of lading should be circulated as well. Paper and electronic bills of lading in a negotiable or a non negotiable form should be the transport documents issued for the purpose of the application of the draft convention in order to achieve standardization. Otherwise multi-

⁷⁹ Article 39. Signature 1. A transport document shall be signed by the carrier or a person acting on its behalf.123 2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf.124 Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

⁸⁰ G Zekos, ePen Technology and Electronic Signatures, 2003 IP&ITL Issue 6, pp2-7 www.emispp.com G Zekos, Electronic signatures and Electronic Contracts, 2004 DEE 614 (Greece)

⁸¹ See G Zekos "Electronic Bills of Lading and Negotiability" 2001 Journal of World Intellectual Property 977.

⁸² G Zekos, Bills of Lading and Charter-parties in CMI Draft Instrument on Transport Law 2001 and Cyberspace, 2005 The ICFAL journal of international Business Law 25 www.icfaiexpress.org,

documentation will emerge in the market not suitable tactic for electronic circulation causing problems in international transportation. Oral contracts are not suitable for the global market of maritime transportation. The path of freedom of contract allows the stronger part to prevail. The use of contacts of adhesion /standard form contract allows the shipper at least to know the contractual terms in advance and not to come across claims of new contractual terms in a later stage of the carriage of goods.